



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**PROBATE & ADMINISTRATION CAUSE NO. 96 OF 2014**

**RE: ESTATE OF ESTHER TALAI TALLAM (DECEASED)**

**FREDRICK KIMUTAI KIPRONO.....PETITIONER**

**VERSUS**

**JOHN KANGOGO CHEBIATOR.....OBJECTOR**

**RULING**

1. The objector prays that the grant of letters of administration to the estate of the deceased be revoked. The objector claims to be a creditor of the estate; and, that the petitioner has deliberately omitted his name from the list of creditors or beneficiaries of the estate.
2. The objector also prays for an order to restrain the petitioner from interfering with his quiet possession of two acres comprised in the land known as [ particulars withheld] . The objector claims that on 7<sup>th</sup> March 1995, he bought the land from one Alesus Kipkoge Rotich who had in turn bought it from the deceased. The objector also seeks general damages.
3. The objector has presented a chamber summons dated 5<sup>th</sup> May 2015. The summons is founded upon section 47 of the Law of Succession Act and Rules 44 and 49 of the Probate and Administration Rules. There is an affidavit filed in support of the summons. He avers that the two acres were to be hived off from the suit land. The objector claims that the letters of administration were obtained in secret and without his consent. At paragraphs 5 and 6 of the deposition he states that the petitioners have put up a barbed wire fence around the property and intend to evict him. He avers that he will suffer irreparable loss and damage.
4. The objector has also annexed an earlier deposition sworn on 31<sup>st</sup> March 2015 by Alesus Kipkoge Rotich. The latter confirms he sold the two acres of land comprised in the estate to the objector on 7<sup>th</sup> March 1995. The consideration was Kshs 110,000. He states that the sale agreement was lost; and, that he reported the matter to Eldoret Police Station vide OB No. 54/30/3/2015. Although he says he has annexed it as exhibit B, it is *not* there.
5. The application is contested. The petitioner has filed a replying affidavit sworn on 10<sup>th</sup> August 2012. He states as follows-

*“5. That the purported agreement relied upon by the objector was entered into with a stranger.....*

*6. That on 13<sup>th</sup> April 1989 the deceased sold 2 acres to be excised from the [suit land] to one Julius Kiptoo Arusei (deceased) who was to take care of the remaining 3 acres. (Herein annexed and marked FKK3 is a copy of the Sale Agreement).*

*7. That in 1996, when we were still in school, we came to claim our late mothers land only*

to be chased away by the applicant.

8. That on 16<sup>th</sup> April 2014 a meeting was held at the Chief's office at Kapsoya comprising of village elders and one Alesus Kipkogei Rotich who was ordered to avail the sale agreement between him and Esther Talai Tallam. It was also resolved that the owners of the land do remain on the land until Alesus Kipkogei Rotich produces the agreement.

9. That in the annexed affidavit of one Alesus Kipkogei Rotich he claims to have lost the agreement entered into with the deceased and reported the same to Eldoret Central Police Station vide OB NO. 54/30/3/2015, however no copy of the abstract has been annexed.

10. That on 27<sup>th</sup> April 2015 another meeting was held at the Chief's Office Kapsoya in which it was resolved that the agreement between Esther Talai Tallam (deceased) and Julius Kiptoo Arusei (deceased) for 2 acres still stands; and, that 3 acres [are] for the family.”

6. On 19<sup>th</sup> October 2015 I heard arguments from learned counsels for the objectors, petitioners and beneficiaries respectively. I have considered the summons, the depositions, and the rival submissions.
7. Section 47 of the Law of Succession Act gives the High Court jurisdiction to entertain *any* application and determine *any* dispute under the Act. Rule 73 of the Probate and Administration Rules provides that nothing in the Rules shall limit the inherent powers of the court to make such orders as are necessary to prevent the ends of justice from being defeated.
8. A grant once confirmed may be revoked either by the court *suo moto* or by an application made under section 76 of the Law of Succession Act. The relevant part of the section states as follows-

“76. 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; .....

9. Section 51(2) of the Law of the Succession Act on the other hand provides as follows-

“51(2). An application shall include information as to-

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

- (e) whether or not the deceased left a valid will;
- (f) the present addresses of any executors appointed by any such valid will;
- (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
- (h) a full inventory of all the assets and liabilities of the deceased; and
- (i) such other matters as may be prescribed.”

10. Rule 26 of the Probate and Administration Rules is also relevant. It states as follows;

“26(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

2. An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require”

11. The Court has discretion in determining who should administer an estate. The order of preference of persons entitled to administration is set out in section 66 of the Law of Succession Act-

“66. 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 with or without association of other beneficiaries;
- b. other beneficiaries entitled in intestacy, with priority according to their respective beneficial interests as provided by Part V;
- c. The Public Trustee; and
- d. creditors.”

12. I am satisfied that the objector presented a formal notice of objection under Rule 14(4) to the Registry on 7<sup>th</sup> May 2015; and, that a notice was delivered as required by Rule 17. There is also an answer to the petition and a petition by way of cross-application for a grant. The key question for determination is whether the grant issued to the petitioner should be *revoked*. I set out earlier the conditions under which a grant may be revoked by the court.

13. The objector claims to be a creditor of the estate. I disagree. He did *not* purchase the two acres from the deceased *Esther Talai Tallam*. He claims to have bought the land from a third party, *Alesus Kipkoge Rotich*. The petitioners acknowledge that Alesus Kipkoge Rotich purchased land from the estate but deny he subsequently sold the land to the objector.

14. The burden of proof of the latter sale fell squarely upon the shoulders of the objector. See sections 107 and 109 of the Evidence Act. See also *Evans Nyakwana v Cleophas Ongaro*, High Court, Homa Bay, Civil Appeal 7 of 2014 [2015] eKLR. The objector did not produce the sale agreement

between him and the third party. He said it was *lost*. That fact was confirmed by the deposition of Alesus Kipkogei Rotich dated 31<sup>st</sup> March 2015. The police abstract referred to is not annexed. From the depositions of the objector and Alesus Rotich, I do not doubt that the portion may have been sold to the objector. I say that very carefully. But that does *not* make him a *creditor* or beneficiary of the estate of *Esther Talai Tallam*.

15. The point that I am making was well explained in *Kennedy Olela v William Ochuodho & Another*, High Court, Homa Bay, Succession Cause 19 of 2014 [2014] eKLR. Majanja J held as follows-

*“I have perused the original file in Rongo Succession Cause No. 11 of 2013 and I have not detected any defect in the form and procedure used. All the beneficiaries were disclosed in the letter dated 10<sup>th</sup> September 2012 written by the Chief, West Kanyada Location and in the petition (Form P&A 80) and the affidavit in support (Form P&A 5). The applicant, as a purchaser, is not a person entitled to a grant of letters of administration under Section 66 of the Law of Succession Act. I would further add that the applicant was neither a dependant nor beneficiary of the deceased and he cannot therefore apply for revocation of a validity issued grant. In *Ireri Nyaga v Karani Ngari & Another* Embu HC Succ. No. 68 of 2007 [2010] eKLR it was held that “..... a buyer or purchaser cannot cause an otherwise valid grant to be revoked for the only reason that he was not recognized in the proceedings. As stated earlier in my ruling, his recourse lies in suing whoever sold the property to him and if such person be dead, then he can only sue the administrator of the deceased's estate.”*

16. I am again fortified in my finding by the decision in *Muriuki Hassan v Rose Kanyua & 4 others*, High Court, Meru, Succession Cause 62 of 2012 [2014] eKLR

*“The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased's beneficiaries and the sale of the land to them is challenged in this application. In such circumstances the interested parties' interest cannot be considered in this matter and the remedy for them if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan”.*

17. Purely from a factual and evidential standpoint, the objector has *not* established, on a balance of probabilities, that he is a *creditor* of the estate of *Esther Talai Tallam*. In so far as that estate is concerned, the objector is a third party. I am thus unable to hold that the objector should have been *notified* of the filing of this cause; or, that his *consent* was a prerequisite.

18. That is not to say that the objector has no remedy: only that his recourse lies in an action against either the estate of Alesus Kipkogei; or, against the administrators in this cause for a declaration that he is entitled to that portion of land. In a synopsis, his claim or interest cannot be a plausible ground to revoke the grant issued to the petitioner.

19. The upshot is that summons for revocation of grant dated 5<sup>th</sup> May 2015 is devoid of merit. It is dismissed. In the interests of justice, I order that each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 2<sup>nd</sup> day of February 2016.**

**GEORGE KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:-**

Ms. Chepkurui for the petitioner.

No appearance for the objector.

Mr. J. Kemboi, Court clerk.