



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

SUCCESSION CAUSE NO. 32 OF 2014

(ESTATE OF CHEPKWONY ARAP MORISIN

ALIAS JOHN CHEPKWONY MARISIN (DECEASED)

JAMES KIPSIGEI CHEPKWONY.....APPLICANT/OBJECTOR

-VERSUS-

FLOSSY CHEROTICH CHEPKWONY.....ADMINISTRATOR/RESPONDENT

ALICE CHEPNG'ENO MARISIN.....ADMINISTRATOR/RESPONDENT

RULING

1. Subject of this ruling is the distribution of the Estate of Chepkwony Arap Morisin (deceased) who died on the 1st July 2010.

On the 17th May 2016, a certificate of confirmation of grant was issued to James Kipsege Chekwony, Joshua Kiptanui Chekwony and Alice Chemngeno Marishi pursuant to Section 71(1) (3) of the Law of Succession to Act.

2. Upon application by the Administrators above, a **Rectified Certificate of Confirmation of Grant was issued to Flossy Cherotich Chepkwony and Alice Chemng'eno Merish** on the 31st January 2019, on grounds that James Kipsigei Chepkwony the Applicant had refused to participate in the distribution of the estate and failed to execute the necessary documents for transmission of land parcels to the beneficiaries while the other Joshua Kiptanui had died.

3. **By an application dated, the 3rd June 2019**, James Kipsegei Chepkwony approached this court for an **Order of further rectification of the Grant** issued on the 31st January 2019 upon provisions of **Section 47 of the Law of Succession Act (the Act)**, and sought for stay of the distribution of the estate.

He further sought to be reinstated as an Administrator of the estate and further order for Redistribution of the estate stated in the grant issued on the 31st January 2019 on grounds that it gave erroneous distribution of the estate.

4. The grounds for the application are stated that the applicant is the eldest son of the deceased and that himself and other members of the deceased's family were not aware of the application for Rectification of the Certificate of Confirmation of grant for lack of service and that the deceased had three wives, and prior to his death he had sub-divided his land to the three (3) wives and his sons.

Thus, it is his prayer that the court do review and rectify the certificate of confirmation of grant issued on 31st January 2019.

5. The administrators oppose the application by a Replying Affidavit sworn by both of them on the 8th July 2019.

I have considered the grounds in support of the summons.

ISSUES FOR DETERMINATION

(1) Whether the applicant has made out a case for further Rectification of the Grant issued to the Respondents on the 31st January 2019.

(2) Whether or not to review and redistribute the deceased's estate as proposed by the applicant and opposed by the Respondents.

6. The court record shows that the initial grant of Letters of Administration were issued to the Applicant alone in this cause on the 1st July 2010 and by his application dated the 16th May 2016, sought to add three others – Joshua Chepkwony, Flossy Jerotich, Chepkwony and Alice Jepng'eno Morisin as co-administrators of the estate, which the court granted.

7. On the 17th May 2016, a Certificate of Confirmation of the grant was issued pursuant to Section 17(1) and (3) of the Law of Succession Act, to the applicant. A Schedule of distribution of the deceased's properties was also stated, having been agreed upon by the beneficiaries in terms of the three houses (wives).

8. The applicant agreed to the mode of distribution of the Estate as well as all other beneficiaries. The properties at stake are, **Kericho/Kabianga/1773, Njoro/Ngata block 2/90, Olkaria Lessos – Kisumu 400/220 KV powerline wayleave compensation through Kentraco.**

9. The court issued a certificate of confirmation of the rectified grant on the 5th December 2016, and together stated the shares allocated to each of the beneficiaries, including the applicant.

Barely two years after, there occurred a rift, and this time round, it was alleged that the Applicant James Kipsigei had refused to participate and co-operate in the distribution of the estate by his failure to execute transfer/transmission forms over the estate properties – as stated in the Grant issued on the 5th December 2016.

10. Upon hearing the Court (Ndung'u J) on the 31st December 2019 further rectified and confirmed the grant by removing the applicant as joint administrator of the deceased's estate.

11. **ISSUE NO.1**

The applicant is the eldest son of the deceased. He was dissatisfied with the court's decision. He moved to court by application before me dated 3rd June 2019, under provisions of Section 47 of the Act seeking an order to be reinstated as an administrator, and re-distribution of the deceased's estate.

In the main, the applicant contends that as the eldest son of the deceased, he ought to be re-instated as administrator so as to control distribution of the assets of the Estate, on grounds that he and the rest of his family were not aware of the application wherein he was removed as an administrator and his two sisters in law confirmed as the administrators.

12. This position has been vigorously opposed. In their replying affidavit the Administrators depone that in the first instance the applicant secretly applied for and obtained a grant over the deceased's estate and once the certificate was rectified and confirmed, the applicant started frustrating the process of distribution by threatening to harm any surveyors who visited the land parcels to effect sub-divisions pursuant to the court orders of distribution to the beneficiaries.

13. It is further deponed that the applicant has allocated to his two sons properties, properly belonging to the administrators and is well bent to allocate himself more land than the other beneficiaries which has caused hostility, and also leasing out the said land without consent of the other beneficiaries.

As a result the respondents oppose the applicant's inclusion as a joint co-administrator of the Estate as by doing so, the applicant will be given an opportunity to delay distribution and thus cause more suffering and frustration to the rest of the beneficiaries.

14. I have considered the main reasons advanced in support of the application. It seems that the applicant, being the eldest son of the deceased, thinks, by that fact alone, he should be allowed to control his father's estate. In my view, there is no legal basis whatsoever to support such proposition.

The Law of Succession Act deems all deceased's children, male and female as equal without any distinction.

15. On the other hand, and being more practical, being the eldest son does not, in itself give leadership, or headship of the family unit. All persons are equal before the law and to encourage the applicant's beliefs would be discriminatory and contrary to **Article 27 (1) (2)(3) of the Constitution.**

Mr. Geke counsel for the applicant was at pains to urge the court on why the applicant should be reinstated, nor could he sufficiently persuade the court that being his advocate at the time, he was not served with the application for rectification of certificate of grant to remove him as an administrator.

16. I note that there are already three "Rectifications" of the certificate of grant. Would a fourth be merited? Would further rectification prejudice the respondents or advantage the Applicant?

Distribution of the Assets of the estate has been fully agreed to by all the beneficiaries save the applicant. He wants to have control of the estate. He has failed to counter accusations by the respondents that he is intermeddling with the estate that has given his sons shares that ought to go to the two administrators and that he continues to frustrate survey and sub-division of the subject properties. The applicant has not faulted the two administrators in any manner of the administration of the estate.

17. In the circumstances, and for the above reasons, I decline to grant prayer No. 2, to reinstate the applicant as an administrator of the estate. He has not shown any *bonafides* in his application.

18. ISSUE NO. 2 Distribution of the deceased's estate.

I have stated the assets properties at stake. There is no opposition to the mode of distribution proposed by the administrators, including the applicant as stated in the Rectified certificate of confirmation of grant dated the *31st December 2019 read 31st December 2018*.

This is a typographical error that both parties agree, and urge for correction.

Under Section 99 of the Civil Procedure Act, I proceed to correct the date of the Certificate of Confirmation of Grant to read **31st December 2018**.

19. I have considered the previous modes of distribution. It is instructive that the applicant agreed and indeed appended his signature to the proposed distribution together with all other beneficiaries. It is not clear at what point in time, that the applicant discovered, that being the eldest son of his father, he ought to get more, and thus control the estate.

This is not to say or state that all beneficiaries should get equal shares, far from it, but on equitable distribution.

20. The applicant seeks rectification on the mode of distribution deponing that his late father subdivided his properties to his three wives and three sons during his life time and thus seeks that his late father's wishes be honoured.

His proposals are:

(1) Kericho/Kabianga/1773 to be shared equally to the three widows.

(2) Ol Karia –Lesoss-Kisumu powerline way leave compensation in the region of Kshs.48 Million. The Applicant's problem is that he does not wish the Respondents to receive the compensation money, yet all beneficiaries, agreed that the three widows will share the proceeds (including the applicant's mother Martha Chepkoech Marisin who will hold the proceeds in trust for herself and for the applicant James Kipsigei, Paul Kipsigei and Flossy Cherotich Chekwony, while the Administrators Sarah Chelagat Marisin and Alice Chemng'eno Marisin will hold their shares in trust for their children.

21. The proposals were agreed and recorded by consent of all the beneficiaries.

No sufficient reasons have been advanced by the applicant to persuade the court to depart from the beneficiaries agreement and consents.

22. There is no problem on distribution on the Kericho land parcel. The three widows will have equal shares of 9 Acres.

23. Nakuru property – Njoro/Ngata Block 2/90.

The applicant lives on this land parcel. It is 72 acres.

The proposals stated in the last rectified certificate of confirmation of grant is that the three windows would share equally the entire land parcel, thus 24 Acres to each; to hold in trust for themselves and their children. For instance, Martha Chepkoech Morisin would hold in trust for herself and for the applicant, and his two brothers.

24. The applicant does not support the above. He desires that the three widows each be given 18 acres (54 Acres) and the balance of 18 acres be shared amongst his three brothers (6 acres each) and NIL to the sons of the other two widows.

His assertion in support of his proposition was that, that was his father's wishes.

He could however not substantiate at what time during his father's lifetime, he stated the alleged wishes. Nothing turns on this, as mere allegations without any proof are simply mere statements and of no evidential value.

25. In my very considered opinion, the applicant seeks to "control the Estate" by disinheriting the sons of the other two widows by getting more land, and controlling Kentraco proceeds to his benefit alone, and to the exclusion of those whose land will be affected by the wayleave.

26. The **Court of Appeal in Civil Appeal No. 42 of 2015 Irene Mabuti Girati –vs- Zacharia Njege Gitari (2017) e KLR** rendered that there ought be no discrimination in polygamous households and that the net estate of a deceased's person should be shared out as to reflect the number of units in the household, where each child is a unit and the wives constitute distinct units.

27. Further, in **Succession Cause No. 401 of 1999 Real Estate of Elijah Kipeter Misoi (2018) e KLR**, the court restated that under **Section 35 of the Act**, a deceased's estate devolves to the number of children not the houses, and a surviving spouse would enjoy life interest due to her children's share and where there is no surviving spouse, **Section 38** would come to play, that the children would share the estate equally amongst themselves.

28. Further, it is trite, by dint of **Section 27 of the Law of Succession Act** that the court has complete discretion to distribute a deceased's estate where the beneficiaries are unable to agree. However, and while doing so, the court must be practical and reasonable, and ought to take all relevant factors into the account, to justify the distribution.

29. The court's power **under Section 27** extends to Appeals where the Appeal court may re-distribute the estate should it differ with any proposed mode of distribution – See **C.A. 47/2016 M.N.M –VS- D.N.M.K & 13 Others (2017) e KLR** and **Johnson Musambayi Musambayi Katumuga (2014) e KLR where Musyoka J** rendered that

*“Under **Section 40 of the Act** if the deceased has several wives, as opposed to households, the estate would devolve depending on the number of children.”*

*Ideally, the estate would be divided among all the members of the entire household, comprising the children and surviving spouses together. After that, the family members would retreat to their respective houses where **Section 35 of the Act** would be put into effect, so that if there was a surviving spouse would split its entitlement in terms of **Section 38 of the Act**, and the Children would divide the estate equally amongst themselves.”*

The above, in my considered view is the position, which has also been accepted by the Court of Appeal in its various decision on subject –

30. In the circumstances, I find no plausible reason to warrant disturbance of the mode of distribution agreed upon by the beneficiaries and stated in the certificate of confirmation of grant dated the 31st December 2018.

31. Accordingly, I find no merit in the applicant's summons dated 3rd June 2019. It is dismissed. Being a family dispute, I make no order as to costs.

Delivered, Dated and Signed this 31st Day of October 2019.

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J.N. MULWA

JUDGE