



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Kiprotich Arap Tumising (Deceased) (Succession Cause
E023 of 2021) [2024] KEHC 6476 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6476 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
SUCCESSION CAUSE E023 OF 2021**

RL KORIR, J

MAY 30, 2024

BETWEEN

ISACK KIPKURUI ROTICH 1ST PETITIONER

KIPLANGAT BUNEI 2ND PETITIONER

AND

JOSEPH KIMUTAI SITONIK OBJECTOR

RULING

1. This is a protest by Joseph Kimutai Sitonik to the Petitioners' Summons of Confirmation of Grant dated January 16, 2023.

Background

2. The Petitioners being the sons of the late Kiprotich arap Tuimising petitioned this court on May 28, 2021 for the Grant of Letters of Administration for the estate Kericho/ndarawetta/595. A Grant in the joint names of the Petitioners was issued by this court on July 20, 2022.
3. The Petitioners filed Summons for Confirmation of Grant dated 16th January 2023. They stated that they wanted the Grant confirmed with the following schedule or mode of distribution of Kericho/ndarawetta/595:-
 - i. Joyce Chemutai Bunei 5.53516 acres
 - ii. Martha Chemutai Rotich 5.53516 acres
 - iii. Isaac Kipkirui Rotich 5.53516 acres
 - iv. Erick Kiplangat Bunei 5.53516 acres
 - v. Winny Chelangat Bunei 5.53516 acres



Protest

4. Through his affidavit of protest dated April 24, 2023, Joseph Kimutai Sitonik (Objector) stated that he was one of the purchasers of the estate of the deceased and that he had not been included in the succession cause. That there were also other purchasers who had not been included in the succession cause.
5. It was the Objector's contention that the Petitioners had concealed material facts with the aim of depriving several beneficiaries their share of the deceased's estate.

Response

6. Through an Affidavit dated 4th July 2023, the 1st Petitioner stated that the Petitioner was a stranger to the deceased's estate. That he was not a creditor to the estate and he could not impede the succession cause through his Protest.
7. It was the 1st Petitioner's case that the Protestor took part in an unlawful transaction by intermeddling with the deceased's estate. That the Objector had no agreement with the deceased's estate. It was his further case that the protest against the confirmation was in bad faith and was meant to frustrate the beneficiaries of the deceased's estate.
8. On September 28, 2023, I directed that the Protest be heard by way of written submissions. Counsel for the Objector, Mr. Koech Advocate informed the court that he would not be filing submissions but instead rely on the Affidavit of Protest. Counsel for the Petitioners, Mr. Mugumya Advocate informed the court that he had filed submissions. However, I have carefully gone through the court record and there are no written submissions filed. I shall therefore proceed to determine the protest on the basis of the respective affidavits.
9. I have considered the Protest and evidence adduced by Joseph Kimutai Sitonik through his Affidavit dated April 24, 2023 and the 1st Objector's response through his Affidavit dated July 4, 2023. The only issue for my determination was whether the evidence was sufficient to halt the grant held by the petitioners by this court.
10. Section 76 of the *Law of Succession Act* provides:-

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;
 - (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or



- (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
 - (e) that the grant has become useless and inoperative through subsequent circumstances.
11. In *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* (2015) eKLR the court held:-
- “The circumstances that can lead to the revocation of grant have been set out in Section 76 *Law of Succession*. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”
12. The Objector stated that the Petitioners concealed material facts from the court when they were obtaining the Grant. That he was among purchasers of the subject parcel being Kericho/ndarawetta/595 and therefore had interest in the said parcel. He further stated that they ought to be included in the succession cause.
13. The Objector named the purchasers as Samuel Kipkorir Sitonik, Leonard Kipkemoi Korir, Kiplangat Maritim, Geoffrey Mutai, Janet Chelangat Chebochok, Richard Soi, Anthony Tuyai, Kenneth Korir, Ezekiel Ngeno, Patrick Bett, Joseah Cheruiyot, Joseph Koskei, Hellen Chepkurkat, Janeth Chepkemoi, Kipngetch Chirchir and himself. He attached a letter from the Chief dated 20th April 2022 as JK 2. I have looked at the Chief’s Letter and it confirmed the averments by the Objector. The letter further revealed that the aforementioned people were purchasers of Kericho/ndarawetta/595.
14. The Objector opined that a meeting was held on June 27, 2022 between the beneficiaries and some of the purchasers where it was resolved that succession proceedings should be commenced. He attached the Minutes of the said meeting as JK 1. I have looked at the Minutes and I have noted that the Objector was part of the meeting. I have also noted that both Petitioners were part of the meeting whose agenda was the succession of Kericho/ndarawetta/595 and the contributions to be made by all parties involved.
15. The Petitioners stated that the objector was a stranger to the meeting, a fact that I find to be untrue. According to the Minutes JK 1, the Petitioners, the Objector and other purchasers of Kericho/ndarawetta/595 participated in a meeting where they discussed how to initiate succession proceedings for the subject land. Even so, in their response, the Petitioners did not deny the existence of the meeting or did not deny the contents of the Chief’s Letters (JK2) that the subject land had purchasers.
16. What is clear to me is that the entire subject land was not free for distribution as proposed by the Petitioners. There was prima facie evidence that there were purchasers of the subject land. It is evident that the dispute of ownership of the subject land arises and such issues need to be resolved before parties move a Probate Court for succession. It is trite that the duty of a Probate Court is to lawfully distribute the free estate of a deceased and in the present case, the subject land Kericho/ndarawetta/595 is not all free for distribution.
17. Rule 41(3) of the *Probate and Administration Rules* provides:-
- Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order



appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.

18. In the case of re Estate of Julius Ndubi Javan (Deceased) (2018) eKLR, Gikonyo J. held:-

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.”

19. From the scanty affidavit evidence presented by both parties, it was not clear to this court whether the protestor and the long list of the other purchasers bought the subject land from the owner (now deceased) or intermeddled by purchasing from the beneficiaries. It was also not clear if any rights or interests had crystalized. Whichever the case, it was clear to this court that the issue of beneficial interest must be resolved before the estate is distributed.

20. The order that commends itself to me in the circumstances of this case is to stay the summons for confirmation of grant dated January 16, 2023 to enable the parties amicably resolve the outstanding issue of liabilities through a mediation process or clearly identify the free estate of the deceased for distribution.

21. Parties at liberty to apply.

22. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 30TH DAY OF MAY, 2024.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the absence of the parties. Siele(Court Assistant).

