



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

Succession Cause 6 of 1999

IN THE MATTER OF THE ESTATE OF ROBERT KIPKURUI CHERUIYOT - DECEASED

WILSON KIPKOECH ARAP CHERUIYOT 1ST APPLICANT

TAITA KIPNGENO ARAP CHERUIYOT 2ND APPLICANT

VERSUS

ESTHER CHERUIYOT RESPONDENT

JUDGMENT

The late **Robert Kipkirui Cheruiyot** (*deceased*) died on the 24th day of May 1997. **Esther Cheruiyot** the widow of the deceased petitioned for the grant of letters of Administration Intestate and the same was granted on 10th May 1999. According to the affidavit in support of the petition, (**Form P & A 5**) the deceased died intestate and left the following surviving him:

- a) **Esther Chepkirui Cheruiyot - Widow**
- b) **Florence Chemutai - Adult daughter**
- c) **Moses K. Kirui - Adult son**
- d) **Hellen Chepkorir - Adult daughter**
- e) **Linah Cheron - Adult daughter**
- f) **Nancy Chepngetich - Adult daughter**
- g) **Charles Kiprono - Minor son**
- h) **Edith Chepngeno - Minor daughter**
- i) **Peter Kiprotich - Minor son**

The grant was confirmed on 7th May 2004 and the Judge specifically stated as follows in the order confirming the grant.

“The grant of letters of Administration Intestate issued to the petitioner on 10th of May 1999 is hereby

confirmed on the following term;

i) **The letters of grant shall be confirmed to the petitioner Esther Chepkoech Cheruiyot and Musa Kipyegon Kirui jointly.**

ii) **The Estate of the deceased shall be distributed as follows: -**

a) **Death gratuity of Kshs.231,000/- - Esther Chepkoech Cheruiyot**

b) **Kericho/Kabianga/839 } - Whole to Esther Chepkoech**

Kericho/Kabianga/838 } Cheruiyot trust for herself

Kericho/Kabianga/835 } and all children of the

Kericho/Kiptere/1927 } deceased.

Kiptere Market Plot No.38 }”

On 15th December 2005, the applicants; **Wilson Kipkoech Arap Cheruiyot** and **Taita Kipngeno Arap Cheruiyot** filed the summons for revocation of the grant. The summons is based on the reasons that the proceedings to obtain the grant were defective in substance. That the grant was obtained fraudulently by the making of a false statement and by the concealment from the court of something material to the case. That the person to whom the grant was made has failed to proceed diligently with the administration of the estate. That the respondent proceeded to distribute the estate of the **late Robert Kipkirui Cheruiyot** before confirmation of the grant.

Further grounds stated in the application are that the applicants are residing on land parcels number **KERICHO/KIPTERE 4181** and **4182** respectively previously referred to as **KERICHO/KIPTERE/1927** which they gained ownership through the operation of the law.

These grounds are further expounded in greater detail in the supporting affidavit of **Wilson Kipkoech Arap Cheruiyot** which was sworn on 15th December 2005.

The gist of the matters deposed to in the said affidavit are that the applicants are the brothers of the deceased. They have lived and have been in quiet, continuous, open possession of land parcel number **KERICHO/KIPTERE/1927** which they allege was subdivided into **KERICHO/KIPTERE 4581** and **4582**. The applicants further stated that they have instituted a suit being **KERICHO HCCC No. 52 of 2005 (O.S)** whereby they are seeking for declaratory orders based on their claim of adverse possession.

The respondent filed a replying affidavit sworn on 9th March 2006 in which she denied having effected any fraudulent transaction. She also denied that the applicants claim has any basis as they are brothers of the deceased who are not entitled to the deceased estate. However the respondent's Counsel did not attend court during the hearing of the application despite the fact that the hearing date was fixed by consent.

The issue for determination that are in controversy in this matter is whether the grant of letters of Administration were issued to the petitioner through fraud and concealment of material facts and in contravention of the law.

The grant of letters of Administration ought to have been issued to two Administrators as the three of the deceased children were still minors and therefore there was a continuing trust. The grant was issued to the widow alone but I find the anomaly was cured when the court ordered the grant be confirmed in the name of the petitioner and her son **Musa Kipkegon Kirui** (see **order dated 7th May 2004**).

On the issue of whether the petitioner fraudulently applied for the letters of Administration, I wish to refer to **Section 66 of the Law of Succession Act Cap 160** which gives guidance to the preference to be given to certain persons to administer the estate where the deceased died intestate.

The order of preference is;

- a) *Surviving spouse or spouses, with or without association of other beneficiaries.*
- b) *Other beneficiaries entitled on intestacy; with priority according to their respective beneficial interest as provided by part v.*

In light of the above provisions it is the deceased spouse who has the priority, followed by his children. The applicants who are the brothers of the deceased have no priority equal or the same degree as the petitioner and therefore the petitioner was not obliged to notify them of her intention to apply for letters of Administration.

The petitioner being the person with priority and the court having confirmed the grant to two administrators, I find no justifiable reason of revoking the grant which in effect would be an exercise in futility as the same persons are the ones who are entitled.

However, there is one curious issue that is raised in this application regarding the transfer of property known as **KERICHO/KIPTERE/1927** to the petitioners even before the grant was confirmed. The applicants have annexed a copy of proprietorship section of the parcel of land which shows a transfer to **Esther Chepkoech Cheruiyot** on 24th January 2003 that is before grant was confirmed. In exercise of the powers donated to this court pursuant to **Section 47 of the Laws of Succession and Rule 73 of the P & A Rules** that empowers this court to make any order in the interest of justice. I hereby order that the transfer effected on parcel number **KERICHO/KIPTERE/1927** to **Esther Chepkoech Cheruiyot** be cancelled. The transfer should be effected to **Esther Chepkoech Cheruiyot** and **Musa Kipkegon Kirui** to hold in trust, in accordance with the confirmed grant to hold the property in trust of herself and all the children of the deceased and no transaction can be effected in any other way without the petitioner first seeking and obtaining the leave of the court.

The applicants remedy lies in the suit which they have filed against the petitioner in a civil suit where they are claiming the land they allege they acquired through adverse possession. If the applicants are desiring of obtaining any orders against the petitioner the appropriate forum is within the civil suit and not in this succession cause. In this regard therefore, I would dismiss the applicants' case but this being a family dispute each party should bear their own costs.

It is so ordered.

Judgment read and signed at Nakuru on 17th November 2006.

MARTHA KOOME

JUDGE