



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENY

AT KITALE.

SUCCESSION CAUSE NO. 72 OF 2006.

IN THE MATTER OF THE ESTATE OF LOTUNGWA ARAP SANG.....DECEASED.

VERSUS

CHRISTOPHER KIPKORIR LOTUNGWA.....APPLICANT.

R U L I N G.

The application dated 18th October, 2010, vide a summons for revocation and/or annulment of grant was made by the objectors/applicants **Albert Kimeli, Mary Jepkoech Kiplagat** and **John Kipchumba Kiplagat** against the petitioner/respondent, **Christopher Kipkorir Lotungwa**, who was granted letters of administration respecting the estate of the deceased **Lotungwa Arap Sang**, on the 5th June, 2009 in his capacity as a son of the deceased. The grant was confirmed on the 21st June, 2007, and certificate issued to that effect.

However, after about three (3) years from the date of confirmation of the grant, the present application was filed seeking a revocation and/or annulment of the grant and the certificate of confirmation of the grant.

The objectors/applicants base their application on grounds that the application for issuance of the grant was made by the petitioner without their consent and that the proceedings to obtain the grant were defective. That, the grant was obtained fraudulently by making of a false statement or by concealment of material facts. That, the petitioner intends to direct the objectors of their entitlement and has unfairly purported to create a perpetual trust in his own favour and against the beneficial interest of the objectors. That, the objector stand to suffer great loss and irreparable damages if this application is not allowed.

The third objector, John Kipchumba Kiplagat, deponed an affidavit in support of the application and on his own behalf and that of his co-objectors. The affidavit is dated 18th October, 2010.

The petitioner opposes the application on the basis of the averments in the replying affidavit dated 16th November, 2010. Also dated 16th November, 2010, is an affidavit by the first objector, Albert Kimeli, in which he appears to disown this application in as much as it is alleged that he gave authority for the application to be made. Apparently, he supports the petitioner's objection to the application which therefore remains the "property" of the second and third objectors.

The first objector went ahead to file a notice to act in person dated 15th November, 2010.

Be that as it may, the application proceeded by way of "viva voce" evidence and written submissions were thereafter filed by the second and third objectors through their advocates **Messrs A.K. Chepkonga**

& Co. Advocates and by the petitioner through his advocates **Messrs Chemwok & Co. Advocates.**

Evidence was led by both the second and third objectors and was supported by that of their two witnesses, **Daniel Kiplagat Kaptoge (PW3)** and **Kimosop Rotich (PW4)**.

The petitioner also led evidence in support of his case and called three witnesses viz **Latema Sang (DW2)**, **Maiyo Moses Kipsang (DW3)** and **Michel Cheruiyot Sawe (DW4)**.

After due consideration of the application in the light of the averments contained in the supporting and replying affidavits and in the light of the evidence led by both sides as well as the rival submissions, it is apparent to this court that the basic issue for determination is whether the objectors have established that the disputed grant was obtained fraudulently or by concealment of material facts.

The objector's concern is that there was an intention by the petitioner to disinherit them from the estate of the deceased who was their grandfather.

In his affidavit of the 18th October, 2010, the second objector avers that the petitioner registered the estate property in his name after unlawfully appointing himself the administrator and trustee of the estate of the deceased and went ahead to purportedly hold the estate property in trust for himself and his brothers and sisters.

The second objector averred that the original title deed respecting the estate property was entrusted to his mother who was a daughter of the deceased from his first house. That, the title deed was later passed over to him (second objector) after his mother passed away.

The said deed is the annexure marked "JKL 7" and was issued on 14th August, 1973 in the name of the deceased.

The second objector contended that the property was unlawfully transferred to the petitioner without creation of a trust over it in favour of all the beneficiaries of the estate of the deceased.

Further, the petitioner excluded the second and third objectors from the estate yet they are his half brother and sister. The foregoing averments and contentions were more or less supported by the testimonies of both the second and third objectors and that of their two witnesses.

In essence, the second and third objectors have shown that they are grandchildren of the deceased but the name of their mother, **Josephine Kimor Kiplagat**, was excluded when the petitioner applied for grant of letters of administration. They imply that they are entitled to their mother's share in the estate. They said that their mother who has since passed away was a sister to the petitioner. They further implied that they lived with the deceased and were thus his dependants.

In his replying affidavit, the petitioner contended that he applied for the grant with the consent of all. He averred that the second and third objectors are the children of one Vincent Kiplagat and therefore not beneficiaries to the estate of the deceased. That, the title deed to the estate property was stolen by the second and third objectors' mother and a report made to that effect to the chief, police and the Land Control Board at Kapcherop.

In his evidence, the petitioner did not deny that the second and third objectors are grandchildren of the deceased, their mother having been his sister. He said that, both are married with their own families and contended that the second objector is a married woman and entitled to inherit the property of her husband. That, she was never a dependant of the deceased although he (deceased) assisted her when she was separated from her husband. The petitioner further stated that the third respondent was also not a dependant of the deceased but he conceded not having involved the mother of the two objectors when he petitioned for the grant. His witnesses (DW2, DW3 and DW4) supported his allegation that the second and third objectors were not dependants of the deceased and that since their mother was married elsewhere they are not entitled to a share of the estate of the deceased.

A perusal of the court record shows that the consent to have the petitioner apply for the necessary grant was given by all the beneficiaries including the mother to the second and third objectors as well as the former first objector, Albert Kimeli. However, when it came to the confirmation of the grant, the necessary certificate dated 21st June, 2009 did not come up with a clear and certain mode of distribution of the estate property (i.e. land portion No. Cherangani/Kipkundu plot 9). Instead the certificate indicated that the land should be registered in the name of the petitioner to hold in trust for himself and his brothers and sisters. The said brothers and sisters are not specified and whether they were dead or alive. This created room for manipulation and mismanagement of the estate at the expense of other beneficiaries who included the mother to the second and third objectors.

Even if the two objectors were not dependant on the deceased, they would be entitled to their late mother's share in the estate of the deceased by dint of section 39 (1) (c) of the Law of Succession Act.

Suffice to hold that whereas no illegality or fraud or concealment of material facts occurred when the petitioner applied for the grants of letters of administration respecting the estate of the deceased, the manner proposed for the distribution of the estate as reflected in the certificate of confirmation of grant was rather vague and improper.

Consequently, this application succeeds to the extent that the said certificate of confirmation of grant dated 21st June, 2009, be and is hereby revoked with direction that the applicants/objectors and the petitioner and other beneficiaries do come up with a fresh and specific mode of distribution and thereafter move the court for necessary confirmation.

Any transaction undertaken on the basis of the revoked certificate of confirmation of grant be deemed to be null and void "*ab initio*".

Each party shall bear own costs of this application.

Ordered accordingly.

[Read and signed this 3rd day of April, 2014.]

J.R. KARANJA.

JUDGE.