



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PROBATE AND ADMINISTRATION SUCCESSION CAUSE NO. 270 OF 2009

**IN THE MATTER OF THE ESTATE OF GIDEON CHEPKETINY
ROTICH (DECEASED)**

**BENJAMIN KIPSORNO KOMEN
JOYCE TAPLULEI AND
JEREMIAH**

CHEPKETANYAPPLICANTS

=VERSUS=

HENRY K.

ROTICHRESPONDENT

RULING

Benjamin Kipsorno Komen, Joyce Taplulei and Jeremiah Chepketany (hereinafter “**the applicants**”) by their Summons dated 18th May,2010 seek one primary order, that the grant of representation intestate issued to **Henry K. Rotich** (hereinafter “**the respondent**”) be annulled on three grounds namely:-

- (i) That the same was obtained fraudulently;
- (ii) That it was obtained by means of false representation in the sense that not all the dependants and beneficiaries to the deceased’s estate were disclosed and
- (iii) That the succession cause was filed secretly and in exclusion of the majority dependants and beneficiaries of the estate.

The application is supported by an affidavit sworn by **Benjamin Kipsorno Komen**, the 1st applicant, who has sworn the same on his own behalf and on the authority of the 2nd and 3rd applicants. In the affidavit, it is deponed, *inter alia*, that the deceased was an uncle to the 1st applicant and a brother of the 2nd and 3rd applicants; That the deceased was registered as owner of the only asset of the estate namely, Baringo/Kapropita/2- in trust for the entire family including the applicants; that after the registration, the applicants and the deceased and other family members occupied distinct portions of the said land and are in such occupation to date; that the respondent lodged this cause secretly and omitted to name the applicants and other beneficiaries and therefore that the grant of representation made in favour of the respondent be annulled.

The application is opposed and there is a replying affidavit sworn by the respondent. It is deponed in the said affidavit, *inter alia*, that the applicants are not beneficiaries of the estate of the deceased; that the 1st and 3rd applicants are from a different clan and that though the 2nd applicant is from the respondent's clan, she is married elsewhere and is not entitled to claim from the estate of the deceased; that the applicants are not in occupation of the estate land and have never lived thereon at any other time; that the deceased did not hold the said land in trust for the applicants at all; that the respondent openly applied for a grant of representation and listed all the beneficiaries; that the deceased passed on three years ago, but the applicants never lodged any claim against him during his life time and that there is no basis for the applicants' summons. Annexed to the affidavit is a ruling delivered by **Maraga J**; in Nakuru HCCC No. 340 of 2009 between the same parties.

The application was debated before me on 14th February, 2011 by **Mr. Lel**, learned counsel for the applicants and **Mr. Keter**, learned counsel for the respondent. Counsel reiterated the averments made by their clients in their respective affidavits.

I have considered the application, the affidavits and the submissions of counsel. I have also considered the relevant Law. Having done so, I take the following view of the matter. The respondent in his application for a Grant of Representation, described himself as a son of the deceased. That capacity is acknowledged by the applicants in paragraph 13 of the supporting affidavit. At paragraph 3 of his affidavit in support of the petition for the said Grant, the respondent listed those who survived the deceased. The list included the deceased's widow and the respondent's siblings. That list does not appear to be challenged by the applicants. The applicants' main contention to my mind is that the deceased held title number Baringo/Kapropita/2 in trust for them and others not joined in these succession cause and the respondent failed to disclose them when he applied for the Grant of Representation. The respondent's answer is that he disclosed those who are the heirs to the deceased's estate and the applicants and those they appear to represent could not be mentioned because they are not heirs or otherwise entitled to claim from the estate of the deceased.

The Law of Succession Act (Cap 160 Laws of Kenya) at Section 66 provides as follows on preference on who may apply for a Grant of representation intestate.

“66. When a deceased has died intestate, the Court shall, save as otherwise expressly provided have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion accept as a general guide the following order of preference:-

- (a) Surviving spouse or spouses with or without association of other beneficiaries;**
- (b) Other beneficiaries entitled in intestacy, with priority according to their respective beneficial interests as provided by part V;**
- (c) The public trustee; and**
- (d) Creditors**”

And Section 35 (1) provides as follows:-

“35(I) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to:

- (a) The personal and household effects of the deceased absolutely and;**
- (b) A life interest in the residue of the net intestate estate:**

(5) Subject the provisions of Sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death or in the case of a widow, re-marriage of the surviving spouse devolve upon the surviving child if there is one or be equally divided among the surviving children.”

Section 35 is one of the sections in part V of the Law of Succession Act which provides the order of priority of beneficiaries entitled under intestacy and their respective beneficial interests.

In view of those provisions, the respondent's right to apply for a Grant of Representation to the estate of his deceased father has the support of the Law. As he does not acknowledge the applicant's interest, he could not have disclosed them in the application for the Grant, more so, given that the applicants made no claim against the deceased during his life time.

When the respondent lodged his petition for the Grant, he did not, in my view, do so secretly. He was identified to the Court by a letter dated 3rd August, 2009, from the Chief of Kabarnet Mosop Location. The applicants alleged fraud against the respondent but gave no particulars of the same.

The applicants have, in Nakuru HCCC No. 340 of 2009, claimed against the respondent for the asset of the estate: Title No. **Baringo/Kapropita/2** on the basis that the deceased was registered as proprietor of the said title in trust for himself and their fathers. In those premises, they claim to be beneficial owners of the same. That suit is pending disposal. In my view, that is the right forum in which the applicants may ventilate their grievances. Their claim is inappropriate in these succession cause.

For those reasons, the applicants' Summons dated 18th May, 2010 for annulment of Grant made to the respondent is without merit and is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 11TH DAY OF APRIL, 2011.

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Okara holding brief for Mr. Keter for the Petitioner.

**F. AZANGALALA
JUDGE
11/4/2011**