



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: E. M. GITHINJI, HANNAH**

**OKWENGU & J. MOHAMMED, JJA.**

**CIVIL APPEAL NO. 117 OF 2016**

**BETWEEN**

**VERONICA CHEPUNDONI MAGAI.....1<sup>ST</sup> APPELLANT**

**JOYCE CHEMUSUNGU MAGAI.....2<sup>ND</sup> APPELLANT**

**AND**

**CICILIA CHESOS CHEPKILIM.....1<sup>ST</sup> RESPONDENT**

**ESTHER CHEPTIREN MAIYA.....2<sup>ND</sup> RESPONDENT**

***(Being an Appeal from the ruling of the High Court of Kenya***

***at Kitale, (S. Githinji, J.) dated 15<sup>th</sup> February, 2016***

**in**

**H.C. SUCCESSION CASE NO. 173 OF 2007)**

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**JUDGMENT OF THE COURT**

[1] This is an appeal from the Ruling of the High Court (S. Githinji, J.) revoking the Grant of letters of administration intestate issued to the appellants in respect of the estate of **Chepokokoi w/o Chepkilim (deceased)** and reverting the land comprising the estate to the deceased.

[2] The deceased was registered as proprietor of land title No. **West Pokot /Siyoi "A"/145** comprising of 8.6 hectares on 17<sup>th</sup> May, 1979. She had three sons and one daughter.

The first son was **Wilfred Magal** who died in 1971. The two appellants are the daughters of Wilfred Magal. The second child is **Chepokasam Chepkilim**, a daughter who is married. The third child was **Samuel Rotumoi Chepkilim** who died on 12<sup>th</sup> December, 2012, leaving behind a widow **Cecilia Chesos Chepkilim** (1<sup>st</sup> respondent herein) and several children. The fourth child was **Maywa Chepkilim** who died in 2001 leaving a widow **Esther Cheptiren Maiywa** (2<sup>nd</sup> respondent herein) and children.

[3] After Chepokokoi w/o Chepkilim died on 2<sup>nd</sup> August, 1991, her son Samuel Rotumoi Chepkilim applied for Grant of letters of administration intestate in Kitale. High Court Succession Cause No. 187 of 2005 and a Grant was issued to him on 1<sup>st</sup> March, 2006 but he died on 12<sup>th</sup> December, 2012 before the administration of the estate was completed.

On 2<sup>nd</sup> October, 2007, the two appellants applied for Grant of letters of administration intestate in respect of same estate in High Court Succession Cause No. 173 of 2007 and a Grant was issued on 24<sup>th</sup> January, 2012. Thereafter the appellants applied for the confirmation of the Grant issued to them. The Grant was confirmed on 7<sup>th</sup> November, 2017 distributing the land title No. West Pokot Siyoi "A"/145 exclusively to the two petitioners to share as follows:-

**Veronicah Chepundon Magal .....11 acres.**

**Joyce Chemusungu Magal.....10.5 acres.**

[4] On 16<sup>th</sup> April, 2014, the two respondents filed a summons for revocation/annulment of the Grant under **section 76** of the Law of Succession Act (*LSA*) on two grounds, namely, that the proceedings to obtain the Grant were defective in substance and that the Grant was obtained fraudulently by making false statements and by concealment of material facts.

The application was supported by the joint affidavit of the two respondents. It was also supported by the affidavit of **Wilson Pkech Chepkilim** and **Charles Ngoletukei**. The 1<sup>st</sup> respondent (*Cecilia*) filed a further affidavit sworn on 8<sup>th</sup> May, 2015. The appellants filed a joint replying affidavit sworn on 25<sup>th</sup> October, 2014 in which they gave the history of the suit land. They claimed that the land belonged to their later father and annexed the proceedings of the Land Adjudication Committee. They also stated that they were not aware of the succession cause filed by Samuel Rotumoi Chepkilim. **Jamin Sungura Abednego Kaimasach** and **Henry Edward Soprin** filed affidavits in opposition to the application for the revocation of the Grant. The respective counsel for the parties filed written submissions. The appellants' counsel in particular submitted that the Land Adjudication Committee decided that the land be registered in the name of the deceased to hold in trust for the appellants.

[5] The learned trial judge considered the appellants' claim that the deceased was registered to hold the land in trust for them and after studying the proceedings of the Land Adjudication Committee stated:

“Nowhere is it stated that Chepokokoi Chepkilim Lopeile was to hold the said land in trust for anyone, leave alone the petitioners/respondents.

The subsequent title issued to him (sic) likewise did not indicate so.

Accordingly I find that there is no reliable evidence showing that chepokokoi Chepkilim was registered as absolute owner of land parcel No. West Pokot/Siyoi A/145 to hold in trust for Wilfred Magal Chepkilim and subsequently for the petitioners/respondents.”

The learned judge also considered the merits of the application and made findings that the appellants were not honest in their application for Grant; that they made an application for Grant when another Grant was in existence; that the appellants misrepresented to the court that they were the only beneficiaries; that they did not disclose that the deceased had a surviving daughter and daughters-in-law who had a better right; that they concealed that they had many cousins who had an equal right to them and that they failed to disclose that the estate in issue was that of their grandfather and not their father.

[6] In the four grounds of appeal, the appellants state that the trial judge erred in not finding that Chepokokoi Chepkilim held the suit land in trust for the appellants; in finding that the estate was in respect of the appellants' grandfather; in finding that appellants were not honest and in failing to appreciate the evidence on record tendered by the appellant. **Mr. Teti**, the appellants' learned counsel filed written submissions and also made oral submissions. Similarly **Mr. Kiarie** for the respondents filed written submissions and made oral submissions.

[7] Mr. Kiarie submitted that the appeal is incompetent for the reason that a certified copy of the order appealed from has not been provided in breach of **Rule 87 (1) (h)** of the Court of Appeal Rules. However, as Mr. Kiarie admits, a copy of the order dated 15<sup>th</sup> February, 2016 is included in the record of appeal. That copy of the order bears the court stamp and is signed by the Deputy Registrar of the Court. It contains the orders made by the High Court.

The enumerated orders are not questioned. It is not contended that they do not conform with the orders of the court nor is it claimed that the respondents have suffered any prejudice. A copy of the stamped order which is signed by the Deputy Registrar is as good as a certified copy of the order. This is a matter of form, a mere technicality that does not render the appeal incompetent.

[8] In essence, the appellants claimed in the High Court that they were entitled to apply for the Grant because the land comprising the estate belonged to their deceased father Wilfred Magal and was registered in the name of their grandmother Chepokokoi in trust for them. They therefore claimed that they were the sole beneficiaries of the entire land. They particularly relied on the proceedings of the Land Adjudication Committee in Land Case No. 9 of 1971 and the decision of the Land Adjudication Committee in that case dated 10<sup>th</sup> January, 1972.

The issue of trust was a substantive issue in the application for the revocation of the Grant. Respective affidavits were filed in relation to that issue. The respective counsel for the parties made submissions on that issue. The trial judge was called upon to decide the issue. In this appeal, the appellants say that the court erred in finding that the land was held in trust. The respective counsel for the parties have made submissions on the issue. It follows that the question of trust was directly and substantially an issue before the trial court and the court exercising the fused equitable and legal jurisdiction had power to determine the issue in the succession cause if it deemed it, as it did, convenient to do so.

[9] The land in dispute was registered in the name of the deceased after the land adjudication process. The land dispute before the Land Adjudication Committee was filed by one **Talapchonu Kameikil** as plaintiff against the deceased Chepokokoi as the defendant. By the time the proceedings were going on, Wilfred Magal, the father of the appellants has already died in 1971.

The evidence of the deceased before the Land Adjudication Committee was that her son Wilfred Magal was living in the land. Jamin Sungura who was the deceased's witness stated before the Committee that Wilfred Magal was given the land by his father who had authority to allocate land. The Committee made a finding that the son of the deceased occupied the land with his father's authority and that:

“The defendant was the first person to occupy the land in dispute while the plaintiff was awarded a land next to this one in dispute. We the Land Adjudication Committee therefore agree that the whole land in dispute belongs to the defendant.”

The final order of the Land Adjudication Committee was framed thus:

“We the Land Adjudication Committee order the whole of this land in dispute be registered to the defendant CHEPOKOKOI W/O CHEPKILIM LOPEILE”.

In his supplementary affidavit Jamin Sungura who supported the appellants’ case deponed that the deceased was registered on behalf of her late son’s children (*appellants*). As the affidavit of Henry Edward Soprin shows Mary Cheptipin the wife of Wilfred Magal and the appellants’ mother were alive. Wilson Pkech Chepkilim deponed that he was a son of Chepkilim – the husband of deceased Chepokokoi w/o Chepkilim, that his father had two wives – including his mother Chepokamwerar; that his father Chepkilim shared his land between his two wives and the disputed land was registered in the name of the deceased.

There was affidavit evidence of Charles Ngoletukei – an Assistant Chief of the area where the disputed land is situated, that the appellants are not the only beneficiaries and that a vast majority of the beneficiaries of the deceased had been disinherited. There was also affidavit evidence of Wilson Pkech Chepkilim and Cecilia Chesos Chepkilim which the learned judge accepted that the disputed land was sub-divided into three portions and each son of the deceased allocated seven acres which they occupy. The father of the appellants is among the three sons who had been allocated seven acres.

[10] It is evident that the appellants were asking the court to re-open the adjudication process. If the appellants’ mother was not satisfied with the decision of the Land Adjudication Committee she should have appealed against the decision in accordance with the procedure set out in the Land Adjudication Act.

The appellants and their mother did not challenge the title of the deceased in her lifetime. It is evident from the adjudication proceedings that the deceased was adjudicated as the proprietor of the land on behalf of her household which include the father of the appellants.

From the totality of the affidavit evidence and the Land Adjudication proceedings, we are satisfied that the court arrived at the correct decision on the issue of trust.

[11] It is clear that the appellants obtained a second Grant when there was already an existing Grant and when the appointed legal representative of the estate Samuel Rotumoi Chepkilim was still alive.

Further, by **section 81** of the LSA, upon the death of one or more of several executors or administrators, all powers and duties of the executors or legal representatives vest in the survivor.

By **section 76(e)** of LSA, a Grant can be revoked if it has become useless or inoperative through subsequent circumstances. Upon the death of Samuel Rotumoi Chepkilim, the appellants should have applied for revocation of the Grant already issued and for issuance of a further Grant to the persons entitled. The second Grant issued to the appellants before the first Grant had been revoked is a nullity in law whether or not the appellants knew of the existence of the first Grant.

[12] Lastly, the findings by the learned judge that the appellants obtained the Grant by misrepresentation and concealment of material true facts were supported by ample evidence. The appellants knew of the existing disputes in the estate and the fact that other beneficiaries and their families had settled on the land. They failed to disclose all this to the court to enable the court exercise its wide powers under **section 70** of the LSA and investigate their interest on intestacy.

[13] For the foregoing reasons, the appeal is dismissed with costs to the respondents.

**Dated and Delivered at Eldoret this 9<sup>th</sup> day of May, 2019.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**