



REPUBLIC OF KENYA

IN THE HIGH OF KENYA COURT AT KERICHO

SUCCESSION CAUSE NO.171 OF 2007

IN THE MATTER OF THE ESTATE OF KIPYEGON MOSONIK CHUMA *Alias* KIPYEGON A. MOSONIK (DECEASED)

SIMON KIPKEMOI YEGON.....1ST PETITIONER

BENJAMIN KIMUTAI YEGON.....2ND PETITIONER

VERSUS

NGENO BERNARD KIPKEMOI

JENIFFER CHELANGAT CHEPKWONY

NGENO KIBETOBJECTORS/APPLICANTS

RULING

1. This ruling relates to an application for revocation of grant dated 31st of July 2014. It was filed pursuant to section 73 and 76 of the Law of Succession Act and rule 44 (1) of the Probate and Administration Rules. The applicants are Ngeno Bernard Kipkemoi, Jennifer Chelangat Chepkwony and Ngeno Kibet who claim to have an interest in the estate of the deceased by virtue of being the 'wife' and children of the first widow of the deceased, Zeddy Chepngeno Chumo.

2. According to the 1st applicant, Zeddy was unable to bear children. Consequently, she married the 2nd applicant, Jennifer Chelangat Chepkwony, through a customary woman to woman marriage as a result of which she had two children, the 1st and 3rd applicants.

3. In his affidavit in support of the application, the 1st applicant avers that the deceased to whose estate these proceedings relate, Kipyegon Mosonik Chuma *alias* Kipyegon A. Mosonik died on 2nd September 1997 and letters of administration intestate were issued to Simon Kipkemoi Yegon and Benjamin Kimutai Yegon. He alleges that the grant was obtained fraudulently by making a false statement and by concealment from the court something material to the case. According to the applicants, Zeddy Chepngeno Chumo is the late Kipyegon Mosonik Chumo's first wife. While this fact has been acknowledged by the petitioners, they had still chosen to disinherit her during confirmation and distribution of the estate.

4. The 1st applicant further avers that Zeddy Chepngeno Chumo had no children and therefore married Jennifer Chelangat Chepkwony through a woman to woman marriage under Kipsigis customary law, and she had the 1st and 3rd applicant. The 1st and 2nd applicant have a homestead within land parcel number

Kericho/Kapsuser/103 which is the sole asset of the estate, a fact that was not disclosed to the court by the respondents. The 1st applicant further deposes that Zeddy is a step mother to the petitioners, and traditionally, they are their step brothers.

5. The applicants therefore pray that the grant of letters of administration intestate issued to Simon Kipkemoi Yegon be revoked on the basis that they are defective in substance and were obtained fraudulently by the concealment of something material to the case.

6. The respondents oppose the application and have filed an affidavit in opposition sworn by the 1st petitioner Simon Kipkemoi Yegon, on 29th September 2014. They argue that they notified their step-mother, Zeddy Chepngeno, about the application for grant, and she appointed a firm of Advocates who did not file any documents on her behalf. They state that the Advocate, W.R Kiprono, passed away in 2012 and so they started serving their step mother personally with documents. Mr. Yegon further avers that the application for confirmation of grant dated 19th May 2011 was served on the firm of W. R. Kiprono on 23rd August 2011 but no opposition to the application was filed.

7. It is also the petitioner's contention that the manner of distributing the estate of the deceased was justified. This was because the deceased had been unable to service a loan owed to Agricultural Finance Corporation (AFC), and he and his two sisters had been requested by their mother to pay off the loan. This is why the land had been subdivided between the three of them in accordance with the application for confirmation of grant.

The Submissions

8. In his submissions on behalf of the applicants, Mr. Mwitia argued that the deceased was married to two wives, a fact that has been admitted by both petitioners. The 1st wife, Zeddy Chepngeno Chumo, did not bear children, and so she married the 2nd objector, Jennifer Chelangat Chepkwony, the mother of the 1st and 3rd objectors, in a woman to woman marriage. The deceased's second wife, Leah Chumo bore the deceased six children, among them the petitioners.

9. The applicants argue that they want the grant revoked as the 2nd objector was not included in the distribution of the estate, and the land comprising the estate, Kericho/Kapsuser/103, was solely subdivided among 3 beneficiaries of the second house in connivance with the other beneficiaries from the 2nd house.

10. Mr. Mwitia pointed out that Form P&A 5 filed on 7th June 2007 together with the letter from the Chief also dated 7th June 2007 and all other documents and affidavits have clearly acknowledged that Zeddy Chepngeno was a widow of the deceased. He submitted that customarily and by law, property of the deceased ought to have devolved around her in accordance with the ranking, and she is not yet deceased. Further, the affidavit on the mode of distribution stated that she was a widow of the deceased, but no reason is given as to why she was left out of the distribution.

11. With respect to the averment in the replying affidavit of Simon Yegon that there were monies owed to AFC and that Simon Yegon and his sisters, Janet Chepkorir Chumo and Mary Cherop Chumo sought funds to clear the loan, and that the land ought therefore to be given to them, Counsel submitted that no documentary evidence was produced to show the existence of the loan at AFC, or that the three beneficiaries paid the loan, nor is there any evidence that there was any loan at all, or who paid it. In his view, such allegations should not be used to allow the petitioner and his sisters to take the entire estate of the deceased to the detriment of the other beneficiaries.

12. With regard to the existence of another counsel who was acting for Zeddy Chepngeno Chumo and who never followed up the matter, the applicants argued that after the demise of the said counsel, the petitioners did not serve the objectors personally. It was their prayer therefore that the grant issued on 6th May 2014 that totally left out beneficiaries of the 1st house be revoked.

13. In response, Mr. Motanya submitted that the applicants are strangers to the proceedings and are not known to the petitioners. He singled out in particular the first objector, Ng'eno Benard Kipkemoi, whom he asserted was not known to the deceased and only appeared in 1999 after the demise of the deceased, who passed away on 2nd September 1997.

14. Mr. Motanya further submitted that the so-called customary marriage between the 1st wife and the 2nd objector never took place during the lifetime of the deceased. She and her children are therefore total strangers to the estate of the deceased.

15. Mr. Motanya reiterated the averments in the affidavit of the petitioner that Zeddy Chepngeno Chumo had appointed a firm of advocates; that the firm of advocates had been served with documents but had not filed any documents in reply; that after the death of the advocate they had served her personally but she too had not filed any documents.

16. He also reiterated the position taken by the petitioners that the land had only been shared out among the three beneficiaries as they had paid the loan for the land, though he conceded that there were no documents before the court with respect to the loan.

17. It was his submission that the 1st widow had been indolent, that the law aids the diligent, not the indolent, and he prayed that the application be dismissed.

18. In his submissions in response, Mr. Mwita argued, with regard to the contention that the applicants are strangers, that under the provisions of section 76 of the Law of Succession Act, a grant can be revoked on the application of an interested party if it is found that the grant had been obtained fraudulently. Further, that in this case, the court was dealing with a widow who had been left out of the distribution of her deceased husband's estate.

19. It was also his submission that under the provisions of Order 9 Rule 12(1) of the Civil Procedure Act, upon the death of an advocate, a party is required to apply for leave to serve the party whose advocate is deceased in person. In the absence of such an application, in his view, there was no service.

20. Finally, it was his submission that Zeddy Chepngeno Chumo had not signed the consent to the distribution of the estate, that she did not renounce her right to the estate, and that she only learnt of the distribution upon confirmation of the grant on 6th May 2014, and she filed the present application soon thereafter, on 31st July 2014. He prayed that the grant be revoked.

Determination

21. I have read and considered the respective pleadings and submissions of the parties in this matter. I note that certain essential facts are not in dispute.

22. It is not disputed that Zeddy Chepngeno Chumo was the first wife of the deceased, and also the surviving widow. She is named in the application for grant as is evidenced in the letter from the Chief of Kapsuser Location dated 7th June 2007 and Form P&A 5 also dated 7th June 2007 and filed in court on the same date. In the said form, three other beneficiaries are named: Simon Kipkemoi Yegon, Benjamin Kimutai Yegon and John Kipkoech Yegon. In the list of liabilities, one Wilson Kipngetch Cheruiyot is named as a liability.

23. Grant of letters of administration intestate was issued to the petitioners, Simon Kipkemoi Yegon and Benjamin Kimutai Yegon, on 14th November 2007.

24. It is also not in dispute that Zeddy Chepngeno did appoint an advocate to act for her, one W.R. Kiprono, on 24th November 2009. The said advocate requested for copies of the pleadings by his letter dated 26th November 2009.

25. By an application dated 19th May 2011, the petitioners applied for confirmation of the grant. The application was supported by the affidavit of the 1st petitioner in which he named the other beneficiaries of the estate who had not been included in Form P&A5, namely Alice Chepwogen Mosonik, Janeth Chepkorir Chumo, and Mary Cherop Chumo.

26. He also averred in the affidavit in support of the application for confirmation of grant that he and his two sisters, Janeth Chepkorir Chumo and Mary Cherop Chumo had paid a loan on the land to Agricultural Finance Corporation between 1981-1983 and that the land should therefore be shared between the three of them. There is no consent to the mode of distribution attached to the said application. Neither is there any evidence of the existence of a loan, and the only liability noted in form P&A5 is the one I alluded to above, where one Wilson Kipngetich Cheruiyot is named as a liability.

27. The grant was confirmed on 6th May 2014, and a certificate of confirmation of grant issued. Thereafter, the applicants filed the present application.

28. Section 76 of the Law of Succession Act provides 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.

29. Rule 44 (1) of the Probate and Administration Rules sets out the procedure for making an application for revocation of grant.

30. I have considered the pleadings before me and the submissions of the parties in this matter. I note that there is no dispute that Zeddy Chepngeno Chumo was a widow of the deceased. Whether she had married the 2nd applicant, who then had the 1st and 3rd applicants is a matter of fact that can only be established after hearing the parties. However, on the basis of the averments on record, the applicants would qualify as “*interested parties*” who have a right under section 76 to apply for revocation of the grant to the petitioners.

31. The second issue of concern to the court is that the grant was confirmed without taking into account the interests of the widow, Zeddy Chepngeno Chumo. Further, assuming that she had indeed “*married*” the 2nd applicant and had the other two applicants, then they would have had a right to be heard with respect to the distribution of the estate. Mr. Motanya tacitly concedes the existence of the 2nd and 3rd applicant in the home of the deceased. He submits that the 1st applicant is unknown, having appeared in the home of the deceased after the demise of the deceased, thereby implying that the 2nd and 3rd applicant were known to the petitioners. It has also not been denied that the 2nd applicant has a homestead on the land comprising the estate of the deceased. That being the case, on the face of it, there appears to have been a deliberate effort to conceal something material to the case: the existence of the applicants who may well turn out to be beneficiaries of the deceased.

32. The petitioners have explained the basis for the land comprising the estate of the deceased being distributed to the 1st petitioner and his two sisters. Whether there was a loan or not has not been

established by way of documentary evidence. Further, even if there was such a loan, at the very least the applicants should have been accorded an opportunity to be heard on the issue.

33. It is imperative that the applicants present their claim to the estate of the deceased for determination by the court. In the circumstances, I am satisfied that the application dated 31st July 2017 is merited. It is hereby allowed. The grant issued on 14th November 2007 and confirmed on 6th May 2014 is hereby revoked.

34. However, as this is a matter involving a family, each party shall bear their own costs.

Dated Delivered and Signed at Kericho this 22nd day of March 2017.

MUMBI NGUGI

JUDGE