



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

P&A NO. 62 of 1992

IN THE MATTER OF THE ESTATE OF JOSEPH AYABEI CHEPKONGA (DECEASED)

AUGUSTINE AYABEI.....1ST APPLICANT

PAULO AYABEI.....2ND APPLICANT

HELLENA TIREN.....3RD APPLICANT

ANNA AYABEI.....4TH APPLICANT

KIPLAGAT AYABEI.....5TH APPLICANT

CATHERINE AYABEI.....6TH APPLICANT

MARK AYABEI.....7TH APPLICANT

VERSUS

ISMAEL KIPROP KOECH.....RESPONDENT

AND

JOHN KIPYEGO CHEBET.....1ST INTERESTED PARTY

FLORENCE JEPKEMOI BARSOSIO.....2ND INTERESTED PARTY

RULING

1. What is coming up for determination is the Summons for Revocation of Grant dated **19 January 2018**. It was filed by the Applicants pursuant to **Sections 45 and 76** of the **Law of Succession Act** and **Rules 44 and 45** of the **Probate and Administration Rules** for orders that:

[a] Spent

[b] Spent

[c] Spent

[d] A permanent injunction do issue restraining the Respondent/his servants and agents plus the Interested Parties from developing the parcel of land identified as **ITEN TOWNSHIP/34** pending the hearing and determination of the application.

[e] That the Grant of Letters of Administration to the estate of **Joseph Ayabei Chepkonga**, deceased, made to the Respondent herein on **2 April 1993** be revoked.

2. The application was supported by the grounds set out on the face of the application and the averments in the Supporting Affidavit sworn

by the 5th Applicant, **Kiplagat Ayabei**, on **19 January 2018**. The brief facts are that the Applicants and the Respondent are some of the beneficiaries of the estate of the late **Joseph Ayabei Chepkonga**, in respect of whom these proceedings relate. The deceased died intestate on **6 December 1989**, leaving behind two widows and 12 sons and daughters; some of whom have since died. The Respondent, who is from the 2nd House, petitioned the Court in this Succession Cause on **27 May 1992** for Grant of Letters of Administration Intestate, in respect of the estate of the deceased and was issued with a Grant on **2 April 1993**. He thereafter caused one of the assets, namely **ITEN TOWNSHIP/34** to be transferred into his name; and thereafter sold the said property to the Interested Parties.

3. According to the Applicants, the Respondent did not obtain the consent of the other beneficiaries before filing this cause; and neither did he inform them of his intention to sell the Iten Township property to third parties. As at the time the application was filed, it was said that the 2nd Interested Party was in the process of constructing a structure on the property. It was within that backdrop that the Applicants sought for, inter alia, a temporary injunction to restrain dealings in the Iten Property pending the hearing of the application; and the record shows that Counsel for the parties agreed to Prayer (3) of the application being granted to protect the substratum of the application, pending the hearing and determination of the application. It is obvious then that Prayer (4) of the application dated **19 January 2018** would not lie in the interim and is accordingly dismissed, without further ado, for being misconceived.

4. According to the Applicants, the Respondent obtained the Grant fraudulently by making false statements that he was acting on behalf of the entire family of the deceased, yet he had no such instructions. They further complained that he obtained confirmation without informing all the beneficiaries. Thus, they faulted the manner in which he has been administering the estate of the deceased and accused him of intermeddling with the estate, especially with regard to the Iten Township Property; and added that to date, he is yet to distribute the estate to the other beneficiaries.

5. The Respondent opposed the application. He relied on his Replying Affidavit, sworn on **22 February 2019** wherein he asserted that as a son of the deceased, he is a beneficiary of his estate as of right; and that the Grant of Letters of Administration dated **2 April 1993** was lawfully issued to him. He further averred that he sold the Iten Township Property in good faith to the Interested Parties who have also since sold the same. He defended the process leading up to the issuance of Grant and said it was flawless from the standpoint of the Law of Succession Act. The Respondent accordingly opposed the application, terming it an afterthought, granted that the matters complained of, such the sale of the Iten Township Plot, are matters that took place over 20 years ago. He annexed to his Replying Affidavit copies of the sale agreements as well as the Grant and the relevant Gazette Notice dated **21 August 1992** to support his assertions.

6. The application was canvassed by way of written submissions, pursuant to the directions given herein on **25 February 2019**. Thus, on behalf of the Applicants, **Dr. Chebii**, relied on **Sections 45 and 76** of the **Law of Succession Act** as well as **Eldoret High Court Misc. Application No. 54 of 2004: Susan Chebich Barchibei vs. Charles Kibiwot Barchigei** in urging the Court to allow the application. He pointed out as pertinent the admission by the Respondent that he sold the Iten Township Property without giving an account to the rest of the beneficiaries of the deceased. He further faulted the Respondent for not having finalized the administration, or furnished a full account thereof, some 26 years after being issued with Grant; and posited that the only logical explanation for it is that he wished to keep the rest of the family in ignorance of the fact that he had intermeddled with **ITEN TOWNSHIP/34**. Thus, in **Dr. Chebii's** view, the Applicants have made a case, not only for revocation of Grant but also for the return of the Iten Township Property to the deceased's estate for distribution to his beneficiaries.

7. On behalf of the Respondent, written submissions were filed herein on **27 May 2019** by the firm of **M/s J.K. Kiplagat & Co. Advocates** proposing the following as the issues for determination and made submissions thereon accordingly:

[a] Whether the proceedings to obtain the Grant were defective to warrant revocation;

[b] Whether the Grant was obtained fraudulently and or by means of an untrue allegation;

[c] Whether the person to whom the Grant was made has failed to proceed diligently with the administration of the estate; and

[d] Whether the application meets the threshold for granting injunctions.

8. Thus, it was the submission of **Mr. Kiplagat** that the notice of application for grant in respect of the estate of the deceased herein was published in the Kenya Gazette vide Gazette Notice No. 3468; and that all the beneficiaries of the estate gave consent to the Respondent being appointed the administrator. He further submitted that, since no objection was raised by any of the Applicants within the 30 days' period specified in the Gazette Notice or to the application for confirmation, the Grant was properly issued. Regarding the allegations of fraud, **Mr. Kiplagat** urged the Court to find that no fraud or concealment was proved by the Applicants. He pointed out that all the beneficiaries attended several family meetings to discuss the mode of distribution of the assets and liabilities of the deceased and therefore that the Applicants have no valid cause for complaint.

9. On whether the Respondent has diligently administered the estate of the deceased, **Mr. Kiplagat** reiterated the contention by the Respondent that he disposed of the Iten Township Property in good faith, having undertaken to faithfully administer the estate according to law and to render a just and true account thereof whenever required by law so to do. He relied on **Re Estate of Thomas Njue Njine Wachira (Deceased) [2018] eKLR** in which an application for revocation premised on the ground that the proceedings to obtain the grant were defective in substance, was dismissed. Counsel further relied on **Githengi P. Mwangi vs. Florence Wangui Mwangi & Another [2018] eKLR** and **Paul Chelangat Rono vs. Johana Kipkosgei Simotwo & 2 Others [2014] eKLR** to support the Respondent's assertion that the Applicants are guilty of laches.

10. In addition to the foregoing, Counsel for the Respondent made submission on the question whether the application meets the threshold for granting temporary injunctions, but, as I have noted herein, the prayer for temporary injunction is spent; the same having been granted by consent on **25 February 2019**.

11. The application was premised under **Section 76** of the **Law of Succession Act**, which provides that:

"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 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 material particular; or

(iv) That the grant has become useless and inoperative through subsequent circumstances."

12. It is manifest therefore from the provision aforesaid that it is immaterial, for purposes of an application for revocation of grant, that the grant in question has already been confirmed. The provision is explicit enough that an application can be made at any time before finalization of distribution. It is noteworthy that **Pauline Chelangat Rono vs. Johana Kipkosgei Simotwo & 2 Others [2014] eKLR**, other than being of persuasive value only, involved an application for revocation 11 years after confirmation, the Court (Hon. Seron, J.) noted that the administratrix therein, who had passed away by the time, had already distributed the estate among the beneficiaries and title deeds had been issued in their favour. I am therefore not convinced by the Respondent's argument that the Applicants are guilty of laches.

13. From my careful perusal of the application, the supporting affidavit and the response thereto, the Applicants allege the following infractions of **Section 76** of the **Law of Succession Act** against the Respondent:

[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 concealment from the court of something material to the case;

[c] That the Respondent 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 material particular.

14. The foregoing then form the issues for determination herein and I will now proceed to consider them in turns.

[a] On whether the Proceedings to Obtain Grant were Defective in Substance:

15. According to the Applicants, the proceedings to obtain the Grant herein and its confirmation were defective in substance on account of the fact that the Respondent made false representations that he was acting on behalf of the entire family, yet he had no such instructions; and therefore that the Grant and the subsequent confirmation were obtained in contravention of the provisions of the **Law of Succession Act** and the Probate and Administration Rules. It is instructive therefore to restate the provisions of **Section 66** of the **Law of Succession Act**. It provides as follows in terms of preference:

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

16. Accordingly, in this instance, as of **27 May 1992** when this Cause was filed, the two widows of the deceased, namely, **Tapkigen Aiyabei** and **Tapkurgoi Aiyabei** jointly ranked first. The deceased sons and daughter came next in equal ranking. Thus, **Rule 7(7)** of the Probate and Administration Rules stipulates that:

“Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has—

[a] Renounced his right generally to apply for a grant; or

[b] Consented in writing to the making of the grant to the applicant; or

[c] Been issued with a citation calling upon him either to renounce such right or to apply for a grant.

17. A look at the record shows that no renunciation or consent was filed by either the widows of the deceased or any of the Respondent's brothers and sisters. I would agree therefore that, in this respect, there was a defect in the procedure adopted in issuing the Respondent with the Grant dated **2 April 1993**, notwithstanding that the other requirements were complied with.

[b] On allegations of Fraud, False Statements and Concealment:

18. In support of the allegations of fraud, false statements and concealment, the Applicants averred that no consent was obtained or filed from the other beneficiaries; and that the Respondent later disposed of one of the estate assets without informing the other beneficiaries. I have found as a fact that no consent or renunciation was obtained or filed from the widows or the Respondents brothers and sisters. He is yet to account for the proceeds of the Iten Township property, which he admittedly disposed of to the Interested parties. I am therefore satisfied that fraud and concealment have been proved against the Respondent.

[c] On Diligence on the part of the Respondent:

19. Whereas there is evidence that the Respondent applied for Confirmation of Grant on **12 May 1994**, about one year from the date of issuance of Grant, there is no indication in the proceedings of the Court that the application was prosecuted to conclusion. There is likewise no copy of the Certificate of Confirmation on the file for purposes of **Section 71** of the **Law of Succession Act** and **Rule 41(5)** of the **Probate and Administration Rules**; and none was annexed to the Respondent's own Replying Affidavit. In the premises, there was absolutely no justification for the Respondent to dispose of the Iten Township Property, since **Section 45** is explicit that:

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

20. In similar vein, the proviso to **Section 82** of the **Law of Succession Act** is clear that **"...no immovable property shall be sold before confirmation of grant..."** There appears to be no dispute that the administration of the estate is yet to be finalized, notwithstanding that the beneficiaries are basically in agreement as to the mode of distribution. The Applicants annexed to their Supporting Affidavit copies of minutes of family meetings that give a picture of general consensus on the distribution of the deceased's assets and liabilities; including the Iten Town Property. I am therefore satisfied, not only that the deceased failed to prosecute his application for confirmation, but also failed to diligently administer the estate with due dispatch. The Applicants averment that they are yet to receive their respective shares remains unrefuted. It is also noteworthy that, so far, the Respondent has not produced to the court, any inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of **Section 83** of the **Law of Succession Act**, or at all.

21. In the result, I am satisfied that the Applicants have made out a good case for revocation of the Grant of Letters of Administration Intestate, issued herein on **2 April 1993** to the Respondent. Accordingly, I would allow the application dated **19 January 2018** and grant orders in the following terms:

[a] That the Grant of Letters of Administration to the estate of Joseph Ayabei Chepkonga, deceased, made to the Respondent herein on 2 April 1993 be and is hereby revoked.

[b] That the purported sale by the Respondent of the deceased's asset, known more particularly as ITEN TOWNSHIP/34 be and is hereby nullified and the property accordingly restored to the estate of the deceased.

[c] That the costs of the application be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF NOVEMBER 2019

OLGA SEWE

JUDGE