



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

**SUCCESSION CAUSE NO.78 OF 2014**

**IN THE MATTER OF THE ESTATE OF KIPRONO ARAP NGETICH *alias* KIPRONO  
NGETICH (DECEASED)**

**AND**

**IN THE MATTER OF AN APPLICATION BY JOSEPH KIPYEGON RONO-OBJECTOR FOR  
REVOCATION OR ANNULMENT OF GRANT**

**JOSEPH KIPYEGON RONO.....OBJECTOR/APPLICANT**

**SAMUEL KIPKOECH RONO.....PETITIONER/RESPONDENT**

**RULING**

1. This matter relates to the estate of Kiprono Arap Ngetich *Alias* Kiprono Ngetich (Deceased) who died on 4<sup>th</sup> April, 1992. An application for letters of administration intestate to his estate was made by Samuel Kipkoech Rono on 12<sup>th</sup> March, 2014. Grant of letters of administration intestate were issued on 25<sup>th</sup> August, 2014 and confirmed on 24<sup>th</sup> September, 2015.

2. By an application dated 8<sup>th</sup> December, 2015 and supported by an affidavit sworn on the same date, the applicant, Joseph Kipyegon Rono, sought the following orders:

***a) THAT the grant of letter of administration issued to the said petitioners/applicants and SAMUEL KIPKOECH RONO in this matter on the 24th September, 2015 be revoked in the following respect as provided for by rule 43(1) of the probate and administration Rules in order to rectify the mode of distribution of the estate of late KIPRONO ARAP NGETICH *Alias* KIPRONO NGETICH (DECEASED) which had not been stated correctly which should appear as;.....***

***b) That necessary direction (sic) be given.***

3. The applicant then sets out at prayer (a) of his application the manner in which the estate of the deceased should be distributed, where each of the sons of the deceased gets an equal share of the property, being 1.28 ha.

4. The petitioner opposed the application and filed an affidavit which he swore on the 21<sup>st</sup> December, 2015.

5. Both parties testified and called witnesses in support of their respective cases and submissions were filed on their behalf by their respective advocates.

6. The facts of the case are fairly straightforward. The petitioner filed an application for grant in which he was the sole applicant. He named all his siblings, including the applicant, as beneficiaries of the estate. Thereafter, he filed an application for confirmation of grant, which was confirmed in the presence of the petitioner, Samuel Kipkoech Rono, and one Richard Kipkoske Tuwey, Samuel Kibii Arap Tirop and Kiplangat Arap Rono.

7. The applicant seeks revocation of the grant on the basis that the distribution of the estate was unfair. This is because the petitioner, in the distribution, got half the estate while the other half was divided between the applicant and his three brothers. In the applicant's view, this is against the law and the Constitution.

8. In his affidavit, the applicant avers that the petitioner failed to involve the other beneficiaries in the application for letters of administration intestate and failed to have them sign and or agree on the mode of distribution. He also failed to distribute the estate equally to other beneficiaries.

9. He further avers that after the confirmation of grant, the petitioner proceeded to subdivide the land despite the protests of the applicant and his brothers, and in the process destroyed the tea plantations, trees and other properties belonging to the applicant and other beneficiaries. He avers that he has been rendered homeless and his source of livelihood partially destroyed. He further avers that the petitioner took a portion that included parcels containing their homes.

10. The applicant gave oral evidence that was substantially along the lines of his deposition. He stated that he has never been involved in the succession to his father's estate, which he wishes to be shared equally. According to the applicant, the deceased had two wives, the first of whom, Chepkemoi Ngetich, had six children, four boys and two girls. The second wife was Tapano Ngetich and she had two children, a daughter and son, who is the petitioner. His evidence is that the petitioner distributed the property of the deceased, Kericho/Kapsaos/641, without involving the children of the first house of the deceased. Each of the four sons of the first house was given 0.8ha while the petitioner gave himself 3.2 ha.

11. His witness, Richard Kipkosgei Tuwei, who is the applicant's brother, testified that he was not aware that the applicant had made an application with respect to the succession to the deceased's estate. He stated that he was told that he was wanted in court on 24<sup>th</sup> September, 2015 for purposes of succession. He came to court with Mark Rono and Samuel Kitur Tirop, and that the petitioner was present but the applicant was not. They were asked to come forward and give their identity cards, then were told to go home and discuss the distribution. His evidence was that he did not agree with the distribution proposed by the petitioner, nor did he agree with the decision of the elders arrived at after a family meeting that the property should be divided between the houses.

12. The petitioner's response is that he applied for the letters of administration as he wanted to share the land. A family meeting was held at which the elders agreed to subdivide the land between the houses. He alleges that the applicant had an advocate, Siele Sigira, and that his brothers, Mark Rono, Samuel Kibii Tirop and Richard Kosgei Tuwei came for the confirmation of grant, and they agreed to the distribution and gave their identity cards.

13. His response to the allegation that property had been destroyed in the course of the subdivision was that they had only cut where it was necessary for the beacons to pass.

14. The petitioner called one witness, Mr. Kipkemoi Arap Mesis, an elder and member of the deceased's clan. His testimony was that the elders had decided that the land of the deceased should be distributed according to Kipsigis customary law, between the houses, not between the sons.

15. In his written submissions, the applicant sets out the pleadings of the parties and the testimony adduced before the court. His submission is that he has proved his case and shown that the grant should be revoked as the distribution of the estate was not done fairly. He also argues that Kipsigis customary law cannot apply in this case as it is contrary to the constitutional provisions on equality.

16. The applicant has filed further submissions in response to the argument by the petitioner that he has not specified a ground under section 76 of the Law of Succession Act for the revocation of grant. His submission is that it is obvious from his application that he relies on section 76(b) of the Law of Succession Act. He further contends that it would be a cruel injustice if he was denied his inheritance only because he did not cite a particular provision of the law.

17. In submissions filed on his behalf, the petitioner argues that the applicant has not demonstrated the existence of any of the grounds set out in section 76 of the Law of Succession Act on the basis of which the court can revoke a grant. The petitioner relies on the case of **Jesse Karaya Gatimu vs Mary Wanjiku Githinji [2014] eKLR**, though he does not set out in his submissions what proposition of law he wishes the court to be guided by from that case. His submission is that the failure of the applicant to state what grounds he relies on in his application is an irregularity not of form but one that goes to the substance of the summons. His submission is therefore that this renders the present application incompetent.

18. With respect to the mode of distribution, it is submitted on behalf of the petitioner that in distributing the estate of the deceased, he followed the proposed mode of distribution given by the clan elders in a meeting held on 30<sup>th</sup> March 2013. His submission is that all the beneficiaries, including the present applicant, attended the meeting and agreed to the proposed mode of distribution. The basis of this submission is that the applicant and, it would appear from the reference to the plural '*they*', his siblings, never raised any form of protest prior to the confirmation of grant and they also consented to the distribution. The petitioner's submission therefore is that the application for revocation is an afterthought and a form of mischief meant to deny the petitioner his rightful share from his father's estate.

19. With respect to the applicant's claim of malicious damage to property, the petitioner argues that all the beneficiaries were informed of the date the surveyors were to come for the demarcation of the boundaries, which was done in the presence of the Assistant Chief, and that it was necessary to clear some tea plants belonging to all the beneficiaries in order to place the beacons. He therefore denies the allegation of malicious damage to property, observing that this can be confirmed from the photos which were produced before the court which show that the plants had been cut in a single line on which the beacons were placed.

20. It is therefore the petitioner's contention that the objectors were present in court both at the time when the temporary grant was issued and the time when the grant was confirmed; that it is the practice before a grant is confirmed that all the beneficiaries have to be present and confirm whether they agree with the mode of distribution or not; and that the beneficiaries in this matter assented to the mode of distribution and the court therefore confirmed the grant. He therefore urges the court to dismiss the application with costs.

## **Determination**

21. Having read the pleadings and submissions of the parties in this matter, and having heard their oral testimony, I believe that only one issue falls for determination: Whether this court should grant the orders sought in the application dated 8<sup>th</sup> December, 2015 and revoke the grant issued in favour of the petitioner.

22. I have set out elsewhere above what the record indicates was the process of application for the grant, and the confirmation thereof. I note from the record that the applicant and his brothers and sisters, though named as beneficiaries, did not sign the consent to the application for grant or the application for the confirmation of grant. Whether they were aware that the process was ongoing is unclear, though the petitioner's evidence, which the applicant confirmed in cross-examination, is that the applicant had an Advocate, Mr. Siele Sigira, who was acting for him and his brothers. I also note that when the matter came up for confirmation of grant, three of the applicant's siblings were in court.

23. The question is whether the distribution of the estate in this matter was fair, and whether it should be allowed to stand. The petitioner argues that the applicant has not set out the ground on which his application is based, such grounds for the revocation of grants being set out under section 76 of the Law

of Succession Act. This section 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)....***

24. It is correct, as argued by the petitioner, that the applicant has not identified in his application the ground under section 76 that his application is based on. I have also noted the view expressed by my brother, Justice Ngaah, in **Jesse Karaya Gatimu vs Mary Wanjiku Githinji (supra)** with regard to the need to set out the statutory grounds for revocation of grant provided under section 76 of the Law of Succession Act.

25. In his supplementary submissions, however, the applicant argues that there is no requirement in the Law of Succession Act that he should cite the ground that he relies on. He also calls in aid Article 159(2), (d) which provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that ***“justice shall be administered without undue regard to procedural technicalities.”***

26. I agree with the applicant that he should not be denied justice because he did not quote a provision of the law in his application. Rule 73 of the Probate and Administration Rules saves the inherent jurisdiction of the Court to do justice. It provides that ***“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”*** While the application before me falls short in terms of drafting, it exposes a level of inequality in the distribution of the estate of the deceased, and a failure to fully present before the court all the facts in relation to the estate of the deceased, which would bring the matter within the ambit of section 76 (b) of the Law of Succession Act, that impels the court to make a determination of the question whether justice has been served.

27. The question before me, in my view, is what justice in the circumstances of this case is. The petitioner applied for letters of administration intestate of the deceased’s estate, and the grant was confirmed. While it appears that some of the applicant’s siblings were present in court at the time of the confirmation, it is clear that he was not, and neither were his sisters and step sister. From the oral evidence presented before me, it is also doubtful that the applicant’s brothers understood the purpose of their presence in court.

28. The petitioner proposed a mode of distribution based on Kipsigis customary law, the result of which was to give him, as the sole son of the deceased’s second house, half of the estate of the deceased. His siblings, the current applicant and his brothers from the first house, got, together, half the estate, each getting 0.8 ha compared to the petitioner’s 3.2 ha. The daughters of the deceased were not considered at all, nor were they present when the grant was confirmed.

29. The mode of distribution proposed by the petitioner that was confirmed on 24<sup>th</sup> September, 2015 was clearly contrary to the provisions of section 40(1) of the Law of Succession Act, which provides that:

***“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”***

30. The deceased died in 1992, and it is thus clear that his estate was to be distributed in accordance with the provisions of the Law of Succession Act, section 40 of which I have set out above. Contrary to what the petitioner and his witness, the elder from his clan, Mr. Kipkemoi Arap Mesis, assert, Kipsigis customary law cannot prevail over the provisions of the Constitution or statute. Unless the beneficiaries of the estate are all in agreement with the mode of distribution proposed by the elders, distribution must be in accordance with the law.

31. In the circumstances, justice demands that the grant issued to the petitioner, and confirmed on the 24<sup>th</sup> of September 2015, be revoked. I therefore revoke the grant of letters of administration issued to the petitioner in this matter, and the confirmation of grant made on 24<sup>th</sup> September, 2015. Any action taken with respect to the estate of the deceased subsequent to the said confirmation is hereby set aside.

32. I direct the beneficiaries of the estate to, within 30 days hereof, agree on the person(s) to be appointed as administrators of the estate along with the petitioner, and on the mode of distribution. In default of such agreement, the court shall proceed to determine the mode of distribution among all the beneficiaries of the estate, including the daughters of the deceased, in accordance with section 40 of the Law of Succession Act.

33. With respect to the allegations of damage to property, I am unable to make a decision thereon on the basis of the available evidence and I will therefore make no orders with respect thereto.

34. Each party to bear their own costs.

**Dated, delivered and Signed at Kericho this 28<sup>th</sup> day of October, 2016.**

**MUMBI NGUGI**

**JUDGE**