



REPUBLIC OF KENYA



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**In re Estate of Kitony Tapkili (Deceased) (Probate & Administration
E005 of 2021) [2024] KEHC 7356 (KLR) (18 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
PROBATE & ADMINISTRATION E005 OF 2021**

JR KARANJA, J

JUNE 18, 2024

IN THE MATTER OF THE ESTATE OF KITONY TAPKILI (DECEASED)

RULING

1. The subject grant respecting the Estate of the Late Kitony Tapkili (deceased) was made and issued on 14th June 2023 to the three Petitioners i.e. Domtila Jepkoech, Lorna Tenai and Hellen Jebet Ngetich.

On 1st September 2023, the summons for confirmation of the grant of letters of administration intestate and not grant of probate as wrongly titled dated 10th August 2023 was taken out by the first and second Petitioners (i.e. Domtila and Lorna).

In the supporting affidavit it is averred that the deceased died intestate and was survived by her three children being one son (Alfred Kimeli Ngetich (deceased) and two daughters (the first and second Petitioners). The third Petitioner (Hellen) is the widow of the late Alfred Kimeli Ngetich, hence a daughter-in-law of the deceased. The three Petitioners are therefore the rightful beneficiaries of the deceased's estate and also joint administrators of the estate conferred with a duty to apply for confirmation of grant under Section 71 of the *Succession Act*.

2. There are eight (8) grounds in support of the application but the first five grounds (a – e) are the most important as they touch on the competence and validity of the application, hence a vital factor for this court to determine whether or not the subject grant should be confirmed at all or in the manner proposed by the applicants in view of the affidavit of protest against confirmation filed herein by the third Petitioner and dated the 15th December 2023.

The mode of distribution of the estate as proposed in the summons for confirmation is different from that proposed in the affidavit of protest.

The implication here is that the Petitioners cum Administrators cum beneficiaries of the Estate did not arrive at a consensus on the mode of distribution. The protest was heard by affidavit evidence and written submissions.

3. It is clear that the bone of contention is the identification of the estate property available for distribution among the beneficiaries. Whereas in the summons the Applicants indicate that land Parcel



No. Nandi/Mutwot/195 is not available for distribution to the Third Petitioner and the estate of her late husband, it is indicated in the protest that the said property is available for distribution to all the petitioner/beneficiaries subject to the specified liability and that Land Parcel No. Nandi/Mutwot/192 is not available for distribution as it does not form part of the estate of the deceased.

The Applicants indicate that the land Parcel No. Nandi/Mutwot/192 originally belonged to their grandmother, the mother of the deceased and after her death the family agreed that the property would be transmitted to their late brother, Alfred, as a whole unit and in return land Parcel No. Nandi/Mutwot/195 would be shared between the First and Second Petitioner's (applicants) together with the deceased's niece, one Anne Metto.

The Applicants contend that the provisions of Section 42 of the Succession Act, would apply to the circumstances of this case if the protestor/ Third Petitioner maintains that the estate of her late husband is entitled to a share of Land Parcel No. Nandi/Mutwot/195.

4. The pre-requisite of determining what is or is not available for distribution in the present case is the validity and competence of the Applicant's summons for confirmation of grant or otherwise. The answer lies with the file record of the court which contains the history of this matter and would give directions as to whether or not the parties are on the right tract towards distribution of the estate property.

In that regard it is apparent that the genesis of this matter is the petition for letters of administration intestate presented to this court by the deceased's late son, Alfred Kimeli Ngetich, for issuance of a grant respecting the estate of the deceased herein who died on 8th March 2013. The Petition was dated 12th May 2021, but it was filed in court on 4th June 2021.

The affidavit deponed by the Petitioner in support of the petition indicated that the estate property available for distribution was Land Parcel No. Nandi/ Mutwot/195 and that it was encumbered by a liability in favour of one Anna Metto. The extent of the liability was not stated.

5. The petition was duly gazetted on the 30th July 2021 vide Gazette Notice No. E5 of 2021 and on the same date the Letters of Administration of all the estate of the deceased Kitony Tapkili was granted to the deceased late son, Alfred Kimeli Ngetich and issued on 16th December 2021. Notably, it was intriguing that the grant was made on the date of the publication of the gazette notice and that whereas in the gazette notice the deceased is said to have died on 8th March 2013, the grant gives the date of death as 3rd August 2020. This therefore means that the grant was irregularly and immaturely issued to the Petitioner. Therefore, any proceedings in relation thereto upto the time of the issuance of the grant and beyond were defective in nature.
6. Nonetheless, in a strange twist of events, the first and second Petitioners herein on the 19th September 2022 filed a Petition for grant of letters of administration intestate respecting the unadministered estate of the deceased being the land Parcel No. Nandi/Mutwot/195 for which the grant issued on 16th December 2021 was made. The reason for the application as may be deciphered from the supporting affidavit was that the initial petitioner/Administrator, that late Alfred Kimeli Ngetich sadly passed away on 21st May 2022 leaving part of the Estate un administered and un-distributed to the beneficiaries. The estate in question is the aforementioned Parcel No. 195. The Petitioners indicated that their application was prompted by the fact that the beneficiary of the estates liability (i.e. Anne Metto) was owed five (5) acres of the parcel and that she had served them a demand letter in respect thereof.



7. The Petitioners also indicated that the deceased administrator was also required to distribute the Land Parcel No. Nandi/Mutwot/192 according to the beneficiaries interest in law. They implied that an administrator ought to be appointed for distribution of the parcel among the beneficiaries/ heirs.

In essence, the Petitioners were applying for grant of letters of administration intestate respecting both Parcels No. Nandi/Mutwot/192 and 195 as well as the distribution thereof to all the beneficiaries inclusive of the estate of their late brother represented herein by the third Petitioner who appears not to have been involved in the application.

All the foregoing was against the background that the grant issued to the late administrator on 16th December 2021 was never confirmed to allow distribution of the estate among the beneficiaries and that on the 3rd August 2022, the third Petitioner appeared in court through her advocate, Mr. Kosgei holding brief for Mr. Tallam and indicated to the court that the late Petitioner/ Administrator had passed away and that they needed time to apply for substitution thereof. The court granted them time to do so.

8. However, instead of applying for substitution of the late administrator with any other or others, the 1st and 2nd Petitioners came up with the application filed on 19th September 2022 and dated 6th September 2022, although the original copy filed in court was undated. Be that as it may, all the three Petitioners appeared before this court on 11th May 2023 through their respective advocates, Ms. Kesei and Mr. Tallam and informed the court that they had on that date filed a consent dated 13th December 2022 and wanted it adopted as an order of the court.

Upon perusal and consideration of the consent the court noted that it effectively substituted the late Petitioner, Alfred Kimeli Ngetich with the three Petitioners as the joint administrators of the Estate of the Late Kitony Tapkili (deceased).

9. In that regard, the court ordered that a fresh grant of letters of administration intestate be issued to the three administrators and to be confirmed within the next six (6) months from that date thereof or any other shorter period that the parties may deem necessary.

The initial grant issued to the late administrator on 16th December 2021, was effectively revoked.

The fresh grant was formally issued on 14th June 2023 and the present application vide the summons for confirmation dated 10th August 2023 was filed herein on 1st September 2023, almost three months after issuance of the fresh grant rather than the prescribed period of six (6) months.

The parties were however, given leeway by the court to apply for confirmation of the grant for a shorter period other than the prescribed period if they deemed it necessary to do so.

10. From all the foregoing, it is evident and clear that the impugned summons for confirmation of grant is proper valid and competent before the court and raises the question whether the parcels of land described as Nandi/Mutwot/192 and 195 belonged to the deceased and if they are therefore available for distribution among the beneficiaries of the deceased's estate who are the First and Second Petitioners together with the estate of their late brother represented herein by his widow, the Third Petitioner.

11. In their supporting affidavit, the First and Second Petitioners indicated that both parcels of land belonged to the deceased and that Parcel No. 192 specifically belonged to the deceased through her mother, the late Tapkurgot Kobot Kitony, who was its original owner. They implied that both Parcels Nos. 192 and No. 195 are part of the estate of their deceased mother available for distribution to all the beneficiaries, but by dint of a family agreement Parcel No. 192 was allocated to the late administrator so that he could surrender his interest in Parcel No. 195 for it to be shared between the First and Second



Petitioners. In that regard the First and Second Petitioners imply that the Third Petitioner is entitled to Parcel No. 192 and not Parcel No. 195 which is not available for distribution to the estate of her late husband.

The Third Petitioner implies in her protest that Parcel No. 192 belonged to her late husband and is therefore not available for distribution as part of the deceased's estate. She further implies that the estate of her late husband is also entitled to Parcel No. 195.

12. The protestor/third petitioner contended that the family agreement alluded to by the First/ Second Petitioner, was non-existent and that their allegations in respect thereof are untruths and pure lies. It was thus the first and second Petitioners' burden to establish and prove by necessary evidence the existence of the family agreement alluded to and that the Parcel No. 192 belonged to the deceased on account of its transmission to her from the estate of her late mother, Tapkurgot Kobot Kitonyi.

With regard to the family agreement the First/ Second Petitioners have not availed any evidence to establish its existence or even any evidence, documentary or oral, to establish that there was a family meeting from which the agreement was conceived and executed. There was nothing whatsoever from the first and second petitioner to establish and prove not only the existence of the agreement but also its alleged terms and conditions.

13. With regard to the ownership of the land Parcel No. 192, the First and Second Petitioners did not also establish and prove that the property belonged to their mother (the deceased) on account of inheriting it from their late grandmother. Indeed there was no evidence to prove that the property ever or at any single time belonged to the deceased and was during her lifetime allocated to her late son, Alfred.

On the contrary, the first/Second Petitioners as well as the third Petitioner exhibited copies of search certificate dated 21st October 2021 and 6th December 2023 respectively clearly showing that the property belonged to the late Alfred Kimeli Ngeitch and was registered in his name since the 16th July 1977. It therefore defeats reason for the first and second Petitioner to allege that the property i.e. Parcel No. 192 belonged to the deceased was gifted by her to the Late husband of the third Petitioner. As such, the property did not form part of the estate for which the grant of letters of administration was issued on 14th June 2023.

14. It would follow that the sole property available for distribution to all the beneficiaries was and still is the parcel of Land No .195. and, for the avoidance of doubt the said beneficiaries include all the three Petitioners to whom the property should be distributed in accordance with the *Law of Succession Act* excluding Section 42 of the *Act* which provides for the doctrine of "hotchpot" which means to bring together or blend shares or properties for purposes of securing equal division especially in an intestate succession. In this case, there are no properties to bring together.

It is for all the foregoing reasons that this court must find that the protest is merited and is hereby allowed and sustained to the extent that the impugned summons for confirmation be and is hereby struck out and dismissed with direction that the Petitioners/ Administrators] do take out a fresh summons for confirmation of the grant only after agreeing on the mode of distribution of the estate property being Land Parcel No. Nandi/Mutwot/195.

A date for mention of the matter to confirm compliance and/or further orders be taken forthwith.

DATED AND DELIVERED THIS 18TH DAY OF JUNE, 2024

J. R. KARANJAH,

JUDGE

