



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 534 OF 2011

**IN THE MATTER OF THE ESTATE OF AMBROSE OKEMWA MOGAKA Alias OKEMWA
MOGAKA (DECEASED)**

-AND-

LYDIAH NYABOKE MOGAKAAPPLICANT

VERSUS

JOHN MAINYE1ST RESPONDENT

DANIEL MOGENI KABURI2ND RERSPONDENT

RULING

(1) The Notice of Motion dated 21st February 2017, is brought by **Lydia Nyaboke Mogaka** (applicant), pursuant to S.47 of the Law of Succession Act, S.89 of the Civil Procedure Act and Sections 61, 68, 69 and 86 of the Land Registration Act. The basic orders sought in the motion are an order of inhibition restricting any dealings with Land Parcel No. **East Kitutu/Bonyamondo/1/44** and an order directing the respondents and/or their representatives to sign the relevant land transfer forms to enable sub-division of the said parcel of land and in the alternative, an order directing the Executive Officer, Kisii High Court to sign the transfer documents respecting the parcel of land on behalf of both the applicant and the respondents.

(2) The application is based on the grounds contained in the body of the Notice of Motion as supported by the averments and annexures in the applicant's supporting affidavit deponed by herself on the 21st February 2017.

The respondents despite being served with the application neglected or failed to file grounds of objection and/or a replying affidavit. The application was therefore unopposed. However, the applicant was under obligation to satisfy the court that she is justly and truly entitled to the orders sought herein against the respondents. In the attempt to do so, the applicant relied fully on her supporting grounds as fortified by the facts contained in her supporting affidavit.

(3) The application is founded on the grant of letters of administration intestate made in favour of the applicant on the 19th July 2012, after she had filed an application to cite the respondents to accept or refuse letters of administration intestate respecting the estate of Ambrose Okemwa Mogaka Alias Okemwa Mogaka (deceased) and in default, the grant be issued to her.

The citation was decided in favour of the applicant on the 9th March 2012 and on the 19th July 2012, the

necessary grant of letters of administration was issued to her and another. Months later, on the 19th April 2013, the grant was confirmed. The sole estate property was the material land parcel No. East Kitutu/Bonyamondo/1/44 which was to be registered in the names of the applicant and Josephine Monyangi Seremani to hold and later sub-divide to the rest of the beneficiaries as per the boundaries on the ground.

(4) An order to that effect was applied for in a Notice of Motion dated 28th August 2013, which was not however, pursued to conclusion by the applicant.

Instead, the applicant took out summons for direction dated 18th August 2014. This was done pursuant to S.47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.

The summons were presented in court for hearing on the 15th December 2014 in the presence of the applicant and the two respondents herein. Thereafter, the court ordered that the certificate of confirmation issued herein be amended to read each beneficiary herein named:-

1. Lydia Nyaboke Mogaka
2. John Mainye Okemwa
3. Daniel Mogeni Kaburi

to get their individual title after sub-division.

The matter was then fixed for mention on 20/2/15 to confirm compliance.

(5) On 20th February 2015, the matter was adjourned to 20th March 2015, but stalled along the way. The file for unknown reasons became inactive until the 22nd February 2017, when the present application was presented to the court under a certificate of urgency and ultimately heard on the 24th May 2017 in the absence of the respondents who failed to appear despite being served with the necessary hearing notice.

Upon due consideration of the application and its supporting grounds, it is this court's view that with regard to the distribution of the estate property the matter was settled by issuance of the certificate of confirmation of grant dated 19th April 2013, as amended by the court order made herein on 5th December 2014. What remained was sub-division of the property and issuance of individual titles to both the applicant and the respondent.

(6) In her supporting affidavit, the applicant averred that she engaged the services of a surveyor who went to the ground and conducted the sub-division in accordance with the court order but the respondents refused to append their signatures on the transfer forms thereby causing the land registrar to decline to authorize the sub-division due to lack of necessary execution by the respondents. Consequently, the applicant moved this court vide the present application.

Under S.47 of the Law of Succession Act, this court has jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders herein as may be expedient.

(7) The applicant was therefore within her rights to bring this application and the reasons advanced by her for grant of the orders sought herein are satisfactory for exercise of discretion in her favour as there is no good or any cause why the respondents should decline to execute the transfer documents in compliance with the court order made herein on 5th December 2015 in their presence and without any objection from them. The amended certificate of confirmation of grant was issued on the same 5th December 2014, and by now the distribution of the estate property should have been a foregone conclusion.

(8) For all the foregoing reasons and to avoid subjecting this case to further delays this application is allowed in terms of prayers (2), (4) and (5) of the Notice of Motion. However, prayer (4) is modified to the extent that instead of the Executive Officer, the transfer documents be executed by the Deputy Registrar of this court on behalf of the respondents.

Each party shall bear own costs of the application.

It is accordingly ordered.

[Read and signed this 25th day of May 2017].

J.R. Karanjah

Judge