



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO**

Succession Cause 56 of 1996

***In the matter of the Estate of the late KIPCHOGE ARAP KIRUI*
.....DECEASED**

AND

JONATHAN KIRUI

.....

PETITIONER

RICHARD KIMUTAI CHOGE

.....OBJECTOR

RULING

Revocation of grant

I: Procedure

i) Background

1. In the estate of Kipchoge Arap Kirui being the matter before this court an application for revocation of grant has been applied by interest parties herein.
2. Kipchoge Arap Kirui died on the 21st February, 1996 aged 54 years old of a cardiac arrest at the Kericho Nursing Home. His brother Jonathan Kirui took out letters of grant alone on his behalf and of those of the four minors (*three son children and one daughter*)
3. A sister named Anna Chesiele Langat was named as a survivor. There was no mention of the deceased widow or widows.
4. Assets of the deceased was disclosed in the P&A form as being

LR NO. Kericho/Kapsoit/1504

LR NO. Kericho/Sosiot /1127

LR NO. Kericho/Sosiot/1149

LR NO. Kericho/Sosiot/1163

5. The Kenya gazette notice was issued on 6th August, 1996 (*Deputy Registrar S.G. Ong'anyi*).
6. Temporary grant was issued on 27th January, 1998 Odeyo J (*Rtd*) as she then was.
7. The grant was confirmed on 26th July, 1999 by Rimita J (*as he then was*).
8. It must be noted that the temporary grant was issued on the basis that the following were survivors of the deceased.

P&A 5

- 8.1 Jonathan Kirui over 18 years (brother)
 - 8.2 Anna Chesiele Langat over 18 years (Sister)
 - 8.3 Kiprotich Simion (minor) (son)
 - 8.4 Patrick Kipkemoi (minor) (son)
 - 8.5 Kipkorir Kirui (minor) (son)
 - 8.6 Chelangat Kirui (minor) (daughter)
9. The confirmed grant issued by Rimita J disclosed the following were the survivors to the deceased.

P&A 54

- 9.1 Jonathan Kirui
- 9.2 Anna Chesiele
- 9.3 Chelangat Kirui
- 9.4 Kiprotich Choge
- 9.5 Kipkorir s/o Kirui
- 9.6 Magagan
- 9.7 Mr. Chumo
- 9.8 J. Rugut

9.9. Richard Mutai

9.10. William Kibore Koech

10. It transpired during these proceedings that the latter five named persons were purchasers of the assets and not survivors. That not all the survivors, then minors were not named or catered for in the grant of confirmation.

11. On the 9.11.2006 the sole administrator Jonathan Arap Kirui sued three defendants Richard Choge, Simon Choge and Bernard Choge of allegedly subletting 1½ acres the land parcel Kericho/Sosiot/2655 which belonged to him as the sole proprietor to a 4th defendant Julius Keter in case No. HCCC. 96/06

12. The 4th defendants filed a defence and counter-claim stating that the administrator acquired the property without catering for their needs as the beneficiaries of the estate. That the said administrator did so through the succession cause of the deceased.

13. The defendants were advised by court to pursue the Law of Succession cause by way of revocation.

14. On 13th December, 2006 application dated 15th December, 2006(?) was filed by the said defendant through their advocate M/S Kiplenge Ogola and Mugambi advocates (*Nakuru*).

15. The applicants being

Dina Keter

Richard Kimutai Choge

Simon Kiprotich Choge

Patrick Kipkemoi Choge

Benard Kipkorir Choge

Gladys Chelangat Choge

who claimed that the grant had been “*fraudulently obtained by the making of a false statement and or concealment to court of material fact. That the administrator obtained the grant by an untrue allegation of facts*”.

16. The administrator responded through his new advocates M/S J. K. Kirui & co. advocates stating that the assets in the name of the deceased had been acquired in trust of himself. He is entitled to 50% of the same.

ii) Procedure

17. The procedure to revocation of grant is simple. Where it has been established a contravention in obtaining grant under **Section 76** of the Law of Succession Act an aggrieved party may apply for revocation of grant.

18. **Section 76** reads

“a grant of representation, whether or not confirmed, may at anytime be revoked or annulled if the court decides, either on application by any interested party or of its own motion –

- a) that the proceedings to obtain the grant were defective in substance,
- b) that the grant was obtained fraudulently by the making of false statement or by 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 and inadvertently.
- d) that the person whom the grant was made has failed, after due notice and without reasonable cause either.
- i) to apply for confirmation of grant within one year from the date thereof, or such longer period as the court has ordered and allowed, or
- ii) to proceed diligently with the administration of the estate; or
- iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provision of paragraph (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular or
- e) that the grant has become useless and
inoperative through subsequent circumstances.

19. Summons for revocation of grant is filed in form P&A 107 supported by an affidavit filed in form P&A 14 under **rules 44(1) and (2)** of the law of succession rules so provided whereby a party so aggrieved under **Section 76** of the Law of **Succession Act Cap 160** would file such application in the same Succession Cause. The exception being if the cause was in the subordinate/magistrates court an application for revocation of grant must be filed in the High Court of Kenya.

20. In this cause the application was filed in the High Court of Kenya Probate case. The Deputy Registrar on receipt of such application being paid for and field would issue form P&A 70 requiring the applicant to appear exparte before the judge on dates given to confirm that persons effected by the intended revocation to be named, together with their ages and address for purpose of services.

21. It seems that in this application persons named actually exceeded those on the confirmed grant.

22. The court gives exparte directions on the mode of service upon those named. Each are to be served with the application and affidavit i.e. Form 107 and Form 14 whereby form 68 is to be attached requiring the parties served to file an affidavit whether they individually support the application of revocation of grant or that they reject the application or the reasons why.

23. In this matter the following were served and majority appeared to court. Most were purchasers of land.

A) Survivors

- a) Jonathan Kirui 57 years brother to deceased
- b) Anna Chesiele 55 years sister to deceased
- c) Kiprotich Simon 29 years son to deceased
- d) Patrick Kipkemoi 21 years son to deceased
- e) Chelangat Kirui 15 years minor
daughter represented by guardian
- f) Richard Kimutai 35 years son to deceased
- g) Dinah Keter 35 years daughter to deceased

B) Purchasers before grant was issued

- h) Magagan
- i) Chumo
- j) J. Rugut
- k) Richard Mutai

C) Purchasers after grant issued

- l) Arap Rugut
- m) Samwel Siele
- n) Daniel Ngeno
- o) Moses Ngeno
- p) Romelt Koech
- q) Simion Kipkorir Martim 30 years old
- r) Andrew Kipkirui Bett 46 years old
- s) John Cheruiyot 40 years old
- t) James Kibet Mitei 42 years old
- u) Peter Kiplion kilimo 50 years old

The guardian to the 15 years old minor is Kipruto Arap Saina aged 75 years old.

24. The reasons why ages of those named is imperative is to ensure any minor involved has a guardian to represent her/or him in these proceedings. This has been so done for the 15 years old minor daughter.
25. Majority filed an affidavit in reply to support the application for revocation including the purchasers who were unable to obtain title to the parcels of land.
26. The question arises as to whether the grant be revoked? The administrator stated he should have obtained a bigger parcel and therefore the grant should be revoked so that he may obtain his share.

iii) Opinion

27. All the applicants require to show is that the grant to the administrator was fraudulently acquired and by means of untrue allegations. That the procedure to obtain grant was irregular.
28. Where there are minors, Section 58 of the Law of Succession requires that there must be a “*resulting TRUST*” to protect the interest of the said minors. Therefore the minor number of administrator must be TWO. The grant before this court was issued to only one administrator.
29. The line of consanguinity requires that a surviving spouse should first apply for a grant. If there is only minors as children that spouse whether male or female must take up the grant with another.
30. The cause before this court was taken up by a brother. He fails to inform the court where the deceased spouse is. It therefore is important to note that not all the survivors were catered for.
31. The spouse would hold the property for a female through, a life interest in trust of the children. The property is divided equally amongst the survivors where there are more than one house.
32. In this case the deceased assets was sold before a grant was issued. No sale agreement had been displayed by any of the purchasers. After the grant was issued more purchasers bought the parcel of land.
33. According to law the land should not be sold before letters of grant are issued. If the grant is issued and to have the land sold parties must go to the Law, **Trustees Act Cap 167 Law of Kenya** and file an application under that act seeking for leave of the court to have the said property sold. Once the court gives its approval with the consent of the survivors then the land would be sold.
34. This procedure had not been followed and as such the procedure of administrating the estate has been irregular.
35. I therefore hold that the confirmed grant issued on the 26th July, 1999 Rimita J (*as be then was*) be and is hereby revoked.
36. I order that the original grant and temporary grant dated 27th January, 1998 and 26th July, 1999 be returned to this court and the Principal Registry be notified.
37. I order that the titles – if so sub-divided be cancelled and the original titles revert back to the name of the deceased pending the proper distribution of the estate according to law.
38. The costs of this application would be borne by the sole administrators Jonathan Kitur. The Sureties under form P&A 57 are duly required to make payments to the estate on the guarantees they had given.

DATED this 27th day of July, 2009 at **KERICHO**

M.A. ANG’AWA

JUDGE

Advocates

- a) Advocate for applicants to revocation of grant Kiplenge, Ogola and Mugambi (Nakuru)
- b) Advocate for administrator D.O. Akinyi, Later J.K. Kirui & co. advocates (Kericho)
- c) No advocate for purchasers