



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 217 OF 2012

IN THE MATTER OF THE ESTATE OF ELIZABETH

TAPRANDICH BARNGETUNY.....(DECEASED)

JONATHAN KIPTANUI SIGEI.....ADMINISTRATOR

VERSUS

EMILY CHERONO.....INTERESTED PARTY

DAVID CHIRCHIR CHEBET.....APPLICANT

JUDGMENT

1. Elizabeth Taprandich Barngetuny died on the 28th June 2009. Jonathan Kiptanui Sigai petitioned for letters of administration intestate to the estate of Elizabeth Taprandich Barngetuny. Letters of administration intestate were issued to Jonathan on 26/7/2012 and the grant confirmed on 12/4/2013.

2. By way of a summons for revocation or annulment of grant dated 4/6/2014, Emily Cherono (Interested Party) seeks orders;

1. Spent.

2. THAT an order that grant of letters of administration made on 26th July 2012 to JONATHAN KIPTANUI be revoked or annulled.

3. Spent.

4. THAT costs of this application be provided for.

3. The summons is based on grounds;

1. THAT JONATHAN KIPTANUI SIGEI concealed the material fact that the deceased had a daughter during his application for a grant of letters of administration.

2. THAT JONATHAN KIPTANUI SIGEI, without reasonable cause has failed to provide diligently with the administration of the estate (sic). He has dealt with the estate of the deceased and intends to disinherit the daughter of the deceased by selling off the property that is remaining in the hands of the daughter of the deceased.

3. THAT JONATHAN KIPTANUI SIGEI has, without reasonable cause failed 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) and Section 83 of the Law of Succession Act.

4. THAT in the event of this happening, the interested party will be left destitute with nowhere to live.

It is further supported by the applicant's affidavit sworn on the 4/6/2014.

4. David Chirchir Chebet (creditor) has vide an application dated 25/6/2014 lays claim to 6 acres forming part of the estate of Elizabeth having allegedly bought the same.

5. By a consent of the parties recorded in court on 27/1/2016, it was agreed that the matter be heard by way of *viva voce* evidence.

Interested Party's Case

6. The interested party called four witnesses. PW1 (Musa Kemboi) told the court that the deceased was his aunt. The deceased was a sister to his (PW1's) mother. Her name was Samari Chepkoech Cheruiyot. The deceased did not have any other sibling other than Samari. PW1 stated that the administrator herein (Jonathan Kiptanui Sigei) was not known to him until the death of the deceased.

7. It is PW1's evidence that the administrator was not present at the burial of the deceased. He did not know that the deceased had died. He added that he came to know Emily Cherono and Philip Kiprotich in 1982 and the deceased told him that she had taken in the two after their mother died.

8. As at the time of the death of the deceased only Emily Cherono was with the deceased Philip having disappeared from 1997 to date.

9. On cross-examination by the administrator, PW1 acknowledged that the administrator was his distant uncle. He acknowledged that the issue of Chebet's (creditor) claim over the land had been raised in a meeting held in 2010.

10. When cross-examined by counsel for the creditor, PW1 said that during her lifetime the deceased had sold one (1) acre of land to the creditor. It was not three (3) acres. The creditor cultivates the land. He has been cultivating for long. He confirmed that no adoption orders were sought in respect of Emily and Philip.

11. PW2 told the court that the interested party (Emily) is a daughter of his sister, one Alice Chepkemoi Chumo who died in 1981. Philip Kiprotich was a son to Alice. Both Emily and Philip were orphaned after the death of their mother Alice.

12. It is PW2's evidence that the deceased herein approached his (PW2's) family with intention of taking in Emily and Philip after the death of their mother. A meeting was held. The deceased paid Kshs. 1,000/= which was equivalent to 2 cows. In total she was to pay 5 cows. She did not go with the children but picked them later. Philip is since lost. The arrangement according to Kalenjin traditions was a marriage between the deceased and the mother of Emily and Philip.

13. PW2 stated that he did not know the administrator (Jonathan) was a relative of deceased. Deceased has only one sister.

14. On cross-examination, PW2 stated that it is normal in Kalenjin Customs to give out children. The children were given away in 1982.

15. Further cross-examined by counsel for the creditor, PW2 said he came to know the creditor when he wrote a letter claiming half the land after death of deceased. He only came to meet him in court later. He confirmed that the land is cultivated by Emily and Chebet. He said he did not know whether the deceased sold three (3) acres of her land in her lifetime. He added that the adoption of Emily and Philip was customary.

16. PW3 adopted his statement as evidence in chief. It is his evidence that he was a neighbor to the deceased at Rare. He stated that in the early eighties Emily Cherono and her brother came to live with the deceased because she was not married and had no children. After 1997 clashes PW3 moved to Bararget Settlement Scheme and deceased too followed suit. Deceased continued living with Emily Cherono but her brother was not there. PW3 did not know Jonathan and Jonathan never lived with the deceased. Everybody in Rare and Bararget knew Emily as a child of deceased.

17. PW4 (Emily) told the court that Alice Chepkemoi Chumo is her biological mother. Kipng'etich Chumo is her grandfather. She added she has one brother namely Philip Kiprotich. She does not know where Philip went after the 1997 clashes. Emily denied that Jonathan is a brother to the deceased. She adds that her parent who took care of her is the deceased.

18. PW4 challenges the claim by the creditor that he bought 6 acres of land from the deceased. The deceased only told her that the creditor had paid for the processing of the title to the land. He has not procured the title yet. She adds that the creditor only gave them a cow and Kshs. 5,000/= and this is the only debt owed to the creditor. PW4 is not aware if consent of the Land Control Board was obtained. PW4 is not aware that one Ibrahim Mbugua Muriu bought parcel of land Nakuru/Laare/Bargaret which has been distributed to the said Muriu.

19. On cross-examination PW4 acknowledged her signature in the agreement dated 19/3/2009. She recalls a sitting at home. She signed. She was not told the land was being sold. Further cross examined PW4 stated that at the burial, the creditor said the deceased owed him.

The Administrators Case

20. In his evidence Jonathan stated that the deceased was his sister. The deceased was not married. When she died and was buried Jonathan was not informed. In 2010 he was called to resolve a land dispute involving the creditor who claimed to have bought land. It is the creditor who looked for him. He produced an agreement dated 19/3/2009 which relates to some Kshs. 20,000/= passed to Musa Sigilai by Jonathan to take to his mother (not clear in reference to which specific person) which monies were received from one Mbogua who states at the bottom of the said agreement that it was the start of a failed transaction of a sale with the family of "Kapusuta". Of note is that this agreement is largely unintelligible(see D exhibit 1©).

21. Defence exhibit Number 1(b) produced is had written narrative stating that the rightful heirs to the deceased are Jonathan Sigei and Samari Chepkoech Ngetich and not Emily Cheron. The document states that Sigei had given Kshs. 87,000/= to Emily Cheron for the following reason, when owner of the land was sick before death she was with Cheron (sic). This document is signed by a chief at the bottom.

22. D. Exhibit 1 (a) is a sale agreement between the deceased and the creditor. It is dated 17/10/2005.

23. When cross examined by counsel for the interested party, the administrator said that he had worked as a police officer. His last station was Marsabit. He said he only learnt of the death of the deceased herein when his own mother died and there was a burial. He added that he sold land to the creditor but the agreement does not indicate the acreage. There was an earlier agreement for sale of land. In both agreements, there was no consent of the land control board.

24. DW2 told the court that the mother of the deceased was not the mother of the administrator. The mother of the deceased had daughter's only. DW2 said the rightful heir to the deceased's estate in Jonathan because Jonathan buried the mother and father of the deceased.

25. On cross examination, DW2 confirms that the deceased's only sibling was one sister. There were no male children.

The Creditor's Case

26. The creditor testified that at one time the deceased needed to process her title. He offered her money for the purpose. An agreement was recorded before old men.

27. At the time of her death, the creditor owed Kshs. 35,000/=. Emily denied that creditor had bought land. This forced the creditor to look for the family of the deceased and he was directed to Jonathan.

28. The family agreed that creditor was to get 3 acres. This is the 3 acres distributed to the creditor as per the grant. Later the family decided to sell the remainder. The creditor paid Kshs. 450,000/= to Jonathan and his people. They were 6 persons.

29. On cross examination, the creditor confirms that Emily lived with the deceased on the land. Emily buried the deceased. The agreement of 2014 does not indicate acreage of the land sold.

30. As regards the agreement dated 17/10/2005 the creditor confirmed that at the time of the death of the deceased, he had paid Kshs. 85,000/= out of the total payable Kshs. 120,000/=. The consent of the Land Control Board was never sought.

31. The creditor acknowledges some discrepancies in the signatures of the deceased in the sale agreements dated 17/10/2005 and the copy of the agreement supplied by the creditor in the list of documents.

32. All the parties filed written submissions.

33. I have had occasion to consider the summons for revocation of grant, the affidavit in support and the replies thereto. I have had regard to the respective testimonies on record, learned submissions by counsel, which I have considered even on areas I may not necessarily mention here, have further illuminated the matter.

34. Issues for determination are;

1. Whether the grant issued to Jonathan Kiptanui Sigei offends Section 76 of the Law of Succession Act and should be annulled or revoked for concealing the existence of beneficiary Emily Cheron and for giving false information.

2. Whether David Chirchir Chebet is entitled to 3 acres of land from the estate purportedly bought before the deceased died.

3. Whether any sale of land (if at all) to David Chirchir Chebet by Jonathan Kiptanui Sigei after confirmation of the grant issued to the said Sigei should be vitiated.

4. Based on the answers to the above, what orders should lie in the interests of the estate herein and the beneficiaries.

35. In the form P & A 5 filed in court by Jonathan on 10th April, 2012 at paragraph 4, Jonathan Kiptanui Sigei ID Number xxxx described himself as a brother to the deceased and the only survivor.

36. From the evidence adduced by Jonathan himself and by the independent witness Wilson Kimutai Arap Koros, it is clear that Jonathan was not a brother of the deceased. Indeed witness Wilson puts it succinctly. He said;

“The mother of the deceased was not the mother of the administrator. The mother of the deceased had daughters only.”

37. This revelation coming from a witness called by Jonathan himself clearly shows that Jonathan made a false statement when applying for the grant of letters of administration in respect of the estate herein.

38. Section 76 of the Law of Succession Act provides:-

“ S. 76. 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 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 any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

39. From the evidence of PW1, it is clear that the deceased had only one sister by the name Samari Chepkoech Cheruiyot. Deceased had no other siblings. PW1's evidence fortifies the claim by Emily Cheronon that she and her brother were taken in by the deceased in 1982 and that at the time of the death of the deceased only Emily Cheronon was living with the deceased as the brother (Philip Kiprotich) had disappeared without trace.

40. Jonathan produced a hand written document, D. Exhibit 1(b), which purports to state that the beneficiaries of the deceased were Jonathan himself and Samari Chepkoech Ngetich and not Emily Cheronon. The document discloses a purported Kshs. 87,000/= given to Emily by Jonathan "for the following reason, when the owner of the land was sick before death she was with Cheronon" (sic).

41. This is a clear acknowledgement that even Jonathan was aware of the relationship between Emily and the deceased and when he now purports to deny this, he is less than candid.

42. Indeed, PW3, a neighbour to the deceased confirms that in the early eighties, Emily and her brother came to live with the deceased because she was not married and had no children. Everybody in the neighbourhood knew Emily as a child of the deceased.

43. PW3 narrated to the court the process through which Emily and Philip went to live with the deceased. It was his evidence that the mother of Emily Cheronon and Philip Kiprotich died and the deceased approached the family of PW3 seeking to take in Emily and Philip when their mother died. Alice Chepkemai Chumo the mother to Emily and Philip was a sister to PW2. The request was acceded to and the deceased paid Kshs. 1,000/= which was equivalent to 2 cows. In total she was to pay 5 cows. In total she was to pay 5 cows. This was a Kalenjin customary practice.

44. In light of the above and noting that even Jonathan acknowledges a relationship between Emily and the deceased, the evidence before me clearly shows that the deceased had taken in Emily Cheronon and Philip Kiprotich as her children.

45. Counsel for the creditor submits that there exists an elaborate process of adoption provided for under **part VII** of the **Children's Act No. 8 of 2001**. Adoption can only be done through a court process and becomes legal once an adoption order under **Section 154** of the **Children's Act** is issued. That is a correct statement of the law.

46. Counsel proceeds to submit that for an application like the one before court to succeed, an applicant has to show that they have an interest in the estate in question either as a beneficiary, dependants and/or creditor. The interested party herein has failed to prove her interest in the estate.

47. As stated above, there is ample evidence showing that the deceased took in Emily Cheronon and Philip Kiprotich as her own children. **Section 29** of the **Law of Succession Act** provides;

“Sec. 29. For the purposes of this Part, “dependant” means -

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grand children, step children, children whom the deceased

had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

48. In matters succession therefore, a child need not be legally adopted to be a dependant. Emily Cherono and Philip Kiprotich are properly within the ambit of “children whom the deceased had taken into his family as his own....”

49. By listing himself as the only survivor of the deceased being a brother and failing to disclose the existence of Emily, Jonathan blatantly flouted **Section 76(b) & (c)** of the **Law of Succession Act**.

50. The grant issued was thus irregular and is one for annulment/revocation.

51. Is David Chirchir entitled to 3 acres of land out of the estate of the deceased as a creditor? David has testified that during the lifetime of the deceased, the deceased agreed to sell land to him at Kshs. 40,000/= per acre. At the time the deceased died, David had made payments totaling Kshs. 85,000/= leaving a balance of Kshs. 35,000/=. A written agreement has been produced as Exhibit 1 (a). It is dated 17/10/2005.

52. PW2 on cross examination by Ms Mukira for the creditor stated;

“I visited the subject land about 3 years ago. It is cultivated by Cherono and Chebet. I do not know the acreage. Emily told me it is half each (3 acres).”

53. PW4 (Emily) stated that the deceased never told her of sale of land to David but she only told her that David had paid for processing of title. The only debt Emily acknowledged as owed to David was a cow and Kshs. 5,000/=.

54. That evidence is materially contradicted by the evidence of PW1 who on cross examination states that the deceased herein had sold 1 acre of land to Chebet (David). He states it is not 3 acres.

55. It is common ground that David Chebet is in occupation of a portion of the land. PW2 confirms that the land is cultivated by Emily and David. He does not know the acreage. He does not know if deceased sold 3 acres of her land during her lifetime.

56. PW3 stated that he knows nothing about David’s connection with land 466.

57. I have considered the evidence for and against the sale. There is a written agreement duly signed by the deceased and David and witnessed by 6 witnesses for the sale of 3 acres to David by the deceased. There is therein written evidence of payment of Kshs. 85,000/= leaving a balance of Kshs. 35,000/= which is acknowledged by David. There is evidence that David is in occupation of part of the land and none of the witnesses challenging the sale has come up with a plausible explanation why David should be in occupation if it were not for having bought the land.

58. Putting the rival evidence on a weighing scale on a balance of probabilities, I am satisfied that the deceased in her lifetime sold 3 acres out of parcel number 466 to David Chirchir Chebet. David paid Kshs. 85,000/=. The said David Chirchir Chebet qualifies as a creditor to the estate and he is entitled to the portion sold to him by the deceased subject to clearing his indebtedness with the administrator of the estate which is Kshs. 35,000/=.

59. As to whether the purported sale by Jonathan (Administrator) of an extra 3 acres after confirmation of grant is valid and passed a lawful title, I note as found above Jonathan obtained the grant fraudulently. He gave false information to court that he was a brother to the deceased. He concealed the existence of other beneficiaries. Intriguingly, David the purported buyer states on cross examination that he paid money to Jonathan and 6 members of the family. These included DW2. He thus shared out monies from the estate with strangers who were not named as beneficiaries in the petition or as parties in the sale of land agreement.

60. The sale agreement relied on for this purported sale does not indicated the acreage of the property being sold.

61. **Section 93** of the **Law of Succession Act** provides;

“Sec. 93 - A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this act.”

62. As held by this court **IN THE MATTER OF THE ESTATE OF STEPHEN MWANGI GITHUKA, SUCCESSION CAUSE NUMBER 855 OF 2015**, a blanket reliance on **Section 93** of the **Law of Succession Act** by purchasers for protection when immovable property is bought from administrators of estates is not tenable and such protection must depend on the facts and circumstances of each case.

63. In our instant suit the sale agreement on whose basis the claim is anchored is unenforceable in law. What was being sold is not specified. My attention is drawn to statements filed by the administrator showing that David Chirchir Chebet paid monies via Mpesa to Samari Chepkoech Ngerechi (Kshs. 50,000/=), Kiprono Arap Kosgei (Kshs. 50,000/=), Simon Sang (Kshs. 50,000/= pursuant to the sale agreement. These persons were not party to the agreement. This whole transaction is shrouded with irregularities that are irredeemable. Before David could seek protection as a purchaser under **Section 93** of the **Law of Succession Act**, he must first and foremost prove a valid

sale which is not the case herein.

64. Even assuming that the defects in the agreement and payments outside the terms of the agreement could be cured, such a sale can be invalidated if shown to be either fraudulent and/or upon other serious defects and/or irregularities.

65. This was the holding of the court in the matter of **CHRISTOPHER JUDE ADELE (DECEASED) 2009 eKLR** where *K.H. Rawal J* (as she then was) stated;

“The correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of section 23 of the RTA (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a Carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal action prejudicing the interest and rights or right beneficiaries of the estate.

In short, I do not agree that section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative.”

66. The rights of beneficiaries to an estate must be jealously guarded from rogue masqueraders as administrators. In my view, where it is manifestly clear that a grant was obtained by a person not entitled so to do, any purported sale of such a property after confirmation must be treated as what it is, a fraud. That fraud started the moment the petition was filed and runs through to distribution or sale of the property and it would amount to injustice of monumental proportions to protect a purchaser who benefits through such a process by a rigid interpretation of **Section 93** of the **Law of Succession Act**.

67. The court must rise to the occasion and call out such sale as it is; a fraud that was started the moment the petition for letters of administration was filed by a person not entitled to the estate.

68. A victim of such an outcome would obviously have ready remedies against such a fraudster directly.

69. The **Court of Appeal** in **JANE GACHOKI GATHECA vs PRISCILLA NYAWIRA GITUNGU & ANOTHER [2008] eKLR** gave appropriate clarity on where the protection under **Section 93** of the **Law of Succession Act** is unavailable. The Court stated;

“We think, with respect, that there is a fallacy in invoking and applying the provisions of Section 93(1) of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where, firstly, there is a “transfer of any interest in immoveable or moveable property”. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void *ab initio* and the property is traceable.”

70. In view of the foregoing, the purported sale of land by Jonathan (Administrator) to David Chirchir Chebet was irregular, *void ab initio* and of no effect.

71. The cumulative effect of the above is that the applicant has achieved the threshold for revocation of the grant herein as per **Section 76** of the **Law of Succession Act**. David Chirchir Chebet has also proved that he is a creditor to the estate to the extent of getting 3 acres of land to be excised from parcel of land Nakuru Baraget Settlement Scheme/466 subject to payment of Kshs. 35,000/= being the balance of purchase price. However his purported purchase of a further three (3) acres from Jonathan Sigei (administrator) is vitiated for reasons stated above.

72. In the absence of other claimants to the estate Emily Cherono is the only known existing beneficiary.

73. Consequently, I allow the application for revocation of the grant herein and make the following orders;

1. The grant of letters of administration intestate issued to Jonathan Kiptanui Sigei on 26/7/2012 and confirmed on 12/4/2013 is revoked.

2. Emily Cherono is hereby appointed the administrator of the estate of Elizabeth Taprandich Barngetuny and a grant of letters of administration to issue.

3. The grant is confirmed in terms that parcel number Nakuru/Baraget Settlement Scheme/466 transmits to Emily Cherono and that distribution to include 3 acres excised from the said land in favour of David Chebet Chirchir.

4. Each party to bear its own costs.

Dated and Delivered at Nakuru this 4th day of April, 2019.

A. K. NDUNG'U

JUDGE