



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 214 OF 2017

IN THE MATTER OF THE ESTATE OF THE LATE BEATRICE TOROITICH (DECEASED)

RULING

1. Beatrice Toroitich Koyier died on 4th December 2016.
2. On 26th April 2017, a Petition for Probate or of Letters of Administration with Written Will annexed was filed by Anne Tutoek, Esther Kiplagat and Joyce Toroitich.
3. Annexed was a Written Will made on 15th September 2016, and signed before Jackline P. A. Omolo Advocate and Mercyline Akoth Odeyo a lawyer.
4. In which Beatrice appointed the three (3) petitioners as executors and trustees.
5. In the will she acknowledged that she was married to one Benjamin Koyier but indicated that they were separated. She named her minor children in the will and proceeded to distribute her property.
6. Grant of Probate of Written Will made on 27th November 2017 by *Lady Justice Maureen Odero* to the three (3) petitioners.
7. On 15th November 2018, a Certificate of Confirmation of Grant was made to the three (3) executors by *Justice A. K. Ndung'u*.
8. Vide Summons for Revocation of Grant dated 3rd June 2019, Benjamin Koyier, sought the revocation of the Certificate of Confirmation of Grant made on 15th November 2018, and grant issued on 27th November 2017. He also sought that the purported will be submitted to DCI for examination as to whether the alleged signatures of the deceased Beatrice Toroitich were forgeries and for that report be filed in court.
9. The grounds for the Summons are set on its face, and the Supporting Affidavit sworn on 3rd June 2019.
10. Generally, he deponed that he was the spouse of the deceased, and at the time of her death they were married and living under the same roof with their children. That upon her death she was buried in his ancestral home. That he was surprised to learn that the petitioners, who are a friend, a sister and the mother to the deceased respectively had filed this petition, yet he had filed **Ngong Succession Cause Number 10 of 2017**, on 17th February, 2017, was issued with a grant on 17th February 2017, and a Certificate of Confirmation of Grant on 8th March 2018. He annexed the said documents. That he only learnt of these proceedings when he visited the National Lands Commission who were compulsorily acquiring part of LR Ngong/Ngong/26377. That there now existed two conflicting grants which were causing confusion and there was need to revoke one, in his view, this one. That the unregistered properties were in his name, and he annexed the title deeds. He contended that the administrators herein never served him with any papers yet the children were in his custody.
11. The application was opposed vide the Replying Affidavit of Joyce Toroitich sworn on 6th December 2019. It was her evidence that she is a sister to the deceased, and one of the executors of her will. That when Beatrice was ailing with cancer her husband the applicant had abandoned her, and began cohabiting with another woman, one Michelle Chelangat with whom he had children. As a result of all this Beatrice had moved to another house where she, the deponent and her other siblings took care of her until her demise.
12. That on 15th September, 2016, she personally accompanied the deceased to Ms. Jackline P. A. Omolo Advocates, where the deceased made her will, and executed it. That the applicant could not have been aware of the will because by then he had abandoned the deceased. That Beatrice was lucid and sound of mind. That Beatrice was apprehensive that the husband would spend her wealth over this new woman. That this petition was filed here (Nakuru) because most of the assets that make up the estate are situate here in Nakuru County.
13. Joyce deponed further that she had been advised by her counsel that a chief's letter was not necessary as long as all the beneficiaries and

deponents were listed, in any event the deceased's Written Will dated 15th September 2016 was valid as it complied with all the mandatory requirements of the law, that the handwriting experts' opinion could not supercede the evidence of eye witnesses who were present and witnessed the deceased make her will.

14. That there was no dispute that at the time of her demise the deceased had separated from the applicant whose only gripe was that he had been excluded from the will and was now in pursuit only for his own benefit.

15. That on the issue of handwriting expert, that executors should also have been given an opportunity to engage their own handwriting expert.

16. On 13th March 2020 the Anne Tuitoek, Joyce Toroitich and Esther Kiplagat filed Chamber Summons dated 11th March 2020 seeking orders; -

1. THAT this application be certified urgent and heard exparte in the 1st instance.

2. THAT Ngong Chief Magistrate Succession Number 10 of 2017 be transferred to this court and be consolidated with this matter being Nakuru High Court Succession Cause 214 of 2017.

2. THAT this file be the lead file for purposes of filing any further pleadings and recording of proceedings.

4. THAT the costs be provided for.

17. The grounds for the application were that **Ngong Chief Magistrate's Succession Cause Number 10 of 2017** and **Nakuru High Court Succession Cause 214 of 2017** related to the estate of the late **Beatrice Toroitich alias Beatrice Toroitich Koyier (deceased)** both of which were subject of revocation proceedings. That it was in the best interests of the estate to consolidate the matters, and in any event no party would be prejudiced.

18. This application was supported by the affidavit of Joyce Toroitich.

19. The main ground for the application was that Benjamin Koyier did file Ngong Chief Magistrate's Succession Cause Number 10 of 2017 together with Aileen Jepkemoi Tallam. They were issued with grant on 23rd June 2017, and it was confirmed on 8th March 2018. This grant is subject of revocation proceedings filed by the applicants herein.

20. At the same time the grant herein issued on 27th November 2017 and confirmed on 15th November 2018 is subject to revocation proceedings filed by Benjamin Koyier.

21. That it is only in the interests of justice that the two (2) matters be combined, by the transfer of the Ngong Chief Magistrate's Succession Cause Number 10 of 2017 to be consolidated with Nakuru High Court Succession Cause Number 214 of 2017. That this will also save judicial time.

22. The application is opposed by Benjamin Koyier vide his Replying Affidavit sworn on 19th October 2020 on the ground that though the cases deal with the same estate, one is said to be testate, the other intestate, and that should the Summons for Revocation of Grant dated 3rd June 2019 be allowed in light of the forensic report that the will is a forgery, then the grant herein will be rendered a nullity. That the only property that is subject to the Ngong Chief Magistrate's Succession Cause Number 10 of 2017 in LR Ngong/Ngong/26377 which the National Government has partially acquired compulsorily, and that the interest of the applicant is the compensation monies which they want in their pockets.

23. Both parties filed Submissions; the applicants dated 17th November 2020, 21st May 2021. The objector's dated 30th October 2020, 6th November 2020 and 2nd June 2021.

24. I have carefully considered the Applications, the Affidavits, the Submissions by each party.

25. Two main issues arise;

1. Whether the will dated 15th September 2016 is valid.

2. Whether the two (2) matters should be consolidated and heard together.

26. On the first issue, each party has filed what they term experts report from a handwriting expert. One from DCI, the other a private handwriting expert, their two (2) opinions draw differing opinions, one to the effect that the will is genuine, the other that it is a forgery. The court, cannot by merely reading the two (2) reports arrive at a reasoned decision. It is inevitable that the two (2) experts must appear before the court and be cross examined on their respective reports. It is also on record that the deceased appeared before an advocate of the High Court of Kenya, and executed the will before her, that evidence would be crucial in determining the validity of the said will.

27. The issue of validity of the will cannot be determined by way of Submissions, parties will have to proceed by way of oral evidence.

29. On the second issue, whether the two (2) matters ought to be consolidated and heard together? There are two (2) grants, one issued intestate, the other issued testate. Clearly, they cannot be in existence together as they are contradictory. It is inevitable that the two (2) Summons for Revocation of Grant be consolidated and heard together to determine which grant ought to remain standing. This is obviously tied to the first issue. Hence it is my considered view that the matters herein be consolidated and heard together.

29. The next question is where should these matters be heard? One could argue that the determining factor is the value of the estate, and whether it is within the pecuniary jurisdiction of the Chief Magistrates Court.

30. I have perused the petition before me and the value of the estate is not indicated. It is also evident that only one property of the deceased was situate at Ngong. It is also noteworthy that the cause in Ngong Chief Magistrate's Succession Cause Number 10 of 2017 is with respect to one property only LR Ngong/Ngong/26377, and not the rest of the estate. Taking into consideration the existence of the disputed will, which if found valid would bring the whole estate under scrutiny, it is only proper that the two (2) applications be heard together before this court.

31. I order therefore that the Ngong Chief Magistrate's Succession Cause Number 10 of 2017 be transferred to this court and be consolidated with this matter for purposes of hearing and determination.

32. The matter be mentioned within 14 days hereof for directions.

DATED, DELIVERED AND SIGNED VIRTUALLY THIS 21ST DAY OF JANUARY, 2022

MUMBUA T. MATHEKA

JUDGE

In the presence of:-

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