REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PROBATE & ADMINISTRATION CAUSE NO. 156 OF 2013

IN THE MATTER OF THE ESTATE OF KIPTOO MELGUT (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR REVOCATION AND/OR ANNULMENT OF GRANT

BETWEEN

JOSEPH KIPROTICH CHELULE.....APPLICANT

AND

KIPLAGAT BARNGETUNY.....RESPONDENT

RULING

[1] The Summons for revocation or annulment of Grant dated **21 March 2017** was filed herein by **Joseph Kiprotich Chelule**, the Applicant, pursuant to **Sections 47 and 76** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**. The orders sought by the Applicant are:

> **[a]** That the Grant of Letters of Administration Intestate issued on **4 February 2014** to **Kiplagat Barngetuny**, the 1st Respondent, be revoked or annulled;
>
> **[b]** That the Applicant be made the administrator and beneficiary of the estate of the late **Kiptoo Melgut**;
>
> **[c]** That a Preservatory Order be issued restraining and/or stopping the Respondents, their agents, assignees and or servants from intermeddling, sub-dividing, selling, developing, cultivating, leasing or dealing in any other way with the estate of the deceased; and more particularly **L.R. No. KIPSINENDE/KIPSINENDE BLOCK 5 (MEREON) 13, measuring 1.83 Ha** pending the hearing and determination of this application and thereafter the hearing of the main cause.

[d] That the costs of the application be provided for.

[2] The application was premised on the grounds that the Grant of Letters of Administration Intestate was obtained fraudulently by concealment from the fact that the Applicant is a beneficiary of the deceased's estate. It was supported by the Applicant's affidavit, sworn on **21 March 2017**, to which the Applicant annexed copies of some of the documents issued or filed herein, such as the Grant of Letters of Administration Intestate issued on **4 February 2014**, Certificate of Confirmation of Grant issued on **15 April 2016**, and the 1st Respondent's Affidavit in Support of Petition. The Applicant also exhibited relevant pages of the Kenya Gazette dated **19 July 2013** and **8 November 2013**, to augment his averment that the Cause was irregularly advertised twice.

[3] The basic contention of the Applicant was that, as a grandson of the deceased who had been given the Suit Property by him as a gift *inter vivos* some four years before his demise, he has priority interest and ought to have been included by the 1st Respondent in this Cause; not only as a beneficiary, but also as an administrator. He therefore contended that the secretive manner in which his father, the 1st Respondent, applied for and obtained grant is proof enough that he had fraudulent intentions which he actualized by immediately selling the Suit Property to the 2nd Respondent. He added that it was well within the knowledge of the 1st Respondent that the subject property belonged to him; and therefore, that he stands to suffer immeasurable loss should the orders sought not be granted.

[4] The 1st Respondent's response was by way of his Replying Affidavit sworn on **9 June 2017**. He admitted that he obtained the Suit

Property by way of transmission from his father; and that he sold it to the 2nd Respondent. He however asserted that, as his son, the Applicant had no role to play in these Succession Proceedings; and therefore, that his consent was not mandatory. Likewise, the 2nd Respondent filed his Replying Affidavit confirming that he bought the Suit Property from the 1st Respondent; and therefore, that he is a *bona fide* purchaser for value and has since caused the property to be registered in his name. He annexed a copy of their Land Sale Agreement with the 1st Respondent as well as a copy of the Title Deed to his Replying Affidavit in proof of his assertions.

[5] The application was canvassed by way of written submissions by **Mr. Okara**, learned Counsel for the Applicant. He reiterated the averments set out in the Applicant's Replying Affidavit and highlighted the assertion that the 1st Respondent had no right at all to sell the property to the 2nd Respondent as he did, since the property was an *inter vivos* gift to him from the deceased. Counsel relied on **Eldoret High Court Succession Cause No. 149 of 1999: Estate of Kipchirchir Kosgei (Deceased)** and **Eldoret High Court P & A Cause No. 85 of 2017: Estate of Tabitha Waitherera Kamau (Deceased)**. In both instances, the application for revocation was allowed.

[6] **Mr. Bett,** learned Counsel for the 1st Respondent, on his part took the position that the Applicant did not furnish any proof at all that the Suit Property was given to him by the deceased in his lifetime. He cited the case of **Re Estate of Gedion Manthi (Deceased) [2015] eKLR** for an explication of what amounts to a valid gift *inter vivos*. Counsel further submitted that for purposes of Part V of the **Law of Succession Act**, grandchildren are not taken into account where the deceased is survived by his children; as was the case herein. He, thus concluded his submissions by stating that the only consent required in this case was that of the 1st Respondent's sister, which was duly obtained.

[7] Having carefully considered the application, the averments set out in the Supporting Affidavit, including the annexures thereto; as well as the written submissions filed herein on behalf of the Applicant and the 1st Respondent, there appears to be no dispute that, the deceased herein, **Kiptoo Melgut**, died intestate on **14 June 1978**; and that he was survived by his son **Kiplagat Barngetuny**, the 1st Respondent and his sister, **Rael Barmao**.

[8] There is further no dispute that, as at **14 June 2013**, when this Cause was filed, the only asset comprising the estate of the deceased was the Suit Property, **L.R. No. KIPSINENDE/KIPSINENDE BLOCK 5 (MEREON) 13,** measuring 1.83 Ha. A Certificate of Search dated **24 May 2013** was filed herein by the 1st Respondent, and it confirms that the Suit Property was still registered in the name of the deceased; and therefore, formed part of his estate as his free property. For purposes of the Law of Succession Act, **Section 3** of the **Law of Succession Act** defines **"free property"** of a deceased to mean:

> **"… the property which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death."**

[9] As was rightly pointed out by Counsel for the Respondents, the Applicant did not avail any evidence at all to demonstrate that the deceased had given him the Suit Property as a gift *inter vivos*. In any event, even if that were the case, it is instructive that the gifting process was not perfected by a transfer during the lifetime of the deceased. Thus, in **Halsbury's Laws of England 4th Edition Volume 20(1)** at **Paragraph 67** it is opined that:

> **"Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise... If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do."**

[10] It is for the foregoing reason that I would agree with the position taken by **Hon. Nyamweya, J.** in **Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR,** that:

> **"For gifts *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts... Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid..."**

[11] The foregoing being my view of the matter, the rest of the arguments presented by the Applicant cannot lie; particularly the contention that he had a superior position than his father, the 1st Respondent, in terms of ranking, to apply for grant in respect of the estate of his late grandfather. **Section 38** of the **Law of Succession Act** is explicit that:

> **"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."**

[12] In the result, I find the application dated **21 March 2017** to be completely lacking in merit. It is accordingly hereby dismissed with no order as to costs.

It is so ordered.

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

OLGA SEWE

JUDGE