



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
PROBATE & ADMINISTRATION 344 OF 2004

**IN THE MATTER OF THE ESTATE OF SIMON KILEL CHELELMET alias KILEL
CHEPTELMET**

JUDGMENT

This is an application lodged by **Richard Kiptanui Cheruiyot** (hereinafter “the objector”), seeking one order of the court namely that the grant of representation issued and confirmed in the name of **Clementina Kilele** and **Monica Jelagat** (hereinafter “the 1st and 2nd petitioners” respectively) be revoked or annulled. The application is made on the grounds that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by the making of false statements and/or by concealment from the court of some facts material to the case; that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant; that the persons to whom the grant was made have failed to proceed diligently and have disposed of part of the deceased’s estate; and that the petitioners omitted some property from the petition for the grant.

The application is supported by affidavits sworn by the objector and the following: **John Koske, Joash Wasike Wejuli** and **Julius K. Kilach**. The objector has sworn, *inter alia*, that he jointly purchased parcel number Uasin Gishu/Ng’enyilel/222 (hereinafter “the suit land”) with the deceased which fact was not disclosed by the petitioners and that he is in actual occupation of the same. The other deponents have supported him in their affidavits the substance of which is that the suit land was jointly purchased by both the objector and the deceased and that the objector has been in possession since 1990 to date.

The application is opposed and there is a replying affidavit sworn by the 1st petitioner. It is deponed in the affidavit, *inter alia*, that the deceased was polygamous and was survived by herself and her six(6) children and the objector and his five siblings; that prior to his death, the objector and his siblings resided on land parcel number **Kericho/Chepsoen/12** whilst she resided on land Parcel Number **Uasin Gishu/Ngenyilel/222**; that the deceased intended that the two houses inherit his property as per their physical occupation and in that regard made a will expressing the said wish; that in accordance with the wishes of the deceased, she and her co-petitioner applied for a grant of representation herein and the objector did the same at Bomet Resident Magistrate’s Court with respect to the respective parcels of land; that the filing of the two succession causes was irregular but it caused no injustice as both houses of the deceased were taken care of; that the deceased did not mention anything about the alleged purchase in his will and was not sued during his lifetime for specific performance; that the objector occupied two acres of the suit land not as a purchaser but as son of the deceased and that his claim should be dismissed.

The pleadings were in that state when **Ibrahim J**, as he then was, directed that the application be heard by way of affidavits and *viva voce* evidence. The objector and his witness testified before **Kaburu Bauni J**,

(now deceased). Another objector's witness testified before me and he closed his case. I then took the testimonies of the 1st petitioner and her two witnesses before she closed her case.

The gist of the objector's case at the trial was that the suit land was allocated to him in 1968 but he had it registered in the deceased's name. He used the land from 1968 to 1970 and left for Nairobi. He returned to the land in 1980 to hostile reception from the deceased prompting him to refer the matter to elders who awarded him 8 acres. He however, only occupies 2 acres of the suit land. Apart from his claim, the houses should occupy their respective shares as they did during the lifetime of the deceased.

The substance of the petitioner's case on the other hand was that the suit land belongs to her as a bequest to her by the deceased through a will he made before he died. According to her, the suit land was not jointly purchased by the deceased and the objector and his claim is an afterthought especially as he did not make his claim during the lifetime of the deceased.

I have considered the record, the affidavits filed both for and in opposition to the application, the evidence adduced and the relevant law. Having done so, I take the following view of the matter. The following facts are not in dispute:

- 1) That the 1st petitioner is a widow of the deceased.**
- 2) The 2nd petitioner and the objector are children of the deceased from the 2nd and 1st houses respectively.**
- 3) That the deceased was survived by the petitioners, the objector and ten(10) other children.**
- 4) That the deceased was the registered proprietor of the suit land and land parcel number Kericho/Chepsoen/12 before he died.**
- 5) That parcel number Kericho/Chepsoen/12 was used exclusively by the deceased's 1st wife (now deceased) and her children and**
- 6) That the petitioners and the objector were in occupation of the suit land before the demise of the deceased.**

The dispute between the petitioners and the objector may be narrowed down to whether the objector is entitled to a share of the suit land and if so to how much. But first, has the objector established grounds upon which the grant issued to the petitioners should be revoked or annulled? Were the proceedings to obtain the grant defective in substance? The objector has not led evidence to demonstrate the defects in the petition for the grant of representation. Was the grant obtained fraudulently by the making of false statements and/or by concealment from the court of some facts material to the case? The admitted error was not indicating the 1st house and the children of that house even though they were not entitled to the suit land. The 1st petitioner testified that it was understood in the family that the 1st house would seek a grant of representation in respect of the Kericho land whilst she would do the same in respect of her house in respect of the suit land. That position, in my view, is not altogether without basis given that the objector himself filed the succession cause, at **Bomet Resident Magistrate's Court (Cause No. 344 of 2004)** without involving the 2nd house and without indicating that the suit land was also registered in the name of the deceased. The objector also admitted that his claim to the suit land is based on contract and not as an heir of the deceased. In the premises, it cannot be said that the petitioners obtained the grant fraudulently by making false statements and/or by concealment from the court of some facts material to the cause. For the same reason, I do not find that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant.

Have the petitioners failed to proceed diligently and even disposed of part of the estate of the deceased? The petitioners filed this succession cause on 30th November, 2004. A grant of representation was issued to them on 20th June, 2005 and the same was confirmed on 8th march, 2006. In my view the petitioners

have proceeded diligently. The objector did not demonstrate that the petitioners disposed of any part of the deceased's estate. To the contrary it is the objector who admitted selling a portion of the Kericho property.

Have the petitioners omitted some properties from the petition for a grant of representation? Save for the Kericho property which the objector dealt with in the Bomet Succession Cause, no other property was shown to have been excluded from the petition.

In the end the objector has not established any of the grounds for revocation or annulment of the grant of representation made to the petitioners. The objector has however, demonstrated that he occupied a portion of the suit land for sometime before the 1st petitioner was married to the deceased. He then moved out in the 1970s and returned to the suit land in the 1980s although acrimoniously. He has since been in possession of 2 acres of the suit land. That fact is acknowledged by the petitioners and her witnesses. The objector has therefore been in actual occupation of the two acres for over 30 years. In view of that fact, I find and hold that the objector is entitled to the two acres. He is so entitled not as a purchaser, as he alleged, but as a son of the deceased. The evidence of purchase was not documented and even if the purchase had been documented, it would not have been enforceable in these proceedings. The objector is the 1st son of the deceased. There is evidence that he may have looked after the suit land before the 1st petitioner was married to the deceased. So, even though he was given a share of the Kericho Land, he deserves the two acres of the suit land he has been using. In the premises, I order that the Certificate of Confirmation be rectified to include the objector as a beneficiary of two (2) acres of the suit land. In order to effect that rectification, I order that the Title deed in respect of **Uasin Gishu/Ngenyilie/222** issued to the 1st petitioner be cancelled and the suit land be registered in accordance with the certificate of confirmation as rectified.

With regard to costs, I observe that the parties are widow and children of the deceased. That being the case, I order that each party bears their own costs of these proceedings.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF JUNE, 2012

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Yego for Mr. Keter for the Respondent/Petitioners and

F. AZANGALALA

JUDGE

25TH JUNE, 2012