



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 207 OF 2013

IN THE MATTER OF THE ESTATE OF MALAKWEN KIPSUGUT (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR CONFIRMATION OF GRANT AND A PROTEST

BETWEEN

KITUR MALAKWEN.....1ST APPLICANT

HENRY MALAKWEN SUGUT.....2ND APPLICANT

AND

RUTH MUSERE TANUI.....PROTESTOR

RULING

[1] On the **24 July 2013**, the two applicants petitioned the Court for Grant of Letters of Administration Intestate in respect of the estate of **Malakwen Kipsugut** (the deceased), who died intestate on **17 August 1987**. They did this in their respective capacities as widow and son of the deceased; and their petition was processed and a grant issued in their joint names on **6 February 2014**. At paragraph 6 of the Affidavit in Support of the Petition, they deposed that the only asset comprising the estate of the deceased is LR No. UASIN GISHU/ILLULA/70, measuring approximately 2.2 Hectares.

[2] In compliance with **Section 71** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**, the petitioners applied for confirmation of grant vide their application dated **28 July 2015**. The said application was supported by the affidavit sworn on **28 July 2015** by the 2nd petitioner/applicant, **Henry Malakwen Sugut**, in which he deposed that the deceased was survived by the following persons:

[a] Kitur Malakwen - widow

[b] Henry Malakwen Sugut - Son

[c] Alex Kipleting - Son

[d] Samuel Kiprop - Son

[e] Kirwa Malakwen - Grandson

[3] The 2nd petitioner also proposed that the aforementioned piece of land be transmitted to the administrators jointly, to hold on their own behalf and as trustees for **Alex Kipletin, Samuel Kiprop** and **Kirwa Malakwen**. It was at this juncture that **Ruth Muserere Tanui** filed what she referred to an Objection to the Confirmation of Grant, which, in essence was an objection to the making of a grant for purposes of **Section 68** of the **Law of Succession Act**. That Objection, dated **10 September 2015**, was thereafter withdrawn on **11 May 2018** and replaced with an Affidavit of Protest, sworn on even date.

[4] It was the contention of the protestor that, not all the beneficiaries of the estate of the deceased were included in the list set out in paragraph 3 of the Supporting Affidavit. In particular, she averred that she is the widow to **Francis Kipkoech Tanui**, one of the sons of the deceased, who is also deceased and who left behind his offspring in respect of whom provision ought to have been made by the petitioners.

She also averred that, as a daughter in law of the deceased, she is entitled to benefit from his estate like other daughters in law and should therefore be provided for in the proposed schedule for distribution. She annexed to her affidavit a copy of the Certificate of Death for **Francis Kipkosgei Tanui** and a copy of the Grant of Letters of Administration Ad Litem to demonstrate her interest in the estate.

[5] Pursuant to the directions given herein on **20 May 2019**, the application was canvassed by way of written submissions, which were filed by learned counsel on **25 September 2019** and **20 October 2019**, respectively. **Mr. Kisuya** for the petitioner reiterated the protestor's averments and added that she was never consulted for purposes of giving her consent to the proposed mode of distribution. Counsel relied on **Nahashon Karungu Macharia vs. Rosemary Kahura Njoroge** [2016] eKLR and **Re Estate of Florence Mukami Kinyua** (Deceased) [2018] eKLR to support his contention that a daughter in law is perfectly entitled to benefit from the estate of her father in law. He urged the Court to overlook the technicalities raised by counsel for the petitioners and uphold justice for purposes of **Articles 27(3)** and **159(2)(d)** of the Constitution.

[6] **Mr. Kagunza** for the petitioners, on his part, submitted that the protestor failed to demonstrate a direct link between **Francis Kipkosgei Tanui** to the estate of the late **Malakwen Kipsugut**. He cited **Sections 29(a)** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**, and **Sections 107 and 109** of the **Evidence Act, Chapter 80** of the **Laws of Kenya** to support his contention that the burden of proof was on the protestor to prove her assertions. It was further the submission of **Mr. Kagunza** that failure by the protestor to take up a Grant of Letters of Administration in respect of the estate of **Francis Kipkosgei Tanui** is detrimental to her application. He pointed out that the temporary grant relied on by the protestor was in respect of the estate of **Malakwen Kipsugut**, the deceased herein, and not **Francis Kipkosgei Tanui**; and therefore that the protestor cannot agitate any interests on behalf of the estate of the late **Francis Kipkosgei Tanui**. He relied on **Trouistik Union International & Another vs. Jane Mbeyu & Another** [1993] eKLR.

[7] On whether a daughter in law and grandchildren have automatic rights of inheritance, counsel relied on **Section 29(b)** of the **Law of Succession Act** and urged the Court to find that, there being no proof of dependence, the protestors claim is untenable. He also cited **Re Estate of Karuri Magu (Deceased)** [2016] eKLR; **Cleopa Amutala Namayi vs. Judith Were** [2015] eKLR and **Re Estate of M'muthamia Mwendwa (Deceased)** [2016] eKLR. Counsel also took issue with the fact that no Summons for Revocation of Grant was filed by the protestor so as to properly invoke the jurisdiction of the Court. He placed reliance on **Re Estate of Kathari Kathitu** (Deceased) [2019] eKLR for the proposition that the protestor was under duty to prove any of the grounds for revocation set out in **Section 76** of the **Law of Succession Act**. Thus, counsel for the petitioners prayed for the dismissal of the protest with costs.

[8] I have given careful consideration to the application for confirmation, its Supporting Affidavit as well as the protestor's averments in the Affidavit of Protest. I have likewise, given due consideration to the written submissions filed by learned counsel for the disputants. The parties are in agreement that the deceased, the late **Malakwen Kipsugut** died intestate on **17 August 1987**; and that he was survived by his widow, **Kitur Malakwen**, who is the 1st Petitioner herein. It is not altogether clear whether the deceased was survived by any daughters, for in paragraph 4 of the Affidavit in Support of Petition, the information supplied relates to the particulars of three sons, namely, **Henry Malakwen, Alex Kiplating and Samuel Kiprop**; and one grandson, **Kirwa Malakwen**.

[9] Be that as it may, having perused the record, it is abundantly clear that the argument that the protestor needed to file an application by way of summons for revocation of grant is misconceived. Misconceived because, while her initial approach to the Court vide the document dated **10 September 2015**, was a little obscure, and understandably so granted that she filed it *pro se*, that document was later withdrawn after the protestor appointed the firm of **Mukabane & Kagunza Advocates** to act for her in the matter. Thus, she replaced it with an Affidavit of Protest, which is the correct document envisaged under **Rule 40(6)** of the **Probate and Administration Rules**. Hence, the protestor has properly invoked the jurisdiction of this court. To that extent, the submissions by **Mr. Kisuya** for the petitioners are misconceived in my view.

[10] Another technical point taken by counsel for the petitioners is the submission that the protestor lacks the *locus standi* to file the protest. This argument was raised on two levels; the first is that, having failed to obtain Grant of Letters of Administration Intestate in respect of the estate of **Francis Kipkosgei Tanui**, the protestor has no legal standing for challenging the proposed division. The second angle has to do with the question whether indeed the said **Francis Kipkosgei Tanui** was the son of the deceased; and whether, in his lifetime, he was married to the protestor.

[11] It is now trite that only a lawfully appointed personal representative can agitate an interest in connection with the estate of a deceased person. In **Trouistik Union International & Another vs. Jane Mbeyu & Another** (supra), it was held by the Court of Appeal that:

“To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the Law of Succession Act. That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all-inclusive answer. It says “personal representative means executor or administrator of a deceased person”. It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative, is the administrator of the estate of the deceased. The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act” section 3 says “administrator means a person to whom a grant of letters of administration has been made under this Act”.

[12] The protestor has demonstrated herein that she applied for and was issued with a Grant of Letters of Administration Ad Litem for the specific purpose of filing an objection in this cause. To my mind, that suffices, and therefore, she has the requisite standing to agitate the protest on her own behalf and on behalf of her children. It is however an entirely different matter whether the protest has merit or not. Thus, the only issue for consideration, is the question whether the protestor's claim to a share of the estate is well founded. As far as can be gleaned from the Affidavit of Protest and the written submissions filed herein, there are two angles to the protest; the first being that the protestor and her three children are entitled to a share of the deceased's estate in their respective capacities as daughter in law and grandchildren of the deceased. The second angle, is that they are in line as heirs, through **Francis Kipkosgei Tanui**, the deceased son of the late **Malakwen Kipsugut** (the deceased herein).

[13] The law is fairly settled that a daughter in law or a grandchild has no direct right to a share of a grandparent's estate; and that any accruing right can only be through the husband, or parent, respectively; and that for them to pitch a direct claim, it must be shown that they were dependants for purposes of **Section 29(b)** of the **Law of Succession Act**, which stipulates that:

“For the purpose of this part, “dependant” means ... such of the deceased’s parents, step-parents, grandparents, grandchildren, stepchildren, children whom the deceased had taken into his family as his own, brother and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death...”

[14] Hence, in **Re Estate of Veronica Njoki Wakagoto** (Deceased) [2013] eKLR, it was held thus:

“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parent are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

[15] Thus, whereas there is no evidence of dependency, there is no denying that the two petitioners recognized and included one of the sons of the testator, **Alex Kiplating**, as one of the beneficiaries of the deceased's estate, misleadingly describing him in the Supporting Affidavit as a son. Moreover, the testator exhibited a letter from the chief of their area as **Annexure RMT-30(b)**; and it shows that she is the widow of the late **Francis Kipkosgei Tanui**. This evidence is uncontroverted. It is noteworthy too, that the Certificate of Death in respect of **Francis Kipkosgei Tanui** confirms that the 1st Petitioner, **Kitur Malakwen**, is his mother, and that he died on **16 December 1999** at the age of 32 years; thus begging the question why this information was concealed from the Court by the two petitioners in their Petition for Grant. The only plausible answer is that which was proffered by the testator, namely, that the petitioners were intent on disinheriting the late **Francis Kipkosgei Tanui's** family, save for **Alex Kiplating**.

[16] In the premises, I am satisfied that the testator has made a good case for the inclusion of her name as one of the beneficiaries of the estate of the deceased herein, for and on behalf of the estate of her deceased husband, **Francis Kipkosgei Tanui**. Thus, the orders that commend themselves to me, and which I hereby give, are as hereunder:

[a] That it is hereby declared that the testator is entitled to a share of the estate of the deceased herein in her capacity as the widow of **Francis Kipkosgei Tanui** for and on behalf of the estate of her deceased husband;

[b] That the proposed Mode of Distribution annexed to the Supporting Affidavit in support of the petitioner's Summons for Confirmation of Grant be amended to include the name of the testator and for purposes of being apportioned a share of the deceased's estate;

[c] That the application for Confirmation of Grant be listed forthwith for hearing and final determination.

[d] Costs to be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF MAY, 2020

OLGA SEWE

JUDGE