In re Estate of Kerewa Kiptanui also known as Kerewa Arap Tanui (Deceased) (Probate & Administration 62 of 2021) [2024] KEHC 4062 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4062 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

PROBATE & ADMINISTRATION 62 OF 2021

JR KARANJA, J

APRIL 25, 2024

(FORMERLY ELDORET SUCCESSION CAUSE NO. 22 OF 2001)

IN THE MATTER OF THE ESTATE OF THE LATE KEREWA KIPTANUI ALSO KNOWN AS KEREWA ARAP TANUI DECEASED

RULING

1. Most unfortunately, the present dispute has been in the court corridors for more than twenty five (25) years. The long history has contributed to the dilapidated and tattered state of the court record so much so that part of the documentary material filed herein over the years are missing, untraceable or may have even been "nibbled by rats".

2. The subject of the dispute is the Estate of the late Kerewa Kiptanui also known as Kerewa Arap Tanui (Deceased) who passed away on the 17th January 1990 at the age of seventy (70) years as per the availed death certificate dated 12th March 1990. Thereafter, in the years 1995 and 1998 petitions for grant of letters of administration in Estate respecting the estate were lodged at the magistrate's courts at Kapsabet leading to the issuance of separate grants and certificate of confirmation of the grants.

3. The initial grant dated 30th June 1995 and confirmed most probable on the month that followed was issued to Rosaline Jeptarus Tanui (the 2nd Respondent). The grant that followed was dated 24th November 1998. It was issued to Jane Jemaiyo Kerewa (1st Respondent) together with Kipkemboi Sang (3rd Respondent) and one Simon Kipruto Too, said to be a purchaser of part of the estate property.

4. However, by an order of the court made on 16th November 2000, the grants aforementioned were annulled and the matter transferred from the Magistrate's Court to the High Court.

   Eventually, on the 27th March 2003, the three Respondents herein (i.e. Jane Jemaiyo Kerewa, Roseline Jeptarus Tanui and Kipkemboi Sang) were appointed by the court as the co-administrators of the deceased estate.

5. Thereafter, several applications relating to the estate were presented by different parties and/or beneficiaries. Ultimately, on the 4th October 2006, the court rendered its judgment with respect to

the distribution and/or sharing of the entire estate amongst the three beneficiaries of the estate which comprised of land parcels No. Nandi/Chemasi/516, 647, 667, 679, 528 as well as town Plots No. 19 situated at Kibigong Trading Centre and No. 17 situated at Chepsweta Trading Centre.

6. Most importantly, it was noted in the court's judgment that there was no dispute relating to the actual beneficiaries or survivors of the deceased. These were identified as George K. Kerewa (deceased) represented by his wife Jane Jemaiyo Kerewa (first adminstratrix/ Respondent). Rosaline Jeptarus, the only surviving widow of the deceased (Second administratrix/ Respondent), Kipkemboi Sang also known as Musa Tanui (Third Administrator), Joash Kibiwot Sang, Nicholas Kibungei Sang, James Kipkogei Kerewa, Mary Jepchrichir, Peter Kiprop Sang, Jacob Kiplagat Kerewa, Esther Jepkorir, Lillian Jepkemboi and Benjamin Kipketer Tai as a purchaser.

7. It was also noted that the deceased had married three wives. The first wife being Kasiei Tanui who was married in the 1940's and passed away in 1995. The second wife was Tabarno Tanui, married in the 1950's and passed away in 1956 after giving birth to her first child (Kipkemboi Sang) (third administrator). The third wife was Rosaline Jeptarus Tanui (second administratrix) married in the year 1965.

   The third administrator/Respondent was said to be a son of the deceased's second wife while the first Administratrix/ Respondent, (Jane Jemaiyo Kerewa) was said to represent her late husband, George Kerewa, son of the deceased.

8. After the Court judgment a certificate of confirmation of grant was accordingly issued on 29th December 2006 and then came its ripple effect reflected in the several applications that followed pitting some of the beneficiaries and parties claiming interest in part of the estate property.

   The present application vide the summons for revocation or annulment of grant dated 1st March 2021, was one such application and is subject of this ruling.

9. The application is brought by David Kiptoo Kogo (herein the Applicant/Objector) seeking orders for revocation and or annulment of the material grant and additional orders including temporary or permanent injunctive orders respecting land parcel numbers Nandi/Chemise/1274, 1275, 1276 and 667, orders to stay proceedings in Kapsabet SPMCC E&L E013 and orders to nullify all acts undertaken with respect to parcels numbers Nandi/Chemase/647 and 667. The orders are sought against the three administrators of the state (1st, 2nd and 3rd Respondents) and the three interested parties including Equatorial Land Holding Ltd (First Interested Party), Kennedy Kipkosgei (Second Interested Party) and Agnes Jepkorir Berenge (Third Interested Party). The Third Administrator/ Respondent, Musa Kipkemboi Sang is since deceased.

10. The nine (9) grounds on which this application is based are fortified by Applicants supporting affidavit dated 1st March 2021 and are substantially anchored on the Applicant's allegation that the impugned given was fraudulently obtained and confirmed by making of false statements and concealment of material facts on the part of the Respondents and without the knowledge and consent of the Applicant and his sister, Everlyn Jeruto, who are beneficiaries of the Estate being the children of the deceased's third wife, Tabarno Chebosia, a fact well know and acknowledged in a meeting of the entire family of the deceased held on the 22nd July 1993.

11. The Applicant's contention is that he was excluded as a beneficiary of the Estate together with his sister during the distribution of the Estate which according to him was fraught with discrimination and/or inequality against the house of the said Tabarno Chebosia.

All the Respondents and the First Interested Party opposed the application on the basis of the grounds/ averments in their respective replying affidavit deponed on 14th March 2021 by the first and second Respondents and on the 7th April 2021 by David May, a director of the First Interested Party.

12. The Second and Third Interested Parties appear not to have filed any response to the application nor participated in these proceedings.

Basically, the dominant prayer in the application is prayer five (5) for revocation and/or annulment of the impugned grant said to have been issued to the three Respondents and confirmed on 4th October 2006.

The determination of this prayer would invariably comprise and/ or dispose of the remainder of the prayers and it was towards that end that the application was heard by way of oral or "*viva-voce*" evidence.

13. In that regards, this court duly and differently constituted received evidence from both the Applicant and the Respondents as well as the First Interested Party and other witnesses, mostly called by the Applicant who was treated as the Plaintiff while the Respondents and interested parties were treated as the Defendants, Accordingly the Applicant testified as PW1 and called five witnesses vis: -

> Hezron Tanui (PW2), Hellen Chepngetich (PW3), Cyrus Limo (PW4) and Joan Bitok (PW5, but indicated in the record as PW6)
>
> The First and Second Respondent testified as DW1 and DW2 respectively while the First Interested Party testified through its Chief Financial Officer, Jeremy Froome (DW3).

14. Coupled with the grounds in support of the application the evidence availed herein clearly indicate that the impugned grant was obtained by the three Respondents and confirmed by the court vide its judgment of the 4th October 2006 after contested dispute on the distribution of the estate between the beneficiaries.

Apparently, the deceased was a polygamist married to three wives during his lifetime. The distribution of the Estate was therefore expected to be amongst the beneficiaries and/ or dependents in all the three houses of the deceased. This was effected by the court in its judgment or rather ruling, made on the 4th October 2006.

15. If any party was aggrieved or dissatisfied with the ruling, the door was wide open for him/her to apply for a review thereof or short of that, appeal the ruling to a higher court.

However, the present application is not for review but for the revocation and/or annulment of the impugned grant and by extension the accrued certificate of confirmation of grant dated 29th December 2006. It is anchored on the provisions of Section 76 of the *Law of Succession Act* and was notably filed fifteen (15) years or so after confirmation of grant.

16. The Applicant's ultimate prayer is that the impugned grant be revoked or annulled for reasons that it was obtained fraudulently by means of false statements and/or representations and/or by concealment of material facts on the part of the Respondents

The *Law of Succession Act* (Cap 160 Laws of Kenya) is the substantive law governing both testate and intestate devolution of property of a deceased person, hence grant of letters of administration and distribution of the estate property or free property of the deceased among the rightful beneficiaries or survivors, heirs and Dependents of the deceased.

17. Any of the aforementioned persons including any other person with a state or interest in the estate such as a creditor may apply for grant of letter of administration as provided for by the *Succession Act* and the Rules made thereunder i.e. the *Probate and Administration Rules* 1980 which serve as the Procedural Law in respect thereof.

A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect (See, Section 34 of the *Succession Act*).

18. This dispute revolves around an intestate as opposed to a testate succession in which the deceased was a polygamist with three wives who may or may not have survived him, hence having preference over all other beneficiaries in the administration of the deceased's estate. The wives or any one of them were most suited in applying for the grant respecting the estate of the deceased.

19. Section 66 of the *Act* provides for the order of preference or priority in the following terms: -

> " when a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or person 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 general guide the following order of preference: -
>
> a. Surviving spouse or spouse, with or without association of other beneficiaries.
>
> b. Other beneficiaries entitled on intestacy, with interests as provided by part V:
>
> c. The Public Trustee and
>
> d. Creditors.

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

20. Part V of the *Act*, deals with intestacy and contains Section 35 which provides that: -

> "
>
> "(1) Subject to the provision of Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to: -
>
> a. The personal and household effects of the deceased absolutely and
>
> b. A life interest in the whole residue of the net intestate estate;
>
> Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person."

Section 40 which also falls under Part V provides 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.

(2) The distribution of the personal and household effects and the residue of the net, intestate estate within each house shall then be in accordance with the rules set out in Section 35 to 38."

21. Section 51 of the *Succession Act* provides for the prescribed format in an application for grant of letters of administration in the manner set out in Rule 7 of the *Probate and Administration Rules* and Section 53 provides for the forms of grant such that if and so far as there may be intestacy, the court may grant letters of administration in respect of the intestate estate.

22. Under Rule 25(1) of the Rules, "every grant made and issued through the principal registry or a high court district registry shall be in one of Forms 41 to 52 as appropriate and shall be signed by a judge of the High Court and sealed with the seal of that registry".

    In this case, Form 41 would be the applicable legal instrument.

    Under Rule 26, Letters of Administration shall not be granted to an Applicant without due notice to every other person entitled in the same degree as or in priority to the Applicant.

23. However, under Rule 27, nothing in Rule 26 would prevent a grant being made to any person to whom a grant may be made, or may be required to be made under the Act.

    Section 67 to 70 of the *Act* provide for procedure on grants while Section 71 provides for confirmation of grants with Section 76, providing for revocation or annulment of grant and on which the present application is founded.

24. Having considered the application, the record, the evidence, the law and the submissions by all the parties, it became apparent to this court that what emerges as the major issue for determination is whether the impugned grant was validly issued by the court and if so whether it turns on revocation or annulment for reasons that it was obtained in proceedings which were defective or it was obtained fraudulently in any manner or that it was obtained by means of an untrue allegation on a point of law or that the administrators have failed to diligently administer the estate. Such are valid and lawful reasons for revocation or annulment of a grant or a certificate of confirmation of grant or both in terms of Section 76 (a) (b) (c) and (d) of the *Succession Act*.

25. It was therefore incumbent upon the Applicant herein to establish and prove by necessary evidence that the impugned grant was unlawfully and fraudulently obtained by the Respondents by the making of false statements or by misrepresentations or by concealment of material facts.

    Although the interested parties were enjoined in the application, albert, unnecessarily, the applicant's allegation is directed more at the Respondents in their capacity os the administrators of the material estate and holders of the impugned grant together with the material certificate of confirmation of grant.

26. However, as may be deciphered from the record and the evidence the inclusion of the interested parties appears to have been informed by the change of ownership of part of the estate from the deceased to the Interested Parties, more so, the First and Third Interested Party which occurred during the distribution or after the distribution of the entire estate to the rightful beneficiaries. The affected property were Land Parcels No. Nandi/Chemase/667 and Nandi/Chemase/647. The Third Interested Party was linked to Parcel No. 667, but she did not participate in these proceedings to give her side of the story with respect to this application.

27. Parcel No. 647 was linked to the First Interested Party by dint of the fact that during the distribution process or after distribution it was allegedly sold to the First and Second Interested Parties after being

sub-divided into separate and distinct parcels of land viz: - Land Parcels No. Nandi/Chemase/1274, 1275 and 1276.

28. In his affidavit in support of this application the Applicant indicates that the Parcel No. 647 after being sub-divided into the three distinct parcels aforementioned was eventually registered in the name of the First Interested Party as Parcel No. Nandi/Chemase/1274 and 1275 and in the name of the Second Interested Party as Parcel No. Nandi/Chemase/1276. This therefore means that estate property Nandi/Chemase/647 is no longer in existence as the property of the deceased.

29. In essence, the current dispute does not involve the interested parties, but the Applicant and the Respondents. What is apparently in dispute between the Applicant and the Interested Parties, in particular, the First and Second Interested Party is a land ownership dispute which would fall within the jurisdiction of the Land and Environment Court. This explains why as indicated by the Applicant, the First Interested Party instituted a land dispute case against him, being Kapsabet SPMCC No. E013 of 2021 for which the Applicant seeks stay of proceedings (See prayer 4 of the Summons for revocation of grant).

30. It would therefore follow that prayer (4) of the summons together with prayers (2), (3) and (7) are misconceived and do not fall for determination in this application and by this court even though the scheme of distribution of the estate property which resulted in the change of ownership and indeed, the land ownership dispute may be upset should the present application succeed. Otherwise, the Applicant's claim against the interested parties is untenable with the result that prayers (2), (3), (4) and (7) are herein disallowed as against the interested parties.

31. Getting back to the main prayer (5), the record shows that the grant subject of this application is the one which was issued to the three Respondents by the High Court on the 27th March 2003, and is also the one which was confirmed on the 4th October 2006, after a protracted dispute on the distribution of the estate property.

    The record also shows that the impugned grant was regularly made and issued on the application of the three Respondents in the prescribed manner and format.

32. In may therefore be stated that the impugned grant was validly made and issued pursuant to the legal and procedural requirements of the *Law of Succession Act* (Cap 160 Laws of Kenya).

    It was however, confirmed past the prescribed period of six months from the date of its issuance although the record shows that the necessary application vide summons of confirmation of grant dated 9th September 2003 was made within time. It is evident that the delay in confirming the grant was occasioned by the dispute on the distribution of the estate which dispute was resolved by the judgment or ruling of the court rendered on 4th October 2006, effectively settling the issue of distribution of the deceased's entire estate amongst the rightful beneficiaries, dependents, heirs or survivors of the deceased.

33. The certificate of confirmation of grant dated 29th December 2006 was issued to seal the distribution of the estate which therefore became spent thereby discharging the three Respondents from their obligations as co-administrators of the estate in terms of Section 83 of the *Succession Act*.

    However, after a delay of about fifteen (15) years since the issuance of the certificate of grant and about eighteen (18) years since the issuance of the impugned grant, the present application was filed by the Applicant against the three Respondents and the Interested Parties who had no kinship relationship with the deceased but were merely purchasers for value of part of the deceased's erstwhile estate which had already devolved to his beneficiaries, dependants, survivors or heirs.

34. Despite the delay by the Applicant in bringing this application, Section 76 of the *Succession Act* does not prescribe the period within which such an application may be brought but Section 58 of the *Interpretation and General Provisions Act* (Cap 2 Law of Kenya) provides that: -

> " where no time is prescribed or allowed within which on privy shall be done, such thing shall be done without unreasonable delay, and as often as due occassion arises."

35. There can be no doubt that the delay of fifteen (15) years in bringing this application was grossly unreasonable, unconscionable, intolerable and inequitable, more so, in the absence of a satisfactory explanation or excuse from the Applicant.

    This court, being a court of equity does find it difficult and is indeed reluctant on account of delay in exercising its discretion in favour of the Applicant by granting prayer (5) of the application which appears not to have been made in good faith and therefore suitable for dismissal.

36. If it were to be taken that the question of delay does not compromise or complicate the application, the obligation to prove that the impugned grant was fraudulently or unlawfully obtained by the three Respondents vested on the Applicant. In that regard, as may be deciphered from his oral and affidavit evidence, his contention is that the Respondents omitted him and his sibling sister called Everlyn Jeruto Tanui as a beneficiary or dependent of the deceased's estate, yet his mother called Tabarno Chebosia (deceased) was also a wife to the deceased and he was born out of that relationship.

37. The Applicant implied that he was a biological son of the deceased and if not, then the deceased took him in and treated him as his own son thereby placing him in a pole position with the Respondents in inheriting the deceased's estate property. He therefore implied that his omission as a beneficiary of the estate was a deliberate, unlawful and fraudulent act on the part of the Respondents intended to not only render him destitute but also to disinherit him of his lawful inheritance.

38. The Applicant placed much weight and reliance on the minutes of an alleged meeting of the deceased's family which is said to have occurred on the 22nd July 1993 and whose main agenda was the distribution of the deceased's estate among the beneficiaries including the Applicant's mother, the said Tabarno Chebosia.

39. The Applicant contended that the resolutions and/or conclusions that came out of the meeting aforementioned were a confirmation that his mother was a wife to the deceased, hence a beneficiary of his estate which he may have acquired on his own or jointly with his mother. The Applicant implied that his mother's alleged linkage to and interest in the estate property was transferred to him and his sister as her children with the deceased, hence giving them the status of being beneficiaries and/or dependents of the deceased's estate.

40. Under the *Succession Act* (Section 3) any child whom a deceased person treated or recognized or accepted as a child of his own or for whom he voluntarily assumed permanent responsibility would be considered as a child of the deceased for purposes of inheritance, hence a beneficiary/ dependant of the deceased's estate.

    It was apparently on the basis of this description of a child that the applicant claimed an interest in the estate property, short of the fact of being considered as a biological son of the deceased.

41. Even though the Applicant relied substantially on the minutes of the meeting alleged to have been conducted on the 22nd July 1993 to establish and prove that his mother was wife to the deceased and that he was a child of the deceased through the alleged marital relationship, the said minutes were never tendered in evidence other than being marked for identification.

Consequently, what the Applicant sought to prove by way of the minutes could not be achieved for want of credibility and probative value.

42. Copies of the said minutes are contained in the court record and even if they were regarded as proper evidence for purposes of this application they cannot be said to be proof of the Applicant's allegation that his mother was wife to the deceased or that he was a child of the deceased in any manner through the relationship or otherwise.

    This is because the minutes make no reference to the Applicant as being a child of the deceased and also make no reference to his mother, Tabarno Chebosia as being a wife of the deceased but a lady with whom he had lived or stayed for long. The fact that a man and woman could be living together or cohabiting does not in itself prove that they are married or in a marital relationship.

43. The four witness (PW2, 3, 4 & 5) testified in support of the Applicant largely on the basis of their respective witness statements contained in the record. A number of the Applicant's potential witnesses recorded witness statement but only the aforementioned four adopted their statements as their respective evidence in these proceedings.

44. Apart from Hezron (PW2), who made reference to the impugned minutes, the rest of the witnesses (PW3, 4 and 5) testified in support of the fact that the deceased and Tabarno Chebosia i.e. the Applicant's mother, lived together.

    None of the said witness added value to the Applicant's allegations of being a child of the deceased or his mother being a wife to the deceased.

    In sum, the Applicant's allegations of fraud through false statement, misrepresentations and/or concealment of material facts on the part of the Respondents in obtaining the impugned grants of letters of administration were not established and proved by the evidence availed herein through himself and witnesses.

45. In any event, the Applicant's evidence as supported by that of his witnesses was countered and disproved by that of the First and Second Respondents who testified as DW1 and DW2 respectively and vehemently contended that the Applicant was not a child of the deceased in any manner and his mother was not a wife to the deceased. They also contended that both the Applicants and his mother never belonged to the family of the deceased and could not therefore be included as beneficiaries in the distribution of the deceased's estate or even in the petition for grant of the impugned letters of administration.

46. For all the foregoing reasons and factors this court ultimately finds that the present application, is devoid of merit and is hereby dismissed with costs to the First and Second Respondents as well as the First Interested Party.

    Ordered accordingly.

DATED AND DELIVERED THIS 25TH DAY OF APRIL, 2024.

HON. J. R. KARANJAH,

JUDGE