



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE AND ADMINISTRATION CAUSE NO. 12 OF 2011

IN THE MATTEER OF THE ESTATE OF MICHAEL KIPKOSGEI KURGAT-DECEASED

HILLARY KIMTAI KURGAT.....OBJECTOR

-VERSUS-

ASCAH KURGAT CHEPTIONY.....PETITIONER

RULING:

Before me are summons seeking revocation or annulment of Grant of Letters of Administration intestate issued to Ascah Kurgat Cheptiony on 26th July, 2011.

In the summons dated 30th August, 2013 the objector seeks orders that;

- a) The Grant of Letters of Administration made to **ASCAH KURGAT CHEPTIONY** on 26th July 2011 be revoked.

The objector's case is premised on the grounds that;

- a) The petitioner did not seek or obtain the consent of all the beneficiaries of the estate entitled to petition for a grant including the objector herein.
- b) The petitioner forged the applicant's signature appearing on both the consent to the making of the grant and consent to confirm acceptance filed in court.
- c) The petitioner did not disclose all beneficiaries to the deceased's estate.
- d) The assets set out in the petition are not the only properties left behind by the deceased.
- e) The purported letter from the Chief filed in support of the petition does not emanate from the area where the deceased resided and was buried.
- f) The petitioner did not disclose to court that on 4th March 2006 the deceased's family in the presence of elders resolved to share the deceased estate equally between the two (2) houses.

OBJECTOR'S CASE.

The objector in his replying affidavit dated 30th August, 2013 and written submissions filed on 7th April, 2021 averred that he is a son to the deceased from his 1st marriage. That the petitioner is a second wife to the deceased. A Grant of Letters of Administration was made to the petitioner on 26th July, 2016. That the objector recently learnt that the petitioner herein had filed this succession cause, obtained a grant and had it confirmed. That upon perusal of the court file, the objector established *inter alia* that: he is named as a dependant to the deceased's estate; that a letter dated 13th January, 2010 from the Chief of Sergoit location was filed alongside the petition; that a consent to the making of the said grant and consent to confirm acceptance of the mode of distribution were filed and purportedly signed by the objector; that the deceased's estate was stated to comprise of two parcels of land and tractors and that the dependants to the deceased's estate are named as the petitioner, two sons and four daughters.

It was the objector's contention that he never signed either of the two consents and what is purported to be his signature is an outright forgery and that the petitioner did not take in to consideration the deceased other house.

That the deceased hailed from Kamariny village of Kiptabus sub-location which is not Sergoit location as evidenced in the death certificate marked as HKK1. That although the deceased owned LR No. Sergoit/ Koiwoptaoi Block 8/17 in Sergoit Location, the area Chief was not the proper administrator to deal with the matter. That before the demise of the deceased he had sold part of the said parcel to John Cheptum (deceased) whose family resides thereon. That the petitioner did not cater for the said family in her petition and or application for confirmation of grant. That the abovementioned parcel of land measures 20.23 Ha (approximately 50.575 acres) but the affidavit in summons for confirmation of grant accounts for only 26 acres.

The objector avers that it is not clear how the balance of the said asset shall be administered and or transferred to respective beneficiaries without the said purchasers being named in these proceedings.

That the petitioner as well sold part of the said parcel of land to other parties who are not named and or disclosed in this petition.

The objector also averred that the deceased herein is a son of the late Thomas Chepkurgat Cheptiony. That the estate of Thomas Chepkurgat Cheptiony (deceased) is unadministered and undivided and that the objector is entitled to a share in the said estate. That the larger family of Thomas Chepkurgat Cheptiony holds the view that the objector's father's estate should not be divided before his entitlement in his grandfather's estate is established. That these instant proceedings were therefore prematurely commenced by the petitioner who is aware of the above position. That proceedings to share the objector's father estate will potentially disinherit his children of an entitlement to the vast estate of their grandfather.

The objector also contended that the mode of distribution proposed to Court by the petitioner was unfair to him since he was only given one tractor and then banished to an agricultural farm land known as Tembelio/ Elgeyo Border Block 5 (Ex-Tooley) 68 while the petitioner and her children benefited from a commercial parcel of land whose value is much higher than the objector's. That the said mode of distribution also disregarded the family agreement arrived at on 4th March, 2006 in the presence of local elders where it was agreed that the deceased's estate shall be shared equally between his two houses.

The objector cited *Eldoret High Court Succession Cause No. 85 of 2007, (In the matter of the Estate of Tabitha Waitherera Kamau-Deceased)* to buttress his submissions.

The objector prayed that the grant herein be revoked, the objector be made a co-petitioner together with the petitioner herein and that the petition herein be amended to include the deceased's entitlement in his father's estate, include all the 50 acres of the Chepkanga property and recognize the purchasers of half of the Chepkanga property as liabilities in the estate.

PETITIONER'S CASE

The petitioner herein opposed the said application and filed a replying affidavit dated 10th December, 2013 and also filed written submission on 12th April, 2021.

The petitioner submitted that she included all the dependants of the deceased in her petition and that at the time of distribution the objector filed this instant application. She further submitted that she had acted in good faith by ensuring that all the dependants were provided for and had in fact given the objector herein the whole of land parcel Tembelio/ Elgeyo Border Block 5 (Ex-Tooley) 68 plus a tractor KUE 042 which are still in possession of the objector herein.

The petitioner also submitted that she has during the subsistence of this cause been flexible to accommodate the objector by issuing three other modes of proposals on how the estate should be distributed which she invited the court to look at. The petitioner submitted that she had filed a further affidavit dated 20th November, 2018 to that effect.

The petitioner testified that she now wants the estate to be distributed equally amongst all the beneficiaries.

On the issue of the estate of deceased's father the petitioner submitted that the same does not form part of the estate at the moment since the grant of the said estate is yet to be confirmed.

The petitioner also admits that the deceased had sold part of the estate land and what is available for distribution is 26 acres. She also admits that the purchasers in question are aware of these proceedings.

The petitioner contends that on cross examination the objector conceded that he was not left out as a beneficiary and even confirmed that he was given the largest share of land compared to the other beneficiaries. That the objector further confirmed that all the properties were captured in the list of properties available for distribution. That when asked whether the objector was agreeable to the estate being distributed equally among all the beneficiaries, the objector affirmed the same. That the properties listed as available for distribution tallied with what the petitioner had presented in court.

The petitioner also submitted that the objector has not presented to this court any evidence to support claims that his signature was allegedly forged. He who alleges must prove, a fact that the objector has failed to do.

The petitioner further contended that the objector has never issued a mode of distribution of the estate in question. The petitioner further submitted that issues raised by the objector herein do not warrant the revocation of grant as his only issues were with the mode of distribution.

The petitioner prayed that the objector's application filed on 2nd September, 2013 be dismissed with costs to the petitioner.

ANALYSIS AND DETERMINATION

A party who wishes a grant to be revoked must satisfy one or more of the grounds set out under Section 76 of the Law of Succession Act which provides as follows;

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**
 - iv. that the grant has become useless and inoperative through subsequent circumstances.**

The Court in the case of Jamleck Maina Njoroge –Vs- Mary Wanjiru Mwangi (2015) eKLR at paragraph 11 of its ruling in revoking a grant reiterated the grounds upon which a grant can be revoked. It stated as follows;

“11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession Act. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.” (emphasis added.)

Looking at the arguments before me, I need consider whether the objector has established through evidence that;

- (a) The proceedings to obtain the grant were defective in substance;**
- (b) 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) 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;**

The objector has alleged that the grant and subsequent confirmation was obtained fraudulently. Other than stating that his signature was forged, he did not offer any concrete evidence to prove the serious allegation. He bore the burden of proof and should have been more vigilant.

It is a cardinal principle of law that **“he who alleges must prove”**. This principle is well captured in sections 107 to 109 of the Evidence Act which reads as follows;

“107 (1) whoever desires any court to give judgment as to the legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies with that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on the other side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it

is provided by any law that proof of that fact shall lie on any particular person.”

Courts of law do not act on impulse or imagination that something may have occurred. The applicant/objector had the onus to establish on the balance of probabilities that forgery of his signature occurred. No evidence whatsoever was tendered by the objector to the said effect.

The petitioner herein has been faulted for failure to disclose material facts in this matter. It is a requirement for a person petitioning for a grant to fully disclose the deceased person's assets and liabilities. Upon my perusal of the affidavit in support of the petition for letters of administration intestate it is clear that the petitioner did not disclose that the deceased had sold part of the parcel of land known as Sergoit/Koiwoptaoi Block 1/71. This is only brought to light at paragraph 12 of the petitioner's replying affidavit dated 10th December, 2013 where the petitioner confirms that the deceased had sold 20 acres of the said parcel to one John Cheptum and an additional 4 acres had been sold to Ambrose Lamanon. During cross-examination the petitioner herein confirmed to have sold part of the estate. She admits to having sold 3 acres of land belonging to the estate, of which proceeds were not distributed among the other beneficiaries. From the foregoing it is apparent that the petitioner herein obtained the grant fraudulently by the concealment from the Court of something material to the case.

The objector has also challenged the mode of distribution by the petitioner herein, stating that the same was unjust and unfair to him. He complains that the land given to him is of a lesser value compared to the one that the petitioner and her children got. However, no valuation report has been tendered before this Court to support that assertion.

It is also worth noting that the petitioner herein has admitted both in her affidavits and during trial that she now wants the estate to be equally shared among all the beneficiaries. This is in view of the objection raised by the objector concerning the mode of distribution proposed by the petitioner. One would then wonder if in fact the initial mode of distribution was just and fair to all the beneficiaries.

The long and short of this is that substantive justice will be served if the grant issued and confirmed on 26th July, 2011 is revoked. I for the aforesaid reasons do revoke the said grant. The objector and the petitioner should jointly apply for letters of administration.

Costs be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF MAY, 2021.

In the presence of:-

Mr. Omondi for the Objector.

Mr. Kibii for the petitioner (absent).

Gladys - Court Assistant