



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

HIGH COURT SUCCESSION CAUSE NO. 666 OF 2009

IN THE MATTER OF THE ESTATE OF IKUBU KINYUNGU MWAGA (DECEASED)

EPHANTUS KINYUA IKUBU.....1ST APPLICANT

GRACE NYAGUTHII KARIA.....2ND APPLICANT

JANE WANGARI MAINA.....3RD APPLICANT

LUCY WAMBUI MWANGI.....4TH APPLICANT

- V E R S U S -

STEPHEN KINYUA IKUBU..... RESPONDENT

R U L I N G

Ikubu Kinyungu Mwaga died on the 2/10/1992 at the age of 74 years.

He had 2 wives; Rose Nyaburugu who was the mother to the applicants and Muthoni Ikubu Kinyungu who was the mother to the respondent and 9 others according to the letter written by the chief Konyu location on 3/10/2005 – Ref. PT 7/5/VOLXV/146.

The 1st applicant is the only son in his mother's house, the respondent has 5 brothers so they are 6 sons in his mother's house.

The deceased left one parcel of land KONYU/**BARICHO**/757 ~1.335HA.

Upon his death his 2 widows filed Karatina R.M.' Court Succession Cause No. 60/2005 with the consent of all the children. It is noteworthy that in that consent filed on 29/11/05 the list does not indicate who is whose child or who belongs to which house though the affidavit in support of the petition clearly sets out each house and its children.

By an order dated 8/6/2009 the matter was transferred to the High Court when the Karatina S.R.M.'s court found it had no jurisdiction.

Grant of letters of administration intestate was made on the 6/8/2009 in the High Court case to the 2 widows.

On 27/4/2010 they filed the summons for confirmation of grant. In the supporting affidavit, they indicated that the land would be shared equally among 8 of the 14 children of the deceased.

On 2/7/2010 the certificate of conformation of grant was issued to Rose Nyaburugu Ikubu and Muthoni Ikubu Kinyungu with the estate shared equally among 8 of the 14 children of the deceased.

1. Ephantus Kinyua Ikubu
2. Stephen Kinyua Ikubu
3. John Mwatha Ikubu
4. Paul Muraguri Ikubu
5. Peter Karanja Ikubu
6. Samwel Munyiri Ikubu
7. Mary Ngima Ikubu
8. Joseph Kamiri Ikubu

On 14/10/2011 the 1st applicant Ephantus Kinyua Ikubu and the respondent, Stephen Kinyua Ikubu filed summons for revocation of the grant issued to the two widows on the ground that Rose Nyaburugu had passed away and Muthoni Ikubu was terminally ill and they could not complete the administration of the estate. The application was brought under s.76(e) of the Laws of Succession Act, and Rule 44(1) of the Probate and Administration Rules.

At paragraph 6 of the affidavit sworn by the 1st applicant herein in support of that application for revocation of grant he said.

“That the beneficiaries have agreed to have my co-applicant and I appointed and confirmed as administrators to **finalize the administration of the Estate** – annexed herein and marked as “MG3” as consent to confirmation of grant executed by all beneficiaries”-

Sure enough there was annexed to the affidavit general form R40(8) by the beneficiaries to the effect that the grant which had been issued to the two widows be confirmed to the two applicants.

Those prayers were granted and the grant of letters of administration of intestate was issued to both Stephen Kinyua Ikubu and Ephantus Kinyua Ikubu on 28/9/2012.

On 10/7/2014 the two administrators filed summons for confirmation of confirm grant supported by the separate affidavits of each administrator and a consent signed by all the beneficiaries to the confirmation of the grant. At paragraph 5 of each of their affidavits, the two administrators set out the same mode of distribution as had been set out by their mothers distributing the estate equally among the 8 beneficiaries.

On 8/1/15, the 1st applicant filed summons for revocation of the grant issued to him and the respondent. He followed it with an affidavit of protest on 15/3/2017. His contention in the summons for revocation of grant brought under s.76(b) of the Law of Succession Act and Rule 44(2) of the Probate and Administration Rules was that the grant issued to himself and the respondent was obtained by making false statement and concealment of material facts; that the respondent concealed to court that the deceased Ikubu Kinyungu had two wives, which information would have led to the sharing of the be shared equally between the two houses, leaving each house to distribute its share to its children.

His affidavit of protest, apparently sworn on his behalf and on behalf of his sisters, but without the authority to do so being filed, he challenged the supporting affidavit sworn by Muthoni Ikubu on 27/4/2010 on the mode of distribution by the two widows. Secondly that it was only fair and just that the estate be divided into two equal portions of 1.64Acres each

The respondent did file a response to the Summons for revocation of grant dated 7th January 2015 and the supporting affidavit. He pointed out that the applicant had not demonstrated any authority from the 2nd, 3rd and 4th Applicants to file the application on their behalf, and denied any allegations of wrong doing.

On 22/3/2017 counsel for the parties Wamahu for King'ori J. Theuri advocates for respondent and Gacheche wa Miano for the applicants agreed to address the issues arising out of the protest and summons for revocation by way of written submissions. It is noteworthy that no authority has been cited by either counsel. I have read the submissions by each counsel and considered the same carefully.

I have carefully set out the history of this matter because in my view it is important in the determination of the issues

1. Whether there is sufficient ground to revoke the grant issued to the 1st applicant and the respondent as required by Section 76 (b) and (c) of the LOSA, 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—

(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;

The 1st applicant's first contention is that the grant issued on 28/9/2012 was as a result of concealment of the fact of the deceased Ikubu Kinyungu having two wives. His counsel submitted that the fact that the two widows' names were clearly missing from the mode of distribution is a matter of grave concern that should lead to the revocation of the grant.

Counsel for the respondent submitted that the matter was essentially concluded and the 1st applicant could only be led by greed as it is very clear that the mode of distribution will leave him with the lion's share of the Estate of his father to the disadvantage of his other siblings.

From the record it very clear from the outset that the estate of the Ikubu Kinyungu was dealt with the complete awareness that he was a man of two wives and 14 children. His two widows Rose and Muthoni are the ones who filed the original petition before the SRM's Court, Karatina and the record speaks for itself. The fact of their names not being on the list of distribution was known to them and at the time of their deaths there was no objection from nay of the children that their mode distribution left them out. Hence nobody concealed from the court that the deceased had 2 wives and 14 children between them.

What is disturbing is that the applicant in his application to have the grant revoked appears to accuse himself of obtaining the grant through untrue allegations and through concealment of material facts. The grant was obtained by himself and the respondent and he cannot be heard to now turn an accusing finger at the respondent. They were in it together. The court had to ask itself whether the 1st applicant was truly aware of the implications of his statements made under oath to the effect that when he and the respondent obtained the grant, he himself lied to the court? That can only be described scandalous. And is untenable.

2. Whether the mode of distribution is unfair and unjust.

The 2nd issue raised by the 1st applicant was that the estate ought to have been distributed equally between the two houses. He seems to be alluding to the provisions of section 40 of the Laws of Succession Act – that

(1) Where an intestate has married more than once under any system of law permitting polygamy,

his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

Then must be read with section 38 of the same Act which states;

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.

There are a host of authorities on the application of these provisions of the Law of Succession Act. See:

(1) **In the Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] eKLR-**

Where the judge stated “...in reliance on the decision of the Court of Appeal in **Rono vs Rono (supra)**, section 40 does not take away the discretion of the court to distribute the estate of a deceased person fairly. In the court’s view, sections 27, 28 and 35 of the Act clothe the court with wide discretion to provide for dependents or beneficiaries. In the words of Omollo J A in **Rono vs Rono**:

“I had the advantage of reading in draft form the judgment prepared by Waki, JA, and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned judge to be laying down any principle of law that the Law of Succession Act, Cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr. Gicheru. I can find no such provision in the Act”.

(2) **Paul Ngumbau Kyatu & another vs. Peter Matheka Kyatu & 15 others [2014] eKLR**

Where the judge quoted from the case of **Saweria Wamuruona Muchanji versus Jinano Ngari [2008] eKLR** and the court held that: -

“This is plain unequivocal language means that the estate shall be sub-divided equally amongst the surviving children of the deceased adding the widow as a unit. It does not say that the estate (in most cases land) should first be shared equally among the houses and then later be distributed equally among the children within each house. I have noted this particular magistrate applied that interpretation and it is in my considered view wrong. He has misunderstood the proper meaning and purport of Section 40(1) of the Law of Succession Act. For emphasis, I repeat that according to Section 40 (1) of the Law of Succession Act, the estate of deceased who died intestate must be distributed equally among the surviving children regardless of house which they are born. The widow is then added as an extra unit to her house. This is the interpretation that has been applied in the High Court as well as in the Court of Appeal. The Court of Appeal in the celebrated case of **Rono versus Rono and Another [2005] 1 E.A. 363**, upheld this interpretation and held that the state of a polygamous deceased person should be distributed according to the number of the children and not the number of houses”.

(3) **In the Estate of John Musambayi Katumanga (Deceased) [2014] eKLR.**

Hence the applicant’s contention that the estate of his father ought to be divided into 2 equal shares between the two houses is unfounded. In addition, following the death of both mothers section 38 falls into place. There are no minors and there is no claim that any of the mothers contributed differently to the acquisition of the estate. I find no reason to disturb the mode of distribution. Hence the children will benefit equally.

I have noted that only 8 of the 14 children have received shares. This would have been a matter of concern for the court. However, there are consents on record both in support of summons for

confirmation of grant filed by the two widows, and also the one filed by the 1st applicant and the respondent herein signed by all the beneficiaries. That deals with this court's concern on the issue.

In conclusion I must find that the two applications by the applicant;

1. The summons for revocation of the grant issued to him and the respondent and the affidavit of protest are not only lack merit but are scandalous and an abuse of the process of court and order as follows

2. Each of the applications is dismissed with costs to the respondent.

3. The grant issued to the 1st applicant and the respondent herein on the 28th September 2014, be and is hereby confirmed as per paragraph 5 of the supporting affidavits of each of them in summons for confirmation of the grant of letters of administration intestate the dated 7th July 2014. The estate comprised of KONYU/BARICHO/757 1.335 HA be shared equally at 0.41acres each to;

a. Ephantus Kinyua Ikubu

b. Stephen Kinyua Ikubu

c. John Mwatha Ikubu

d. Paul Muraguri Ikubu

e. Peter Karanja Ikubu

f. Samwel Munyiri Ikubu

g. Mary Ngima Ikubu

h. Joseph Kamiri Ikubu

It is so ordered.

Dated, Signed and Delivered at Nyeri this 14th Day of June 2017.

Right of appeal explained.

TERESIA MATHEKA

JUDGE

In the presence of;

The Parties

Mr. Gacheche wa Miano for the Applicants

Mr. Wamahiu for the Respondent

Court Assistant Harriet