



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**SUCCESSION CAUSE NO.100 OF 2000**

**SIMEON MOKAYA ASANYA**

**NATHAN MOTURI ASANYO**

**EZEKIEL MAKORI ASANYO.....APPLICANTS**

**JEREMIAH MOMANYI**

**HELLEN MORAA ISOE**

**AND**

**KEFA MISATI ONDERE**

**JACKSON NYATWONGI ASANYO**

**COUNTY LAND REGISTRAR-NYAMIRA.....RESPONDENTS**

**COUNTY SURVEYOR-NYAMIRA**

**RULING**

**1.** The applicants through a Notice of Motion dated the 16<sup>th</sup> July 2018 brought under section 2,3 & 4 of the Civil Procedure Act seeks the following order;

*i. That the County Land Registrar Nyamira be ordered to cancel parcel numbers KITUTU MASABA/MWABOSIRE/1629,1630,1631,1632,1633, 1634 and 1635 that resulted sub-division of parcel number of KITUTU MASABA/MWABOSIRE/653 and same be re-surveyed to enable each beneficiaries obtain equal share.*

*ii. That the costs of this application be borne by the Respondent.*

**2.** The application is supported by the affidavit of Simeon Mokaya Asanyo (Simeon) dated the 16<sup>th</sup> July 2018. He depones as follows; that they are the beneficiaries of the estate of ASANYO ONKOBA KERINA the deceased and he was issued with letters of administration to administer the estate of the deceased. That the Nyamira District Surveyor has proceeded to survey the parcel subject herein in the absence of other applicants. Thus even neglected to implement the court order. That the County Land Registrar has already issued title deeds in respect of the unfair distribution of the estate as the award was not adhered to. That the applicants were not offered opportunity to attend due to major threats which resulted to bloodshed. That they believe that the actions of Respondents, the Nyamira County land Registrar and Surveyor all are of bad motive when they went to the ground in the absence of all beneficiaries. That the Respondents did not act in good faith. That they are seeking that the County Land Registrar Nyamira be ordered to cancel parcel numbers KITUTU MASABA/Mwabosire/1629, 1630,1631,1632,1633, 1634 and 1635 that resulted after sub-division of parcel number of KITUTU MASABA/MWABOSIRE/653 and same be re-surveyed in the presence of all beneficiaries to enable each beneficiary obtain equal share and further orders of this court. That if the orders sought are not granted, we shall suffer irreparable loss and damage not compensated in monetary form.

**3.** The application was opposed. Jackson Nyatwongi Asanyo in his affidavit dated the 1<sup>st</sup> of August 2018 responded as follows; that the Application dated 16/7/2018 has no merit and is an abuse of the process of the court and should be dismissed with costs. That land which is the subject of this succession cause was properly surveyed and distributed as per the decree of the court dated 7/7/2004 and issued on 31/8/2004 following the arbitration award filed on 24/4/2003 and judgment entered as per the award. That all the Applications to set aside judgment, review of the same and or stay execution were refused on various times and the proceedings in this case will bear me witness. That on 21/4/2009 this court closed the file on its own motion under Rule 73 of Succession Act. That it was by consent that the matter was

referred for arbitration and this can be seen vide the order of the court dated 26/2/2003. That the confirmation of grant annexed in the present Application and dated 14/7/1999 was revoked and superseded by the subsequent confirmation dated 22/7/1999 after a new beneficiary was added in the grant and the subsequent confirmation does not state the acreage each beneficiary was to get and that is why the matter was rendered for arbitration and the acreage taken as how the beneficiaries live on the ground and as per the manner the deceased Asanyo Onkoba Kerina had allocated to them when he was alive. That the beneficiaries of the estate of Asanyo Onkoba have occupied their respective portions of land from time immemorial and have done various permanent developments and any attempt to dislodge them will cause untold damage. That this Court on 29/7/2005 had made the order for the survey of the land namely land parcel No. KITUTU MASABA/MWABOSIRE/653 and in the event any party refused to sign any transfer documents the executive officer of the court was to do it on his or her behalf and this is exactly what the court did when it signed the mutation forms annexed herein and marked "JNA1". That there is absolutely to ground advanced to cancel the titles as alleged by the Applicants. That the award annexed herein by the Applicants as "SMA 5A" and dated 19/2/2002 is not the award which gave rise to judgment herein and is therefore an irrelevant document herein. The document marked "SMA 4" is also irrelevant and uncalled for and unknown to him. That the award that gave rise to the judgment of this court is the finding of the Chief who sat with his 2 Assistant Chiefs and filed a report in court. He sought a dismissal of the application dated 16/7/2018 with costs.

4. This matter has been in court since 2000. I have carefully gone through the court file and I note the following. The applicant the son of the deceased petitioned for a letters of administration intestate on the 16/1/1998 at Nakuru High Court. He listed the beneficiaries surviving the deceased as; Shadrack Misati Onkoba, Nathan Moturi Asanyo, Jackson Nyatwonyi Asanyo, Ezekiel Makori Asanyo, Jeremiah Momanyi Asanyo, Simeon Mokaya Asanyo, John Isoe Asanyo, Ann Kemunto Oanda, Agnes Bosibori Oremo and Teresa Moraa Mosongo. A grant of letters of administration intestate was issued on the 4<sup>th</sup> August 1998 which was confirmed on the 14<sup>th</sup> July 1999. Mwabosire/653 the asset left by the deceased was divided amongst 7 beneficiaries as listed in the said confirmed grant dated the 14<sup>th</sup> July 1999.

5. On the 18<sup>th</sup> January 2000 Biliah Mwamboka Misati and 5 other filed an application against the applicant seeking to revoke the grant of letters of administration confirmed on the 14/7/1999. On the 7/2/2000 Justice Rimita revoked the grant and transferred the file to Kisii court for hearing and disposal. On the 22 February 2000 Biliah Kwamboka Misati (Biliah) and Kefa Ondere Misati petitioned for letters of administration intestate at Nakuru High Court as daughter in law and grandson of the deceased. The court file was transferred to Kisii High Court on the 20/4/2000.

6. On the 8/9/2000 the applicant filed an objection to the petition filed by Biliah. A certificate of confirmation of the grant was issued to Simeon on the 22<sup>nd</sup> July 2002 and Land parcel Mwabosire/653 was shared amongst 8 beneficiaries, Esther Nyamoita Misati, Nathan Moturi Asanyo, Jackson Nyatwongi Asanyo, Ezekiel Makori Asanyo, Jeremiah Momanyi Asanyo, Simeon Mokaya Asanyo, John Isoe Asanyo and Biliah Kwamboka Misati, the acreages were not indicated. The land comprises of 9.7 hectares. The affidavits on record show that the parties had boundary issues within the said parcel of land. On the 5/5/2003 parties recorded a consent before Justice Wambilyangah that the matter be referred to Chief Ben Mobisa Ongeri of Central Kitutu in Nyamira District to arbitrate, the chief was to determine whether the deceased shared his land amongst his heirs/ beneficiaries before he died and whether the objector Biliah interfered with boundaries fixed by the deceased. The chief's report was filed in court on the 24/4/2003. The chief's findings were that he found that *the land was sub divided in 1966 by the late father Mzee Absolom Asanyo Onkoba and beacons put by Mzee are there to date. That the objector Biliah has never interfered with the boundary and that they were put or marked by Mzee.* The report was signed by Shadrack Obwocha Ogeto Acting Senior Chief Central Kitutu Location.

7. On the 26<sup>th</sup> June 2003 Simeon filed an application seeking to set aside the arbitration award read by the court on grounds that he was aware that the land could not have been subdivided in 1966 and that the land was demarcated in 1995 and that as per Kisii customary law the land could not have been sub-divided when the rest of his brothers were minors. On the 26/1/2004 the objector sought to have the estate of the deceased distributed as per the arbitration award and that the award be confirmed as a judgment.

8. On the 7/7/2004 the court dismissed Simeon's application to set the award. On the 3/9/2004 Simeon by an application dated the 2/9/2004 sought to have the ruling delivered on the 7/7/2004 reviewed, set aside or varied. On the 29/7/2005 an order was issued directing the District Land Registrar and District Surveyor of Nyamira District to visit the land parcel No. Central/ Kitutu/ Mwabosire/653 to distribute the property of the deceased as per the decree of the court issued on the 31/8/2004 as demarcated by the deceased on the ground as per award filed in court and confirmed in the judgment of the court. The executive officer was to sign transfer or necessary documents if any of the parties refused to do so. On the 3/10/2005 Simeon filled an application seeking a stay of execution pending attendance of all the beneficiaries who were in prison custody awaiting the determination of Nyamira Criminal case no.866 of 2004. A similar application was made by Jeremiah Momanyi Asanyo a beneficiary on the 2/12/2005.

9. On 21/4/2009 Justice Musinga closed the file under Rule 73 of the Probate and Administration Rules, parties were at liberty to apply for reopening. What followed after this order is the current application dated the 16/7/2018. In the said application the applicant seeks to have the Land Registrar cancel the titles that resulted from the sub-division of Kitutu/ Masaba / Mwabosire/653. From what I have gathered from the proceedings and applications filed, the court order dated the 29<sup>th</sup> July 2005 was never set aside. The court seized with the jurisdiction to cancel land titles is the Environment and Land Court. This court lacks the jurisdiction to make the orders sought in the application dated the 16<sup>th</sup> July 2018. The application is dismissed each party to bear its own costs.

**Dated, signed and delivered this 23<sup>rd</sup> day of January 2019.**

**R.EOUGO**

**JUDGE**

**In the presence of;**

Simeon Mokaya Asanya

In person/Applicant

Mr. Okenye

For the Respondent

Rael

Court clerk