



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 357 OF 1998

IN THE MATTER OF THE ESTATE OF KIPSANGA ARAP TUIYA - DECEASED

JOSEPH SANG

PAUL SAMOEI

PHILIP TOO.....PETITIONERS

VERSUS

JEPCHIRCHIR TUIYA

KIMAGUT ARAP SANG.....OBJECTORS

R U L I N G

1. The deceased, **Kipsanga Arap Tuiya**, passed away on the 22nd December, 1995 at the age of sixty six (66) years and on the 20th September, 2001, grant of letters of administration intestate respecting his estate was issued to **Joseph Sang, Paul Samoei** and **Phillip Too** in their capacity as the executors of his will dated 19th February, 1995. The grant was confirmed on the 22nd June, 2005 and the ensuing certificate of confirmation indicated that land parcel **No. Nandi/Sagot/114**, be registered in the name of the deceased's grandson, **Laban Kipruto Rotich**.

2. Prior to the confirmation of the grant an objection to the issuance of the grant was raised by **Jepchirchir Tuiya** and **Kimagut Arap Sang**, vide a chamber summons dated **31st October, 2001**. The record does not however, show what became of the application. It appeared to have been ignored and/or abandoned because the objectors filed another application dated **14th January, 2004** which was heard and dismissed by the court on the 18th March, 2004.

After the confirmation of the grant on 23rd June, 2005, the petitioners filed an application dated **26th October, 2005**, to remove the name of Paul Samoei from the certificate of confirmation for reason that he had passed away. The application was granted by the court on 8th June, 2006.

3. The objectors came up with another application dated **23rd November, 2005**, for revocation of the certificate of confirmation of grant and setting aside of the order dismissing the objection dated 31st October, 2001, and re-reinstating the same for hearing. This application appears not to have been prosecuted and instead the objectors filed a notice of withdrawal of the application dated 5th April, 2006.

Accordingly, the application was withdrawn on 6th April, 2006, but after the expiry of about ten (10) years, the third petitioner, Phillip Too, filed summons for rectification of certificate of confirmation of grant dated **8th January, 2015**, so that the title reflected as **Nandi/Sagot/114** be rectified to read **Nandi/Sigot/114**. The application is still pending hearing and determination.

4. The second objector, **Kimagut Sanga**, filed the present application on the **2nd February, 2015**. It is dated the same day and seeks orders that the grant issued herein on 20th September, 2001 and confirmed on 23rd June, 2004 be annulled. The application is brought under Section 76 of the Law of Succession Act and Rule 33 of the Probate & Administration Rules and is supported by the facts contained in the supporting affidavit deponed by the objector dated 2nd February, 2015, to the effect that the deceased was the objector's father and the petitioner Phillip Too is his only younger brother who filed this case without his (objector's) participation. That the other petitioners Joseph Sang and Paul Samoei are not the children of the deceased and have no right of inheritance of the deceased's property. That Laban Kipruto Rotich, who was allocated the property known as Nandi/Sigot/114 is the son of Phillip Too. That the "Will" allegedly made by the deceased dated 19th February, 1995 is a forgery as the deceased never lived in Kitale at the material time but at his home in Nandi. That the property Nandi/Sagot/114 is not the same as Nandi/Sigot/114.

5. The objector, further depones that the family property is Nandi/Sigot/114 measuring 17 acres or thereabout and is to be shared equally between him (objector) and Phillip Too i.e 8.5 acres for each.

That, the objector is not in occupation of his rightful share of the property as Phillip Too and his co-petitioners misled the court to give the entire property to Laban Kipruto Rotich. That, the grant shows that the deceased died intestate yet there is a claim that he left a written "Will". That the grant was obtained fraudulently and by concealing material facts from the court and that the deceased did not own any land measuring 60 acres or 30 acres as mentioned in the alleged "Will".

It is for all the foregoing reasons that the objector prays for the nullification of the grant and the resultant certificate of confirmation of grant.

6. The application is opposed by the petitioner Phillip Too, on the basis of the facts contained in his replying affidavit deponed and dated 12th March, 2015, to the effect that the deceased lived with the petitioner at Kibomet, Kitale from January, 1994 upto March 1995, when he returned to Nandi in good health. That the objector's application dated 23rd November, 2005 was never prosecuted and the application dated 14th January, 2004, was dismissed by the court on 18th March, 2004. That, after the confirmation of the grant, transmission forms were signed and property No. Nandi/Sigot/114 was registered in the name of Laban Kipruto Rotich on 26th June, 2006. That, the objector as early as 1997 was aware of the Will of the deceased bequeathing the said property to the said Laban Kipruto Rotich, his grandson. That, as an administrator of the estate, the petitioner/respondent obligation ended with the transmission of the said property to the rightful heir and therefore this application is an abuse of the court process.

7. The petitioner/respondent, deponed further that in the year 2006, the objector purported to forcibly occupy part of the material Nandi/Sigot/114, whereas the title thereof was in the name of Laban Kipruto Rotich. That, Kitale HCCC No. 156 of 2006, was filed against the objector and by a consent letter dated 31st May, 2008, judgment was entered as prayed in the plaint save that each party was to bear their own costs. That, due to the consent aforesaid the court cleared Laban Kipruto Rotich, the lawful owner of the aforementioned Nandi/Sigot/114. That, this application has been overtaken by events, is "res-judicata" and a clear abuse of the court process.

8. At the hearing of the application, the objector/applicant through the learned counsel **Mr. Miiyenda**, reiterated the contents of his supporting affidavit and contended that the property in the confirmed grant is property No. Nandi/Sagot/114, which is not the property in dispute in this application and that the court ruling of the 18th March, 2004 related to yet a different property known as **Nandi/Sogot/144**.

The objector submitted that property No. Nandi/Sigot/114 is ancestral land bequeathed to him and his

brother Phillip Too (respondent) and therefore the deceased's grandson Laban Kipruto Rotich could not inherit the property as the deceased was survived by two sons. That, the alleged "Will" is a forgery and was a ploy to disinherit him (Objector). The objector further submitted that the alleged consent was never executed by himself and was a forgery which never formed part of the court record. That, this application is not "res-judicata" as the previous application dated 31st October, 2001 and 23rd November, 2005, were dismissed on technicality which cannot be applied herein to disinherit the objector in view of Article 159(2) (d) of the Constitution.

9. The petitioner/respondent also reiterated the contents of his replying affidavit through the learned counsel **Mr. Samba**, who submitted and contended that the present application is "res-judicata" as the matter was filed in 1998 and two previous applications by the objector dated 31st October, 2001 and 23rd November, 2005 respectively were dismissed for non-attendance thereby paving way for the confirmation of the grant and the distribution of the estate in accordance with the "Will" of the deceased. That, it is after a period of about nine (9) years that the objector returned to court and as such Article 159 (2) (d) of the Constitution does not favour him as he has not explained the delay and cannot say that he lost touch with his advocate. That, the material property was transferred to the beneficiaries and the objector's attempt to interfere with the land gave rise to the suit against him instituted by Laban Kipruto Rotich but which was settled by way of a consent which was filed in court and which resulted in a decree.

10. The petitioner contends further that this application has no merits and that the grounds set out in Section 76 of the Succession Act have not been established by the objector. That the alleged strangers were executors of the "Will" as shown in the certificate of confirmation of grant and that the material property is Nandi/Sigot/114, as such the word "Sagot" is a typographical error as there is no registration area by that name. That the objector was not candid when he said in his affidavit that he became aware of the "Will" in 2005 yet the letter dated 1997 which he was aware of referred to the "Will". The petitioner thus prays for the dismissal of this application with costs.

11. From the pleadings as well as the submissions the basic issue for determination is whether the applicant/objector is entitled to an order of revocation and/or annulment of the grant issued herein in favour of the respondents. Put another way, whether the objector has satisfied this court in terms of Section 76 of the Law of Succession Act for grant of the orders sought herein against the respondent.

The indication given by the objector is that the grant was obtained fraudulently and by concealment of material facts. Indeed, Section 76 of the Succession Act provides for revocation of a grant if it was obtained fraudulently or by the concealment from the court of something material to the case. A grant may also be revoked if the proceedings to obtain it were defective in substance.

12. Apart from alleging that the "Will" purportedly made by the deceased was a forgery, the objector did not provide cogent evidence to establish the alleged forgery or indeed any fraud on the part of the respondents. Forgery or fraud could not be established by the mere uncertainty as to where the deceased resided while making the "Will" or by the inclusion in the "Will" of non-existent property.

The alleged concealment of material facts took the form of two petitioners i.e Joseph Sang and Paul Samoei being included as children of the deceased yet the only surviving children of the deceased were the objector and the respondent Phillip Too who were beneficiary of the deceased's estate together with Laban Kipruto Rotice grandson to the deceased who was bequeathed the parcel of land described as Nandi/Sigot/114.

13. It is objector's contention that the said portion of land is not the same as the portion described as Nandi/Sagot/114 in the certificate of confirmation of grant or Nandi/Sogot/144 in the court's ruling of 18th March, 2014. The respondents have explained that the actual description is Nandi/Sigot/114 and that the other description aforesaid were merely typographical errors.

This court is prepared to accept that any description of the land other than Nandi/Sigot/114 was most likely than not a typographical error or simply a misdescription of the actual portion of land subject matter of this application which is the latest application of similar applications previously filed by the

objector dated 31st October, 2001 and 23rd November, 2005.

14. The application dated 31st October, 2001, was not prosecuted while the application dated 23rd November, 2005, was withdrawn. Both applications never proceeded to full hearing and were therefore never determined on the merits. The contention by the respondents that the present application is *res-judicata* is clearly unsustainable.

Going back to the alleged concealment of material facts on the part of the respondents the record shows that the petition for letters of administration respecting the estate of the deceased was made by the respondents in their capacity as the executors of the deceased's "Will" and not as the surviving sons of the deceased. Most importantly, the petition was for grants of letters of administration with written Will annexed and hence, the involvement of the appointment of executors of the "Will" who were not the children of the deceased save one i.e Phillip Too.

15. The deceased was during his lifetime entitled to make his last Will and testament bequeathing any of this property to any person or animal he desired. In that regard, he could have decided not to bequeath any property to his own children but his grand children or anybody else including a non-member of his family. In the circumstances, the objector's allegation that the respondents concealed material facts in their application for grant of letters of administration was without justification or merit.

However, since the application was for letters of administration with written Will annexed, the presupposition was that the deceased died leaving a valid Will which did not appoint an executor or the executors. In such circumstances, Section 63 of the Succession Act would apply. A grant of letters of administration with the Will annexed is conclusive proof as to the terms of the Will and that the Will had been fully executed. Such a grant means that the administrator of the estate of the deceased is appointed by the court through the grant of letters of administration and not by the Will. Where an executor is appointed under a Will, such a person would normally apply for grant of probate

16. Herein, the application for grant of letters of administration with Will annexed was made by the three respondents/petitioners yet the material Will dated 19th February, 1995 indicated that they were the persons appointed by the deceased as the executors of the Will. In that regard, they ought to have petitioned for a grant of probate rather than grant of letters of administration with Will annexed. Nonetheless, the matter progressed up to the point of issuance by the court of the grant of letters of administration intestate thereby implying that this was an intestate succession contrary to what the petitioners had intended.

The material grant is herein the disputed grant dated 20th September, 2001 which was confirmed on 23rd June, 2005 in respect of land a parcel Nandi/Sigot/114 which was bequeathed to the grandson of the deceased, Laban Kipruto Rotich, on the basis of the written Will.

The foregoing factors clearly indicate that the respondent wrongly petitioned the court for grant of letters of administration instead of grant of probate. They could not petition for grant of letters of administration with written Will annexed because the Will herein had appointed them executors of the Will.

The whole process of obtaining the disputed grant of letters of administration together with the certificate of confirmation was erroneous and therefore defective in substance if not null and void "ab-initio".

17. For all the foregoing reasons, this court must find and hereby find that the present application or objection is well merited and is granted to the extent that the grant of letters of administration dated 20th September, 2001, together with the subsequent certificate of confirmation dated 23rd June, 2005, are hereby revoked and/or annulled.

The parties shall bear their own costs of the application.

Ordered accordingly.

J.R. KARANJA

JUDGE

9/7/2015

Read and signed this **9th** day of **July, 2015**

In the presence of Mr. Bororio holding brief for Mr. Miyienda for Objector and Mr. Samba for Respondent.