



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**

**P&A CAUSE 108 OF 2012**

**RE ESTATE OF JOB KIBIWOTT TANUI (DECEASED)**

**SELLY JEPKOSGEI BIRGEN.....OBJECTOR**

**ROSE CHEMUTAI TANUI..... PETITIONER**

**JUDGMENT**

1. The deceased, Job Kibiwott Tanui, was an administration police officer. He died intestate on 24<sup>th</sup> October 2005. On 25<sup>th</sup> July 2012, the High Court issued a grant of letters of administration to the widow (the petitioner). The grant has not been confirmed. On 12<sup>th</sup> October 2012, the objector brought proceedings to annul the grant.
2. The gravamen of the objection is that the objector is also a widow; that the grant was obtained fraudulently; and, that the details of some beneficiaries were concealed from the court. Those matters are buttressed by the supporting affidavit of the objector sworn on 12<sup>th</sup> October 2012.
3. The application is contested. There is a replying affidavit sworn by the petitioner on 13<sup>th</sup> November 2012. She avers that the objector is an impostor belatedly staking a claim to the estate seven years after the death of the deceased.
4. On 16<sup>th</sup> December 2012 the court directed that that the objection be determined by *viva voce* evidence. The objector testified that she married the deceased in the year 2002 under *Nandi* customary law. They had cohabited since 1999. At the time, the deceased was an administration police officer at Eldoret. She acknowledged that the petitioner, Rose Chemutai, was also married to the deceased. She however claimed that at the time she married the deceased, Rose had separated with the deceased. She said Rose left her three children behind. The objector testified that she initially stayed with the children in Rose's house. The deceased later purchased some land for her in Tapsagoi, Sugoi.
5. The objector testified that when the deceased died, the two widows attended his funeral. The objector claimed however that she is the one who made burial arrangements. She said the District Commissioner gave Rose Kshs 10,000. Rose gave the objector Kshs 5,000. A dispute arose later. Rose locked out the objector from the matrimonial house. The Children's Department ordered Rose to take her children. An elder's meeting chaired by Francis Koech was convened in the year 2007. She referred to the minutes of that meeting. The elders resolved that the house be re-opened; and, that Rose should construct her own house in Sugoi. The objector decided to relocate.
6. Upon cross-examination by the petitioner, she said she now lives in Sosian Location next to Sugoi. She was also at a loss to explain why relatives of the deceased were not involved in the arbitration; or, why the panel of elders only comprised of neighbours. The objector said she later learnt that the petitioner

had applied for letters of administration without disclosing her interest or that of her two children. She then lodged this objection.

7. PW2 was David Samoei. He was the Chief of Sugoi Location. He knew the deceased. He said the deceased had two wives; the objector and petitioner. He produced a letter dated 16<sup>th</sup> December 2011 to that effect. He said the meeting of elders resolved that the objector should occupy the Tuigoin farm. He said that in 2005 the area chief was Hezron Kosgei. He disowned a letter dated 21<sup>st</sup> March 2012 attached to the petition. The letter is authored by one K. W. Maiyo who claimed to be the Chief Sugoi Location.

8. That narrative was largely confirmed by John Kipkoech (PW3). He knew the deceased. He was his neighbor since 1970. He testified that the deceased married Rose in 1982. He attended the engagement. The couple had three children. He claimed they separated in 1995. PW3 and David Lelei went to Rose's home but she refused to return. He said that in the year 2000 the deceased married the objector. He said that initially the deceased was living on his parents' land. He later bought some land for the objector at Sugoi. He said when the deceased died, he had not reconciled with the first wife. He attended the meeting called by elders referred to earlier.

9. PW4, Simon Songok, was another neighbour. He supplied the deceased with building posts at Sugoi. He confirmed that the deceased was married to both disputants but had separated with the petitioner. He said he attended the elders' meeting referred to earlier. That marked the close of the of the objector's case.

10. Although the petitioner attended court on one occasion and cross-examined the objector, she failed to return to court or call further evidence in support of her case. There were affidavits of service filed by counsel for the objector confirming that she had been served with hearing notices.

11. On 20<sup>th</sup> June 2016, the objector filed written submissions. I have carefully considered the evidence, the pleadings, depositions, documents and written submissions.

12. Section 47 of the Law of Succession Act provides as follows;

*“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”*

13. The jurisdiction of this Court to deal with the dispute is thus not in doubt. A grant, whether or not confirmed, may be *revoked* either by the court *suo moto*; or, by an application made under section 76 of the Law of Succession Act. The section 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 has ordered or allowed; 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.”*

**14.** I thus find that the application for annulment of the grant is properly before the court. From the uncontroverted evidence of the objector and that of PW2, I am satisfied that the deceased had two wives: the petitioner as the first wife; and, the objector. The former had three children, Kennedy Kipchumba Biwott, Basilisa Chepkoech and Sylvia Jerono. They are all adults and their details appear in form P&A 5 lodged with the petition. The objector had two children: Linvy Jepkorir and Keith Kiprop. The consent of the objector was not obtained. The particulars of the objector and her two children were also not disclosed by the petitioner.

**15.** Failure to obtain the objector’s consent contravened Rule 26 of the Probate and Administration Rules which states as follows-

*“26(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.*

*(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require”*

**16.** Failure to disclose the interests of the objector and her children ran afoul of section 51 (2) of the Act. The section provides-

*“51(2) An application shall include information as to-*

*(a) the full names of the deceased;*

*(b) the date and place of his death;*

*(c) his last known place of residence;*

*(d) the relationship (if any) of the applicant to the deceased;*

*(e) whether or not the deceased left a valid will;*

*(f) the present addresses of any executors appointed by any such valid will;*

*(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;*

*(h) a full inventory of all the assets and liabilities of the deceased; and,*

*(i) such other matters as may be prescribed.”*

**17.** It follows that under sections 51 and 76 of the Law of Succession Act as read with Rules 26, 40(8)

and 41(8) of the Probate and Administration Rules, all beneficiaries *must* consent to the confirmation of grant; and, to the distribution of the estate. See *Re Estate of Evaristus Njagi Mugo* High Court, Embu, Succession Cause No. 324 of 2005 [2008] eKLR, *Re Estate of Daudi Kiprop Arap Titi* High Court, Eldoret, Succession Cause No. 40 of 2011 [2015] eKLR.

**18.** In the end, I find that the proceedings to obtain the grant were defective in substance; and, that the grant was obtained by concealment of material facts. The application for annulment of the grant is allowed. I order as follows-

**a)** THAT the grant of letters of administration issued by the Court to the petitioner on 25<sup>th</sup> July 2012 be and is hereby *revoked*. A fresh grant shall be issued *jointly* to the petitioner and objector.

**b)** THAT the administrators shall file summons for confirmation of the grant containing a proposed mode of distribution of the net intestate estate of the deceased. In the event of a dispute, the Court shall give further directions and determine the matter.

**c)** THAT considering that this is a family dispute, there shall be no order on costs.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 18<sup>th</sup> day of August 2016.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of:-**

The petitioner (in person).

Mr. Magut for the objector.

Mr. J. Kemboi, Court clerk.