



REPUBLIC OF KENYA



In re Estate of Christopher Cherutich Kimeli (Deceased) (Succession Cause E95 of 2021) [2023] KEHC 19643 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19643 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E95 OF 2021**

JRA WANANDA, J

JULY 7, 2023

**IN THE MATTER OF THE ESTATE OF CHRISTOPHER CHERUTICH KIMELI
(DECEASED)**

BETWEEN

PIUS KIBUTA CHERUTICH 1ST PETITIONER

PIUS KIPROP BUTIA 2ND PETITIONER

AND

PAUL CHERUTICH 1ST OBJECTOR

MICHAEL KIPROTICH 2ND OBJECTOR

RULING

1. Before Court is the Application by way of the Summons dated May 18, 2022 filed by the Objectors seeking revocation of the Grant issued herein to the Petitioners on February 4, 2022.
2. The Application is filed through Messrs Biwott Ronoh & Co Advocates and is stated to brought under “Section 76 of the *Law of Succession Act* and Rule 44 of the *Probate and Administration Rules* and all enabling provisions”.
3. The Grounds of the Application are that the proceedings to obtain the Grant were defective in substance and that the Grant was obtained by the making of a false statement and/or concealment from the Court of material facts to the Succession. The Application is supported by the Affidavit sworn by the 2nd Objector.
 4. In the Affidavit, the 2nd Objector has deponed that he is one the beneficiaries of the estate of the late Christopher Chrutich (deceased), he is one of the sons from the 1st house, the deceased had married two wives, the Objectors’ mother,



one Tapkili Shokwei Kimeli who is the 1st wife and one Juliana Cherutich who is now deceased and who was the 2nd wife, they have had meetings as a family since the demise of their late father to discuss the way forward with regard to his estate, at no time did they ever appoint the Petitioners by the consent of all the family members to be the Administrators of the estate, the 2nd Objector personally took over the issue of processing their late father's death certificate which was processed and issued on April 15, 2021, as such he has possession of the original death certificate, it has come to his attention that the Petitioners used a second death certificate that was obtained through fraudulent means and/or forgery to initiate the Succession proceedings, upon realization of the same, he reported the forgery at the Naiberi Police Station, the matter is pending investigations.

5. He deponed further that armed with the forged death certificate, the Petitioners proceeded to secretly and without consent of the other beneficiaries petition this Court for grant of letters of administration, the Petitioners now intend to apply for the confirmation of the said grant which without consent of other beneficiaries might be detrimental to the other beneficiaries, there was no consent that was signed by the beneficiaries when the Application for Grant of letters of Administration was made by the Petitioners, the Chief's letter relied on by the Petitioners and which lists the beneficiaries is not countersigned by the listed beneficiaries to prove free participation by the beneficiaries, he can only infer that the Petitioners have ulterior motives since they went to the lengths of forging their late father's death certificate to bring this Cause, the Petitioners intend on distributing the estate contrary to the wishes of all the beneficiaries, it will not be suitable for the Petitioners being from the 2nd house to administer the estate as there is malice.

Petitioners' Response

6. The Application is opposed by the Petitioners *vide* the Replying Affidavit sworn by the 1st Petitioner and filed in Court on July 12, 2022. The same is filed through Messrs RM Wafula & Co Advocates. In the Affidavit, the 1st Petitioner deponed that he is one of the children of the estate, their late father was a polygamist having married two wives, the Objectors are his step-brothers from the 1st house, he and the co-Petitioner are from the 2nd house, before filing this cause he had on several occasions tried to see whether they could sit down as a family and agree on the way forward regarding the administration of the estate but members of the 1st house were uncooperative, he later discovered that some members from the 1st house were not up to any good as they had sold their late father's combine harvester registration number KAE 553B, the step-brothers from the 1st house who sold the combine harvester were the 2nd Objector and one John Kipyego, members of the 1st house and the Objectors benefitted from the proceeds of the sale, some members of the 1st house also wasted part of the estate by selling it to a third party, in June 2022 the same 2nd Objector and the said John Kipyego Kibutia sold their late father's remaining combine harvester registration KAA 215X to a third party, members of the 1st house including the 2nd Objector and the said John Kipyego benefitted from the proceeds of the sale.
7. He deponed further that none of the members of the 2nd house were involved in the said transactions, he is surprised that the Objectors have the audacity to blame the Petitioners yet the Objectors' hands are not clean, none of the members of the 2nd house has wasted the estate or any part thereof, it is the members of the 1st house who are benefiting from the bigger portion of the estate hence not wanting



it to be distributed to the right beneficiaries, upon discovering what the said persons were doing to the estate, in or about February 2021 he reported the matter to the area Chief, the Chief summoned the deceased's family to his office, the Objectors declined to attend, the Chief summoned members of the deceased's family for another meeting but again members of the 1st house did not turn up hence the Chief was forced to refer them to the Deputy County Commissioner (DCC) Moiben sub-County, before the Chief had referred the matter to the DCC he had written a letter to the Human Rights Office to assist in the impasse, the DCC summoned members of the two houses to his office and this time round some members of the 1st house did appear, the DCC inquired from both houses as to what they wanted as regards the estate, members of the 2nd house made it clear that they wanted the estate to be fairly distributed out to the beneficiaries but the members of the 1st house did not want that, with their refusal the DCC advised them to take the matter to Court, on three or so occasions he had requested the 2nd Objector to give him a copy of the certificate of death for purposes of filing Succession proceedings but he declined.

8. The 1st Petitioner deponed further that to safeguard his interest in the estate as well as those of other beneficiaries, through the Chief he applied for and obtained a certificate of death and also an introductory letter from the area Chief, while giving out the names of the beneficiaries he did not leave anyone out, he has been shown some purported minutes but he wishes to state that none of members of the 2nd house are aware of the minutes or meetings and/or was invited to attend any of the same, the purported minutes are therefore nothing but afterthoughts, manufactured with the intention of "making the Petitioners to be the bad ones", the Petitioners have not fraudulently obtained the letters of administration by making a false statement and/or concealment from the court of something material to these proceedings, they did not obtain the certificate of death through fraud and/or forgery, if they made false information then they ought to be charged in Court, prosecuted and punished, it is the Objectors who are intermeddling with estate, after initiating the proceedings he did inform his step-brothers including the Objectors, in order to save Court's precious time, the Objectors can be incorporated as co-administrators then the parties proceed to the issue of distribution of the estate, the Objectors should however account for the two combine harvesters and any portion of the estate they have sold.

Objectors' Rejoinder

9. In response to the above, the 2nd Objector filed a Further Affidavit on August 4, 2022. He denied that he sold their father's combine harvester, he deponed that he purchased the same from one Samuel Kimeli Kitur in the year 1998 and they entered into a Sale Agreement, he who alleges must substantiate his allegations, not all the beneficiaries were summoned by the Petitioners to attend the meeting at the DCC, there are two people Sarah Jebet Kimutai and Francis Kosiom who had purchased parts of the estate of their father prior to his demise, they even had sale agreements, the Petitioners are economical with the truth, they failed to acknowledge the existence of the said purchasers as beneficiaries whilst they are fully aware of their existence and their lack of title to the purchased lands, the contents of the Affidavit are innuendos meant to disparage the 2nd Objector to appear to be uncooperative, if the Petitioners had to go to the Chief for issuance of a second death certificate, the 2nd Objector should have been summoned by the Chief and even by the Registrar of Persons to have the initial death certificate nullified, they were informed of an existing Succession Cause after the Letters of Administration had already been issued, the proposal by the Petitioner could only be feasible if the parties have a sit down with all the beneficiaries and the Petitioners avail themselves as they tend to evade such meetings whenever they are convened.



Hearing of the Application

10. The Application was canvassed by way of written Submissions. The Objectors filed their Submissions on May 3, 2023 and the Petitioners filed theirs on May 5, 2023.

Objectors' Submissions

11. Counsel for the Objectors cited the provisions of Section 76 of the *Law of Succession Act* which addresses the issue of revocation or annulment of grants, he also cited the case of *Re Estate of Prisca Ongayo Nande (Deceased)* [2020] eKLR. He reiterated that despite them having had family meetings, at no time did they ever appoint the Petitioners to be the administrators of the estate, the 2nd objector was the one who was in possession of the original death certificate of their late father, at no time would the Registrar of Persons issue two death certificates at the same time, as a result of these discrepancies the Objectors caused a report to be made to the police, at no point were the Objectors called upon to visit the Chief's office, they never appended their signatures on the consent to the making of grant as they were never involved, the letters relied upon by the Petitioners were a forgery, Counsel then cited the case of *Re Estate of Moses Wachira Kimocho (Deceased)* [2009] eKLR in which he submitted the Court made pronouncements on the importance of disclosing all material facts while seeking letters of Administration and confirmation thereof, the Grant was obtained fraudulently and through concealment of material facts and as such the same should be nullified, in the alternative, they would wish that the Objectors be brought on board as co-Administrators of the estate.

Petitioners' Submissions

12. On his part, the Petitioners' Counsel in setting out the principles which guide the Court in determining Applications for revocation of a Grant cited the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] eKLR. He then submitted that the Petitioners in the Affidavit in support of their Petition gave out the names of all beneficiaries without excluding anyone, they also attached a letter of consent in which they were given authority by other beneficiaries to represent them in obtaining the grant, prior to the filing of the Petition the Petitioners had on several occasions tried to engage the entire family in discussions aimed towards agreeing on a way forward with regard to distribution of the estate but the 1st family was uncooperative, only members from the 1st family failed to sign the consent, the Petitioners, via a letter to their area Chief, lawfully obtained a Certificate of death, the Objectors have not demonstrated how the proceedings were defective, the Certificate of death was genuine and not fraudulently obtained. He then submitted that the elements of fraud must be strictly proved and cited the cases of *RG Patel v Lalji Makanji* [1957] EA 314 and *Moses Parantai & Peris Wanjiku Mukuru (Suing as the legal representatives of the Estate of Sospter Mukuru Mbeere-Deceased) v Stephen Njoroge Macharia* [2020] eKLR. He also cited Section 109 of the *Evidence Act*.
13. Counsel further argued that the Petitioners having been deprived of access to the deceased's certificate of death invoked the help of the area Chief and applied for and acquired the certificate of death termed as forged by the Objectors, the Objectors should prove to the require standard how the foregoing amounts to forgery or fraud, the Objectors have not been cooperative and have been a stumbling block to proper distribution of the estate, they have engaged in intermeddling in the sense of Section 45 of the *Law of Succession Act* which stipulates that there should be no intermeddling with the property of a deceased person except so far as expressly authorized by the Act, or by any other written law or by a Grant of representation under the Act. Counsel cited the case of *Virginia Mwari Thurania v Purity Nkirote Thurania* [2017] eKLR and submitted that the Objectors have wasted the deceased's estate by selling the combine harvesters to third parties, in both sales only the Objectors and members of the 1st family were involved and benefitted from the proceeds, from the above it can be deduced



that the actions of the Petitioners in obtaining a second certificate of death was a justified contingency measure against the continued wastage of the estate, under Section 82 of the Law of Succession Act, no immovable property of a deceased person shall be sold before confirmation of Grant, the 1st family having sold part of the estate are in violation of this provision, the Objectors have not met the requirements envisaged under Section 76 of the Law of Succession Act.

Analysis and Determination

14. Upon examination of the record, the pleadings filed, including the Affidavits and respective parties' Submissions, I find the issue that arises for determination to be as follows:

Whether the Objectors' Application meets the threshold for the revocation of a grant within the meaning of Section 76 of the Law of Succession Act.

15. Section 76 of the Law of Succession Act states as follows:

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“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time 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 a false statement or by the 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 or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; 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 provisions of paragraphs (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.”

16. Section 76 was clearly expounded upon by Hon Justice W Musyoka in the case of Re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR where he stated as follows:

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective,



either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

17. The Objectors have invited this Court to revoke the Grant of Letters of Administration made to the Petitioners. The grounds alleged are that the Petitioners obtained the Grant by making a false statement and/or concealment from the Court of material facts.
18. It is not in dispute that the deceased was a polygamous man with two wives. The Objectors are from the 1st house while the Petitioners are from the 2nd house.
19. The first allegation made by the Objectors is that at the time when the Petitioners applied for the Grant, they did not obtain consents from the entire family members and particularly, members of the 1st house. I have perused the Petition, the Affidavit in support thereto and the consent. I note that while 14 beneficiaries were listed in the consent, only 3 signed. It is therefore true that the Petitioners did not obtain consent from all the beneficiaries. The Affidavit in support of the Petition and also the Chief’s letter both list all the beneficiaries from both houses. Under these circumstances, can it be said that the Petitioners concealed the information that there were other survivors and/or beneficiaries in the family? I do not think so. Indeed, they openly disclosed this information and presented the consent with the blank spaces provided for the other beneficiaries remaining unsigned.
20. Although there is blame and counter-blame from either party on who between them is the cause of the current turn of events, the Petitioners have explained that they had on several occasions unsuccessfully approached the Objectors with the view of discussing issues of administration of the estate. The Petitioners insist that they had on several occasions invited the Objectors for meetings to discuss the matters but the Objectors had time and again failed to attend. The Petitioners claim that they even sought help from the local administration offices within their area without any success. This has in fact been demonstrated by the Petitioners through copies of letters from the area Chief Tembilio Location and the Deputy County Commissioner Moiben Sub-County summoning the parties to meetings. Although I appreciate that on their part, the Objectors also, in turn, blame the Petitioners as the parties that have proved uncooperative, I find the explanation by the Petitioners to be plausible.
21. In view of the foregoing, it is understandable that the parties have not been able to agree on who should administer the estate. That is not so surprising since the two sides come from two different households and with the nature of a polygamous family, at times comes absence of harmony. From the pleadings before Court, it is evident that there seems to be lack of goodwill from both sides. However, I have already found that the Petitioners did not conceal any material facts relevant to the proceedings and



they in fact listed all the beneficiaries of the deceased. The Petitioners recognized the fact that their late father was a polygamous man and factored the interests of both houses at the time of filing the Petition. The only bone of contention which in fact has not been contested by the Petitioners is their failure to obtain consent from all the beneficiaries. In my view, the Petitioners have ably explained the circumstances leading to the same. In the circumstances of this case therefore, I do not think it would be prudent to revoke the Grant on this particular ground.

22. Regarding the Objectors' allegations of fraud against the Petitioners in respect to the Certificate of death, it is evident that indeed there two separate Certificates of death in this Cause. The Objectors allege that they are in possession of the original Certificate and have accused the Petitioners of obtaining a second Certificate through fraud. The Petitioners have readily admitted that they obtained a second Certificate. They have however offered a chronology of events leading them to procuring the second Certificate. The Petitioners maintain that they had on several occasions requested for the Certificate from the Objectors without success. Consequently, the Petitioners deponed that with the help of their area Chief they were able to obtain the second Certificate which they argue, was not fraudulently obtained as alleged by the Objectors.
23. The Objectors deponed that upon realizing that there was a second Certificate, they reported the matter to the Police. At this juncture I must mention that this Court cannot, sitting as a Succession Court, determine the said allegations. This Court cannot conclusively conclude whether the second Certificate is valid or not or whether it is a forgery, that is the province of the criminal Court. Since the Objectors submit that they have reported the matter to the Police, I would rather leave that issue to be handled by the police as indeed the law requires. It is for the police to investigate the complaint and if found merited, to subject the "offenders' to prosecution under our criminal law system.
24. Meanwhile, it is not in dispute that the Objectors, just like the Petitioners, are survivors of the deceased and therefore have a right to participate in these proceedings. In the interest of justice, revoking the Grant on the sole ground of absence of their consent to the Petition would not, in my view, be the prudent step to take. Each survivor is entitled to a fair share of the estate. One party cannot and should not hold the other hostage for whatever reasons. The purposes of Succession proceedings is to ensure that the estate of a deceased is administered in accordance with the law and that every beneficiary receives his or her fair share of the estate without undue and unreasonable delay.
25. The deceased having been a polygamous man, it is only fair that each of the two houses has a representative as a co-Administrator who can efficiently assure each house that their interests are protected. At present, both Administrators come from the 2nd house. Members of the 1st house should therefore also have a representative.
26. I will therefore invoke the provisions of Article 159 of the Constitution and also the Court's inherent powers under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, which latter two provisions donate to the Court the requisite jurisdiction to make such orders in Succession matters as the justice of the case may require.
27. Section 47 of the Law of Succession Act, provides as follows:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient...”



28. Rule 73 of the *Probate and Administration Rules*, on the other hand, provides that:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

29. Before I put my pen down, I note that there are allegations of intermeddling with the estate. On this issue, Section 45 of The *Law of Succession Act* provides as follows:

“45.

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

30. I therefore remind the parties that according to Section 45 above, anyone who has no authority under this Act, or by any other written law, or has grant of representation under this Act takes possession or dispose of or otherwise intermeddles with any free property of a deceased person for any purpose is guilty of an offence punishable under by law.

31. *In Re Estate of M’Ngarithi M’Miriti* [2017] eKLR, Hon. Justice Gikonyo held as follows:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”



32. The parties are therefore warned against any acts of intermeddling and are advised to maintain the status quo until and as when the estate of the deceased herein will be distributed with finality.

Final Orders

33. In light of the above findings, I make the following orders:

- i. The Summons dated May 18, 2022 filed by the Objectors is hereby dismissed.
- ii. The 1st and 2nd Objectors are hereby appointed to be co-Administrators of the estate of the late Christopher Cherutich Kimeli (Deceased) alongside the 1st and 2nd Petitioners who had been appointed earlier, to make up a total of four (4) joint Administrators.
- iii. For avoidance of doubt, the new four (4) co-Administrators shall therefore be Pius Kibutia Cherotich, Patrick Kiprop Butia, Paul Cherutich and Michael Kiprotich.
- iv. The Administrators shall jointly or separately, within sixty (60) days from the date hereof, file an Application or respective Applications for confirmation of Grant taking into account all the rightful beneficiaries and containing the proposed mode of distribution.
- v. Upon compliance with (iv) above, and in the event of there being any dispute, the Court will determine whether to first refer the matter to the Court Annexed Mediation process or to forthwith proceed to determine the same on its own.
- vi. This being a family matter, each party shall bear his/her own costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF JULY 2023

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WANANDA J. R. ANURO

JUDGE

