



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO.24 OF 2008

IN THE MATTER OF THE ESTATE OF STEPHEN KURGAT KIMWEI – DECEASED

JULIUS CHEPKWONY.....APPLICANT

VRS

WILLY SUPUNGUT CHEPKWONY.....RESPONDENT

RULING

1. This matter relates to the estate of Stephen Kurgat Kimwei who died intestate on the 20th of April 1993. An application for grant of letters of administration intestate was made by two of his sons, Supungut Chepkwony and Samuel Kipkoech Chepkwony on 31st March 2008. The grant was issued on 9th October 2014 and confirmed on 17th March 2016.

2. The applicant, Julius Chepkwony, has now approached the court seeking the revocation of the grant. The application, which is dated 27th July 2016 and supported by an affidavit sworn by the applicant, is expressed to be brought under the provisions of Rule 44 (1) and section 76 of the Law of Succession Act and to be based on the following grounds:

- a) 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 by the concealment of material to the case.***
- c) Some beneficiaries did not sign the consent to the making of grant or obtain letters of administration.***
- d) 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.***
- e) Other parcels of land not included in the petition.***
- f) The beneficiaries did not sign Form 38 (consent to the making of grant of administration)***
- g) The land parcel numbers Kericho/Kanusin/287 was prior to the filing of succession transferred to Julius Chepkwony while Kericho/Kaitet/437 was already registered in the name of Samwel Chepkwony with the full knowledge and approval of the beneficiaries including the respondent in trust.***

h)The administrator/petitioner was not agreed upon.

i)The succession proceedings to obtain grant were therefore futile exercise.

j) Some beneficiaries were excluded from the succession namely Grace Chepkoske, Esther Cheptonui and Ann Chelangat.

3. In his affidavit in support of the application, the applicant avers that he is surprised that the grant of letters of administration was issued to Willy Supungut Chepkwony without his consent and that of other beneficiaries. He further avers that some beneficiaries, namely Grace Chepkoske, Esther Cheptonui and Ann Chelangat, have been left out. It is also his contention that the co-petitioner, one Samwel Chepkwony, did not sign the consent to the making of grant and was not involved in the succession process, and neither did he attend court.

4. The applicant further avers that land parcel number Kericho/Kanusin/287 was already registered in his name with the consent of his brothers and sisters, and that he was to hold the property in trust for them. Further, that land parcel number Kericho/Kaitet/437 was already registered in the name of Samwel Chepkwony with the full knowledge and approval of all beneficiaries and held in trust on their behalf.

5. Finally, it is his averment that the distribution of the estate was not agreed upon by the beneficiaries, that some parcels of land have already been sold by the respondent, and that it is fair and just that the grant be revoked.

6. In submissions made on his behalf by his Counsel, Mr. J. K. Rono, the applicant argues that the consent form filed in court was not signed by all the applicants, and that some of the beneficiaries of the estate, his sisters, Grace Chepkoskei, Esther Cheptanui and Anne Chelangat were left out in the succession.

7. The applicant further argues that the mode of distribution of the estate was prepared by Willy Supungut Chepkwony without involving the other parties, and the other petitioner had also not signed the consent for the distribution of the estate.

8. It is the applicant's contention further that the properties set out in the application for confirmation of grant, and which were the subject of distribution as set out in the certificate of confirmation, had already been registered in the names of individuals. In this regard, he asserts that Kericho/Kanusin/287 and Kericho/Kaitet/437, the subject matter of the succession, were already registered in the names of individual beneficiaries, noting that property number Kericho/Kanusin/287 had already been registered in his name. His contention is that this was not brought to the knowledge of the court even though the respondent was aware of the registration, and that all the other beneficiaries were aware and had approved the registration.

9. While recognizing that the registration to the two beneficiaries had not been properly done, Counsel for the applicant submitted that succession proceedings override what has been done in an improper way, and that the revocation of the grant should be allowed so that the distribution of the estate could proceed in the proper way.

The Response

10. The application is opposed. The respondent, Willy Supungut Chepkwony, filed an affidavit in opposition which he swore on 2nd August 2016. In his affidavit, the respondent avers that he and his co-administrator filed the application for letters of administration intestate to the estate of Stephen Kurgat Kimwei on 31st March 2008. The beneficiaries of the estate, with the exception of the applicant and John Chepkwony, signed the consent filed with the application for grant of letters of administration. However, when the petitioners were requested to amend some of the forms filed with the application, some of his brothers, including the applicant, refused to sign the necessary forms, which resulted in the matter taking a long time to determine.

11. According to the respondent, the applicant and some of his brothers refused to co-operate and sign the documents required as they did not want their sisters to inherit. It is his averment that prior to the confirmation of the grant, all the beneficiaries, including the applicant, were informed both orally and through their mobile phones but they declined to either sign or even attend court. Despite service on them by a process server pursuant to directions of the court, the applicant and his brothers still refused to attend court, and the grant was confirmed in their absence

12. In submissions made on his behalf by his Counsel, Mr. Motanya, the respondent argued that the applicants (sic) were not being candid as they had not disclosed to the court that they had transferred to themselves various parcels of land during the lifetime of the deceased. These include Kericho/Kanusin/662 measuring 1.80 ha registered in the name of John Kipkorir Arap Chepkwony which was registered on 21st April 1981 and Kericho Kapkatet/177 measuring 6.075 ha transferred on 10th April 1988 to John Kipkorir Chepkwony.

13. According to the respondent, by the time the present succession cause was filed on 31st March 2008, parcel numbers Kericho/Kanusin/287 and Kericho/Kaitet/437 were still in the name of the deceased.

14. It was further submitted on behalf of the respondent that though the applicants were aware of the proceedings before the court, they had refused to co-operate as they did not want any of their sisters, including those who were not married, to benefit from the estate of the deceased. The rest of the family had signed the consent, but the applicant and one of his brothers who is also a co-administrator refused to sign the consent. Those who refused to sign were Johana K. Chepkwony, Elijah Chepkwony and Julius Chepkwony.

15. Mr. Motanya further submitted on behalf of the respondent that prior to confirming the grant, the court (Ong'udi J), had directed that all the beneficiaries be served. Counsel submitted that he had personally called the applicants but they declined to appear in court so long as their sisters were being given a share in their father's property. The respondents relied on an affidavit of service dated 17th March 2016 and filed on the same date which showed that service had been effected on the applicant and his brothers.

16. It was the respondent's position that the applicant had been given a chance to attend court but had failed to do so. Mr. Motanya submitted that the matter had been filed in 2008 but had not proceeded due to the conduct of the applicant, and he urged the court not to disturb the mode of distribution passed by Ong'udi J.

Determination

17. I have considered the application before me and the affidavit in support and opposition thereto. I have also considered the submissions of the parties as presented by their respective Counsel. I have also read the record of the court and the proceedings before Ong'udi J prior to granting the orders for confirmation of the grant now sought to be revoked.

18. I begin by considering the conditions under which the court will revoke a grant as set out under section 76 and Rule 44 of the Probate and Administration Rules. Section 76 provides as follows:

“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 by the 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)

19. The documents filed in court show that the application for the grant of letters of administration intestate was filed and seven beneficiaries, including the applicant, named therein. The petitioners are the respondent and one of the brothers who did not sign the consent to the distribution, one Samuel Kipkorir Chepkwony.

20. While the applicant has set out in his application the statutory grounds for revocation of a grant as set out under section 76, I have not been able to find, either in his affidavit or the submissions made on his behalf, any substantiation of those grounds.

21. Indeed, a consideration of the record indicates that every effort was made to ensure that all parties were informed of the proceedings, executed all documents required, and were present in court. The documents in court indicate that the respondent and all the daughters of the deceased who are named in form P&A 5 and in the letter from the Chief indicating the beneficiaries of the estate signed the consent to the distribution and were present in court when the confirmation of the grant was made.

22. The three sisters whom the applicant alleges were left out, namely Grace Chepkoske, Esther Cheptonui and Ann Chelangat, are not named in form no. P&A 5 among the list of beneficiaries of the estate, nor are they named in the letter from the chief setting out beneficiaries of the estate. Nothing would have been easier than for these sisters to swear an affidavit in support of the application for revocation on the basis that they were left out, or to appear in court and express their support or opposition to the application. I am therefore unable to find the applicant's averment in this regard worthy of merit.

23. What of the brothers, including the applicant? The record indicates that on the 11th of March 2016, the matter was listed before Ong'udi J, in the absence of all the brothers, including the 2nd administrator. Mr. Motanya for the respondent informed the court that the 2nd administrator had become very difficult, and the court directed that summons should issue to the 2nd administrator and the absent brothers to appear before the court on 17th March 2016 to explain why they were delaying the distribution of the estate. The directions of the court were that the summons should be served by the area chief.

24. When the matter was placed before the court on 17th March 2016, the applicant and his brothers were again absent, though an affidavit of service showed that they had been served. The respondent informed the court that his brothers did not want their sisters to inherit anything from their father's estate, and that is why they were being uncooperative.

25. After noting that it had summoned the 2nd administrator and his brothers and they had refused to sign the consent or attend court "*because of their prejudices*", the court proceeded to confirm the grant which the applicant now seeks to have revoked.

26. Having considered the totality of the material before me, I am unable to find any merit in the application. The applicant has not demonstrated that the grant in this matter was obtained in a manner that rendered the grant defective in substance, or fraudulently by the making of a false statement, or concealed from the court something material to the case, or made an untrue allegation of a fact essential in point of fact to the case. What appears to be the case is that the applicant and his brothers, stuck somewhere in a past where women were second class citizens, were intent on frustrating the distribution of their father's estate in the hope that they could somehow deny their sisters their constitutional and statutory right to inherit as children of the deceased.

27. This is borne out by the actions of the applicant and the 2nd administrator in relation to the properties comprising the estate, Kericho/Kanusin/287 and Kericho/Kaitet/437. Seemingly oblivious of the enormity of their actions, the applicant has produced official searches and certificates of title showing that

the two properties were transferred to him and his brother, the 2nd administrator, on 13th November 2015, during the pendency of the present proceedings. The applicant and the 2nd administrator know, or ought to know, that the only way the property of a deceased person can be lawfully transferred to a beneficiary is upon the confirmation of grant, when the property of the deceased is lawfully distributed.

28. For any party to purport to transfer property to himself, and for any Land Registrar to purport to effect the transfer and issue a title otherwise than in accordance with the provisions of the Law of Succession Act, is to intermeddle with the estate. This is prohibited under section 45 of the Law of Succession Act, and anyone who intermeddles with the estate of a deceased person commits a criminal offence punishable by law.

29. In the circumstances, in view of the matters set out above, I find that the application before me is unmerited, and it is hereby dismissed with costs to the respondent.

30. The titles to Kericho/Kanusin/287 and Kericho/Kaitet/437, purportedly issued to the applicant and the 2nd administrator respectively, which from the documents annexed to the affidavit of the applicant have been issued in the name of **Samwel J. Kimutai Chepkwony** and **Samwel Kipkoech Chepkwony**, are hereby cancelled.

31. The distribution of the estate shall proceed in accordance with the Certificate of Confirmation of Grant issued by the court on 17th March 2016.

32. It is so ordered.

Dated, Delivered and Signed at Kericho this 25th day of January 2017.

MUMBI NGUGI

JUDGE