



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

P & A MISC. APPLICATION NO. 220 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE WALTER KIPLANGAT

ARAP CHAMDANY ALIAS WALTER KIPLANGAT CHAMDANY (DECEASED)

JUDITH WAITHERERO CHAMDANY.....PETITIONER

VERSUS

CHRISTINE CHEBET.....OBJECTOR/APPLICANT

RULING

1. The Application for determination is the Summons dated 5th July 2021 filed under Certificate of Urgency. It is premised on section 76 of the Law of Succession Act Cap 160, Laws of Kenya, and is supported by the affidavit of the Applicant. It seeks prayers:-

(i) That the Grant of Letters of Administration issued to Judith Waittherero Chamdany on 11th December 2015 and confirmed on 30 July 2018 be revoked or annulled.

(ii) That costs be awarded to the Applicant.

2. The Application is premised on the following grounds:

a) That the Petitioner failed to provide for ALL the biological children of the deceased person but instead made provision only for herself and her co-wife.

b) That the Petitioner concealed the true facts and information with the intention to deny the beneficiaries of their shares.

c) That the Petitioner applied for Grant of Letters of Administration and confirmation of the same without following the procedure as per the Law of Succession Act.

d) That it is for the interest of justice and fairness that the Grant of Letters of Administration and confirmation issued to the Petitioner be revoked or annulled and the Estate of the deceased be distributed equally to all the beneficiaries.

Applicant/Objector's case

3. The Applicant is the third born of the deceased Walter who died intestate on 27 November 2014 and the Petitioner herein. She avers that the Court appointed the Petitioner alongside the co-wife from the second household as Administrators and proceeded to confirm Grant on 30 July 2018. The Applicant avers that her mother, the Petitioner herein, filed for Succession and failed to make any provision for the deceased's biological children. That the mode of distribution that was presented in Court was presented without their consent and was aimed to unduly prejudice the beneficiaries from benefiting from the Estate. That she had no property yet she was a daughter of the deceased and was entitled to a share of the Estate. That she was unable to meet her financial obligations including a loan in the sum of Kshs.659,217/= which she had obtained from Faulu Microfinance Bank. She therefore prayed for the revocation of the Grant.

Petitioner's case

4. The summons was opposed by the Petitioner through a Replying Affidavit dated 22nd July 2021. She averred that the Applicant was in court during the confirmation of Grant and that she signed the consent to the mode of distribution contrary to what she alleged in her

affidavit. That she has already allocated 1 acre of tea plantation to the Applicant which the latter leased to a third party and a further 2 acres on Kericho/Cheptalal/702 to build her house, which she considers reasonable provision for the moment. That the Applicant was enjoying the fruits of her pension and that since the Petitioner had a life interest in the net Estate under sections 36 (1) (c) and 40 (2), provision would only arise once the interest determines.

5. The Application was urged through written submissions.

Objector/Applicant's submissions

6. In her submissions, the Applicant claims that she was lured to sign the consent which was a fabricated document. She submitted that a family meeting was held at Brevan Hotel in which they were given a plain paper in which they were asked to append their signatures and that the said document was later attached to a typed agreement and annexed at the back to appear as if the signatures had been obtained correctly. That the same procedure was used to fabricate the consent that was used to confirm Grant in court. She averred that she never participated in the succession process and has been unduly denied her share of the property.

7. Secondly, the Applicant submitted that the Petitioner relied on non-applicable provisions of the law to justify her actions to deprive the Applicant and her siblings of their share of property. She submitted that the deceased had left two surviving spouses with children and relied on the case of **Brian Kadima vs. Jackson William Musera & Another (2017) eKLR**.

8. Thirdly, the Applicant submitted that she was a daughter of the deceased and thus a beneficiary under section 29 of the Act. She also admitted to being in occupation of part of the parcel of land from the Estate but submitted that the issue before court was in respect of ownership based on the Grant, which the Petitioner had denied her yet she was a rightful heir.

9. The Applicant relied on Section 76 of the Act and the case **the Matter of the Estate of LAK (deceased) [2014] eKLR**, to entreat the court to only revoke the certificate for confirmation of Grant and not interfere with the entire succession cause. She also asked the court to consider the provisions under section 40 in respect of distribution of the Estate of a polygamous person. It was her submission that there was no agreement to distribute the Estate to the exclusion of the children and that the manner in which the consent was obtained was fraudulent thus satisfying the threshold under Section 76.

10. Further, the Applicant submitted that she had no intention to renounce her share of the Estate and that the court ought to intervene to save her from being deprived of her share of the Estate based on fabricated signatures that were used to her disadvantage.

11. Lastly, on the issue of costs, the Applicant submitted that the general principle is that costs followed the suit and that the court ought to make a discretionary award in favour of the Applicant. To this end, they cited the case of **Republic vs. Rosemary Wairimu Munene, Ex-Parte Applicant vs. Ihururu Dairy Farmers Co-operative Society Ltd, Party of Independent Candidate of Kenya vs. Mutula Kilonzo & 2 Others** together with Section 27(1) of the Civil Procedure Act.

Petitioner's submissions

12. The Petitioner narrowed down the main issues in the Application to four. She submitted that the Applicant consented to the Petitioner being appointed as administrator vide consent dated 1 December 2015. That the Petitioner rightfully produced the Agreement and Consent dated 16 February 2017 and if this was in contention by the Applicant, then the Applicant ought to have challenged the same by producing the actual documents that she claims to have signed. That the Applicant was estopped by section 120 of the Evidence Act from challenging a process that she fully participated in. The Petitioner submitted that the Applicant had not disclosed the facts that were concealed by the Petitioner in her application for confirmation of Grant. She urged the court to find that the grounds under Section 76 were not met.

13. Secondly, the Petitioner stated that the Applicant was in breach of the rules of natural justice and Article 50 of the Constitution which required that no one shall be condemned unheard. That she should have therefore also enjoined the second household administrator who was already enjoying the life interest in the property that vested in her from the succession proceedings. It was her submission that the beneficiaries in the second household would be adversely affected were the court to revoke the entire grant without affording them a hearing.

14. Thirdly, the Petitioner submitted that the Applicant did not give the court full disclosure when she failed to mention the portions of land which she was given to build a house and carry out tea farming. That her claim to be destitute and unable to fend for her children was untrue since she was already enjoying the retirement benefits from her former employer, NSSF.

15. With respect to the law, the Petitioner admitted that she had erroneously quoted Section 36 as opposed to Section 35(1) (b) of the Law of Succession Act. She submitted that the same was a mere technicality which the court ought to overlook in the interest of justice as per Article 159 (2) (d) of the Constitution. On life interest, she submitted that the Applicant ought not to demand distribution from her mother while the latter was still alive since the life interest determined only upon death. To this end, she relied on **Mary Wanjiku Kamonde vs. Daniel Muriithi Kamonde (2016) eKLR**, **Re. Estate of Zablon Komingoi Mateget (2018) eKLR**, **Re Estate of Fredrick Shikuku Mukabana (deceased) [2020] eKLR** and **Mungai Munyaka (deceased) [2017] eKLR**.

16. The Petitioner further submitted that, the claim by the Applicant that she (the Applicant) risked being disinherited by the sale of the property was unfounded since she had no intention of selling the property and had made adequate provision for the Applicant and her children.

17. Lastly, she urged the court to dismiss the Application as allowing the same would open a Pandora's box and would interfere with the interest of other beneficiaries. She urged the court to consider not issuing any orders as to costs since this was a family matter.

Issues for determination

18. The main issue for consideration in the present Application is whether it has met the threshold for revocation or annulment of Grant.

19. The Law of Succession Act provides for circumstances under which a Grant may be revoked or annulled. Section 76 provides 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.

20. The law as stated above outlines the various scenarios in which a grant may be revoked or annulled either by the court on its own motion or on application by an interested party. It is important to distinguish between the grant of representation and the certificate of confirmation of Grant.

21. The Applicant in her submissions stated that her prayer was for the Court to only revoke the certificate of confirmation of grant and not interfere with the entire succession process. I interpret this to mean that her only grievance is with the Certificate that confers the legal rights over the Petitioner and not the terms of the grant and how it was obtained (the succession process). However, her Application is based on section 76 of the Law of Succession Act which deals with revocation of grants.

22. In **Succession Cause No. 836 of 2013, In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR** Musyoka J., faced with a similar issue adequately distinguished between a grant of letter of representation which took the forms outlined in section 53 and 54 of the Act and the certificate of confirmation of grant which does not take any of the forms that are envisioned with section 53 and 54 of the Act. He stated thus:-

“A certificate of confirmation of grant does not take any of those forms, and it cannot possibly, therefore, be a grant of representation. It is a document extracted from the orders that a court makes after confirmation of a grant under section 71 of the Law of Succession Act, as evidence the fact that a grant of representation has been confirmed. It should be emphasized that the confirmation process does not produce another grant. The grant sought to be confirmed, through that process, remains intact, after confirmation. Whereas a grant of representation appoints personal representatives or administrators, the certificate of confirmation does not do anything of that sort. All what it does is to confirm that the court has approved the persons appointed under the grant to continue to administer the estate, with a view to distribute it in accordance with the distribution schedule approved. A certificate of confirmation of grant is akin to that order or decree that is extracted from a ruling or judgement made by a court; it is an extract of the orders that the court makes on an application for confirmation of grant. Quite clearly, therefore, a certificate of confirmation of grant is not a grant of representation, and for that reason it is not available for revocation under section 76 of the Law of Succession Act.”

23. I am persuaded by the above lucid distinction. It follows therefore that the Applicant's prayer for the Court to revoke the Certificate of Confirmation of Grant and not interfere with the succession process is something untenable in law. This is because, such an action would be useless because it does not change the main orders that the Court had previously issued in respect of the distribution of the Estate at the time of confirmation of Grant. Therefore, Section 76 becomes inapplicable at this stage and the correct avenue for redress would have been for the Applicant to apply for a revocation of the entire grant on grounds founded under Section 76. I observe that the Applicant's submissions with respect to revocation of the certificate was a departure from the main prayer founded on Section 76 of the Law of Succession Act.

24. It is clear that the Applicant's demand is to be given her share of the Estate for her personal use. In fact, she has attached a letter from Faulu Microfinance Bank demonstrating that she has loans to pay. She further claimed that she was unable to fend for herself and her children because she depended on her father's Estate. I note from the Record that she consented to the Applicant being appointed as administrator. There is also an agreement to include the 2nd wife as a co administrator and beneficiary to the Estate, which she consented to. Lastly, she also consented to the mode of distribution which was filed before court by the Applicant during the confirmation hearing.

Although she says she was lured to executing a blank document (plain paper) during the family meeting at Brevan Hotel, she has not controverted the Petitioner's evidence that she was present in court on the day of confirmation of the Grant.

25. Having understood that the Applicant's interest is to get her share of the Estate, the question then is whether her right to succeed the deceased's property has crystallized.

26. From the material placed before this court, it is not in dispute that the Applicant's father died intestate and had two wives. Section 40 of the Law of Succession Act was therefore applicable. Indeed the confirmed grant shows that the two households represented by the two widows were apportioned the deceased's Estate. It must be interpreted that they hold the Estate in trust for their children. Section 40 provides:-

“where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

27. Section 35 safeguards the right of a surviving spouse over the Estate thus:-

35. Where intestate has left one surviving spouse and child or children

1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

a) the personal and household effects of the deceased absolutely; and

b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

28. The court of Appeal in **Justus Thiora Kiugu & 4 Others .V. Joyce Nkatha Kiugu & Anor'**, Civil Appeal No. 30 of 2014 (2015) eKLR decried the proceedings which had gone on for 10 years pitting the children of the deceased against their mother whom they wanted to force to distribute their deceased father's Estate. The court directed the properties of the deceased to be registered in favour of the widow to hold in trust for herself and the deceased's. The court stated:-

“...an estate of a deceased person who died intestate leaving one spouse and children like in this case of M'Ikiungu Mwirichia cannot legally be distributed in any other way other than the parties agreeing among themselves and filing a consent, or by the court following the provisions of Section 35 of the Law of Succession. In the event that the parties agree and they record consent on the mode of distribution, the court has no choice but to adopt the consent and make it an order of the court. Short of a written consent on the mode of distribution, the court has no discretion but to distribute the estate of the deceased as per the provisions of Section 35 of the Law of Succession which makes provisions for an intestate who has left one surviving spouse and child or children.”

29. In **Tau Katungi vs. Margrethe Katungi & Another (2014) eKLR** Musyoka J. interpreted Section 35 in respect of life interest thus:-

“The effect of section 35(1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children's right to the property crystallises upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income she would be the person entitled exclusively to the income so generated....Life interest confers a limited right to the surviving spouse over the intestate estate. He or she does not enjoy absolute ownership over the property. They cannot deal with it as if it was their own. By virtue of section 37 of the Act, a surviving spouse cannot during the life interest dispose of any property subject to that life interest without the consent of all the adult children, co-trustees and the court. This is meant to safeguard the interest of the children who are the ultimate beneficiaries of the property the subject of the life interest. It is in this respect that the life interest operates as a trust over the property the subject thereof, a trust held by the surviving spouse for the benefit of the surviving children.”

30. Following the law as set out above and the legal principles as espoused in the above cited authorities, I agree with the Petitioner that presently, she holds a life interest in the Estate of the deceased. And while this entitlement is not absolute, her children, including the Applicant are not entitled to seek to have the property devolve to them except where the Petitioner remarries or passes on. In the absence of these two events, she continues to enjoy a life interest in the net intestate Estate while at the same time holding it in trust for her surviving children.

31. I must state however, that Section 35 (2) of the Law of Succession Act empowers the Petitioner to apportion any part of the intestate Estate to any of her children who were the ultimate beneficiaries of the Estate. Conversely, the law gives a remedy to a beneficiary aggrieved by a surviving spouse during the subsistence of the life interest. Section 35 (3) provides:-

3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld,

he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—

a) the nature and amount of the deceased's property;

b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;

c) the existing and future means and needs of the applicant and the surviving spouse;

d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;

e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and

g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

5) ----

32. In this case however whereas the Applicant would be entitled by way of appointment, she must demonstrate that the Petitioner has unreasonably exercised or withheld the power of appointment. The fact of having a personal loan as pleaded by the Applicant is not sufficient. To the contrary, the Petitioner has demonstrated that she has made provision for the beneficiaries. Indeed the Applicant has not controverted the Petitioner's claim that she has apportioned her land to build a home and carry out tea farming.

33. In the end, I find that the Application is not merited. It is dismissed with the order that each party bears their costs.

34. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 29TH DAY OF NOVEMBER, 2021.

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R. LAGAT-KORIR

JUDGE

Ruling delivered virtually in the presence of Mr. Kigen for the Petitioner, Kiprotich (Court Assistant) and in the absence of Mr. Cheruiyot for the Objector/Applicant