REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPSABET

FAMILY DIVISION

PROBATE AND ADMINISTRATION CAUSE NO. 52 OF 2021

IN THE MATTER OF THE ESTATE OF THE LATE KIMAIYO BWALE:::::::DECEASED

BETWEEN

SOLOMON K. TOO::PETITIONER

AND

DHEPKOECH BWALEI::1ST OBJECTGOR

PHILIP KIMAIYO::2ND OBJECTOR

DANIEL KIMAIYO::3RD OBJECTOR

RULING

1. This case is amongst those with the longest history in our registry, having been filed on 14th October 2003 at Eldoret vide the Petition for Letters of Administration intestate respecting the Estate of the **Late Kimaiyo Arap Bwalei** [deceased] comprising of **Land Parcel No. Nandi/Kaptel/566,** being the main asset.

The petition was presented by **Cherubeth Jeruto Bwalei** and **Solomon K. Too** in their respective capacities as widow and son of the deceased.

2. The affidavit in support of the petitioner indicated that the deceased died on 21st March 2003, and was survived by the two Petitioners as well as a daughter called **Jane Chepkosgei Mining.** Two other dependants were said to be deceased i.e. **Salina Cherotich and Kipkering Maiyo**.

3. The grant of letters of administration intestate was accordingly issued by the Court on 2nd August 2004 but an application vide the summons for revocation and annulment of grant dated 15th January 2005 was made by **Chepkeoch Bwalei, Philip Maiyo** and **Daniel Maiyo.**

The affidavit in support of the application dated 15th January 2005 was made by **Chepkoech Bwalei, Philip Maiyo** and **Daniel Maiyo.**

The Affidavit indicated that the First Applicant **[Chepkoech]** was among the three wives of the deceased inclusive of the First Petitioner **[Cherubeth]** as the First Wife and **Tapchore**

Tapkelong [deceased] as the Second Wife. The First Applicant was the Third Wife.

4. The Second Applicant [Philip] and the Third Applicant **[Daniel]** are said to be the sons of the deceased with the First Applicant and the deceased Second Wife respectively. It was thus indicated that the estate of the deceased was comprised of three [3] houses rather than one house to which the Petitioners belonged [i.e. the First House].

5. The summons was issued on 24th January 2005 and on the 7th February 2005, the Respondents/Petitioners lodged a notice of preliminary objection to the summons. The record is not clear or does not show what happened to the application and the objection. But, it shows that a summons for confirmation of grant dated 4th October 2005 was filed by the Petitioners.

6. This resulted to protracted proceedings on the matter which cultivated on **20th November 2006** with a consent that the grant dated 2nd August 2004, which was initially issued to the Petitioners be annulled and substituted for a fresh grant of Letters of Administration intestate in the names of four [4] administrators viz: -

(1) Jerubeth Jeruto or Cherubeth Jeruto
(2) Solomon K. Too
(3) Daniel Kipkoech Maiyo

(4) Chepkoech Bwalei

The fresh grant was accordingly issued on that date.

7. The sole asset/property availed for distribution was **Land Parcel No. Nandi/Kaptei/566** measuring 25.5hectares. The Beneficiaries were identified as the first house of the deceased comprising of the widow, **Cherubeth J. Bwalei** and her children, **Solomon K. Too** and **Jane Chepkosgei Mining,** the Second House of the deceased comprising of **Chemesunde Arusei, Elizabeth Jeptoo Tarus** and **Daniel Kipkoech Maiyo** and the Third House of the deceased comprising of the widow, **Chepkoech Bwalei** and her children, **Philip Arap Maiyo, Anna Cherono Tanui, Pazilisa Jepchirchir, Joseph Kipkorir Maiyo** and **Ruth Jematia Biwott.**

8. Pursuant to the consent “giving birth” to the fresh grant the distribution of the estate remained the only issue to be determined by the court or be agreed upon by the parties. This meant that a fresh certificate for confirmation of grant had to be taken out by the administrators to jumpstart the distribution of the estate among the beneficiaries and formally transmit the estate to them, respectively.

9. Such process is governed by the **Law of Succession Act** under **Section 71** thereof which provides that: -

"[1] After the expiration of a period of six months, or such shorter period as the court may direct under Sub Section [3], from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

[2] Subject to Sub Section [2A], the court to which application is made, or to which any dispute in respect thereof is referred, may –

[a] if it is satisfied that the grant was rightly made to the Applicant and that he is administering and will administer, the estate according to law, confirm the grant; or

[b] If it is not satisfied, issue to some other person or persons, in accordance with the provisions of Sections 56 to 66 of this Act, a confirmed grant of Letters of Administration in respect of the estate or so much thereof as may be unadministered.

[c]

……..

[d]

……..

10. The proviso to aforementioned provision reads as follows: -

> **“provided that; in cases of intestacy, the grant of Letters of Administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled and when confirmed such grant shall specify all such persons and their respective shares.”**

The identities of the beneficiaries and their respective shares in the estate would be disclosed in the summons for confirmation of gran in terms of a consensus between the beneficiaries, if any.

11. **Under Section 71[3] of the Act** it is stated that: -

> **“The Court may on the application of the holder of a grant of representation, direct that such grant be confirmed before the expiration of six months from the date of the grant if it is satisfied.**
>
> > ***[a] That there is no dependant, as defined by Section 29 of the deceased or that the only dependants are of full age and consent to the application.***

[b] That it would be expedient in all circumstances of the case so to direct."

12. It is clear that before the estate property is distributed to or shared amongst the beneficiaries the information alluded to in the foregoing provisions of the Succession Act must be disclosed to the court and the proper way to do so is by way of the summons for confirmation of grant. It is then that the court would put into effect the provisions of **Part five [v]** of the **Succession Act** in particular **Section 35 to 42** of the **Act** in the distribution of the estate.

13. In the present circumstances, the provisions of **Section 40** of the **Act** would be most ideal considering that the deceased was polygamous with three [3] wives.

However, the provision may be avoided if the beneficiaries agree to apply a different formula in sharing the estate amongst themselves. This would therefore be treated as a consent on the distribution of the estate.

14. In essence, **Section 40[1] of the Act** provides that: -

> **"Where an intestate has married more than once under any system of law permitting polygamy, his personal and house hold effects and the residue of the net intestate estate shall, in the first instance, be divided among the house according to the number of children in each houses, but also adding any**

surviving wife as an additional unit to the number of children."

15. The fact that this matter has taken this long to finalize means that the beneficiaries have never agreed on the manner or mode of distribution of the estate. The passage of time took a toll on the estate with the demise of the first administrator, **Cherubeth Jeruto Bwalei,** on the 14th March 2014.

Several efforts have been made by some parties to come to an agreement on distribution even through family negotiations and mediation but all in vain. We are at this point in time due to the apparent stalemate on distribution of the estate which created numerous inter-locatory applications on the matter.

16. One such application is the application vide the chamber summons dated 22nd May 2017, in which the Second and third houses of the deceased seek orders against the first house of the deceased to the effect that the grant of letters of administration issued on 20th November 2006 be revoked and/or annulled by reason of concealment and fraud and that the entire proceedings and consent entered on 20th November 2006 be set aside on account of an error on the face of the record.

17. The filing of this application and others before it could apparently be the reason for the failure by the parties to take out a summons for confirmation of the grant issued on 20th

November 2006. The proceedings indicate that the application is being treated as an objection to the issuance of the material grant dated 20th November 2006 and this explains why it initially proceeded by way of viva-voce evidence before this court gave fresh directions on 18th December 2023, that the application be heard by way of affidavit evidence and written submissions.

18. On the scheduled hearing date i.e. 18th April 2024, at the instance of the Applicant/Objectors' advocate, **Mr. Murgor,** the matter was rescheduled to 12th June 2024 on status and way forward when the court noted that the matter was partly heard by viva-voce evidence and directed that the previous proceedings be typed for further hearing on 17th September 2024 from where it lastly stopped. On that 17th September 2006, the matter was adjourned at the instance of the third applicant on account of the absence of his advocate. Despite the objection of the Respondent/ Petitioner the third Applicant was indulged by the court and matter fixed for further hearing on 14th October 2024, on which date evidence was received from **Philip Maiyo [PW2],** before matter was further adjourned to 11th November 2024.

19. A total of four [4] witnesses testified on behalf of the applicants on the 11th November 2024. There were, **William Martim Kkosgei [PW3], Magdalena jesoimo**

Melly [PW4], Philip Kipchumba Tarus [PW5] and **Philip Kipkemboi Kogo[PW6].** Thereafter, the matter was further adjourned to 3rd March 2025, again to 16th April 2025 and again to 13th May 2025 and then to 10th June 2025, when evidence was received from **Mogere Lumumba [PW7]** before the Applicant/ Objectors closed their case.

20. The Respondent/ Petitioner's case commenced and closed on the same 10th June 2025, with evidence from the Petitioner, **Solomon Kipchumba Too [DW1**] and his witness, **Kibet Isaac [PW2].** As at 7th October 2025, both sides had filed their final written submissions.

Upon due consideration of the application on the basis of the supporting grounds and those in opposition thereto and in the light of the rival submissions, it became quite clear to this court that the bone of contention was whether the proceedings of the 20th November 2006 which resulted in a consent order which germinated the impugned grant of letters of administration dated 20th November 2006 were flawed enough to render the ensuing grant null and void for purposes of administration and distribution of the estate property among the beneficiaries.

21. A grant obtained with the consent of all the beneficiaries cannot be said to have been obtained by concealment of material facts or by fraud unless it can be

shown that the consent was arrived at by mistake and/or fraud. The party with the obligation to establish and prove the alleged mistake or fraud would definitely be the Applicant/Objector. Therefore, without the success of prayer [2] of the present application prayer [1] would be a misconception and/or devoid of merit.

22. By and large the oral evidence availed by the Applicant/ Objectors did not address the issue pertaining to the impugned consent thereby failing to prove in any manner that it was a product of mistake and/or fraud at the behest of the Petitioner/ Respondent.

The supporting affidavit dated 22nd May 2017 by **Ann Jerono Tanui** and **Julia Arusei** allude to the consent being entered into on their behalf by an advocate who was not authorized nor qualified. However, the two did not testify nor avail any evidence to prove the allegation.

23. The supporting affidavit of **Elizabeth Jeptoo Samoei** dated 22nd May 2017 also indicated that their advocate then on record had no capacity to enter the consent and that she did not give her consent for the same.

However, she also did not testify nor lead any evidence to prove her allegations.

It therefore follows that most likely than not the impugned consent made by the parties in court and in the presence of their respective advocates on the 20th November 2006 was proper and lawful.

24. Prayer [2] of the application must therefore fail for want of proof of mistake, fraud or error apparent on the face of the record. In the circumstances, prayer [1] must also fail for being misconception and in any event, for want of proof of concealment and/or fraud.

It is imperative to note that the real bone of contention between the parties is the distribution of the estate property and nothing more. The consent of the 20th November 2006 identified the property as the sole asset available for distribution among the beneficiaries who were also identified in the consent as the three houses of the deceased comprising of all the parties herein.

25. It is therefore an irony that the Applicant/ Objectors by way of this application seem to disown the Petitioner/ Respondent as a beneficiary of the estate alleging that his mother, the Late First Wife of the deceased received her share of the estate property, but sold it and moved elsewhere with the Petitioner in tow, his fact was in any event not established and proved by the applicants evidence availed herein.

26. The position taken by the Applicants vis-à-vis the Respondent/ Petitioner raises a lot of questions including whether or not the Petitioner was entitled to a share of his father's estate independent of that of his mother and what

was exactly his mother's lawful interest in the estate as provided for under the Succession Act???

27. Clearly, the impugned grant has all along been ripe for confirmation to enable distribution of the estate property since the year 2006, but the failure of the parties to agree on distribution and take out necessary summons for confirmation of grant has contributed greatly to the protracted nature of the matter leading to wastage of time and resources especially taking into consideration that the impugned consent order clearly identified the estate property as being available for distribution to the identified beneficiaries inclusive of the Applicants and the Petitioner/ Respondent herein.

28. All in all, the present application was absolutely unnecessary and is devoid of merit in any event. It is therefore dismissed with the parties bearing own costs and with directions that the estate property being **Land Parcel No. Nandi/Kaptel/566** be re-surveyed freshly to ascertain its exact size and enable its equitable distribution among the beneficiaries who ought to agree on a mode of distribution and take out a fresh summons for confirmation of grant at least within the next six [6] months from this date hereof or any shorter period.

29. The costs of the re-survey be derived from the proceeds of the tea bushes within the estate property on the account

of the second and third houses of the deceased who are said to be the recipients and in control of the proceeds.

The matter be given a mention date on the way forward and/or further orders.

Delivered and Dated this 15th day of October, 2025.

HON. J. R. KARANJAH,
JUDGE