



IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO.282 OF 2003

IN THE MATTER OF THE ESTATE OF BEIGONG TOMNO

MARY KOBILO SAMBU.....OBJECTOR/APPLICANT

VERSUS

EUNICE KATAMEI.....1ST RESPONDENT

JENNIFER CHEROP.....2ND RESPONDENT

JUDGMENT

1. The objector Mary Kobilu Sambu brings this application by way of summons under the provisions of **Section 76** of the **Law of Succession**.
2. The objector is the daughter-in-law of the late Beigong Tomno (deceased) and seeks an order from this court that the Grant of Letters of Administration issued to Eunice Katamei and Jennifer Cherop on the 20th November, 2006 be revoked or annulled on the grounds listed hereunder:
 - a. That the confirmed grant was obtained fraudulently by the making of a false statement and concealment from the court of material matters.
 - b. That the Respondents deliberately refused to disclose that the applicant as well as other children of the deceased were alive and entitled to get a share of the properties of the estate.
 - c. That the respondents failed to mention other beneficiaries entitled to be considered during the distribution of the properties of the estate.
 - d. That the respondents did not involve the applicant while applying for confirmation of the grant and neither did they comply with the law in regard to obtaining consent from the beneficiaries during the distribution of the estate.
 - e. That respondents failed to have the estate conclusively distributed to the point that all the beneficiaries get their respective shares of land or properties distributed to them.
3. At the hearing of the application, the objector was the only one who testified and she called no other witness to testify on her behalf.
4. Eunice Katamei, one of the respondents testified on behalf of both respondents and called no witness.
5. After hearing the evidence of the objector and the respondents, this court finds the following issues for determination:
 - i) fraudulent concealment of the true beneficiaries to the Estate of the Deceased

ii) revocation or annulment

iii) costs

6. It was the objectors testimony, that her sister-in-laws who are the respondents herein filed the current Succession Cause and deliberately excluded the objector and her seven (7) children as beneficiaries who were entitled to benefit from the deceased's estate.

7. The objector's evidence was that her late husband Patrick Boit Sambu now deceased was a son to the late Beigong Tomno and being the sole surviving widow of the deceased's son, she ranks close in hierarchy as a beneficiary of the said Estate.

8. The objector submitted that the confirmed grant as it stands is a source of strife in waiting as she has seven (7) children and only two (2) are named and the names of the two are unknown to her.

9. It was the objector's testimony that her late husband's remains were interred on the sole asset of the estate, the property is known as BARINGO/KAPROPPITA/832. All that the objector wants is her fair share of the husband's portion to be given to her directly and not through her children.

10. The respondents' case was that they took out Letters of Administration over the above mentioned property and the Grant was confirmed.

11. The respondents produced the Official Search marked as “**DExb 1(a) and (b)**” relating to the said parcel of land and the proprietorship section states that the property is in the names of both the respondents, Justus Beigong, Isaack Komen and two children of the late Patrick Sambu.

12. It was the respondents' evidence that the property was held in trust and the respondents had acknowledged an error in distribution as they had included two sons of the objector's husband, whereas it should have been only one and that they had omitted to include a son of their late brother KOECH.

13. It was the evidence of the respondents that their later father had a lot of property and the family had agreed on the methods of sharing. That the objector's late husband had benefited greatly and had 19 acres and 3 plots altogether.

14. The respondents' case was that their late father had given all the sons land and that he had left the KAPROPITA property for the girls, the last born in the family known as Justus and their mother Kobilu (now deceased).

15. The respondents further testified that their father had intimated that

all his first grandchildren from his four sons be given a portion of the property in issue.

16. In cross-examination, the respondents explained that their brothers'

names were included in the title as their said children were not of age.

17. The objectors' names were not included as the objector has been

requested severally by the respondents to provide the names but the objector refused to provide the same.

18. The respondents, on conclusion urged the court to dismiss the

objectors application.

19. On the first issue, Section 76 of the Laws of Succession Act provides

for instances where revocation of grant can be considered by the court.

20. **Section 76(b)** and **(c)** provides as follows:

“Section 76:

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 if its own motion.”

(b) that the grant was obtained fraudulently by 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.”

21. It is a cardinal principle of law that:

“.....whoever alleges must prove that the allegation...”

Refer to the case of **The Estate of Waitheru Kihoro** (Deceased) 2009 eKLR.

22. The evidence of the respondents which was not challenged or controverted by the objector is that they requested that objector to provide them with the children's names, which she declined.

23. The exhibit “*D Exb.1(a) and (b)*” also indicates that the sons of the objector though not named are included.

24. A maxim of equity is that:

“.....he who seeks equity must do equity.....”

25. The evidence on record is that the objector herein filed her own Succession Cause with her brother-in-law names Isaac and excluded the respondents.

26. This goes to show that the objector contributed to the condition complained of and that by excluding the respondents in her succession cause, she also failed to give the respondents any corresponding right as they may have been entitled to in respect of their father's estate.

27. It is apparent to the court that the respondents chose not to interfere with the objector's Succession Cause and it is also apparent from the evidence adduced that the objector is the greatest beneficiary of the estate of the late Beigong Tomno and has inherited the greatest chunk of the estate.

28. The order sought for revocation is a discretionary order and the court may make or grant the same or may make such orders that it may deem fair and just to grant depending on the circumstances of the case.

FINDING

29. This court finds that the objector has failed to prove on a balance of probabilities that there was fraudulent concealment of the true beneficiaries to the estate of the deceased.

30. This court has noted that the objector's sons though not named are included as beneficiaries and that the respondents together with others hold this sole property in trust.

31.The court finds that although there are anomalies, the same are curable by rectification and since the said children are now of age, their full names can be included.

CONCLUSION

32.The application is found to lack merit and is hereby dismissed.

33.The court directs the respondents to apply for rectification to include the names of the beneficiaries.

34.The application be made and filed in court within forty five (45) days of the date hereof. In default the said Certificate of Confirmation shall stand revoked.

35.As the parties are all related and to avoid further acrimony, each party shall bear their own costs.

It is so ordered.

MSHILA

JUDGE

Dated, Signed and Delivered at Eldoret this 20th day of May, 2013. Hon. Justice G. W. Ngenye Macharia

JUDGE

In the presence of

..... Advocate for the Objector's

..... Advocates for the Respondent/Petitioners