REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 99 OF 2003

IN THE MATTER OF THE ESTATE OF MUSA KIPKEMEI CHELIMO - DECEASED

PHILEMON JEPKEMBOI TANUI)

KENNETH NARISHA KENEI):::::::::::::::::APPLICANTS/OBJECTORS

AND

SILAS KIPTANUI CHELIMO::::::::::::::::::RESPONDENT/PETITIONER

R U L I N G

The grant of letters of Administration intestate respecting the estate of the late **Musa Kipkemei Chelimo,** was issued to **Silas Kiptanui Chelimo,** (herein the petitioner/respondent), on the 10th June, 2004, in his capacity as the brother of the deceased. The same was confirmed approximately seven years later on the 28th July, 2011 and one year thereafter, **Philomena Jepkemboi Tanui** and **Kenneth Narisha Kenei** (herein, the first and second applicants/objectors), took out summons for revocation or annulment of the grant, dated 25th June, 2012, alleging that they were wife and son to the deceased respectively and contending that the petitioner had no right to administer the estate of the deceased. They further contend that the grant was obtained fraudulently and by means of untrue allegations of facts among other factors specified in the supporting affidavits dated 25th June, 2012 and 31st October, 2012. They therefore pray for the revocation and/or annulment of the grant.

The petitioner opposed the application on the basis of the facts contained in his replying affidavit dated 20th September, 2012 in which he contends that the deceased was neither married to nor lived with the first applicant as his wife nor was the second applicant his biological son. That, the deceased was survived only by his parents and siblings who decided that the petition for the grant of the letters of administration be made by him (the respondent) and this was done without any objection from anyone.

From the averments contained in both the supporting and replying affidavits, the basic issue that arises for determination is whether the first applicant was for all intents and purposes wife to the deceased and by the same token whether the second applicant was son to the deceased in any manner.

Under section 76 of the Laws of Succession Act, a grant of representation, whether or not confirmed, may be revoked or annulled at any time where “inter-alia” it was obtained fraudulently by the making of a false statement or by the concealment of any material facts.

If therefore the first applicant was the wife of the deceased and the second applicant was his son and the fact was not disclosed by the respondent at the time of petitioning for the grant, it would invariably follow

that the grant was indeed obtained by fraud and would be suitable for revocation.

Even if the first applicant was not a wife of the deceased but a dependent along with her children whether or not sired by the deceased, the fact ought to have been disclosed for them to be included as beneficiaries and if there was no such disclosure the grant would also have been obtained fraudulently and/or by concealment of material facts.

Although a parent or sibling of a deceased would be entitled to apply for grant of representation, they take a secondary position if the deceased was married and was survived by his/her spouse and their children. This is because the spouse and children are on the top of the order of priority for those entitled to apply for the grant. Parents and siblings are covered under section 39 of the Law of Succession Act.

Herein, the first applicant would have been more entitled than the respondent for grant of letters of Administration if she was indeed wife to the deceased. She relied on three letters from the chief or chiefs of Kibomet location [i.e Annextures marked PJT1(a-c)] to establish the fact.

The first letter is dated 10th January, 2005 from an Assistant chief called Zachary O. Arisi. The second letter dated 11th July, 2005 is from a chief called Shem Amai and the third letter dated 25th March, 2009 is from another chief also called Shem. It is not clear whether the letters dated 11th July, 2005 and 25th March, 2009 were written by the same chief. What is however clear is that all the letters emanated from the chief's office Kibomet location and they all show that the first applicant was wife to the deceased. Two of the letters show that the deceased and the first applicant had two children i.e a son and a daughter.

The respondent disowned the letters and instead relied on a letter dated 18th August, 2003 from the same chief Shem K. S. Amai which he used to petition for grant and which showed that the deceased has no spouse and children.

A sister to the respondent, Anne Jerono Jose, deponed an affidavit dated 24th March, 2014 in which she contends that the letter dated 18th March, 2003 was not a forgery as alleged by chief Shem K. S. Amai, in his affidavit dated 24th January, 2014.

All the four letters mentioned hereinabove emanated from two chief's office Kibomet location where Shem K. S. Amai serves as the senior chief. He implied that the letters relied upon by the first applicant to establish her marital status were genuine while that relied upon by the respondent to indicate non existent of a marital relationship between the first applicant and the deceased was not genuine and thus a forgery.

However, the fact of forgery was not established and since the information coming from the letter dated 18th March, 2003, was in conflict with that emanating from the other three letters, the chief i.e Shem K. S. Aman, could not be relied upon to offer correct information pertaining to the existence or non existence of the alleged marital relationship between the first applicant and the deceased. Neither could the chief be relied upon to establish whether or not the second applicant is son to the deceased.

In any event, a marriage relationship cannot be established by a mere letter from a chief which is unsupported by other cogent and independent evidence. In essence, the applicants have failed to prove that the deceased was prior to his death married to the first applicant and that he sired a son or daughter with her. There is even no proof that any other relationship existed between the applicants and the deceased so as to give rise to the fact of dependency. Undoubtedly, this present conflict was precipitated by the chief above mentioned who decided to take sides instead of trying to establish the truth.

Without credible proof that the first applicant was wife to the deceased and the second applicant son to the deceased this application has no foundation and must crumble as non of the grounds for the revocation and/or annulment of the material grant have been established.

The application is thus dismissed with costs to the respondent.

J. R. KARANJA

JUDGE

[Read & signed this 28th day of October, 2014]