Chepkerich v Murei & another (Succession Cause 200 of 2012)
[2022] KEHC 3115 (KLR) (27 June 2022) (Ruling)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 200 OF 2012

EKO OGOLA, J

JUNE 27, 2022

IN THE MATTER OF THE ESTATE OF CHRISTINE JEPKOECH MUREI (DECEASED)

BETWEEN

ROSELINE CHEPKERICH ..... PETITIONER

AND

PRISCILA JEMUTAI MUREI ..... 1ST OBJECTOR

ESTHER CHEPKWONY ..... 2ND OBJECTOR

RULING

1. By way of Summons for Revocation or Annulment of Grant dated 4th March, 2020, the applicant seeks;
    1. That the grant of probate with written will annexed issued to Roseline Chepkerich made on 11th day of December, 2012 and confirmed on 9th December, 2013 be revoked on the grounds that the procedure used to obtain the grant was defective in substance and that the grant was obtained fraudulently by the making of false statement or by the concealment from the court of something material to the case.
    2. That the vesting of the property known as SOY/KAPSANG BLOCK 7 (ZIWA)/79 in the name of Roseline Chepkerich be declared null and void and the certificate of title issued thereto be revoked.
    3. That a new grant be made to Priscila Jemutai Murei and Esther Chepkwony as joint administrators of the estate of Christine Jepkoech Murei (Deceased).
    4. That the said grant be confirmed in the names of Priscila Jemutai Murei and Esther Chepkwony as the only beneficiaries of the estate of the deceased being the property known as SOY/KAPSANG BLOCK 7 (ZIWA)/79 in equal shares in schedule for distribution thereto.

2. Priscila Jemutai Murei, the 1st Applicant through her affidavit dated 4th March, 2020 in support of the summons for revocation of grant, deposes that the deceased died on 23rd May, 2005 and a grant of probate with written will annexed was issued to Roseline Chepkerich on 11th December, 2012, and that the said grant mentions Roseline Chepkerich (the Petitioner) as an executor named in the will when in fact she is not the one named as such.

3. The 1st Applicant averred that on 9th December, 2013 the said grant was confirmed in the names of Roseline Chepkerich, Agness Chepchumba and Ian Kiplagat. The 1st Applicant contends that Agness Chepchumba and Ian Kiplagat were never the Petitioners and their inclusion as administrators was an error on the face of the record.

4. The 1st Applicant averred that the said Roseline Chepkerich, Agness Chepchumba and Ian Kiplagat are the only persons listed as the deceased's beneficiaries.

5. The 1st Applicant challenges the validity of the said will on grounds that; at the time when the will was being made the deceased was so sick and could not have been of sound mind; that the deceased suffered from mental instability; that the deceased named Sally Jebotip as a beneficiary in the said estate when in fact, the said Sally Jebotip had pre-deceased her on 26th April 2001; the Respondent must have coerced the deceased into making the will in her favour; that the Will was never read during the burial of the deceased or after forty days as is the norm and that the Respondent took (7) years to petition for a grant of probate with will annexed.

6. The 1st Applicant maintains that the Gazette Notice No. 10716 published on 3/8/2012 was irregular as it indicated that the application was for grant of letters of administration intestate when in fact it was a petition for grant of probate with will annexed.

7. The 1st Applicant's case is that the will excluded her and Esther Chepkwony as beneficiaries of the deceased. The 1st Applicant averred that the deceased had five children namely; Roseline Chepkerich, Esther Chepkwony, Romanus Kiprop Saina, Priscila Jemutai Murei and Selly Jebotip Murei. That Selly Jebotip Murei died on 26/4/2001 and was survived by the following two children; Agness Jepchumba and Ian Kiplagat.

8. The 1st Applicant alleges that she was never notified of the petition for grant of probate with written will annexed and only came to learn that succession had been concluded in the year 2016.

9. The 1st Applicant contends that the grant was obtained fraudulently by making of a false statement or by concealment from court of something material to the case. That the Respondent misled court into believing that Sally Jebotip and herself were the only surviving children of the deceased.

10. The 1st Applicant averred that the deceased was the wife to the late Samuel Murei who had six wives. The 1st Applicant further averred that when the said Samuel Murei died, her mother was given approximately 32 acres of land located in Ziwa area in Uasin Gishu Distrrict and at the time land adjudication had not been done in Ziwa. That the said 32 acres comprised of two portions, one portion measuring approximately 20 acres and the other portion measuring 10 acres. The 1st Applicant further averred that upon the death of their father, she met with her siblings and it was decided that in the interim 20 acres of the said land be given to their brother Romanus Kiprop Saina whereas the remaining 10 acres remain with their mother to hold in trust for the daughters.

11. The 1st Applicant averred that in 1995 when land adjudication was being done in Ziwa area, Sally Jebotip and Roseline Chepkerich were more educated than her and Esther Chepkwony. The 1st Applicant alleges that Sally Jebotip and Roseline Chepkerich took advantage of their mother's lack of intelligence and their absence to defraud them. That Sally Jebotip and Roseline Chepkerich decided

to sub-divide the 12 acres into three portions which Sally Jebotip proceeded to allocate herself 4.7 acres being SOY/KAPSANG (ZIWA) BLOCK 7/77; Roseline Jepkerich proceeded to allocate herself SOY/KAPSANG (ZIWA) BLOCK 7/78 and the remaining 2 acres being SOY/KAPSANG (ZIWA) BLOCK 7/79 was registered in the name of the deceased herein. The 1st Applicant further averred that Romanus Kiprop Saina occupies the piece of land known as SOY/KAPSANG (ZIWA) BLOCK 7/93 measuring approximately 20 acres.

12. The 1st Applicant averred that when the deceased died, they met as a family and decided to leave the 12 acres of land to the Petitioner herein to utilize and educate the two children of Sally Jebotip who had died in 2001 as the Petitioner did not have any children of her own, her only child having passed on in 2003. The 1st Applicant contends that the Petitioner herein did not use proceeds from the said farm to carter for the needs of Sally's children and that in the year 2016, the Applicants convened a meeting with the view of diving the said 12 acres but the Petitioner frustrated their efforts. The 1st Applicant stated that it was at this point that they realized that the Petitioner had done Succession in relation to the 2 acres of land that had been registered in the name of their deceased mother and that their deceased mother had allegedly written a will.

13. The Applicants maintain that they rank equally with the Petitioner and the late Sally Jebotip as beneficiaries of the deceased and that the Petitioner and Sally Jebotip do not have superior rights to inherit over them. The 1st Applicant contends that considering that the Petitioner and the late Sally Jebotip got 5 acres each it is only fair that the 2 acres remaining be given to her and Esther Chepkwony. That Agness Chepchumba and Ian Kiplagat are entitled to inherit the portion of land that was registered in the name of their deceased mother Sally Jebotip being SOY/KAPSANG (ZIWA) BLOCK 7/77.

14. The Applicants urged court to revoke the grant issued to Petitioner and nullify the vesting of the suit property in the name of the Petitioner herein and revoke the title issued thereto.

15. The summons for revocation of grant is opposed by the Petitioner/Respondent who relies on her replying affidavit dated 25th March, 2020. She depones that their mother never suffered from any mental instability and was sound of mind until her demise. That the allegations made by the Applicants are full of falsehood and are meant to mislead the court.

16. The Respondent maintains that she petitioned for the grant of letters of administration with knowledge of the Applicants herein.

17. The Respondent admits that the late Sally Jebotip pre-deceased their mother but nevertheless their mother wrote a will and included her children as beneficiaries.

18. The Applicant contends that their late mother left a written will distributing her estate and the fact that a grant of probate was not issued is a procedural technicality and the same can be cured under Article 159 of *the Constitution*.

19. The Respondent urged court to dismiss the application.

Hearing

20. This court on 30/10/2018 ordered that the matter do proceed by way of viva voce evidence. Both parties called their witnesses and their evidence can be summarized as follows;

21. PW1 Priscila Jemutai Murei, testified that the deceased was her mother who died in the year 2005 leaving behind 32 acres of land. She testified that they shared the property and gave their brother known as Romanus 20 acres of the said land. She further testified that the deceased remained with 2 acres

of the said land. She testified that the Petitioner instituted succession proceedings without informing them; that the Petitioner showed a Will dated 31/1/2005 which they were unaware of; that the said Will only mentioned the Petitioner and the late Sally Jebotip as the only beneficiaries of the deceased's estate; and that the Will in question was never read at the burial of their late mother.

22. On cross-examination the witness testified that the remaining 12 acres of land was supposed to be shared equally among the deceased's daughters. She further testified that the Petitioner and the late Sally Jebotip held the suit property on behalf of all the daughters of the deceased. She reiterated that she did not agree with the contents of the Will and that the deceased suffered from unsound mind. She conceded that she did not have a medical report to confirm the same. She further testified that it was the Petitioner who had coerced the deceased into writing the Will.

23. PW2 Esther Chepkwony, testified that she is one of the children of the deceased and she only has one brother and three sisters. She testified that the deceased had 32 acres of land 20 of which was given to their brother and that the remaining 12 acres was to be shared amongst the daughters of the deceased. She testified that the Petitioner and the late Sally Jebotip had 5 acres each registered in their names respectively; that she later on got to learn about the Will and in the said Will the deceased had given the remaining 2 acres to the Petitioner herein and the late Sally Jebotip at their exclusion.

24. On cross-examination she reiterated that the Petitioner was supposed to hold 12 acres of land on behalf of the rest of the sisters. She conceded that she did not have report to prove that the deceased suffered from mental illness. She reiterated that the Petitioner had coerced the deceased into making of the said Will.

25. DW1 Roseline Chepkerich, testified that the deceased is her mother and that she died in 2005; that she is a first born and that they were 5 children; that the deceased made a Will and it was after her burial that she was informed by the firm of Birech & Co Advocates that the deceased had drawn a Will. She denied that the deceased suffered from mental illness and stated that she had a sister who was called Sally who died in 2001.

26. On cross-examination the witness confirmed that apart from the late Sally her other siblings are PW1, PW2 and Romanus. She admitted that she resides on her parents' land being SOY/KAPSANG (ZIWA) BLOCK 7/78 whereas the late Sally Jebotip was given 5 acres of all that parcel of land known as SOY/KAPSANG (ZIWA) BLOCK 7/77 measuring 5 acres whereas their brother Romanus occupies all that parcel of land known as SOY/KAPSANG (ZIWA) BLOCK 7/93 measuring 20 acres.

27. The witness told Court that when she got to know of the Will they went to the Office at Birech Advocate but not all her siblings were present so the meeting never took place. She however admitted that at the time when the will was being written, Sally Jebotip had already died but her children were in the deceased's custody. She reiterated that the deceased did not suffer from any mental illness. She admitted that it was only her and the late Sally that had been provided for in the said Will and that the Will did not mention her other siblings. She denied being present at time when Will was being written at the office of Birech Advocate. She conceded that the deceased was illiterate and did not know how to read and write and that the Will was written in English. She also stated that there was nothing in the Will to show that the Will was translated to the deceased and no certificate to proof that the Will was translated to the deceased.

28. The witness further testified that when she learnt about the Will she did not inform the rest of her siblings but they were informed about her intention to file Succession proceedings. She testified that her Advocate had informed her that the rest of her siblings had given their consent and had signed consent forms permitting her to file the said proceedings. She however, conceded that she did not see the consent forms and admitted that she was the only one who filed the said Succession cause. She also

testified that PW1, PW2 had been excluded from their mother's Will because they were married and their brother had already been given his share of the land.

29. The witness denied knowing Advocate Birech personally and stated that he had not handled any other transactions on her behalf and that she did not know any of the witnesses who had witnessed the said Will. She however admitted she presently occupies 5 acres whereas Sally's children also occupy 5 acres. She conceded that PW1 and PW2 have nothing.

30. DW2 Gabriel Kipkiring, testified that in 2005, he was a village elder and the deceased had approached him so that he could accompany her to the chief with the view of writing a Will. He testified that the Chief had informed the deceased that he could not write a Will and advised that he accompanies her to an Advocate's office. He testified that he took the deceased to Birech Advocate and left her there. He also testified that the deceased was in good mental health but was however epileptic.

31. On cross-examination the witness testified that he had only informed the Petitioner about the Will but did not inform the rest of her siblings. He also stated that he was aware that the Petitioner and the late Sally had both been given 5 acres of land each and that Romanus had been given 20 acres of the said land. He denied having been to the office of Birech Advocate before and also stated that he was aware that Birech Advocate was the Petitioner's Advocate. He also denied that the deceased was sick at the time when she wrote the will.

Determination

32. At the end of the oral hearing, the parties were directed to file submissions. Parties herein complied.

33. I have looked at the pleadings, the recorded evidence and the written submissions lodged by both sides. The issues that emerge for determination revolve around the revocation of grant and the validity of the Will on record.

34. The application is premised on section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya. The said provision states as follows:

> "76 Revocation or annulment of grant A grant of representation, whether or not confirmed, may at any time be revoked or annulled if 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 an 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) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
>
> (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances."

35. Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party.

36. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems, that is, where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation were not competent or suitable for appointment, or the deceased died testate having made a valid Will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons.

37. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required.

38. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.

39. In the present case it is clear that the Petitioner herein petitioned for the grant of the letters of administration with will annexed without including and or obtaining consent from the rest of the deceased's children. From the record, it is also clear that the Petitioner did not include the Objectors as well as her brother when petitioning for the grant of letters of administration with will annexed. Rule 26 of *P & A Rules* places a mandatory requirement on the Petitioner to seek consent from all the beneficiaries of the deceased before filing the petition. The Objectors had not renounced their rights to the estate. They should have been notified of the filing of the cause.

40. Flowing from the above, it is without a doubt that the procedure used to obtain the grant was defective in substance and that the grant was obtained fraudulently by the making of a false statement or my concealment from the court of something material to the case.

41. The Objectors have challenged the validity of the will on record. A Will is the means by which a person exercises his or her testamentary freedom to bequeath his or her estate without relying on intestacy rules of probate. The validity of a Will is dependent on the capacity of the testator to make a Will at the material time and compliance with the formal requirements for the making of a Will.

42. The threshold of the essentials of testamentary capacity were laid out in the case of *Banks v Goodfellow* [1870] LR 5 QB 549 as cited with approval in the case of *Vaghella v Vaghella*:

> " a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made."

43. Section 5 of the *Law of Succession Act*, deals with capacity to make a Will, and of testation. The relevant provisions state as follows -

> 5
>
> (1) ... any person who is sound of mind and not a minor may dispose of his free property by will ...
>
> (2) ...
>
> (3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.
>
> (4). The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.

44. In the instant cause, the Objectors have challenged the testamentary capacity of the deceased at the time of making the Will. The Objectors have argued that the deceased did not possess the requisite soundness of mind for purposes of making the impugned Will. The burden of proof in the first instance lies upon the person alleging lack of capacity. Once it is established to the satisfaction of the court that in fact the testator was not of sound mind then the onus is shifted to the person propounding the Will to prove the existence of mental capacity. The Objectors testified that the deceased was of unsound mind at the time of making the impugned Will. They however, were not able to tender any medical report to that effect.

45. The Objectors have also called into question the circumstances under which the Will was made which they say ought to raise suspicion that the Will was not the product of the deceased's intentions or wishes.

46. In addition to having testamentary capacity, a testator must know and approve the contents of the Will. A testator will be deemed to have known the contents of his Will if he is aware of its contents and understands the terms. Approval is seen from the execution of the Will and in *John Kinuthia Githinji v Githua Kiarie & Others*, Civil Appeal No.99 of 1988, it was held that it is essential to the validity of the Will that at the time of its execution, the testator should have known and approved its contents.

47. The law on knowledge and approval of a Will is found in Section 7 of the *Law of Succession Act* which provides that;

> " A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been adduced by mistake is void."

48. Where a person who plays the central role in the making of the Will, that is, other than the testator himself/herself, takes a substantial benefit under the Will; the role of the court is to scrutinize the evidence carefully so as to be satisfied that the maker of the Will did indeed know and approve the contents of the document before he/she signed it.

49. Suspicion would arise for instance in cases where the principal beneficiary under the Will is the person who suggested the terms of the Will to the maker, or wrote the document himself, or took the testator to an advocate of his own choice, among others. It is noteworthy that the principal beneficiary under the terms of the subject Will is the Petitioner herein.

50. During cross-examination DW1 testified that she was made aware of the existence of the said Will by one Asenwa, immediately after the demise of their mother. She however, conceded that she did not inform the rest of her siblings about the said Will and six years later she proceeded to petition for the grant of letters of administration with Will annexed without seeking their consent. DW2 on cross-examination also told court that he only informed the petitioner about and her siblings. No reasons have been advanced as to why the rest of the beneficiaries of the deceased were not made aware of the existence of the Will and subsequent proceedings. The Objectors have testified that they only became aware of these instant proceedings after the same had been concluded and grant had been issued in favour of the Petitioner herein. I also find it strange that Agness Chepchumba and Ian Kiplagat never petitioned for the grant of probate in this particular matter but appear as co-administrators in the Certificate of Confirmation that was issued on 18th February, 2014.

51. From the evidence tendered by all parties it is clear that the deceased was illiterate; she did not know how to read and write. However, the Will was drawn in English. An issue arising is that the deceased could not have attested the said Will as she could not understand the contents therein. It would have been diligent on the part of the advocate drawing the said Will to also draw up a certificate of translation to indicate that the contents of the said Will had been read out to the deceased in a language she understands and she had attested to the same. This was not done.

52. The Objectors also testified that the deceased did not make any provision for them in the impugned Will. The deceased only made a provision for the Petitioner and their late sister Sally Jebotip.

53. In *James Maina Anyanga v Lorna Yimbiha Ottaro & 4 Others* [2014] eKLR the court held that

'Failure to make provision for a dependant by a deceased person in his will does not invalidate the will as the court is empowered under Section 26 of the *Law of Succession Act* to make reasonable provision for the dependant.'

54. It is true that the deceased had a freedom to dispose off her estate in a manner that was suitable to her. The freedom is the essence of testate succession, and the fact that the Will did not provide for some beneficiaries does not, and cannot, invalidate the Will.

55. However, my reading of the will dated 31st January, 2005 indicates that the deceased herein indeed only made a provision for the Petitioner and her late sister Sally Jebotip who in fact had pre-deceased her.

56. What compounds the suspicion is that the deceased made a provision for the late Sally Jebotip, her daughter who had died on the 26th April, 2001 fours years before demise of the deceased. The Will having been drawn in the presence of Advocate, I find it difficult to believe that the testatrix knowingly made a provision for her daughter who was already dead at the time when the Will was being written.

57. It is not in contention that the Applicants are children of the deceased. From evidence produced before this Court it is not in dispute that they were the only ones that never got a share of the said estate. The Petitioner herein, the late Sally Jebotip and their brother Romanus Kiprop Saina had all prior to the deceased's death got a share of their parent's estate. It is also worth noting that the children of the late Sally Jebotip are equally well catered for as the 5 acres of all that parcel of land known as SOY/KAPSANG BLOCK 7(ZIWA)/77 belonging to their mother directly vests in them. The argument by the Petitioner herein that the Objector were excluded from the will because they married cannot stand. (See In *Re Estate of Solomon Ngatia Kariuki (Deceased)* [2008] eKLR).

58. It is my view, therefore, that the Objectors/Applicants are not strangers and as such should have been beneficiaries of the Deceased's estate. I therefore invoke the Court's authority under Section 26 to make provisions for them being children of the Deceased and direct that the remaining 2 acres of all that parcel of land known as SOY/KAPSANG BLOCK 7(ZIWA)/79 be equally shared between the Objectors herein.

59. Accordingly, I hereby order that;

    i. The will of the deceased on record, executed on 31st January, 2005 is invalid, null and void.

    ii. The deceased is declared to have died intestate and her estate is subject to distribution in accordance with the provisions of Section 40 of the*Law of succession Act*.

    iii. The grant of probate of written will made to Roseline Chepkerich, Agnes Chepchumba and Ian Kiplagat on 11th December, 2012 and confirmed on 9th December, 2013 is hereby revoked.

    iv. A fresh grant to be and is hereby issued in the names of Priscila Jemutai Murei and Esther Chepkwony as joint administrator of the estate of Christine Jepkoech Murei (deceased)

    v. The remaining 2 acres of all that parcel land known as SOY/KAPSANG BLOCK 7(ZIWA)/79 to be shared equally between Priscila Jemutai Murei and Esther Chepkwony.

    vi. The vesting of the property known as Soy/Kapsang Block 7 (Ziwa)/79 in the name of Roseline Chepkerich is hereby declared null and void and the certificate of title revoked.

    vii. Each party to bear its costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH OF JUNE 2022.

E. K. OGOLA

JUDGE