



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

MISC. SUCCESSION CAUSE NO. 1 OF 2019

ESTATE OF KIPTOO KIPKECH (DECEASED)

GRACE TUNGO KIPTOO.....1ST ADMINISTRATOR

TUNGO CHERUIYOT.....2ND ADMINISTRATOR

VERSUS

KIPKOCHOI KIPTOO

REBECCA TITOMET

MARIA TUNGO KIPTOO.....OBJECTOR/APPLICANTS

JUDGMENT

1. The Applicants who are children of the deceased herein seek revocation of Confirmed Grant herein made to the Administrators by the Principal Magistrate's Court at Eldama Ravine on 10th January 2019, on the grounds that-

- 1. The grant was obtained fraudulently by making false statements and/or concealing from court something material to the cause.*
- 2. The proceedings to obtain letters of Administration were defective in substance.*
- 3. The Applicants were not consulted before the purported distribution of the deceased estate was arrived at.*
- 4. The mode of distribution of the deceased estate is not fair and equitable and is oppressive or against the interest of the Applicants.*
- 5. The Administrators did not call for a family meeting to discuss the question of distribution as requested of them by the Lower Court on 8th November 2018.*
- 6. The deceased had two families and the administrators' family sidelined our family."*

2. The application was supported by the affidavit of the 1st applicant and opposed by the Replying Affidavit of the 1st respondent respectively on 25th January and 4th February 2019. The applicant filed a further affidavit sworn on 11th February 2019 in response to the replying affidavit.

3. Significantly, the Respondents' Replying Affidavit sworn on 4th February 2019 while denying any notions of fraud and concealment of material facts in the process and content of the application for the grant and Confirmed Grant conceded the issue of an agreement by family members on distribution of the estate, with which they claimed the Confirmed Grant complied, as follows:

7. ***“THAT:*** - on 23rd October, 2015 the application for grant of letter of Administration was gazette vide gazette notice No.8090 of 2015. (Attached and marked GTK 2 is a copy of the Gazette Notice).

8. ***THAT:*** - on 14th November, 2016 I and TUNGO CHERUIYOT were appointed administrators of the estate of the deceased. (Attached and marked GTK 3 is a copy of Grant of Letters of Administration).

9. ***THAT:-*** at the time of filing for confirmation of grant the other beneficiaries refused to sign summons for confirmation of

grant that necessitated us filing an application to compel the applicants to sign the documents.(attached and marked GTK 4 is a copy of the application).

10. **THAT:** - after numerous court attendance the applicants refused to co-operate. They attended court and court directed that family members do meet and agree.

11. **THAT:-** upon meeting and minutes taken the mode of distribution agreed upon. (Attached and marked GTK 5 is a copy of the minutes of the meeting).

12. **THAT:** - On September, 2015 we filed summons for confirmation of grant. (Attached and marked GTK 6 is a copy of the summons for confirmation of Grant.)

13. **THAT:** - the applicants were all along made aware of the hearing dates for confirmation of grant. (Attached and marked GTK 7 is a copy of the Return of Service.)

14. **THAT:** - it is untrue that the applicants were not made aware of the summons for confirmation of grant.

15. **THAT: - the court proceeded to confirm the grant as per the terms in the minutes.**

4. The application was with consent of the parties urged by way of written submissions filed in court. In the submissions by the Applicants case was simply made for the alignment of the terms of the Confirmed Grant with the agreement by family members on distribution as follows:

“Your Lordship

The minutes marked as exhibit GTK5 of the affidavit sworn by the Respondent on the 4th February 2019 on the mode of distribution does not tally with the confirmation of grant issued by this honorable court on the 8th November 2018.

Your Lordship

The mode of distribution was agreed amongst the family and if was wrong for the Respondent to proceed to confirm the grant to suit her without considering the meeting that the family agreed on the mode of distribution.”

5. For the Administrators, the respondents’ submissions urged that the distribution was fair and equitable as follows:

“iii) Whether the mode of distribution of the estate of the deceased was not fair and equitable.

Your Lordship on this issue we submit that the distribution of the estate was done in consultation with the applicants contrary to the applicants contention that they were not consulted prior to the distribution and further your Lordship that the same is not fair and equitable and is oppressive or against the interest of the applicants.

Your Lordship a meeting was held and all parties were involved, the allegations by the applicant that the said distribution was not fair are untrue as per minutes dated 1st November, 2017 where an agreed mode of distribution allocated the applicant herein a larger portion of the estate of the deceased.

Your Lordship the applicant has failed to inform the court of the same and the fact as per attached certificate of confirmation of grant dated 10.01.2019 the applicant herein was allocated a larger share of the estate. The applicants has failed to demonstrate that the distribution of the estate was not fair equitable and is oppressive against him and we submit that the same should not be used as a ground to revoke the grant.”

6. According to the Minutes of the family meeting of 1/11/2017 put forward by both parties to the application, the Estate of the deceased fell to be distributed as follows:

“Grace and Others- 18 acres

Kipkochoi and family – 41 Acres

Marai, Tungo Titomet and Others – 5 Acres.”

7. Conversely, the Confirmed Grant made on 15th January 2019 directed the distribution of the Estate as follows:

“1. Grace Tungo Kiptoo 28 acres of Pokor/Keben/Mugurin/10 (26.0 ha.) to share with Tungo Cheruiyot, Serina Tungo Cheriut, Tungo Chereon, Tongo Lonyako (equal shares).

2. Kipkochoi Kiptoo 36 acres of Pokor/Keben/Mugurin/10 (26.0 ha.) to share with John Kiptoo, Maria Kiptoo, Rebecca Titomet,

Esther Kiptooand May Kiptoo.”

8. While section 40 of the Law of Succession Act provides for intestate distribution of the estate of a deceased person where the intestate was polygamous it does not preclude an agreement as to distribution by the beneficiaries of the deceased. Indeed, Rule 40 (8) of the Probate and Administration Rules provides that “*where no affidavit of protest to the application for confirmation of Grant has been filed, the summons and affidavit shall without delay be placed by the Registrar before the court by which the grant was issued which may on receipt of a Consent in Form 37 of all dependants, or other persons who may be beneficially entitled, allow the application without the attendance of any person...*”

9. Having considered the affidavit evidence before the court, I find on a balance of probabilities that the Applicants were at all times aware of the succession proceedings on the Estate of their deceased father and that they, therefore, have not proved that the Confirmed Grant was obtained by fraud as alleged by the applicants.

10. However, it is established by the evidence presented by the Applicants and the Respondents that the Confirmed Grant did not reflect the distribution agreement reached between the family members involving the two households of the deceased as set out in the Minutes of the family meeting attached to the Replying Affidavit of the Respondents in opposition to the application for revocation. No explanation was given for the departure from the distribution agreement of the family members and certainly no consent for the new distribution proposal was given to the court to warrant the confirmation of the Grant in terms other than agreed in the family meeting.

Orders

11. The Confirmed Grant herein issued on 15th January 2019 is revoked and substituted with a Grant confirmed in terms as agreed by the family members as shown in the Minutes of the Family Meeting of 1/11/2017 as follows:

“Grace and Others- 18 acres

Kipkochoi and family – 41 Acres

Marai, Tungo Titomet and Others – 5 Acres.”

12. A fresh Confirmed grant shall be issued for the distribution of the estate of the deceased in terms as aforesaid. The Administrators shall for that purpose prepare and file with the Court a Schedule of Distribution which accords to the said Agreement of the members of the family meeting of 1st November 2017.

13. The court gives parties liberty to apply, if necessary, for purposes of giving effect to this distribution orders according to the agreement of the family members as aforesaid.

Costs

14. Although the Applicants have been successful on the point of divergent terms of distribution from the terms agreed between the beneficiaries and family members of the deceased, they have failed to establish the other grounds for seeking revocation of the confirmed grant and the court shall, therefore, make no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 17TH DAY OF SEPTEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Ochweri, Ngamate & Co. Advocates for the Applicants.

M/S Martim & Co. Advocates for the Respondents.