



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO.39 OF 2013

IN THE MATTER OF THE ESTATE OF JOSEPH KIPNGETICH CHELULE (DECEASED)

SELLY CHEPTONUI ORINDO.....1ST PETITIONER/APPLICANT

PENINA CHEBET.....2ND PETITIONER/APPLICANT

VERSUS

BERNARD KIBET CHELULE.....RESPONDENT

R U L I N G

1. The Petitioners/Applicants have brought this application under **Section 45** of the **Law of Succession Act** with a claim that the Protestor/Respondent is inter-meddling with the estate of the deceased.
2. The 1st Petitioner has filed an affidavit in support of the application saying she is one of the administrators of the estate of the deceased- **Joseph Kipngetich Chelule** who was her husband.
3. In her affidavit she says the Respondent has sold several assets of the deceased like motor vehicle reg. no. KAL 334A Nissan Matatu. And that he obtained Kshs.214,635 in the form of benefits of the deceased through false pretences. And that he and another have been charged for this offence.
4. She also says she has been chased away from her matrimonial home by the Respondent who has placed one Catherine in that home to live there.
5. She wants the Respondent restrained from committing this unlawful acts and be directed to account for the proceeds of the sale of the motor vehicle and the money received from the District Commissioner's office.
6. Mr. Kipsang for the Petitioners/Applicants in his submissions reiterated what the Applicant has stated in her supporting affidavit.
7. The Protestor/Respondent filed a long Replying affidavit. In it he says the Applicant was not a wife of the deceased and has a living husband with whom she has children. He also denies that the applicant had any children with the deceased.
8. In paragraph 11-13 he has denied selling the motor vehicle complained of by the Applicant. He has explained how the said motor vehicle was repossessed by the seller after the deceased's family were unable to pay the balance of the purchase price.
9. An affidavit by the seller **Samwel Kipkemboi Misik** (BK 5) was attached. It explains the

Respondent's averments in paragraph 10-13 of his replying affidavit.

10. He admitted being paid money at the District Commissioner's office Kericho as the deceased's next of Kin and he has used the money to pay fees for the children of the deceased.

11. Mr. Motanya for the Respondent opposed the application and relied on the Replying Affidavit wholly.

12. I have considered the application and the affidavits filed for and against the application. I have equally considered the annexures filed plus all the documents filed in respect of this Succession Cause.

13. The issue of the marriage of the Petitioner to the deceased is at the center of this dispute.

Another issue is about the children listed as the deceased's children in Form P&A 5, BK1.

These are not matters which can be determined by way of affidavit evidence, or in this application.

14. This court may even demand for these children to come and testify before this court. Who has been and is taking care of them? Who is paying their school fees? Bank accounts have been listed in Form P&A5. Have they been accessed? If so, by whom and for whose benefit?

15. **Issue of money paid by the District Commissioner's office as benefits of the deceased.** How was the Protestor/Respondent paid the money? Was there misrepresentation? Have criminal charges been preferred against the Respondent? If so, is the case proceeding or has it been determined?

16. Before me are the Applicants' allegations and the Respondent's response on the released money through the District Commissioner's office. There is no response by the officers who paid and/or released the money. It's the Applicants' word against that of the Respondent.

17. **On the issue of the motor vehicle allegedly sold by the Respondent.** An affidavit has been filed by the alleged seller and what he is saying is contrary to the Applicants' averments. There is also a letter from Kipkosgei Choge advocate dated 11th January, 2013 in this file written to the 1st Petitioner/Applicant in respect of this motor vehicle. Mr. Kipkosgei was acting on behalf of the seller of this motor vehicle **Samwel Kipkemboi Misik**. The question is whether the Respondent sold this motor vehicle as claimed by the Applicant. This court would require more evidence to ascertain the correctness or otherwise of the allegation.

18. A plot at Salgaa belonging to the deceased is said to have been sold by the Respondent. This plot is nowhere mentioned in form P&A5 as one of the deceased's assets. A copy of an application for consent to the Land Control Board is annexed as SCO "3". With all due respect, I have perused the application and do not see the names of the Respondent nor those of the deceased. The seller is one : **CHUMO ARAP KIGEN** while the purchaser is **JAMES KIMUTAI NGENO**. The Applicant has not explained how the Respondent was involved in this sale and how much he was paid for it.

19. The final allegation is that the Respondent has chased the Applicant from her Chepseon farm and house and put his niece Catherine in her house. The Respondent has again denied this. There is no independent evidence to support this allegation. Where is she staying and where is the evidence to support that? As I have stated earlier these are matters that need evidence to be adduced, to support them.

20. The Respondent has filed a Protest against the confirmation of the grant. The Petitioner/Applicant has filed her response to it. The hearing of the Protest will deal with the issues being raised in this application. I do not see why directions have not been taken for hearing of the Protest. Owing to the acrimony that appears to exist between the Applicant and the deceased's family I do give

directions to the effect that the **PROTEST** filed herein be heard by way of *viva voce* evidence. Parties will be at liberty to call witnesses whose number shall be indicated to the Registry in charge before a hearing date is taken.

21. He who alleges a fact must prove it. I do find that the Applicant has not established any of the allegations raised in her application. Despite the failure to prove her claims, I find it prudent to warn the Petitioners and the Protestor against doing anything in respect of any of the assets in the deceased's estate without an order of this court. Any party found contravening this will be dealt with in accordance with the Law.

ORDER

The application stands dismissed. Each party to bear his/her own costs.

Dated, signed and delivered in open court this 21st day of November, 2014

H.I.ONG'UDI

JUDGE

In the presence of

Mr. Kipsang for Kipkurui for Petitioner/Applicant-absent

Mr. Motanya for Respondent- present

Court Assistant- Benson Karanja