



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE & ADMINISTRATION CAUSE NO. 40 OF 2011

RE: ESTATE OF D K ARAP T (DECEASED)

E T R.....PETITIONER

VERSUS

J K R.....OBJECTOR

RULING

1. The deceased, D Arap K T, died on 10th August 1988. On 28th March 2012, the High Court issued a grant of letters of administration to the petitioner. The grant has not been confirmed. On 24th September 2012, the objector brought proceedings to annul the grant.
2. The gravamen of the objection is that the consent of the objector was not obtained; that there exists a written will; that some of the beneficiaries in the petition are grandchildren of the deceased; and, that there has been concealment of material facts. Those matters are buttressed by the supporting affidavit of the objector sworn on 24th September 2012.
3. The application is contested. There is a replying affidavit sworn by the petitioner on 7th December 2012. The petitioner avers that he was appointed an administrator under the will. A copy is annexed marked *ETR2*. He denies that there was an agreement that both the petitioner and objector apply jointly to administer the estate. Regarding the list of beneficiaries, he deposes that E K T, a son of the deceased, is of unsound mind; and, that his interests are thus represented by his wife, S J. Another son, P T (now deceased) was represented his two sons. The widow of W K R, I R, has been named as a beneficiary. He avers that the deceased had transferred *inter vivos* thirteen acres of land to each of his five sons. They included the objector.
4. The petitioner states that the objector sold his thirteen acres of land. He accuses him of having squandered his inheritance. He avers that the interests of the objector in the remainder of the estate have been recognized. He claims that the objector has intermeddled in the estate. He gives the example of some parcels of land belonging to E T that were fraudulently sold resulting in a civil suit at Kapsabet Court in PMCC 211 of 2010 *Paul Ng'arng'ar v Salina Rop*. The petitioner denied that he removed the objector's name from the petition because of the objector's testimony in the case at Kapsabet.
5. On 9th June 2014, the court directed that the objection be determined on the basis of the affidavits on record, pleadings and oral submissions. On 22nd June 2015, I heard learned counsel for the parties. I have carefully considered the pleadings, depositions, documents and the rival submissions.
6. Section 47 of the Law of Succession Act provides as follows;

“47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may

be expedient: Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”

7. The jurisdiction of this Court to deal with the dispute is thus not in doubt. A grant, whether or not confirmed, may be *revoked* either by the court *suo moto*; or, by an application made under section 76 of the Law of Succession Act. The section states as follows-

“76. 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 has

ordered or allowed; 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.”

8. I thus find that the application for annulment of the grant is properly before the court. The submission by the petitioner that the application is defective is prosaic. The averment that the application should have been brought before the grant was issued lacks legal foundation. I note that the summons for confirmation of the grant has not been heard. Even if the grant had been confirmed, it would still be amenable to impeachment on the grounds outlined in section 76 of the Law of Succession Act.

9. I will now turn to the merits of the application. It is common ground that the objector is a son of the deceased. I have studied Form 38, the *consent to the making of a grant* filed on 15th February 2011. The name of the objector is *not* there. It follows as a corollary that the objector did *not* give his *consent* to the making of the grant in favour of the petitioner. Failure to obtain his consent contravened Rule 26 of the Probate and Administration Rules which states as follows-

“26(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

2. *An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require”*

10. The petitioner freely concedes that his brother E K T is of *unsound* mind. I do *not* have sufficient evidence to make a finding on the matter. But it raises questions as to who executed the consent on his behalf. I say so because E's wife, S J, has executed the consent independently. I have also closely studied the list of beneficiaries. S and I R (another widow to the deceased's son, W R) are listed; and so are *seven* grandsons. The petitioner has explained that two of the latter are sons of P T (also deceased). While the two widows and grandsons may be entitled to inherit the deceased, their interests rank in lesser priority to the objector.
11. The omission of the objector's name may be a pointer to something else. Upon closer scrutiny of all the forms filed in the petition, the name of the objector seems to have been initially entered as a *co-administrator* to the petitioner. However, in all the forms it has been *white-washed*. The result is that the petitioner became the sole administrator. I thus readily find that there was material non-disclosure offending section 51 (2) of the Act. The section provides as follows-

“51(2) An application shall include information as to-

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any

such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of

his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the

deceased; and,

(i) such other matters as may be prescribed.”

12. There is then the matter of the written will. The petitioner freely concedes that the deceased had expressed his wishes in a written document. I have studied the annexure marked *ETR2*. The alleged will has three pages. *Prima facie*, page one does *not* tally with the others. The style, fonts, typesetting and layout are completely different. It has a photograph. Page two would pass for a testamentary disposition. Regrettably, the execution page is completely separate and it is not certain that it was properly attested as provided in the Act. I am unable to hold that it is a valid written will. As it was executed way back on 2nd May 1973, and the deceased died on 10th August 1988, well after *three* months of its date, it does not also rise to the threshold of an *oral will*. See *Re Estate of Rufus Ngethe Munyua* [1977] KLR 137.

13. I thus find that the deceased died *intestate*. It follows that the net intestate estate should be administered and distributed as provided by the Act or as may be ordered by the High Court. An important matter arising out of the alleged will is the claim by the petitioner that he was appointed the administrator. I find the converse is true. The alleged will appointed *three* executors: W K T (deceased); J P K T; and, E K T. The claim that the petitioner was appointed a *sole* administrator falls flat on its face.

14. It follows that under sections 51 and 76 of the Law of Succession Act as read with Rules 26, 40(8)

and 41(8) of the Probate and Administration Rules, all beneficiaries must consent to the confirmation of grant and to the distribution of the estate. See *Re Estate of Evaristus Njagi Mugo* High Court, Embu, Succession Cause No. 324 of 2005 (2008) eKLR. In the end, I find that the proceedings to obtain the grant were defective in substance; and, that the grant was obtained by concealment of material facts. The application for annulment of the grant has merit and is allowed. 15. For all the foregoing reasons, and in the interests of justice, I finally order as follows-

- a. THAT the grant of letters of administration issued by the Court to the petitioner on 28th March 2012 be and is hereby *revoked*. A fresh grant shall be applied for by *not more* than four beneficiaries including the petitioner and objector.
- b. THAT the administrators shall file a fresh summons for confirmation of the grant containing a proposed mode of distribution of the net intestate estate of the deceased. In the event of a dispute, the Court shall give further directions and determine the matter.
- c. THAT to avoid the ends of justice from being defeated, any further proceedings in Kapsabet Principal Magistrates Court PMCC 211 of 2010 *Paul Ng'arng'ar v S R* are hereby stayed until the confirmation of the new grant or further orders of this Court.
- d. THAT considering that this is a family dispute, there shall be no order on costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 28th day of July 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:-

Mr. Kagunza for the petitioner.

Mr. Kiboi for the objector.

Mr. J. Kemboi, Court clerk.