



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE AND ADMINISTRATION CASE NO. 25 OF 2005

IN THE MATTR OF THE ESTATE OF THE LATE KIMETO KAPKABAI

STEPHEN KIPROTICH.....PETITIONER

VERSUS

WILLIAM METTO.....OBJECTOR

JUDGMENT

The objector filed an objection to the issuance of the grant dated 24th November 2005. The petitioner petitioned for letters of administration of the estate of the deceased on 3rd February 2005. On 24th November 2005 the objector filed a notice of objection on the grounds that the petitioner was not a son of the deceased and had been given his share of 2.5 acres out of the deceased parcel of land known as Kaptagat/Lotonyok/Block 5 (Ngelel Tarit) 126 and that he disposed of it. The land was given to him on humanitarian grounds and not as a son.

The objector contended that the proceedings were commenced without his knowledge and consent of all beneficiaries.

On 16th July 2007, the objector filed in court by way of cross application for a grant under rule 17(5) together with the answer to the petition for a grant in which he sought to be granted with the letters of administration intestate of the deceased and asked the court to dismiss the application by the petitioner.

OBJECTOR'S CASE

The objector submitted that the main reason for making the application for revocation of the grant is that not all the beneficiaries of the estate of the deceased gave consent to the petitioner to apply for the grant of representation in the estate of the deceased.

He referred to *Section 66* of the Law of Succession Act and submitted that the petitioner did not obtain consent as he had already sold his share of the land and wanted to get a bigger share. This was confirmed by PW4 who stated that the petitioner applied to take his share and sold it. There is a sale agreement to that effect and it was produced as Exh 5.

PW2 stated on cross examination that the petitioner sold his share and wanted an equal share of the remainder.

The petitioner conceded in court that the deceased had a plot measuring 50 x 100 feet at Duka Moja in Eldoret. When he listed the assets of the deceased he left it out and he has fraudulently disposed of the same as evidenced by Dexh2. DW1 testified that the petitioner and other siblings from the other houses had a meeting including village elders where he wanted his share of the land and it was agreed that he be given 2.5 acres as per the minutes produced as Dexh3. He stated that on 21/7/2013 the family met with the chief and the petitioner was shown his portion of the land evidenced by Dexh4.

The objector cited *Section 76* of the Law of Succession Act and submitted that the grant issued is defective for lack of consent of the beneficiaries. The petitioner failed to provide all material information to the court during the application of the grant.

The objector submitted that as per *Section 66* of the Law of Succession Act the objector being a beneficiary has the right to petition the court for grant of letters of administration.

It is not in dispute that the property herein belonged to the deceased. PW1 testified that the petitioner applied to take his share of land and that he had sold his share of it. PW2 testified that they had not plotted with the petitioner for him to get a share of land despite the petitioner having sold his share.

PW1 does not stay on the suit land and it will be prudent that the court finds it just to exclude him from the list of beneficiaries as he already disposed of his share of the land.

The objector submitted that as per *Section 27* of the *Civil Procedure Act* the petitioner should bear the costs of the suit.

PETITIONER'S CASE

The petitioner testified that the deceased was a polygamous man with 2 wives and 9 children wherein the survivors are 3 children from the 1st house and 6 children from the 2nd house exclusive of the widows who both passed on. He is the only boy from the 1st house and the oldest among his brothers.

During a family meeting he was given his share of 2.5 acres, he settled on the land and built a home on it but his siblings evicted him from it. It is only the issues from the 2nd house who are using the property and he wants equal distribution among all the beneficiaries.

PW3 testified that the petitioner was the 1st child and only son and the deceased who was a shareholder of Ngelel Tarit farm bought 18 acres of the same.

The petitioner submitted that the defendant's witnesses confirmed the houses and number of children. They stated that the deceased had 2 parcels of land, that is; KAPTAGAT/LOTONYOK/BLOCK 5 (NGELEL TARIT) 126 and DUKA MOJA SHOPPING CENTRE – 1 PLOT 50 X 100. They went further to mention that they had a meeting where they agreed that the deceased property be distributed among the beneficiaries. They claimed that Wilson and Kipserem were given a larger share because they contributed to the purchase of the property but did not produce any documentary evidence on the same.

There is no dispute as to the number of children and spouses. The objectors failed to produce evidence to prove the existence of the Duka Moja plot and therefore the deceased's estate only comprised of KAPTAGAT/LOTONYOK/BLOCK 5 (NGELEL TARIT) 126 as demonstrated by copies of the certificate of official search and the title. He relied on the case of **Re Estate of Job Ndunda Muthike (Deceased) [2018] eKLR.**

All the issues from the 1st and 2nd house qualify as dependants of the estate as per section 29 of the Law of Succession Act. As per *Section 38* of the *Act* they should all get an equal share of the estate. The objectors' proposal on distribution is not tenable as the daughters and the petitioner have been excluded from getting shares of the estate of the deceased contrary to the provisions of the law. They relied on the case of **Re Estate of Francis Mwangi Mbaria (Deceased) [2018] eKLR.**

The distribution of the estate among the sons only is discriminatory and untenable. On equal distribution the petitioner relied on the case of **Re Estate of Joseph M'Ithili M'Thirua (Deceased) [2019] eKLR** and the case of **Re estate of Martin Joseph Wandera (Deceased) [2019] eKLR.**

The agreements produced by the objectors herein Dexh5 and Dexh6 appertains to the parcels of land known as NGELEL NDARIT FARM L.R 10729(PLOT 38) and NGELEL NDARIT FARM L.R 10729 (PLOT 39) do not form part of the deceased's estate and therefore the allegation that the petitioner disposed of the deceased estate is outrageous. The subjects of the alleged sale have no nexus with the deceased's estate which is comprised only of KAPTAGAT/LOTONYOK/BLOCK 5 (NGELEL TARIT) 126.

The grant should be confirmed and the property shared equally among the surviving dependants.

ISSUES FOR DETERMINATION

A) Whether all the beneficiaries consented to the appointment of the petitioner as the administrator of the estate

B) Whether the grant should be revoked

WHETHER ALL THE BENEFICIARIES CONSENTED TO THE APPOINTMENT OF THE PETITIONER AS THE ADMINISTRATOR OF THE ESTATE

Rule 26 of the *Probate and Administration* rules provides;

(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.

Section 66 of the *Law of Succession Act* provides;

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;

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

Section 38 of the Law of Succession Act;

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

From the provisions above, the petitioner was required to seek consent from the other children/issues in order to make an application for grant for letters of administration. In the alternative the petitioner could have issued the other beneficiaries with a citation before proceeding to take out the grant as he claims that they had refused to consent. The objectors, while making their cross application should have also done the same as they claim the petitioner refused to consent to their application.

The evidence on record including the testimony of the witnesses proves that the petitioner did not obtain consent from the other dependants.

WHETHER THE GRANT SHOULD BE REVOKED

Section 76(a) of the Law of Succession Act provides;

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.

In the absence of consent from all the beneficiaries, the process of obtaining the grant was defective in substance.

The objection has merit and the grant is accordingly revoked with costs to the objector.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 2nd day of October, 2019.

In the presence of:-

Mr. Mitei holding brief for Mr. Kibii for petitioner

Firm of Kimaru Kiplagat for objector absent

Ms. Abigael - Court clerk