REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 85 OF 2004

IN THE MATTER OF THE ESTATE OF BARNGETUNY KENDUIYWA

HOSEA KOSGEI KENDUIYWA.....1ST APPLICANT/OBJECTOR

PHILEMON CHERUIYOT KENDUIYWA .....2ND APPLICANT/OBJECTOR

VERSUS

HELLEN CHEMELI KENDUIYWA ….....1ST RESPODNENT

JULIAN CHEPTOO KENDUIYWA ….....2ND RESPODNENT

RUTH JEBET KIPTOO ….....3RD RESPODNENT

LILIAN CHEPKOECH KENDUIYWA ….....4TH RESPODNENT

R U L I N G

By their application dated 9/5/2016 the applicant/objectors pray for the following reliefs;

1) That the grant of letters of administration intestate issued to Hellen Chemeli Kenduiywa herein and confirmed on the 12th July 2012 be revoked and or annulled.

2) That a fresh grant be made and issued to Hosea Kosgey Keinduiywa, Philemon Cheruiyot Kenduiywa and or any other person the court shall deem fit.

3) That Title Deeds issued in implementation of the grant herein as confirmed by this court being titles Numbers: Trans Nzoia Sitatunga Block 3/Taito/303, 304, 305, 306, 307, 308, 309, 310, 311 and 312 be cancelled.

The applicants contention is that the grant so confirmed has caused great hardship to them as they have been displaced from where they had been shown by the deceased. That the administrator has been controlled and managed by the other beneficiaries especially the daughters and other sons. They argue further that one of the properties namely Nandi North/Sangalo/Tirini/257 does not belong to the deceased and the grant to that extent was defective. The said applicants did attach several annextures to their replying affidavits including photographs of their houses in which they have occupied and

developed.

On her part the administrator Hellen Chemeli Kenduiywa the applicants mother, has denied the above allegations. She said in her affidavit dated 11/5/2016 that she was still in good health and capable of discharging her responsibilities as an administrator. She said that the title deeds were issued after a survey exercise had been undertaken properly and that it is the applicants who have refused and or failed to pay for their stamp duty and get their titles just like the rest of the beneficiaries. She further stated that the titles have already been transferred to her and all that is left is for them to be transferred to the applicants and other beneficiaries.

She contended that the already sold parcels of land were those from the other beneficiaries portions and that the applicants shares were intact. I have also perused her replying affidavit filed on 15/8/2016.

Juliane Cheptoo Kenduiywa has largely associated herself to the affidavit of her mother in her replying affidavit dated 19/9/2013. She further argued that no appeal was filed inrespect to the grant confirmed on 12/7/2012 and neither did the applicants apply for the same to be reviewed.

I have perused the entire pleadings in this file especially the myriad of applicantions prior to the grant being confirmed and thereafter. Those applications include those which the parties have withdrawn. I have further perused the parties written submissions herein as well as the attendant authorities.

From the facts on record its clear that all the parties have always been represented by counsels. They were then asked to file their mode of distribution since there was disagreement especially after the daughters were brought on board. The learned Honourable Justice Karanja on 12/7/2012 confirmed the grant based on the only mode of distribution as presented by the 1st respondent.

Since then there were myriad of applications which were argued or withdrawn. From what is available it appears that none of the applicants presented any other mode of distribution dispite being given sufficient time. Equally, none of the applicants has applied to review the said confirmed grant least of all appeal against it.

Does the application herein raises any triable issue which warrants this court to interrogate" Does the grant herein merit annulment and if so can the titles already issued be revoked.

In my view for the grant to be interfered with one must satisfy the grounds set under Section 76 of the Law of Succession Act namely;

a) The proceedings were defective in substance.

b) The grant was obtained fraudulently by making of a false statement, or by concealment from the court of material facts.

c) That the grant was obtained by means of untrue allegation of facts essential in a 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 the longer period as the court has ordered or allowed; or

(ii) To proceed diligently with the administration of the estate

(iii) To produce to the court within the time prescribed any such inventory or account of administration as required by the provisions of prayers (e) and (g) of section 83 or has produced any such inventory or account which is false in any material petition or

(e) That the grant has become useless and inoperative through subsequent circumstances.

From the above directions its apparently clear that the administrator of the estate did apply for the grant to be confirmed which the court readily did.

Can it be said therefore that the application herein qualifies under the (5) reasons required to anull the grant"

In my respectful view I do not think so. As earlier alluded the applicants were satisfied with the mode of distribution as presented by their mother. They did not present any other alternative for the court to consider. Even after being given sufficient time and notice they did not present any. The courts hands were therefore tied so to speak. There was no other mode of distribution and since the parties recognised each other as beneficiaries, it was not difficult for the court to distribute equally. In any case none of the parties has appealed against the said confirmation nor applied for any review.

Did the administrator conceal any material fact" I do not think so. All the decided properties and beneficiaries were clearly stated except land parcel No. Nandi North/Sangalo Tirini/257 which it is alleged belonged to a different person not the deceased. If this was so then the applicants who were ably represented in court ought to have notified the court. In any case if it is true then they have the ability to apply for the grant to be amended but not revoked.

I find that by their own admission the further replying affidavit of the 2nd applicant states what the whole beef is all about. Paragraph 10 of the said affidavit states as follows;

10) “That we are not opposed to our sisters inheriting from the estate of our father. We are only opposed to them being given portions of lands which we have been using and we have developed since 2000 when our father gave them to us.

(11) That we are amenable to our sisters being shown elsewhere since the estate of our father is vast

12) That when the said land was given to us, our sisters were not at home as they were already married. They are still married and wealth is so that it shall not be fair for them to inherit equal share with us since we do not have any other wealth/land.”

The last issue of share of each beneficiary has been overtaken by events. All that this court can do is to exercise its inherent right to ensure that the portions already developed and having actual structures by the objectors should not be interfered with.

This is so because its not disputed that they have not been on the land. This however does not meant that any of the beneficiaries acreages be reduced. Each of them must get what is stated in the grant. However in the actual survey work on the ground care should be taken so that any physical structures especially the houses be curved to each intended beneficiary as before or while the deceased was still alive.

The other critical issue which makes this court not to allow the application is the fact that other 3rd parties who may have already obtained title through the execution of the grant are not parties to this application. Should this court allow the same they stand to suffer great injustice. These for example include purchasers who are already in occupation.

In winding up, its clear that in their own words the applicant have submitted that their advocate did not file their suggested mode of distribution. Even so, its not available on record even as I write this ruling. I do not respectfully find any breach by the motion on implementation of the grant. I have not been shown how she has whimsically or capriciously executed the grant. If for example the applicants were suggesting that they got less acreages then that would be a different ball game. But to generally alleged that she has colluded with other beneficiaries is to stretch the law too far.

In light of the above observations I think that the issues relating to this estate ought to be closed. In dismissing this application I shall make the following orders in applying the inherent jurisdiction of this court

(a) The application herein is dismissed with no order as to costs

(b) In executing the grant especially in undertaking the surveyexercise care ought to be taken so that the development already on the ground by the beneficiaries ought to be as closely as possible not to be interfered with especially those dating back to 12/7/2012 and each should approximately get the portion he/she has been utilising or residing.

(c) Should any property not clearly described or does not belong to the estate the parties be at liberty to apply for the grant to be amended.

(d) Each party should be able to meet their respective conveyancy charges.

Orders accordingly.

Delivered this 5th day of December 2016.

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H.K. CHEMITEI

JUDGE

In the presence of;

Kiarie for 2,3, and 4th Respondents

Gacathi holding brief for Munialo for 1st Respondent

Kirong – Court Assistant