



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**P&A NO. 107 OF 2014**

**IN THE MATTER OF THE ESTATE OF CHRISTIAN TABUKIGEN MARITIM (DECEASED)**

**IN THE MATTER OF AN APPLICATION FOR REVOCATION OF GRANT**

**PIUS KIPCHUMBA KEMBOI.....APPLICANT**

**VERSUS**

**PRICILA CHEPKEMEI LAGAT.....1<sup>ST</sup> PETITIONER**

**JOSEPH KIPKORIR KOECH.....2<sup>ND</sup> PETITIONER**

**RULING**

[1] This ruling is in respect of the Summons for Revocation of Grant dated **18 May 2018**. It was filed herein by the Applicant, **Pius Kipchumba Kemboi**, pursuant to **Section 76** of the **Law of Succession Act, Chapter 160 of the Laws of Kenya**; and **Rules 44 and 75** of the **Probate and Administration Rules**, for orders that:

[a] Spent

[b] The Grant of Letters of Administration Intestate issued herein on **5 September 2016** to the Petitioners, **Pricila Chepkemei Lagat** and **Joseph Kipkorir Koech**, be revoked and/or annulled.

[c] That the costs of the application be borne by the Respondents.

[2] The application is premised on the grounds set out in the Supporting Affidavit annexed thereto, sworn by the Applicant, wherein it was deposed that the deceased, **Christian Tabukigen Maritim**, died on **17 November 1993**; and that, in their petition for Grant of Letters of Administration Intestate in respect of her estate, which was issued to the Petitioners/Respondents on **5 September 2016**, the Petitioners failed to disclose that the 2<sup>nd</sup> Petitioner is but a purchaser. In addition thereto, the Applicant contends that Petitioners deliberately failed to furnish the particulars of all the beneficiaries of the deceased. He therefore prayed that the Grant of Letters of Administration Intestate issued herein on **5 September 2016** be revoked and or annulled; and that a fresh Grant be issued to him.

[3] The application was opposed by the Petitioners. They relied on what they called Cross-Objection dated **11 June 2018**. They likewise filed Reasons and Grounds as well as a Replying Affidavit sworn by the 1<sup>st</sup> Petitioner, **Pricila Chepkemei Lagat**. The main contention therein is the 1<sup>st</sup> Petitioner was married to the deceased in a woman-to-woman marriage as recognized under Kipsigis customary law and therefore she ranked in priority to the Applicant in so far as the administration of the estate of the deceased was concerned. The Parties thereafter filed their respective statements and documents and were heard, on a *viva voce* basis, on **16 September 2019**.

[4] As **PW1**, the Applicant adopted his witness statement dated **7 November 2019**. He testified that his late father, **Wilson Kipkemboi Koros** and the deceased were brother and sister; and that they inherited their mother's 5 acres of land in equal shares upon her demise. **PW1** further stated that the deceased herein proceeded to sell her portion and bought the piece of land that is the subject of this dispute. According to him, the Petitioners have no better right to petition for Grant in respect of the estate of the deceased; and that they forged documents to show that his father, **Wilson Kipkemboi Koros**, had consented to their being appointed as the administrators of the estate of the late **Christian Maritim**. Thus, it was the contention of **PW1** that he has an equal right as does **Pricila Chepkemei Lagat** to administer and inherit the estate of the late **Christian Maritim**.

[5] The applicant called his nephew, **Wesley Kiprono**, who is also the son of **Pricila Chepkemei Lagat** as **PW2**. He likewise, adopted his witness statement dated **7 November 2018**. His evidence was that the deceased, **Christian Maritim** was his grandmother; and that she

owned 5 acres of land which she apportioned between, his mother, **Pricila Chepkemei Lagat** and deceased's brother, **Wilson Kipkemboi Koros**. He also confirmed that **Pricila Chepkemei** sold portions of the half share of the land she inherited from the deceased, totaling 1.8 acres, to the following persons:

- [a] Dorcas Karan - 0.2 acres
- [b] Mary Cherop - 0.4 acres
- [c] Reuben - 0.2 acres
- [d] Noah Rono - 0.3 acres
- [e] Rose Cheptoo - 0.45 acres
- [f] Joseph Kipkorir Koech - 0.25 acres

[6] **PW2** was categorical that at no time did he consent to the 2<sup>nd</sup> Petitioner, **Joseph Kipkorir Koech**, being appointed as an administrator of the estate of his deceased grandmother as is purported by his mother. He added that the only interest the 2<sup>nd</sup> Petitioner has in the estate of the deceased is the 0.25 acres that he bought from his (**PW2's**) mother, **Pricila Chepkemei**. It was therefore his evidence that his signature was forged and that the consent aforementioned is a forgery. **PW2** further stated that the original title to the deceased's land has all along been under the custody of the 2<sup>nd</sup> Petitioner after he tricked the 1<sup>st</sup> Petitioner that he wanted to make a photocopy of the document; and that he has since refused to return the same. He therefore supported the application and prayed for the revocation of the Grant of Letters of Administration Intestate issued herein to his mother, the 1<sup>st</sup> Petitioner, and **Joseph Kipkorir Koech**.

[7] On her part, the 1<sup>st</sup> Petitioner relied on the averments she made in her Replying Affidavits sworn on **11 June 2018** and **22 May 2019**. In the first affidavit she deposed that the deceased was married to the late **Maritim** but were not blessed with any children; and that she consequently married her in a woman-to-woman marriage in accordance with Kipsigis customary law. It was further averred by the 1<sup>st</sup> Respondent that, whereas the deceased was given a portion of land by her late husband, **Maritim**, she sold the same and moved to Nandi where she bought a piece of land, **LR No. Nandi/Chepterit/362**. She later gave 1.5 acres thereof as a gift to her late brother, **Wilson Kipkemboi Koros**; and that the said **Wilson Kipkemboi Koros** thereafter sold a piece thereof, measuring 0.6 acres to the 2<sup>nd</sup> Petitioner.

[8] It was further the evidence of **DW1** that the Applicant persuaded his father, **Wilson Kipkemboi Koros**, to give him and was given the proceeds of the sale; and with it he went and bought land at **Kabongwa village** where he resides to date. **DW1** testified that her sons, **Stephen Kogo**, **Emmanuel Kogo** and **Henry Kogo**, all consented to her taking out Letters of Administration in respect of the deceased's estate in her capacity as the "widow" of the deceased. As for the 2<sup>nd</sup> Petitioner, the evidence of **DW1** was that his joinder, as one of the purchasers, was approved by all members of the deceased's family. She therefore prayed that the application dated **18 May 2018** be dismissed with costs as the Applicant has no *locus standi* to bring the said application.

[9] The evidence of the 2<sup>nd</sup> Respondent, **Joseph Kipkorir Koech (DW2)**, was that he was one of the people who bought a portion of the land comprising the estate of the deceased. He testified that he was proposed as the 2<sup>nd</sup> administrator by the Applicant's father, to act on behalf of all the purchasers; and that he did not expect the Applicant to raise any objection to their appointment.

[10] I have given careful consideration to the application, the affidavits, statements and documents filed in respect thereof as well as the *viva voce* evidence given herein and the written submissions filed by learned counsel. There is no dispute, and indeed the court record does confirm, that the deceased, **Christian Tabukigen Maritim**, also referred to in the documentation filed herein as **Christina Tabukigen Maritim**, died intestate on **17 November 1993**. She was then a retired prison officer. There is further no dispute that the only known asset left behind by the deceased is the piece land known as **Nandi/Chepterit/362**, measuring 2.0 hectares (the suit property). The deceased had no biological children of her own.

[11] The 1<sup>st</sup> Petitioner, **Pricila Chepkemei (DW1)** gave uncontroverted evidence that she got married to the deceased in a customary woman-to-woman marriage for the purpose of bearing children on her behalf. Hence, on **27 March 2014**, the 1<sup>st</sup> Petitioner filed this petition in her capacity as the deceased's "widow". She filed the petition jointly with the 2<sup>nd</sup> Petitioner, one of the purchasers of portions of the suit property, seeking to be appointed as co-administrators of the subject estate. Likewise, there seems to be no controversy that the only reason the 2<sup>nd</sup> Petitioner came on board was to represent the interests of the purchasers.

[12] Thus, in the Petition filed herein and the affidavit in support, the Petitioners disclosed that the deceased left only three persons surviving him, namely:

- [a] the 1<sup>st</sup> Petitioner, **Pricila Chepkemei Lagat**, as the "widow"
- [b] **Wilson Kipkemboi Koros**, a brother to the deceased;
- [c] **Wesley Kogo**, described as grandson to the deceased.

[13] The Petitioners also furnished a list of the purchasers of the suit property alongside the beneficiaries; and these include:

- [a] Joseph Kipkorir Koech, the 2<sup>nd</sup> Petitioner herein;
- [b] Mary Jerop,
- [c] Dorcas Senge Karan,
- [d] Rose Jeptoo,
- [e] St. Paul Kamonjil Primary School.

[14] The Petition was processed in the usual manner and a Grant of Letters of Administration Intestate was thereafter issued on 5 September 2016 to the two Petitioners. Then, on the 5 December 2016, the Petitioners applied for confirmation of Grant, notwithstanding that a period of 6 months had not yet elapsed, pursuant to the provisions of Section 71(3) of the Law of Succession Act. While that application was pending hearing and determination, the Applicant filed the instant application for revocation/annulment of Grant. The application was brought pursuant to the provisions of Section 76 of the Law of Succession Act, which provides that:

**"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 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 has ordered or 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 provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in material particular; or
- (e) That the grant has become useless and inoperative through subsequent circumstances."

[15] On the face of his application, the Applicant raised the following grounds:

- [a] That the Grant was obtained fraudulently by the making of a false statement or concealment from the court of something material to the case;
- [b] That the Grant was obtained by means of untrue allegation of a fact essential in point of law to justify the Grant notwithstanding that the allegations were made in ignorance or inadvertently.
- [c] That Joseph Kipkorir Koech is a purchaser of a portion of the land belonging to the deceased, Christian Tabukigen Maritim, and therefore has no authority to be an administrator;
- [d] That the Applicant herein is a beneficiary by virtue of being the son of Wilson Kipkemboi Koros, the deceased brother of Christian Tabukigen Maritim; and,
- [e] That the Petitioners did not seek his consent before applying for Grant.

[16] Accordingly, the issues for determination can be summarized to be:

- [a] Whether the Grant was obtained by means of fraud; and who is entitled to administer the estate;
- [b] Who are the rightful beneficiaries of the estate of the deceased.

[17] Section 66 of the Law of Succession Act is pertinent. It provides as follows in terms of preference:

**When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the**

person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- (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 interests as provided by Part V;
- (c) The Public Trustee; and
- (d) Creditors

[18] The contention of the 1<sup>st</sup> Petitioner is that she got married to the deceased; and that this marriage was in the form of woman-to-woman marriage as practiced by the Kipsigis and Nandi communities. Regarding this arrangement among the Nandi and Kipsigis communities, **Eugene Cotran** in his book, **Restatement of African Law, Volume 1, The Law of Marriage and Divorce**, proffered the following position:

**“A woman past the age of child-bearing and who has no sons, may enter into a form of marriage with another woman. This may be done during the lifetime of her husband, but is more usual after his death. Marriage consideration is paid, as in regular marriage, and a man from the woman’s husband’s clan has sexual intercourse with the girl in respect of whom marriage consideration has been paid. Any children born to the girl are regarded as the children of the woman who paid marriage consideration and her husband.”**

[19] In **Monica Jesang Katam vs. Jackson Chepkwony & Another** [2011] eKLR, a similar issue arose and the Court (**Hon. Ojwang, J.** as he then was) was confronted with the question as to whether a woman-to-woman marriage is valid. He took the following view of the matter:

**“I have concluded that the consistency in the testimonies of the petitioner’s witnesses shows the evidence to be truthful. The research-material referred to shows this to have been the typical condition in which a woman-to-woman marriage takes place; and the testimonies show such a marriage to have taken place on 16<sup>th</sup> October, 2006. It is therefore, not true as the objectors say, that the petitioner was only a servant; on the contrary, she was a “wife”, and, by the operative customary law, she and her sons belonged to the household of the deceased, and were entitled to inheritance rights, prior to anyone else. This custom, I hold, is to be read into the scheme of s. 29 of the Law of Succession Act (Cap 160), placing the petitioner and her children in the first line of inheritance; the petitioner herself being “wife of the deceased”, and her children for being the children of the deceased. The conclusion to be drawn is that the petitioner is entitled to the grant of letters of representation.”**

[20] There being no dispute that the 1<sup>st</sup> Petitioner got married to the deceased as aforementioned, there can be no doubt that, as the deceased’s “widow”, she ranks in priority to the Applicant as well as her son, **Wesley Kiprono (PW2)**. She cannot therefore be faulted for making the Petition. In fact, it is commendable that she did not exclude the deceased’s brother, **Wilson Kipkemboi Koros**, or her own son, **Wesley Kiprono**, as beneficiaries. Moreover, since she ranks in priority over the two, the 1<sup>st</sup> Petitioner was under no obligation to obtain their consent, for **Rule 7(7)** of the **Probate and Administration Rules** stipulates that:

**“Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has—**

- (a) Renounced his right generally to apply for a grant; or
- (b) Consented in writing to the making of the grant to the applicant; or
- (c) Been issued with a citation calling upon him either to renounce such right or to apply for a grant.

[21] The foregoing notwithstanding, it is significant that in this case, the Petitioners did file a Consent dated **15 April 2016**. Hence, it is imperative to consider whether the allegations of fraud in connection therewith are tenable.

[22] The Applicant explained that, before the demise of the deceased, she made it clear that her piece of land be shared equally between the 1<sup>st</sup> Petitioner and her (deceased’s) brother, **Wilson Kipkemboi Koros**. He produced as an exhibit the Certificate of Death in respect of **Wilson Kipkemboi Koros**, and it confirms his date of death as **29 April 2014**; about one month after the Petition herein was filed. It is noteworthy however that the consent itself was not filed until **15 April 2016**; and it includes the name of **Wilson Kipkemboi Koros** as one of the people who gave consent to the filing of the Petition alongside **Wesley Kiprono (PW2)**.

[23] Hence, in cross-examination the 1<sup>st</sup> Petitioner was confronted with this anomaly; and in response she conceded that:

**“...Koros could not have signed the documents after his death. I do not know how to read. I did not prepare the consent filed on 15 April 2016...”**

[24] Likewise, the 2<sup>nd</sup> Petitioner acknowledged that **Wilson Kipkemboi Koros** did not sign the consent. In similar vein, **Wesley Kiprono (PW2)** was categorical that he did not sign the said consent. In the premises, and given the evidence of both the 1<sup>st</sup> and 2<sup>nd</sup> Petitioner in that regard, it is manifest that the truth lies in the testimony of the Applicant (**PW1**) and **PW2**. That evidence does prove beyond a balance of probabilities that the consent dated **15 April 2016** is a forged document. It is plainly telling a lie about itself by purporting that it was signed by **Wilson Kipkemboi Koros** on **15 April 2016**, yet the said **Wilson Kipkemboi Koros** died two years earlier on **29 April 2014**.

[25] With regard to the 2<sup>nd</sup> Petitioner, although it was disclosed that he was one of the purchasers, it was misleading that, in the Petition (Form P&A 80) and in the Supporting Affidavit (Form P&A 5), he was listed as a beneficiary of the deceased. In fact, in the Petition, he averred jointly with the 1<sup>st</sup> Petitioner that he had presented the Petition in his capacity as a beneficiary of the deceased; which is false. Thus, the Applicant has proved beyond a mere balance of probabilities that the Grant was obtained fraudulently, by the making of a false statement that the 2<sup>nd</sup> Petitioner was a beneficiary of the deceased; and by means of a forged consent, purporting to show that **Wilson Kipkemboi Koros** was agreeable to the filing of the Petition for Grant in respect of the estate of the deceased by the two Petitioners, **Pricila Chepkemei Lagat** and **Joseph Kipkorir Koech**.

[26] Whereas it is not altogether clear when the sale agreements took place, it is worth noting that neither the 1<sup>st</sup> Petitioner, nor **Wilson Kipkemboi Koros** had any colour of right to sell portions of the property comprising the estate of the deceased before confirmation of Grant. This is because **Section 45** is explicit that:

“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.”

[27] In similar vein, the proviso to **Section 82** of the **Law of Succession Act** is clear that "...no immovable property shall be sold before confirmation of grant..." There is therefore a sense in which the land sale agreement from which the 2<sup>nd</sup> Petitioner purported to derive his authority to act, can be viewed as being null and void.

[28] In the result, I am satisfied that the Applicant made out a good case for revocation of the Grant of Letters of Administration Intestate, issued herein on **5 September 2016** to the Respondents. From the material placed before the Court, the persons who were entitled to act as administrators of the estate of the deceased as at **27 March 2014** when the Petition was filed were the 1<sup>st</sup> Petitioner, and **Wilson Kipkemboi Koros**. It has been demonstrated that the deceased expressed the wish that they share the suit property equally. Thus, they also qualify as the two and only beneficiaries of the deceased. The 1<sup>st</sup> Petitioner would then be at liberty to bequeath her portion to her progeny, including **Wesley Kogo**. As **Wilson Kipkemboi Koros** is also deceased, his share, or what remains of it, ought to go to his beneficiaries, including the Applicant.

[29] Accordingly, I find merit in the application dated **18 May 2018** which is hereby allowed, and orders granted in the following terms:

[a] That the Grant of Letters of Administration Intestate to the estate of **Christian Tabukigen Maritim**, the deceased herein, issued on **5 September 2016** to the Petitioners, **Pricila Chepkemei Lagat** and **Joseph Kipkorir Koech** be and is hereby revoked.

[b] That a new Grant of Letters of Administration Intestate in respect of the estate of the deceased be and is hereby issued forthwith in the joint names of **Pricila Chepkemei Lagat** and the Applicant, **Pius Kipchumba Kemboi**.

[c] That the costs of the application be costs in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 6<sup>TH</sup> DAY OF FEBRUARY 2020**

**OLGA SEWE**

**JUDGE**