



In re Estate of Kipkosgei Bwalei Kerich alias Kipkosgei Bwalei (Deceased) (Probate & Administration 02 of 2021) [2023] KEHC 27215 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
PROBATE & ADMINISTRATION 02 OF 2021**

JR KARANJA, J

DECEMBER 20, 2023

**N THE MATTER OF THE ESTATE OF KIPKOSGEI BWALEI
KERICH ALIAS KIPKOSGEI
BWALEI (DECEASED)**

RULING

1. The grant of letters of administration intestate respecting the estate of the Late Kipkosgei Bwalei Kerich alias Kipkosgei Bwalei (Deceased) who died on 29th August 2002 was issued to his son John Kiprotich Kerich, (Petitioner) on 28th June 2013 from among his surviving widow and three other sons being David Maritim Karch, Stephen Sing’oei and Edwin Kiptoo Kosgei.

The Petitioner was the youngest of the deceased’s four (4) sons. However, after a period of about two years on 10th July 2015, the grant was revoked for failure by the Petitioner to further prosecute, the matter by taking out the necessary summons for confirmation of the grant.

2. The record does not indicate whether or not the revocation order was ever set aside by the court or on application by the parties. Nonetheless in an apparent revival of the matter or otherwise an application for revocation of the grant dated 6th June 2017 was filed by the second youngest son of the deceased, Stephen Kimutai Sing’oei (Objector). This was followed by an application for confirmation of grant dated 14th July 2017 filed by the Petitioner.

In view of the two applications, the court on the 18th September 2017 directed that the application for annulment and/or revocation of grant be heard first and by way of written submissions.

3. In between, on the 27th February 2019, the Petitioner filed an application for preservation of the estate and on the 7th March 2019, the court ordered that the “*status quo*” be maintained. Thereafter, matter was referred to a Court Annexed Mediation (CAT) process but this appeared to have failed. The parties therefore reverted to the application for revocation of the grant and fresh directions were given by the court on 22nd September 2020, for the application to be heard by way of viva-voce evidence. This was



never to be despite the attempts made on the 17th April 2023 and the 8th May 2023 when the court re-directed that the application be canvassed by way of affidavit evidence and written submissions.

4. In that regard, the Petitioner/ Respondent was the first to file written submissions on 17th October 2023 through Nyaundi Tuiyott & Company Advocate. The Objector/Applicant filed his submissions on 28th November 2023 through Morgan Omusundi & Company Advocates or Morgan Omusundi Law Firm. Basically, the application is founded on the provisions of section 76 of the Law of Succession Act which provides for revocation or annulment of grant as follows: -

“ A grant of representation, whether or not confirmed, may at any time be revoked or annulled by the court decides, either on application by any interested party or of its own motion: -

- a) That the proceedings to obtain the grant were defective in substance;
- b) That the grant was obtained fraudulently by the making of a false statement, or by the concealment from the court of something material to the case;
- c) That the grant was obtained by means of any untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
- d)
- e)

5. The grounds in support of the application are anchored on Sub-Sections (a) and (b) of section 76 of the Succession Act.

It is the Applicant’s contention that the impugned grant was obtained fraudulently by making false statement and concealing material fact in the manner that the Petitioner did not involve or include all the beneficiaries in these proceedings but misled the court that the beneficiaries signed the consent forms or refused to do so;

That, the guarantors were induced by fraudulent misrepresentations to sign the affidavits of justification of sureties form. That, the Petitioner included and involved strangers to these proceedings and made false indication or proportion of the deceased’s share of properties. That, the Petitioner’s objectives were misplaced, unlawful and against the deceased’s will and wish.

6. The foregoing allegations are fortified by the Applicant’s averment contained in the supporting affidavit deponed on 6th June 2017 and on which the supporting affidavit documents are annexed. Additional affidavits or statements in support of the objection were filed by the Objector and his witnesses mainly in the month of June 2023. The said witnesses include Robert Rotich, Magdaline Kerich, Rida kasuvu, and Stanley Sing’oei.

In response and opposition to the application, the Petitioner filed the replying affidavits dated 17th July 2017, 27th February 2019, 2nd June 2023 together with his statement and those of his witnesses including David Maritim Kerich, Rael Jepkemei Sabul, Jane Jepkorir Sitienei, Rosemary Jepkoech Taiget, Edwin Kiptoo Kosgei or Koske and Eunice Sigei Kerich.

7. It is clear from the record, the impugned grant was regularly obtained by the Petitioner. The necessary pre-requisite documents were duly examined and being satisfied that the petition for the grant was proper and lawful the court issued the grant on 28th June 2023. What remained was for the Petitioner and/or any of the listed beneficiaries to take out the necessary summons for confirmation of grant within six months from the date of issue. However, this was not done thereby prompting the court to



revoke the grant and order the closure of the file on account of the failure by the parties to proceed any further and have the estate formally distributed and transmitted to the true beneficiaries. One glaring aspect of the application for the grant was the exclusion of the deceased's female children apparently with their consent but rather prematurely as the matter had not reached the distribution stage where the female children would have expressed their intentions to surrender their interest in the estate, hence inheritance, in favour of their male siblings.

8. Be that as it may, the property listed as the sole immovable asset belonging to the deceased and available for distribution to all the true beneficiaries of the estate was the parcel of land described as Nandi/lessos/786.

In fact, this objection emanates from the question of availability of the entire portion of land for distribution among the beneficiaries. Whereas the objector contended that part of the property belonged to him and not the deceased hence not available for distribution as a whole, the Petitioner contended that the entire position of land belonged to the deceased and was therefore available for distribution to all beneficiaries.

9. The contest being on distribution of the estate and the availability of the estate property for distribution to all the beneficiaries as a whole unit and not part thereof, it would appear “{{term{refersTo |title In civil cases it is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

In criminal cases it is a case which on full consideration might possibly be thought sufficient to sustain a conviction.} prima-facie}}” that the present application may be premature as the actual beneficiaries of the estate are yet to agree and take out the necessary summons for confirmation of grant. It would also appear that the summons for confirmation of grant dated 14th July 2017 taken out by the Petitioner was also premature as the parties had not yet agreed on distribution of the estate.

In the circumstances, the application is untenable at this juncture and even if it were tenable for the sole purpose of having the grant annulled and/or revoked prior to distribution of the estate, the evidence availed herein by the Applicant/ Objector would not be sufficient and cogent enough to establish and prove the allegation of fraud made against the Petitioner. Neither would the evidence be sufficient enough to establish that the proceedings to obtain the grant were defective in substance given that the record clearly shows that the grant was regularly obtained and that this is an intestate and not testate succession.

10. Fraud is a serious allegation and it cannot be proved by merely raising the issue of fraud in an application such as the present one. All the pleaded particulars of fraud must be proved. Herein, the evidence, availed by the Objector falls short of that requirement. His personal claim of interest in part of the estate property ought to be addressed when the matter reaches the distribution stage if not the appropriate forum once the distribution is effected i.e the Environment and Land Court.
11. For the reasons foregoing, the present application must fail firstly, for being premature and secondly, for failure by the Objector to establish and prove the parameters set out in subsections (a) and (b) of section 76 of the *Law of Succession Act* for annulment and/or revocation of a grant.

The application is therefore dismissed with each party bearing their own costs.

Further, regard being given to the fact that this matter has been in court for far too long the parties are hereby directed to agree on the distribution of the estate and take out the necessary summons for confirmation of grant in the next four (4) months from this date hereof or in any event, not later than six (6) months.



And, for purpose of creating peace and harmony within the family of the deceased and enable a smooth distribution of the estate the Applicant/Objector Stephen Kimutai Sing'oei shall be included as a Co-Administrator of the Estate along with two female children of the deceased to be nominated by the parties on or before the 14th February 2024 when this matter shall be mentioned for further orders.

Ordered accordingly.

DELIVERED AND DATED THIS 20TH DAY OF DECEMBER, 2023

J. R. KARANJAH,

JUDGE

