



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

SUCCESSION CAUSE NO. 223 OF 2015

IN THE MATTER OF THE ESTATE OF JOHN KIPTALE BII (DECEASED)

JULIANA CHEPKOECH LANGAT.....1ST APPLICANT/PROTESTOR

EMMY CHEMUTAI BII.....2ND APPLICANT/PROTESTOR

ANGELINE CHEPKEMOI BII.....3RD APPLICANT

VERSUS

ELIZABETH CHEPKEMOI BII.....1ST PETITIONER/RESPONDENT

WESLEY KIBET TELE.....2ND PETITIONER/RESPONDENT

RULING

1. This Ruling is in respect of the summons for Revocation of Grant dated 10th December, 2019. The application is supported by the sworn Affidavit of the 1st and 2nd Applicants/Protestors. It seeks revocation of the grant issued on 4th July, 2018.

2. The Applicants have raised the following grounds:

- i) That the Petitioners applied for a confirmation of Grant excluding the Applicants;
- ii) That the consent of the Applicants was not obtained before the filing of the Application for the confirmation of Grant;
- iii) That the Applicants are daughters of John Kiptele Bii (the deceased) and that they solely depended on the Estate of their late father; and
- iv) That the costs of the Application be provided for.

Background

3. The background to the present application is rather lengthy. The deceased died intestate on 27th March, 2014. He is survived by two wives and 17 children as follows:

- 1st House**
1. Agnes Bii (deceased) – 1st Wife/widow
 2. Daniel Tele – Son
 3. Zephania Langat – Son
 4. Michael Langat – Son
 5. Titus Langat – Son

6. Elijah Langat – Son
7. Wesley Kibet Tele – Son (*Administrator*)
8. Angeline Bii – Daughter
9. Juliana Langat – Daughter
10. Emmy Chemutai Bii – Daughter

2nd House

1. Elizabeth Bii - 2nd Wife/ Widow (*Administrator*)
2. Robert Langat – Son
3. Joyce Koech – Son
4. Judy Kirui – Son
5. Emily Langat – Daughter
6. Winnie Ng'eno – Daughter
7. Janeth Barimeny – Daughter
8. Daisy Cherotich – Daughter
9. Lydiah Chebet – Daughter

4. The Chief's letter dated 14th September, 2015 indicated that the family had agreed to have Wesley Kibet and Elizabeth Bii representing the 1st and 2nd households respectively appointed as administrators. The Court issued the Letters of Administration intestate dated 29th March, 2016 granting the 1st and 2nd Petitioner the authority to administer the Estate of the deceased.

5. Subsequently, the Petitioners filed Summons for Confirmation of Grant dated 19th September, 2016 accompanied by an affidavit outlining schedule of distribution together with consent to Confirmation of Grant. The consent for Confirmation was executed by the beneficiaries from the 2nd household only. Zephania Langat, Daniel Tele, Michael Langat, Titus Langat, Juliana Lang'at and Emmy Chemutai Bii, all children from the 1st household, did not execute the consent. Before the hearing of the summons for Confirmation took place, the 1st Petitioner filed a Supplementary Affidavit dated 26th May, 2017 which indicated that the entire land parcel No. Kericho/Kipsonoi S.S./175 goes to Wesley Kibet on behalf of the first house and the entire land parcel Kericho/Emkwen/Kapkures Block 1 (Kapkures/69) goes to her on behalf of the second house.

6. The said Notice for Confirmation of Grant was served upon all the children of the 1st house except Juliana Langat (the 1st Applicant) and in the 2nd house, only Elizabeth Bii and Judy Kirui were served. The Grant was confirmed on 26th July, 2017.

7. Thereafter, the 2nd Petitioner filed an Affidavit of Protest dated 13th September, 2017 claiming that he was absent in court on the date of the confirmation and that the Court issued the Confirmation despite his brother Elijah notifying the Court that the family had not agreed on the distribution of the property. In addition, he alleged that part of the Estate being Kericho/Emkwen/Kapkures Block 1 (Kapkures/69) had already been transferred in favour of his step mother (the 2nd Petitioner) on 26th January, 2016 making her an intermeddler. Based on this, he brought an Application through a Notice of Motion dated 28th February, 2018 praying for an order of the Court to reverse the transfer of this parcel from the 1st Petitioner to the name of their deceased father for purposes of distribution.

8. The above dispute was resolved through a family meeting and the Application dated 28th February, 2018 compromised when the parties agreed on a new mode of distribution which resulted in three of the parcels of land going fully to the 1st household and the another set of three going fully to the 2nd household. An amended Consent to Confirmation of Grant containing every beneficiary's signature was filed and a rectified Grant issued on 4th July, 2018.

9. The daughters in the first household (the Protestors herein) then made an Application through Summons dated 29th October, 2018 for Rectification of Grant. The main prayer in the said Application was that the Estate be distributed amongst the beneficiaries in the 1st household equally. The Applicants stated that their brother, the 2nd Petitioner/Administrator, had denied them their rightful share in the Estate and threatened to evict them from the portions that their father had allocated to them. Through an oral Application to preserve the Estate made by counsel for the Protestors, the Court issued an Order dated 22nd May, 2019 in this regard, barring any party from selling any parcel of land belonging to the deceased in respect of the 1st house until the Application was heard and determined.

10. The 1st and 2nd Applicants then subsequently made the present application through Summons under Certificate of Urgency **dated 10th December, 2019** seeking revocation of Letters of Administration. The application was supported by an affidavit sworn by the 1st Applicant in which she claimed that she never executed the consent which led to the confirmation of the Grant. She also claimed that their brother never allocated any share to any of the daughters of the deceased despite being dependents of the Estate. She also stated that she had no issue with the allocations made to the second house and that her only contention was that the property in the first house should not vest in her brother but should be shared equally.

11. The 3rd Applicant also filed a supporting affidavit in support. She stated that the Petitioners left out the daughters of the deceased when dividing the Estate; that because she was not married, she stayed with her parents until her father's demise and that her brothers had given her notice to move out of the parcel of land and at some point evicted her thereby causing her untold suffering.

12. The Application was opposed by Mrs. Elizabeth Bii, (1st Petitioner/Respondent) through a Replying Affidavit dated 31st January, 2020. She averred that the Application was an abuse of the court process and an afterthought owing to the fact that the Applicants participated in the Succession proceedings during the Confirmation of Grant. She stated that the Applicant did not protest the share allocated to the second house and the Application should therefore be dismissed. Wesley Kibet Tele, the 2nd Petitioner never filed any Replying Affidavit in this regard.

Submissions

13. The Applicants relied on section 76 of the Law of Succession Act in their prayer for revocation of the grant confirmed on 4 July, 2018 on the basis that it was fraudulently made. They stated that the Petitioners shared the Estate and intentionally left out other beneficiaries. In addition, they stated that the Applicants' consent had not been obtained. Further they submitted that the Petitioners discriminated against them yet they depended on the Estate. Lastly, they submitted that failure to disclose all persons entitled to the Estate is a concealment of material information to the court and amounts to obtaining the Grant in a fraudulent manner. In this regard, they relied on the case of **Ibrahim vs. Charles Kimeny Macharia, interested party (2019) eKLR**. They asked the court to direct the Petitioners to render accounts from the Estate to prevent them from abusing their administration powers.

14. In her submissions, the 1st Petitioner, termed the summons for revocation an afterthought. That it lacked merit, was malicious and marred by falsehood and non-disclosure of material facts. She stated that the said Grant was issued to the 2nd Petitioner to hold the property in trust for the beneficiaries of the first house as she did for the second house.

15. She further submitted that the Applicants had deliberately failed to attend Court despite being summoned and being served with the Confirmation Notice. She added that they also failed to file supplementary affidavits as directed by the Court on the mode of distribution since they were not agreeable to the initial one, but they again failed to do so. She did however agree with the Applicants that upon the confirmation of the Grant, all the beneficiaries from the first house were entitled to an equal share of the Estate including the Objectors/Applicants herein and that the 2nd Administrator, Wesley Kibet should be held to account on how he has distributed the Estate. Finally, it was her submission that annulling the entire Grant was not tenable since the Application did not meet the threshold for annulment. She submitted that the only issue in contention is how the 2nd Administrator has distributed the Estate amongst the beneficiaries of the first house.

16. The 2nd Petitioner Wesley Kibet submitted that they listed all the beneficiaries of the Estate and that the claim by the 2nd Applicant Emmy Chemutai Bii that she was chased out of her house was untrue. He also stated that all his sisters were married except Emmy and that he only followed his father's instructions in dealing with the Estate.

17. The main issue for determination in this application is whether the Grant of Letters of Administration should be revoked.

18. Section 76 of the Law of Succession Act Cap 160 sets out the threshold for revocation of a Grant. It 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.”

19. It is the Applicant's case that the Petitioners made a false statement and concealed material facts from the court when they sought confirmation of Grant by failing to state all the beneficiaries. They contended that they were never informed of the process to confirm the grant and that their consent was never obtained.

20. From the Record, I note that the Applicants consented to the appointment of the Petitioners as the proposed Administrators. This is evidenced by the Consent dated 1st July, 2015. The parties then recorded another consent in which they outlined the mode of distribution. This consent was executed by Angelina Langat (Now 3rd Applicant) from the first house alongside everyone in the second house. The consent to confirmation of grant dated 16th September, 2016 was then filed in Court.

21. The Petitioners, through Summons dated 19th September, 2016 filed for Confirmation of Grant and the hearing was set for 21th March, 2017. The Notice was served upon all the parties in the first house save for Juliana Langat, the 1st Applicant herein. The parties then agreed to file a Supplementary Affidavit dated 26th May, 2017 in which two of the parcels of land were to be wholly vested individually for each house and not shared into half between the two houses as per the previous mode of distribution. The Grant was then confirmed on 26th July, 2017.

22. The 2nd Administrator objected to this particular Grant and filed an Application seeking a revocation on the basis of intermeddling and concealment of property from the schedule of assets in the Affidavit. Following this objection, the parties engaged in further discussions and filed another amended consent to confirmation of grant dated 3rd July, 2018. This time, 6 parcels of land were now wholly vested in the two households with each taking 3 whole shares and not half shares of the various parcels as before. This consent was also now fully executed by all the beneficiaries, including the Applicants herein. On this basis, the Court proceeded to rectify the previous Grant and confirm the new proposed mode of distribution thereby issuing a rectified Certificate dated 4th July, 2018.

23. From the Court record, the Application for rectification of Grant dated 29th October, 2018 made by the 1st and 2nd Applicants was premised on the issue of equal distribution in respect to the share of the first house. The 1st Applicant in her supporting affidavit at paragraph 10 stated that she did not execute the said consent and that the signatures contained therein did not belong to any of her sisters. She also further stated that she only came to know about the Confirmed Grant when her brother brought in surveyors to subdivide the land. She also stated that her brothers were proceeding to dispose off the parcels of land and they never received any proceeds as equal beneficiaries.

24. In response to this, the 2nd Petitioner stated that he held the shares allocated to the first house in trust for the beneficiaries and that he had not even begun distributing the Estate as yet. He also stated that he was ready to convene a meeting to agree on how to distribute the property in the first house. He admitted that the only parcel transferred was Nakuru Municipality 29/1306 measuring 0.6 Acres which their father had bequeathed the sons and not the daughters prior to his death. Finally he denied threatening the Applicants.

25. Precedent is clear on circumstances when a Grant may be revoked or annulled. In the Court of Appeal case of **Samuel Wafula Wasike vs. Hudson Simiyu Wafula C.A No.161 of 1993**, the Court of Appeal (Kwach, Omolo and Tunoi JJA) held that:-

“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.”

26. In a similar fashion, Koome J. (as she then was) in **the Matter of the Estate of Ngari Gatumbi alias James Ngari Gatumbi (Deceased) Nairobi High Court Succession Cause No.783 of 1993 [Ur]** held that:-

“A grant will be revoked where a person who is entitled to apply is not notified by the petitioner of their intention to apply and that person's consent to the petitioner's application is not sought.”

27. The above means that where a Petitioner seeks to move the court to confirm a grant, that Petitioner must ensure that he obtains the consent of the beneficiaries and must adequately notify them of the same. It is clear from the Record that the Hearing Notice for Confirmation of Grant was duly served upon the 2nd and 3rd Applicants. The only person who may have reasonable ground to state that she was not aware is the first Applicant as there is no affidavit confirming service upon her. Therefore, it is not factual that the 1st Applicant's sisters were not aware of the proceedings leading to Confirmation of Grant. They failed to avail themselves in court to object to the mode of distribution that had been proposed initially. I find that they were duly notified and cannot allege otherwise.

28. On the aspect of obtaining consent, the 1st Applicant alleged that the signatures on the Consent to Confirmation of Grant dated 3rd July, 2018 neither belonged to her nor her sisters. The Applicants have not demonstrated to the Court any aspect of fraud or that they were not the ones who actually signed the consent. The Court has also not been shown how their signatures look and an expert has also not been called to confirm that the signatures that appear on the consent do not belong to the Applicants. It is trite that he who alleges must prove. It is not enough for the Applicants to merely state that the signatures did not belong to them. I am therefore not persuaded at this stage that the consent was not properly obtained. It follows then that the threshold for revocation of grant set out in Section 76 Law of Succession Act has not been met.

29. The above notwithstanding, I now consider whether the confirmed Grant as it stands has been applied for the intended purpose being the

distribution of the deceased's property in a fair and just manner to all the beneficiaries.

30. The 2nd Petitioner admitted that he held the property vested in him in trust for all the beneficiaries of the first house. The 1st Applicant also stated that she understood that the 2nd Petitioner/Administrator was indeed holding the property in trust for his siblings and that they ought to share the same equally amongst themselves.

31. I must recognize that all the beneficiaries of the deceased were properly listed before the Court. However, at the time of confirmation of the Grant, only two beneficiaries who had been appointed as Administrators were the only ones listed on the Grant as the persons to whom the property would devolve, albeit in trust for the remaining beneficiaries. Evidently, the contention is from the first house alone and not the second house.

32. **Section 71(2)** provides that before a Court can confirm the grant of letters of Administration where a person dies intestate, it must satisfy itself that all the beneficiaries and all the property belonging to the deceased have been properly identified and have a proper comprehension of how the property will be or has been distributed. This requirement is set out as follows:-

“71 (2)Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

33. Similarly, **Rule 40 (4)** of the Probate and Administration Rules provides as follows:-

“4) Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.”

34. I have perused the Record and I am convinced that all the parties were aware of the succession proceedings in respect of the deceased's property. It is only the hearing of the confirmation in which one member from the first household seems not to have been notified as there is no affidavit of service on record. I also point out that during the confirmation of the Grant hearing, the parties notified the court that they had now agreed on the final mode of distribution and presented a fully signed consent. As stated before, this formed the basis for the Court proceeding to confirm the Grant even though the first Applicant and her sisters from the first house were all absent. The Consent presented to the Court only listed the parcels of property owned by the deceased and further outlined the share for each household, with the only names appearing on the schedule being those of the two Petitioners/Administrators.

35. It is trite that where all beneficiaries in a Succession Cause have agreed on a mode of distribution of the deceased person's property, courts would ordinarily adopt the same and cannot impose upon the beneficiaries its own decision unless the circumstances required an intervention. In this case, having perused the proceedings, I have come to the conclusion that the Grant as issued depicted the desire and agreement of the parties at the time.

36. I however find the conduct of the 2nd Petitioner/Administrator somewhat mischievous. He stated in his submissions that he was yet to distribute the property and was willing to convene a meeting in order to agree with the beneficiaries of the first household on how to divide the property and that he was incapable of threatening and evicting his sisters. He also claimed further that his duty was only to hold the property in trust for his family and not that he was now the sole owner of the entire share allocated to the first house. On the other hand, he has never convened a meeting despite the Grant being confirmed as far back as 4th July, 2018.

37. In addition, Angeline, the 3rd Applicant deponed in her sworn affidavit dated 28th October, 2020 that her brothers had chased her away from the only place she called home on the premise that she was not entitled to the Estate as a daughter. At the same time, the 2nd Applicant Emmy Chemutai stated in her affidavit that she was assaulted by one of her brothers in an attempt to remove her from the Estate. She attached a copy of the Occurrence Book Entry No. 09/10/05/2021. Further to this, I have also read the 2nd Petitioner's submissions and from it, I can deduce that he has difficulty accepting that married daughters were entitled to inherit part of their deceased father's estate alongside their brothers. His choice of words was that all his sisters "were lucky enough to be married except one." He also stated that he acted as per the instructions of his father implying that he has only engaged his brothers in respect of the Estate.

38. The law is clear on distribution of property of a deceased person. Firstly, the Constitution of Kenya under Article 27 prohibits any form of discrimination. It provides as follows:-

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law...”

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

38. More pointedly, **Section 38 of the Law of Succession Act** clearly provides:-

“Where an intestate has left a surviving child or children but no spouse the net estate shall subject to the provisions of Section 41 and 42 devolve upon the surviving child, if there be only one or shall be equally divided among the surviving children.”

39. The Court of Appeal in the case of **Stephen Gitonga M'Murithi vs. Faith Ngiramurithi (2015) eKLR** interpreted the above section thus:-

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”

40. It follows then that the three daughters in the first household are equally entitled to a share from their father’s Estate by law and not as an act of charity on the part of their brother the 2nd Administrator. His failure to identify to them their portion goes against the duties of an Administrator set out under sections 82 and 83 of the Law of Succession Act as follows:-

“83. Duties of personal representatives **Personal representatives shall have the following duties**

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

41. These powers however have limitations. A grant holder must always remember that he is not an absolute owner of the deceased’s property because the property does not belong to him in a personal manner, but belongs to the Estate. Section 79 of the Law of Succession Act clearly states that he is only a persona representative of the deceased and this is only for purposes of administration and the management of the Estate in order to ensure that all the beneficiaries will eventually get their fair and equitable share of the property. (See **Re Estate of Agwang Wasiro (Deceased) [2020] eKLR, Succession Cause No. 859 of 2015.**)

42. In this case, it is clear to this court that the 2nd Petitioner does not have a genuine intention to distribute the Estate amongst his siblings including his sisters as he claims. If he was sincere, he would have already taken steps to distribute the Estate to all the beneficiaries or at the very least come to an agreement with them on how the Estate which he now holds in trust would be distributed. It is not enough for him to deny having shut the Applicants out of the Estate.

43. Consequently, it is my conclusion that the Grant in the manner drafted and issued is not in itself defective, but gives room for the 2nd Administrator to abuse his powers and mischievously transact the affairs of the Estate in any manner he deems fit, to the disadvantage of the beneficiaries from the 1st household and for whom he holds the Estate in trust.

44. In the final analysis, I have come to the conclusion that the threshold for the revocation of grant has not been met. The prayer to have the entire Grant revoked is not merited as the same would affect the position of the second household which is not affected by the issues raised in this application. The Applicants have however made a case for Rectification of the Grant in order to prevent further wastage of the part of the Estate belonging to beneficiaries from the 1st household.

45. The 2nd Administrator/Petitioner is directed to convene a meeting of all the beneficiaries from the 1st household to agree on a schedule of distribution specifying the individual share of each beneficiary. The said schedule and consent signed by all the beneficiaries shall be filed in court within 30 days of today to enable the court rectify the Grant accordingly.

46. For clarity, 2nd Administrator/Petitioner shall not dispose any part of the Estate and shall ensure that none of the beneficiaries from the 1st household is evicted from the Estate.

47. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 23RD DAY OF NOVEMBER, 2021.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the absence of Counsel and in the presence of the Applicants/Protestors, the Petitioners/Respondents, and Kiprotich (Court Assistant).