REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

SUCCESSION CAUSE NO 35 OF 2017

IN THE ESTATE OF KIPTOO ARAP MALUCHI

SELLY CHEBET MOLEL.....PETITIONER/RESPONDENT

VERSUS

PHILIP KIPKEMOI TOWETT.....OBJECTOR/APPLICANT

RULING

INTRODUCTION

1. The objector has applied for the revocation or annulment of the grant issued to the petitioner on the following grounds. The petitioner secretly applied for letters of administration intestate in respect of the subject estate. The grant was obtained through defective proceedings and was obtained fraudulently by the making of a false statement or by concealing from the court the full list of assets of the estate. Additionally, the petitioner also did not disclose the full list of beneficiaries.

2. The petitioner has opposed the application. She has denied that she secretly applied for the grant of letters of administration. She has also denied that she did not disclose all assets of the estate.

The case for the objector.

3. The objector is the step brother of the petitioner. The mother of the objector was the second wife of the deceased, while the mother of the petitioner was the first wife of the deceased. The objector (Pw 1) gave evidence in support of the objection and called two witnesses in support of the objection. Pw 1 testified that his deceased father died in 2000. He also testified that he lives on land parcel No Cis-Mara/IL motiok/ 1096, which is the property of his late father. Pw 1 produced the title deed in respect of that land as exhibit Pexh 1, which shows that the land is registered in his late father's name. It was his further evidence that the said land is now registered in the name of the petitioner, a matter in respect of which he produced a certificate of official search as exhibit Pexh 2.

4. It was also his evidence that the deceased had another parcel of land being Cis-Mara/ Il-Motiok/62, in respect of which he produced a title deed as exhibit Pexh 4. In addition to the foregoing Pw 1 testified that the deceased also had bought shares in Esinoni land group ranch and had the land registered in the name of the petitioner.

5. Furthermore, the objector continued to testify that the petitioner did not consult them before she filed the succession cause in the High Court at Kericho, being succession cause No 259 of 2014. Pw 1 also produced a letter from the chief of Mulot location as exhibit 5, in which all the names of the fifteen beneficiaries including the petitioner are listed. It is his evidence that land parcel Nos Cis-Mara/IL Motiok/1096 and 62, be divided equally among all the beneficiaries.

6. The petitioner then called Jane Maritim (Pw 2). Pw 2 testified that she is a sister to Pw 1. It was her evidence that land parcel No Cis-Mara/il Motiok/1096 be subdivided equally among the fifteen beneficiaries. She further testified that the deceased was a member that owned land reference No. Cis-Mara/il Motiok/62. It is her evidence that her brother Joseph Towett and sister Hellen Chemtai live on this parcel of land. Finally, she testified that the petitioner was bought land at Chebinyiny by their deceased father.

7. Finally, the objector called Samuel Kibet Rono (Pw 3). Pw 3 is a cousin to the petitioner. It was his evidence that the deceased had a share in the group ranch land reference Cis-Mara/il Motiok/62, which is fifty-five acres. He also testified that the deceased in 1980 gave the petitioner five acres of land at Chebinyiny, which parcel of land, the deceased bought for the petitioner.

8. He also testified that no one is claiming land parcel No. Cis-Mara/il Motiok/4412, which is registered in the name of Selly Chebet Moley, according to the search certificate, exhibit exh 6. Pw 3 continued to testify that after the death of the deceased, the petitioner started to claim a share in land reference numbers Cis-Mara/il Motiok/1096 and 62. It was also the evidence of Pw 3 that the petitioner was given one cow in response to her claim of shares in the two parcels of land. Pw 3 further testified that the petitioner lives on a five-acre land parcel No Cis-

Mara/il Motiok/ 4412, which was bought for her by the deceased. Finally, it was his evidence that according to a letter dated 23rd September 2003, defence exhibit Dexh 2, the petitioner is a member of Esinoni land group ranch.

The case for the petitioner

9. The petitioner testified in her own behalf and called three witnesses. She testified that she approached her brothers for a share of the land of the deceased. They told her there was no land for her, since she was married. As a result, she filed a case before the Mulot Land Disputes Tribunal claiming her share from his brothers, which ruled in her favour according to defence exhibit Dexh 3. The brothers appealed to the Land Disputes Appeals Committee for Rift Valley Province, which found in their favour according to defence exhibit Dexh 4.

10. Furthermore, the petitioner was issued with a letter by the chief of Kiplabotwa location in Bomet County defence exhibit Dexh 6 (a), which introduced her as the only child of her deceased mother. She then proceeded to successfully apply for a confirmed grant which was issued to her according to defence exhibits D exh7 (a) and (b), in which she is the only beneficiary. It was also her evidence that the title deed for land reference No Cis-Mara/il Motiok/1096 got lost as result of which it was advertised as lost through the Kenya Gazette, which was produced as defence exhibit Dexh 8.

11. It was also her evidence that the deceased had land at Oldany, being land reference No Cis-Mara/il Motiok/ 437, which he bought and had it registered in the name of her brother Chimon. She further testified that land reference Cis-Mara/il Motiok/62 was subdivided into several parcels. All her brothers are living in those parcels. She also testified that the objector sold the property of the estate without consulting her.

12. In addition to the above land parcels, the deceased had 60 heads of cattle, each animal being valued at shs. 50,0000. He also had 40 sheep and goats, with each being valued shs. 4,000. The petitioner denied being given any animal. It was also her evidence that the deceased had an ox plough valued at shs 6,000. He also left a posho mill.

13. The petitioner denied being bought land reference Cis-Mara/il motiok/ 4412. She testified that she was given this parcel of land because she was a member of the group ranch. In this regard, she produced minutes of Esinoni group ranch as defence exhibit D exh 1 (a) and (b).

14. According to her the assets of the estate should be shared as follows. Land parcel Cis-Mara/il motiok/62 should be divided equally between the first house and the second house of the objector. Furthermore, land reference No. Cis-mara/il motiok/1096 should be given to her wholly. It was also her evidence that she took out citation proceedings against her brothers in the High Court at Kericho, because there was no High Court at Narok at that time, being citation No 32 of 2012 for refusing to take out letters of administration. The citees who were her brothers when served expressed their willingness to take out letters of administration. As a result, the High Court ruled (Sergon, J) ruled that the citation proceedings were not appropriate and the same were struck out. The ruling was produced as defence exhibit exh 5

15. The petitioner called Elijah Tuie (Dw 2). He testified that the mother of the deceased died while living with the deceased. He testified that the deceased had one motor vehicle, whose whereabouts he does not know.

16. The petitioner also called Chorerei (Dw 3). Dw 3 testified that the deceased is her daughter and was a member of Esinoni group ranch. She bought land reference No Cis-mara/il motiok/4412 from that group ranch. It was also her evidence that the deceased owned land reference No Cis-mara/il motion/62 and had bought parcel No. Cis-mara/il motiok/ 437 and had it registered in the name of Stephen. He also testified that the deceased had 60 heads of cattle and 40 sheep and goats.

17. The petitioner finally called James Rono (Dw 4). Dw 4 testified that the deceased was his uncle. Dw 4 further testified that land reference No Cis-mara/il motiok/ 1096 is the property of the deceased, although those residing there are not the sons of the deceased. He also testified that Stephen lives on the land of the deceased at Esinoni.

Submissions of the counsel for the petitioner.

18. Both counsel filed written submissions. Mr. Langat for the petitioner submitted that the objector was aware of the intention of the petitioner to administer the estate. After the ruling striking out the citation proceedings was delivered, the objector did not file succession proceedings.

19. Mr Langat further submitted that land reference No Cis-mara/il motiok/62 is available for distribution, although it is owned by five people including the deceased. It was also his submission that land reference No. Cis-mara/il motiok/1096 is not available for distribution and its ownersip should be maintained as the property of the petitioner. He further submitted that land parcel Nos Cis-mara/il motiok/4727, 4728, and 4729, which were as result of subdivision of the original land reference No Cis-mara/il motiok/62 are available for distribution, since it was originally the property of the deceased. Counsel further submitted that land parcel No. Cis-mara/il motiok/437 is available for distribution since the deceased bought it and had it registered in the name of his son.

20. Mr. Langat also submitted that the land parcel No. Cis-mara/il motiok/4412 is the property of the petitioner and is not available for distribution. He has therefore submitted that the summons for revocation of the grant should be dismissed with costs to the petitioner.

Submissions of counsel for the objector.

21. Ms. Maritim for the objector has submitted that the property of a polygamous deceased should be divided among the houses according to the number of children in each house, with the surviving spouse added as additional unit to the number of children in terms of section 40 of the Law of Succession (Cap 160) Laws of Kenya. She also submitted that since both wives of the deceased are dead, the first house has only the petitioner as a beneficiary while the second house of the deceased has fourteen children. According to her the property of the deceased is

to be divide equally among the fifteen children as beneficiaries. She cited the decision of the Court of Appeal in ***Catherine Nyaguthii Mbauni v Gregory Maina Mbauni, Civil Appeal No. 34 of 2004 at Nyeri*** in support of that submission.

22. Furthermore, she submitted that it is customary law that applies in respect of livestock, where a deceased died intestate. She cited sections 32-part V and 33 of the Law of Succession (Cap. 160) Laws of Kenya, in support of her submissions. She submitted that the applicable law in respect of the livestock is Kipsigis customary law. She therefore submitted that the mode of distribution of livestock as proposed by the petitioner has no basis in law. The reason being that the Kipsigis customary law has not been proved by evidence. The 2010 Constitution in article 2(4) recognizes the application of customary law. Section 3 of the Judicature Act (Cap 8) Laws of Kenya similarly recognizes its application and prescribes the circumstances under which it applies. Its application in terms of mode of distribution is a matter of fact which has to be proved by evidence.

23. Counsel has further submitted that in respect of parcels of land, some of them are not available for distribution. According to counsel the only property that is available for distribution is Narok/Cis-mara/il motiok/1096, which now is registered in the name of the petitioner. Land parcel No Cis-mara/ il motiok/62 is not available for distribution. This property is owned jointly by Kiptoo arap Malunji (the deceased herein), Kitur arap Malunji (also deceased), Chimon arap Towet, Richard Kipngetich arap Towet, Joseph Kipkoech arap Towet, as at 11 th September 1980, but as at 18th December 2012 the title was closed upon subdivision and the resultant new numbers were issued namely Cis-mara/il motiok4727 and 4729. The last property namely Cis-mara/il motiok/62 is not part of the property of the estate, since the land is registered in the joint names of the deceased and other third parties. She has therefore submitted that Cis-mara/il motiok/62 is held in trust by the sons of the deceased on behalf of the estate of the deceased, which is a matter to be determined by the Environment and Land Court. It is that court that has jurisdiction to determine issues of ownership of land.

24. Counsel also cited the decision of the High Court (Musyoka, J) *in Succession Cause No 1946 of 2002**, In the Estate of Ng'ang'a Mwangi alias Suleiman Ng'ang'a Mwangi (deceased)***. In that cause the court held that a probate court cannot make determinations as to whether a claim is statute barred or not or questions of ownership of property. It also held that when confirming a grant, the assets ought to be ascertained and the beneficiaries ought to be established including their shares which ought to be known. Finally, that court also held that it must also be shown that the property is available for distribution and that any issues that arise as to ownership and existence of trusts, are matters that should be taken away from the distribution list and should await determinations in separate proceedings.

25. Counsel has therefore urged the court to revoke the grant issued to the petitioner on 8th March 2016. Thereafter the court should revoke the title deed issued to the petitioner as the owner of land parcel No Cis-mara/il motiok/1096 and the same be distributed equally among the beneficiaries.

26. I have considered the evidence of the objector and that of the petitioner and the submissions. In the light of the applicable law, I find the following to be the issues for determination.

1. whether or not the objector has made out a case for the revocation of the grant.

2. which properties are available for distribution?

3. which is the appropriate mode of distribution?

4. which are the final disposal orders?

Issue 1

27. I have considered the objector's evidence and that of the petitioner. As a result, I find that the petitioner did not disclose to the probate court in Kericho that there were fifteen beneficiaries in the estate of the deceased. This is clear from the certificate of confirmed grant issued in her favour on 8th March 2016 by the High Court in Kericho in succession cause No 259 of 2014. In this regard, defence exhibit D exh 7 (b), being the certificate of confirmation of grant is clear on this point.

28. Furthermore, the grant of letters intestate defence exhibit D exh 7 (a) is also clear on this point. Finally, in this regard there is the letter of introduction defence exhibit D exh 7(a), in which the petitioner is shown as the sole beneficiary of the estate of her deceased mother. The children of the second house are not mentioned in that letter. The fact that she had taken out citation proceedings, defence exhibit D exh 5 did not in itself constitute full disclosure of what was required of her in the probate court. I therefore believe the objector's evidence that the petitioner did not consult them before applying for letters of administration, which resulted in the issuance of certificate of confirmed grant. I therefore find that the petitioner concealed material facts from the probate court. The objector has made out a case for the revocation of the grant.

Issue 2

29. In this regard, I find that land reference No Narok/Cis-mara/il motio k/62 is registered in the names of the deceased, Kitur arap Towet, Chimon arap Towet, Richard Kimngetich arap Towet and Joseph Kipkoech arap Towet. The share of the deceased in this parcel of land has not been ascertained. It therefore follows that this parcel of land is not available for distribution. I find the case of ***in the estate of Nganga Mwangi*** supra to be persuasive. Similarly, I find that the other parcels of land do not form part of the estate of the deceased. Furthermore, I also find that the petitioner has not proved the mode of distribution of the livestock under Kipsigis customary law, since the same is by statutory law governed by that law. They are not available for distribution. I further find that monetary value of both the two ox ploughs and the posho mill should be shared equally among the fifteen beneficiaries.

30. The certificate of confirmed grant in favour of the petitioner is hereby revoked. Similarly, the title deed issued to the petitioner in respect

of land parcel No. Narok/Cis-mara/il Motikok/1096 is hereby revoked.

31. Finally, I find that land parcel No. Narok/Cis-mara/il motiok/1096 is part of the estate and should be equally shared among the fifteen beneficiaries in accordance with the Court of Appeal decision in ***Catherine Nyaguthii Mbauni v. Gregory Maina Mbauni,*** *supra.*

32. There will be no order as to costs.

33. The properties that are in dispute should have their status determined in another forum, namely the Environment and Land Court.

Ruling dated, signed and delivered in open court at Narok this 4th day of April, 2019 in the presence of Ms Maritim for the objector and Mr. Langat for the Petitioner.

J. M. Bwonwonga

Judge

4/4/2019