



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

SUCCESSION CAUSE NO. 16 OF 2015

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

BETWEEN

JUDITH NASIMIYU KIPTOO.....OBJECTOR/APPLICANT

AND

CHEPOCHEPOS WARIKA.....RESPONDENT

CORAM: LADY JUSTICE RUTH N. SITATI

RULING

1. There are two applications for consideration in this matter. The first application is the summons dated 23rd November, 2016, brought under *section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules* made under the Act. It is brought by Judith Nasimiyu Kiptoo. The same seeks revocation of the Grant of Letters of Administration and Confirmation of grant issued to CHEPOCHEPOS WARIKA on grounds:-

- a. THAT the grant was obtained fraudulently by the making of a fake statement and by concealment from the court of facts material to the cause.**
- b. THAT the petitioner has failed to proceed diligently with the administration of the estate.**
- c. THAT the objector shall seek orders for stay of enforcement of the confirmation of grant pending hearing and determination of this application.**

2. The summon is also premised on the applicant's sworn affidavit of even date in which the applicant depones that the Petitioner, Chepochepos Warika filed the succession cause secretly and without involving the applicant and her children and further that even the earlier Kitale High Court Succession Cause number 68 of 2009 was filed in a similar manner to the detriment of the applicant and her children. Further that the filing of the instant case was actuated by malice with the sole intention of disinheriting the applicant, her children as well as other beneficiaries of the deceased's estate.

3. Annexed to the application are copies of various title deeds which came from the original title number WEST POKOT/SIYOI "A"/346 measuring 33 hectares, the only asset left behind by the deceased, KIPTOO KITANY.

4. The application is opposed vide the respondent's replying affidavit dated 13th February 2017. The deponent contends that the summons is unwarranted and actuated by malice especially after the applicant and her son wantonly sold their entitlement out of the deceased's estate. She also depones that the woes surrounding this matter are being fanned by Solomon Koyopel who filed Kitale High Court Succession Cause number 68 of 2009. She prays that this litigation be brought to an end.

5. The second application is the summons for revocation of grant dated 20th February 2018. The same is brought by Solomon Kiprugut Koyopel. The summons seeks revocation of the Grant of Letters of Administration issued to CHEPOCHEPOS WARIKA on 10th November 2016 on grounds:-

- a. THAT the grant was obtained fraudulently by the concealment from the court of things material to the cause.**
- b. THAT the respondent has failed to grant the applicants herein a share in the estate of the deceased.**

c. THAT the objector shall seek orders for stay of enforcement of the confirmation of grant pending hearing and determination of this application.

6. The summons is also supported by the applicant's affidavit sworn on 20th February, 2018. The deponent avers that his name was omitted from the list of beneficiaries, a fact which was material to the case. He also avers that the suit property was trust land which the deceased held in trust for himself and his brothers, one of whom was the applicant's late father. He also deponed that he only learnt of the grant after the same had already been confirmed. He asks for a reasonable provision for him out of the deceased's estate, as well as a share equal to the share of the deceased's other sons for Fred Kibyego Kiptoo.

Submissions

7. The two applications proceeded by way of written submissions. The rival submissions filed on 12th April 2018 (for the petitioner) and 24th April 2018 (for Objectors) respectively speak into the averments in the respective supporting affidavits as well as the grounds in support of the two applications. From the petitioner/respondent, it is submitted that the 2nd objector in this matter, Fred Kibyego Kiptoo together with his mother Judith Nasimiyu gave their consents for the filing of the petition by the 1st objector whom they have consistently used to harass the petitioner. That in any event, the grant issued to the petitioner was a joint grant issued to her, her co-wife Judith Nasimiyu Kiptoo and two other persons although the 2nd objector refused to give consent for confirmation of the grant.

8. The gist of the submissions by the 1st objector (applicant) in second application is that the petitioner has excluded him altogether from getting an inheritance from the deceased estate, and that she has also omitted the 2nd objector who is a son to the deceased from any inheritance out of the deceased estate. They pray that the 2nd objector be given an equal share of the deceased's estate along the other sons of the deceased. The 1st objector is asking for a reasonable provision out of the deceased's estate.

Background

9. The parties herein have been in and out of court since 2009 when Kitale HC Succession Cause number 68 of 2009 was filed. The deceased was survived by Chepochepos Warika, the first wife and also Judith Nasimiyu Kiptoo. The Petition for Grant of Letters of Administration herein was filed on 24th November, 2015. Gazettement was on 15th January, 2016. The Grant of Letters of Administration was issued on 23rd February 2016 and confirmed on 10th November, 2016.

10. By a ruling dated 19th August, 2015 the court (J.R. Karanja J) revoked the grant issued to Solomon Kiprugut Koyopel on 27th May 2010 and confirmed on 11th October, 2012 on the ground that the said Solomon Kiprugut was an inter-meddler and stranger in the deceased's estate who had obtained the said grant by way of a false and fraudulent transaction. The learned judge ordered for the filing of a fresh application for Grant of Letters of Administration intestate by the surviving widows of the deceased namely Chepochepos Warika and Judith Nasimiyu Kiptoo. That is what followed and on 23rd February 2016, Grant of Letters of Administration Intestate was jointly issued to Chepochepos Warika, Judith Nasimiyu Cheptoo, Eunice C. Kiptoo and Jackson Kibor.

11. Summons for confirmation of the said grant was filed in court on 25th August, 2016 together with consent to confirmation of grant duly signed by Joseph L. Kiptoo and Samwel K. Kiptoo. Fred Kibyego Kiptoo did not append his signature to the consent. From the record, Fred Kibyego Kiptoo is a son to Judith Nasimiyu Kiptoo and does include Fred Kibyego and Solomon Kiprugut Koyopel as beneficiaries. In the said summons, the children of the deceased and their respective shares were indicated on form 9, but this form was not signed by Judith Nasimiyu Kiptoo and does not include Fred Kibyego Kiptoo and Solomon Kiprugut as beneficiaries. The refusal by Judith Nasimiyu Kiptoo and Fred Kibyego Kiptoo to consent to the summons for confirmation was the subject of an affidavit sworn by Chepochepos Warika on 20th September 2016 to the effect as stated at paragraph 6 thereof. **"6. THAT FRED KIPTOO has refused to sign the consent herein on the grounds that I revoked the grant earlier issued to SOLOMON KIPRUGUT KOYOPEL."** The petitioner Chepochepos also deponed at paragraph 5 **"THAT it is within my knowledge that JUDITH NASIMIYU and her son FRED KIBYEGO KIPTOO sold part of the portions given to them under the certificate of confirmation to the revoked Grant annexed herein and marked CW"2".** The grant was consequently confirmed as shown in the certificate of confirmation dated 10th November, 2016. The instant applications are reactions to the said confirmation.

Issues, Analysis and Determination

12. From a reading of the two applications, the issues for determination are:-

a. Whether the impugned grant was obtained fraudulently by excluding from the list of beneficiaries Solomon Kiprugut Koyopel and Fred Kibyego Kiptoo; and

b. Whether the petitioner has failed to administer the estate faithfully.

13. With regard to the first issue, it is worth noting, that the 1st Objector was the Petitioner in Kitale HC Succession Cause number 68 of 2009, and as already pointed out, the court made a finding that the said Solomon Kiprugut Koyopel was not a beneficiary to the estate of the deceased herein. Further, the court found as a fact, that the said Solomon Kiprugut Koyopel had obtained the said grant through false and fraudulent means. In fact the widows of the deceased did not sign consent for confirmation of the grant in the Kitale Succession Cause.

14. The above being the position the issues raised in the second application are *res judicata*. There is no evidence that Solomon Kiprugut Koyopel appealed that ruling. He is therefore bound by it. Accordingly the application dated 20th February 2018 is an abuse of the court process and is accordingly dismissed.

15. As concerns the application dated 23rd November 2016, upon which the second issue is hinged, the applicant Judith Nasimiyu alleges that she was forced to append her signature to certain documents to facilitate the filing of the petition herein and further that she did not consent to the confirmation of the grant. She also alleged that Solomon Kiprugut Koyopel and Fred Kibyego Kiptoo who are beneficiaries of the deceased's estate were left out. The issue of whether or not Solomon Kiprugut Koyopel is a beneficiary of the deceased's estate has been firmly decided in the negative and I shall not return to it. All I can add here is that he is trying to make a comeback into the matter by hiding behind Fred Kibyego Kiptoo.

16. I have perused the petition papers as well as the summons for confirmation and note that Judith Nasimiyu Kiptoo and her son Fred Kibeygo Kiptoo do not feature in the list of beneficiaries. The argument put forward by the Petitioner is that those two beneficiaries have already squandered their wealth by selling their rightful share to third parties. It is on record that the grant under which Judith Nasimiyu Kiptoo and her son Fred got a share of the deceased's estate was revoked and all subsequent transactions attached to that grant would follow suit. The fact that Fred did not consent to the confirmation of the grant does not, in my considered view, deprive him of his right as a beneficiary to the deceased's estate. His name should have featured among the beneficiaries.

17. For the above reasons and in light of the provisions of section 76 of the Law of Succession Act, Cap 160 Laws of Kenya, I would allow the application dated 23rd November, 2016 and filed in court on 7th December, 2016 as the Petitioner has not diligently administered the deceased's estate.

Final Orders

18. From all the above, I make the following final orders:-

- a. The summons dated 23rd November 2016 be and is hereby allowed in part to the extent that the certificate of confirmation issued to Chepochepos Warika on 10th November, 2016 be and is hereby revoked.**
- b. Fresh summons for confirmation of grant shall be filed by the petitioners jointly or if there is no agreement each petitioner to file their own summons for confirmation for determination by the court.**
- c. The fresh summons for confirmation shall be filed and served within thirty (30) days from the date of this ruling.**
- d. The summons dated 20th February 2018 be and is hereby dismissed in its entirety.**
- e. As the warring parties herein are all family, each shall bear their own costs.**

It is so ordered.

Ruling delivered, dated and signed at Kapenguria 12th day of October, 2018

RUTH N. SITATI

JUDGE

In the presence of

M/S Chebet holding brief for Kaosa for state

M/S Chebet holding brief for M/S Opondo for applicant in application dated 20th February, 2018

Mr. Juma Barasa – Court Assistant