



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KERICHO**

**SUCCESSION CAUSE NO.40 OF 2003**

**IN THE MATTER OF THE ESTATE OF THE LATE KIPTONUI**

**KALYA A. BETT alias KIPTONUI A. BETT (DECEASED)**

**JOEL TONU I.....APPLICANT**

**VERSUS**

**MOSES KIMUTAI TONU I.....1<sup>ST</sup> RESPONDENT**

**KITUR KALYA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Protestor herein JOEL TONU I (hereafter referred to as the Protestor) filed a summons for revocation dated 22/10/2020 seeking to revoke the grant of letters of Administration issued to MOSES KIMUTAI TONU I (now deceased) and KITUR KALYA (also now deceased) dated 21/7/2005 and first confirmed on 15/6/2006 and amended on 14/6/2016.

2. The deceased herein KIPTONUI KALYA A. BETT alias KIPTONUI A. BETT (hereafter referred to as the deceased) died intestate on 6/7/1994. He had the following beneficiaries: -

**(a) Wilson Kipkemoi Tonui (Deceased)**

**(b) Daniel Tonui - Son**

**(c) Joel Tonui - Son**

**(d) Zacharia Tonui - Deceased**

**(e) Moses Tonui - Deceased**

**(f) Joseph Tonui - Deceased**

**(g) Samwel Tonui - Deceased**

3. The deceased was the registered owner of land parcels No. KERICHO/KABIANGA/971 and NANDI/CHEBILAT/488.

4. On 8/12/2020, the Court appointed JOSEPH TONU I to replace MOSES KIMUTAI TONU I and KITUR KALYA (both deceased).

5. The Protestor is seeking revocation of the confirmed grant on the basis the Administrators did not obtain his consent before petitioning for grant of representation and further that the Protestor and the Elder brother WILSON KIPKEMOI TONU I (deceased) were disinherited.

6. The Petitioner JOSEPH TONU I opposed the summons for revocation and filed a Replying Affidavit in which he deposed that in the year, 1964, WILSON KIPKEMOI TONU I (deceased) sold Seven Acres of their father's land and relocated to Nandi with the Protestor and further that they reside there to-date.

7. The case proceeded by viva voce evidence. The Protestor who testified as OW.1 said he is a son of the deceased herein and yet he was left out of the distribution of the Estate and further that his consent was not obtained in filing the Petition.
8. The Petitioner called a total of five witnesses whose evidence in summary was that the Deceased sold Seven Acres to the husband of PW.2 (GRACE CHEPNGETICH SANG) who is also now deceased and relocated WILSON (now deceased) and JOEL to Nandi.
9. The witnesses who testified as PW.1 (the Petitioner) PW.2, PW.3, PW.4 and PW.5 said they were not privy to the sale agreement but they were all aware that the Protestor and his late brother relocated to Nandi.
10. The Petitioner said the two brothers WILSON and JOEL (the Protestor) went with the proceeds of seven (7) Acres and they left the remaining five beneficiaries to share the remaining seven (7) Acres.
11. I have considered the evidence adduced during the hearing. I find that there is evidence that Seven (7) Acres were sold by the deceased herein and the protestor and his late brother were relocated to Nandi where the Protestor stays to this date.
12. Section 42 of the Law of Succession Act, states as follows: **“where-**

***(a) An intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or***

***(b) Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this act,***

***That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”***

13. The high court in *re estate of Marete Mbui alias M’Marete M’Mbui alias Julius Marete (2017) eKLR* stated as follows: **“At this point I feel obliged to state and I have stated in other cases that section 42 of the Law of Succession Act serves two important purposes; one, it fends off selfish tendencies of human beings in seeking for double portions in the estate of the deceased; and two It enables the court to attain equity in the sharing out of the estate property among the rightful beneficiaries.”**

14. The Protestor has failed to prove that he is entitled to a share of the remaining portion of land at KERICHO/KABIANGA/971.

15. Section 76 of the Law of Succession Act, provides for revocation of grants, and it states as follows: **“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.”***

16. The Chief’s letter dated 8/4/2003 has the Protestor’s name and I find that the summons for revocation of grant filed by the Protestor lacks in merit and the same is dismissed.

17. This being a family dispute, each party to bear its own costs of the Application.

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 17TH DAY OF DECEMBER, 2021.**

**A.N. ONGERI**

**JUDGE**