



**In re Estate of Japhet Kimutai Tenai (Deceased) (Miscellaneous Succession Cause 49 of 2023) [2024] KEHC 14996 (KLR) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14996 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS SUCCESSION CAUSE 49 OF 2023**

**JRA WANANDA, J  
NOVEMBER 29, 2024**

**IN THE MATTER OF THE ESTATE OF JAPHET KIMUTAI TENAI (DECEASED)**

**BETWEEN**

**KOKWATAI INVESTMENT CO-OPERATIVE SOCIETY  
LIMITED ..... APPLICANT**

**AND**

**JAPHET KIPKEMBOI TENAI ..... RESPONDENT**

**RULING**

1. Before this Court for determination is the Summons for Revocation of Grant dated 15/11/2023 and filed by the Objectors through Messrs Tum & Associates Advocates. It seeks the following orders;
  - i. [.....] spent.
  - ii. That the Eldoret Chief Magistrate’s Court Succession Cause No. 15 of 2018 be transferred to Eldoret High Court, Family Division and be consolidated with this matter for further orders.
  - iii. That the Grant issued on 5/09/2018 be revoked and or annulled.
2. The Application is expressed brought under the provisions of Section 76(a) and (c), 47, 48 and 49 of the *Law of Succession Act*, Rule 44 and 49 of the Probate and Administration Rules, Section 23 of the Magistrates Court Act 2015 and “all enabling provisions of the law” and is premised on the grounds stated on the face thereof. It is then supported by the Affidavit sworn by one Kipkorir Menjo.
3. The deponent stated that he is the Chairperson of the Applicant which is one of the Creditors of the estate of the deceased herein, Japhet Kipkemboi Tenai, as indicated by the Petitioner in their list of liabilities to the estate, that the Petition in respect of the estate of the deceased, namely, Succession Cause No. 15 of 2018 was filed at the Chief Magistrates’ Court by one David Kimutai on 18/01/2018, and the Grant of Letters of Administration was issued to the Petitioner on 5/09/2018. He deponed



that in the Affidavit in support of the Petition, the Petitioner stated that the total estimated value of the estate is Kshs 20,000,000/- being parcel number Pioneer/Langas Block 1/13 but misled the Court on the value of the estate and also failed to include the parcel number LR 2396/1 measuring approximately 40 acres which the Applicant has a purchaser's interest. He deponed further that the value of one of the properties forming part of the estate, namely, LR No. 12396 was estimated at the market value of Kshs 130,000,000/- as at 2018 when the Petition was filed, that the Petitioner failed to disclose to the Court the material fact that the estate worth exceeded what he had indicated in the Affidavit, and that the proceedings to obtain the Grant were therefore defective in form and in substance for want of pecuniary jurisdiction. He further deponed that in the Affidavit in support of the Petition, the Petitioner indicated that the Applicant is entitled to a portion measuring 34 acres in LR No. 12396 but according to the deponent, the Applicant has a purchaser's interest of a portion measuring 40 acres from one Hon. John Kipkorir Sambu who also had a purchaser's interest from the registered proprietor, one the late Nathaniel K. Tenai and the deceased herein, Japhet Kipkemboi Tenai. He deponed that the Applicant purchased a portion of 40 acres and is entitled to the said portion from the estate and according to him, the Chief Magistrates' Court lacks pecuniary jurisdiction to handle the Petition.

### **Respondent's Replying Affidavit**

4. The Application is opposed by the Respondent vide the Replying Affidavit sworn by one David Kimutai Tenai and filed on 30/01/2024 through Messrs Wambua Kigamwa & Co. Advocates. The deponent stated that since the Applicant seeks to challenge the propriety of the Grant issued by the Magistrate's Court, the Application ought to have been filed in the same Cause where the Grant was issued since the High Court can only sit on appeal in a decision emanating from the Magistrates' Court. He deponed that the High Court, by dint of the amendment made under Section 48 of the Law of Succession Act vide Section 23 of the Magistrate's Court Act 2015, was deprived of original jurisdiction. He deponed further that, in any event, the Applicant's grievance as can be discerned from the Supporting Affidavit, relates to issues of a purchase between the deceased and Hon. John Kipkorir Sambu, based on an Agreement dated 20/11/1995 in respect of LR No. 12396 for Kshs 4,400,000/- and that issues arising out of such land purchase agreement ought to be litigated between the parties to the agreement in the Environment and Land Court vide a suit as opposed to a Miscellaneous Cause filed in the High Court Family Court. According to him therefore, the High Court lacks jurisdiction to determine matters arising out of the said agreement.
5. He deponed that, in any event, the Applicant is a stranger to the Agreement dated 20/11/1998 and is thus barred from taking up any matters arising therefrom, that the Respondent is a stranger to the Agreement dated 19/03/2011 between Hon. John Kipkorir Sambu and the Applicant for the sale of LR No. 12395 and 12396 for Kshs 16,026,000/- and that any matters arising under that Sale Agreement dated 19/03/2011 can only be litigated as between the parties thereto, to the exclusion of the Respondent herein by virtue of the doctrine of privity of contract. He contended further that, in any event, even if such matters are ripe for litigation between the parties to that Agreement, then they can only be litigated at the Environment and Land Court and not vide this Miscellaneous Cause in the High Court. He maintained that the declared value of the property as at the time of instituting the Petition for Grant before the Magistrate Court is within its jurisdiction and it is the only Court which under the law that can make a finding on the validity or otherwise of the Grant with this Court only exercising appellate jurisdiction on an appeal by any party so aggrieved.



## Hearing of the Application

6. The Application was canvassed by way of written Submissions. The Applicant filed its Submissions on 27/03/2024 while the Respondent filed on 20/05/2024.

## Applicant's Submissions

7. Counsel for the Applicant reiterated that the Grant of Letters of Administration issued by the Magistrate's Court was defective for want of pecuniary jurisdiction by that Court and insisted that the Respondent, in the Petition for Letters of Administration, misled the Magistrate's Court on the value of the assets forming the estate. She then reiterated the matters already stated in the Supporting Affidavit, including the claim that the Respondent stated the value of the estate as approximately Kshs 20,000,000/- being the value of the only asset cited, namely, LR No. Pioneer/Langas Block 1/13. She submitted further that the Respondent listed the Applicant as being a liability of the estate to a tune of 34 acres, but did not however disclose the parcel number and the value thereof. She also restated that the Applicant has now presented to this Court a copy of a Valuation Report which indicates the value of one of the estate properties, namely, LR No. 12396, at the estimated sum of Kshs 130,000,000/- as at 2018 when the Petition was filed and therefore maintained that the value of the estate exceeds the pecuniary jurisdiction of the subordinate Court.
8. Counsel insisted that the Eldoret Chief Magistrate's Court Succession Cause No. 15 of 2018 should be transferred to the Eldoret High Court and be consolidated with this matter for further orders, that the law on transfer of cases as prescribed under Section 18 of the *Civil Procedure Act*, empowers the High Court to withdraw and transfer cases instituted in the Subordinate Court and that the Court may be moved by either party or do so on its own motion. She added that any suit pending before the Magistrates' Court may be transferred for various reasons even if the Court in question is competent to determine it, and that Section 48 of the *Law of Succession Act* was amended to give the Magistrate's Court powers to hear and determine succession causes. She cited the case of *Muchiri & 4 Others v Muchiri (Miscellaneous Application E013 of 2021)* [2022]KEHC 10481 (KIR) (27 July 2022).
9. Counsel urged that from the said Section, the jurisdiction of the Magistrate's Court is pegged on their pecuniary jurisdiction under Section 10 of the Magistrates' Court Act and the highest is that of the Chief Magistrate at Kshs 20,000,000/-, and that the Valuation Report presented by the Applicant has not been challenged by the Respondent as he did not file his own Report. She contended that if the Court finds that it has no jurisdiction, then it will down its tools and the matter will be left without any directions and that therefore, the Application for transfer is proper in the circumstances, to allow the Applicant to file a formal Application in the High Court to ventilate its issues.

## Respondent's Submissions

10. Counsel for the Respondent reiterated that since the Applicant seeks to challenge the propriety of the Grant issued by the Magistrate's Court, the Application ought to have been filed in the same Cause where the Grant was issued since the High Court can only sit on appeal on a decision emanating from the Magistrates' Court. He cited the case of *Estate of Charles Boi (Deceased)* [2022] eKLR and also the case of *Estate of Petro Okumbe Ouko (Deceased)* [2020] eKLR. He contended that, in any event, an examination of the Valuation Report presented by the Applicant confirms that it does not tally with the property declared in the estate hence the Court cannot consider it as a basis for a finding of want of jurisdiction. He submitted further that the issue of transfer of a Succession Cause to the High Court can only be addressed by the Magistrate's Court itself as it is vested with the jurisdiction to deal with



any questions of distribution of the estate, including transfer of the suit. He cited Section 40(9) and 41(3) and (4) of the Probate & Administration Rules.

11. Counsel also submitted that the High Court is bereft of jurisdiction to transfer the matter as the applicable law is Section 18 of the *Civil Procedure Act* which, by dint of Rule 63 of the Probate & Administration Rules, is not applicable to Succession Causes. He cited the case of John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another (2016) eKLR. He reiterated that the Applicant's grievance being in respect to a land sale agreement between the deceased and one Hon. John Kipkorir Sambu, such issue should be litigated at the Environment & Land Court. He cited the case of Mathew Njenga Njogu & Another v Rosemary Muthoni Njue [2021] eKLR. He reiterated that as regards the second Agreement, the same being between one Hon. John Kipkorir Sambu and the Applicant, the Respondent is a stranger thereto and cannot therefore, by virtue of the principle of privity of contract, be involved therein. He cited the case of Re Estate of Stone Kathuli Muinde (Deceased).

### Determination

12. The issues that arise for determination in this matter are evidently the following:
  - i. Whether this Court should order that the Magistrate's Court Succession Cause be transferred to this Court.
  - ii. Whether this Court should revoke the Grant issued in the said Magistrate's Court Succession Cause.
13. Counsel for the Respondent has submitted that the High Court is bereft of jurisdiction to transfer the Succession Cause that was filed at the Magistrate's Court because the applicable law is Section 18 of the *Civil Procedure Act* which, by dint of Rule 63 of the Probate & Administration Rules, is not applicable to Succession Causes. He cited the case of John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another (2016) eKLR.
14. In making the above submission, Counsel is obviously wrong. This is because *the Constitution* of Kenya 2010 provides otherwise.
15. Article 165(6) of *the Constitution* provides as follows:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”
16. Article 165(7) then provides that:

“For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
17. That this High Court, in exercising its supervisory role over subordinate Courts within its territorial jurisdiction, possesses the power to withdraw and transfer suits from one subordinate Court to another, is therefore not in doubt. However, unlike Section 17 and 18 of the *Civil Procedure Act* which expressly donate to the High Court the power to withdraw and transfer suits, the *Law of Succession Act* does not expressly do so. This lack of express provision does not however in any way diminish the High Court's power to transfer a suit by dint of its supervisory powers donated by *the Constitution*.



18. Further, Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules donate to the High Court wide inherent powers to issue any necessary orders in Succession or probate matters.
19. Section 47 of the *Law of Succession Act* provides as follows:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”
20. On its part, Rule 73 of the Probate and Administration Rules that:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
21. According to the Applicant, the Chief Magistrate’s Court lacks the pecuniary jurisdiction to hear and determine issues surrounding administration of the estate of the deceased. The Applicant basically argues that even looking at the value of just one of the properties forming part of the estate, namely, LR No. 12396, the same is estimated at about Kshs 130,000,000/ thus over and above the estimated value of Kshs 20,000,000/- given by the Petitioners before the Magistrates’ Court. For this reason, the Applicant wants the matter filed as Eldoret Chief Magistrates’ Court, Succession Cause No. 15 of 2018 to transferred to this Court.
22. The issue of jurisdiction is a fundamental one as was held in the locus classicus case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989) where the Court held as follows:

“Jurisdiction is everything. Without it a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction .... Where a Court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
23. The above principle was restated by the Supreme Court in the case of Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR.
24. If therefore the Magistrate’s Court did not possess the pecuniary jurisdiction to issue the Grant of Letters of Administration as it did, then indeed, it can be divested of the matter before it. The question that however arises is whether the jurisdiction of this High Court to transfer the suit before the Magistrate’s Court has itself been properly invoked.
25. The first issue that catches my eye is that the person named as the Respondent in this Application is one “Japhet Kipkemboi Tenai”. I note that the name of the deceased in respect to whom the estate herein is being litigated is also “Japhet Kipkemboi Tenai”. There is however no explanation whether the person named as the Respondent is the same as the deceased. If it is the same person, then obviously, that would be a fundamental defect since a deceased person cannot be sued as a Respondent. Even if the person named as Respondent is different from the deceased, despite sharing the exact name, then still, it means that the person named as Respondent is a stranger to this matter. Since it is evident that the Petitioner and by extension, the person appointed by the Magistrate’s Court as Administrator of the estate, and who is the one who has even sworn the Replying Affidavit herein, is one David Kimutai



Tenai, it is clear that it is him who ought to have been named as the Respondent herein. The scenario set out may as well be a result of a typographical error but this being a Court of record, and there being no explanation regarding the said apparent irregularity, it is not open for this Court to speculate. On this ground alone, the Application would therefore fail.

26. Secondly, it is evident that the Applicant is claiming as a purchaser of land alleged to comprise a portion of the estate (creditor), not as a member of the family or a survivor or a dependent of the deceased, who are the recognized primary claimants. The extent to which an alleged Creditor to an estate can litigate in a Succession Cause relating to the estate is limited, noting that a Creditor's claim is basically a secondary one. A Succession Cause belongs to the immediate family of a deceased person who comprise the survivors and/or dependents and it is them who agree on or nominate an Administrator or in the event of a dispute, the Court appoints an Administrator among them. An alleged Creditor, as in this case, being a third party, has no locus to usurp the role of the Administrator or the survivors for that matter.
27. The Applicant argues that even looking at the value of just one of the properties forming part of the estate, namely, LR No. 12396, which is estimated at about Kshs 130,000,000/-, it would be clear that the value of the estate is above the figure of Kshs 20,000,000/- given by the Petitioners before the Magistrates' Court. Applying the principles set out above, it is evident that the Applicant cannot, as a purchaser, purport to confer upon itself the role of identifying the properties forming the estate of the estate or determining the value thereof, to the exclusion of the Administrators or the survivors, and to purport to use such to come before this Court with the argument that the value of the estate exceeds the jurisdiction of the subordinate Court. It cannot be the role of the Applicant, as a purchaser or a Creditor, to challenge the jurisdiction of the Magistrate's Court in its handling of the estate of the deceased. That right belongs only to the Administrator or the survivors or the immediate beneficiaries.
28. On the above issue, I refer to the decision of Musyoka J in the case of *In the matter of the Estate of Stone Kakhuli Muinde (Deceased)* [2016] eKLR in which he stated as follows:

“24. The probate process is meant to be largely administrative, where the documents lodged in the cause are scrutinized administratively by court officers before certain instruments are processed and executed by relevant judicial officers before being issued to the parties. It is intended that there be minimal court appearance. The whole process is tailored to be non-contentious, and the only contemplated court appearance is at the stage of the confirmation of the grant of representation. In that scenario then there would be no need to join any person or entity to the succession cause.

25. The cause can and does, as a matter of course, turn contentious. To facilitate distribution of the estate, the court should identify the persons who are entitled to inherit from the estate of the deceased and the assets to be shared out amongst the person entitled. Disputes often arise on those issues. It may become necessary for the court to determine whether a particular person is entitled to a share in the estate of the deceased or not. An issue may also arise whether some asset formed part of the estate of the deceased or not.

26. The Act and the Rules have elaborate provisions on resolving such questions, and to settle them there would be no need to bring in persons who have no direct interest in the matter, especially those who are not family members. Whether a person is entitled to the part of the estate is an issue to be resolved without joining other persons to the matter.



27. With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.
28. Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.
29. It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the probate court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the court to allow joinder of persons to the succession cause who ideally ought not to be party to the cause in the first place.”
29. Musyoka J, again, in the case of *In re Estate of Atibu Oronje Asioma (Deceased) (Succession Cause 312 of 2008)* [2022] KEHC 11046 (KLR) (22 July 2022) (Ruling), stated as follows:
- “ 18. The applicants cite section 66 of Law of Succession Act, which provides a guide on the persons who may be appointed administrators, and creditors are in that list. The argument is that creditors have a say in probate proceedings, and issues relating to them can be litigated in succession causes. Creditors, in the context of the Law of Succession Act, are the individuals and entities that the estate is indebted to, and who have been acknowledged as such by the personal representatives. It also includes individuals and entities holding valid court decrees against the estate. Individuals and entities whose claims against the estate have not been acknowledged by the person representation, and who do not hold any valid court decrees are not creditors of the estate, but mere claimants. Their claims are yet to be proved or established against the estate. The place to establish or prove those claims is not within the succession cause, but in separate proceedings. That is what rule 41(3) of the Probate and Administration Rules provides, and that is what the courts *In re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim J) and others, have pronounced.”
30. It should therefore be always recognized that the role of a probate Court is strictly to appoint an Administrator to manage the estate of a deceased person, and thereafter to, identify the beneficiaries and the assets comprising the estate and eventually, to distribute the estate amongst such beneficiaries. Any claims by third parties seeking a share of the estate, where such claims are disputed by the Administrators, such as by persons claiming to have purchased land from the deceased, unless in exceptional circumstances, ought not to be entertained by the probate or Succession Court. Depending



on whether the claim is in respect to a trust or an immovable property, such claims are supposed to be placed for determination before the civil Courts or the Environment and Land Court, as the case may be. In such a case, the asset that is under contention may in the meantime be isolated by the probate Court from distribution of the rest of the estate, placed aside in the interim and be only duly distributed once the civil Court or the Environment & Land Court has determined such Creditor's claim. Even if not so isolated or stayed from distribution of the rest of the estate, the decree and/or determination of the civil Court or Land & Environment Court, once received by the probate Court, can still be subsequently implemented by the probate or Succession Court since there is no action that cannot be undone by the Court where necessary.

31. In the circumstances of this case therefore, the Applicant's claims, being claims by an alleged purchaser of a parcel of land from the deceased or from a person who had himself purchased the parcel from the deceased, cannot be entertained by the probate or Succession Court, whether sitting as the Magistrate's Court or the High Court. On this second ground, the Application must fail.
32. In any event, assuming that the nature of the Applicant's claim is one that be canvassed before a probate Court, the Applicant can, at the stage of confirmation of the Grant, still invoke Rule 40 (9) of the Probate and Administration Rules and seek a determination by the same Magistrate's Court before which the matter is presently being litigated, on whether that Court can confirm the Grant or whether it should remit the Grant to the High Court for confirmation. The said Rule 40(9) is premised in the following terms:

“In giving directions the magistrate's court may in the case before it either order that the application for confirmation should proceed in that court, or at the request of any party or of its own motion order that it be transferred to the High Court and give all necessary consequential directions in that behalf to enable the application to be dealt with by the High Court.”

33. Having made the above findings, it is evident that the second issue, namely, whether this Court should revoke the Grant issued in the said Eldoret Chief Magistrates' Court, Succession Cause No. 15 of 2018 cannot arise. In January 2016, by dint of Section 23 of the *Magistrates' Courts Act*, 2015, which came into force around that date, Section 48(1) of the *Law of Succession Act* was amended to confer jurisdiction upon the Magistrate's Courts to revoke Grants issued by themselves, contrary to the earlier position where only the High Court could do so. There is therefore no reason why this Court has been approached with an Application to revoke the Grant issued by the Magistrate's Court. On this issue, I again cite of Musyoka J in respect to his decision made in the case of *In re Estate of Charles Boi (Deceased)* [2020] eKLR, in which he made the following observations:

“8. The taking away of jurisdiction from the High Court, with respect to revocation of grants, made by the magistrate's court, would mean that the High Court no longer has original jurisdiction to address that issue, and that its jurisdiction, over the issue, would be as an appellate court, from a ruling of the magistrate's court, on a summons for revocation of the grant issued by that court. I have no jurisdiction, therefore, sitting as a High Court, to entertain a summons for revocation of grant, where the applicant has not filed such application at the magistrate's court in the first instance, since the *Law of Succession Act*, as currently framed, does not vest me with such jurisdiction. Secondly, the issue of revocation of the grant made by the magistrate's court has not been placed before me in invocation of my appellate jurisdiction.





34. In the premises, I find that the Application dated 15/11/2023 is misconceived. Accordingly, the same is dismissed with costs to Respondent.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 29<sup>TH</sup> DAY OF NOVEMBER 2024**

.....

**WANANDA J.R. ANURO**

**JUDGE**

Delivered in the presence of:

Mua Wambua for Respondent

Ms. Sielei h/b for Ms. Tum for Applicant

Court Assistant: Brian Kimathi

