



REPUBLIC OF KENYA

High Court at Meru

Succession Cause 112 of 1990

**IN THE MATTER OF THE ESTATE OF THE LATE CHABARI
M'ITUANG'ONDU.....(DECEASED)**

PATRICK SAFARI MUINDI.....APPLICANT

VERSUS

PETER MWONGERAH.....RESPONDENT

R U L I N G

The applicant PATRICK SAFARI MUINDI through an amended summon filed pursuant to a consent order made in court on 8th October, 2012 brought under Section 47 of the Law of Succession Act and Rule 49 and Rule 73 of the Probate and Administration Rules, Section 68 of the Land Registration Act seeks several orders, but for the sake of this application is seeking prayer 4A only and has put the other prayers in abeyance awaiting outcome of prayer 4A in which the applicant prays for;

“4A. That the Government Document Examiner do examine and establish whether the Respondent’s exhibit marked as annexure PM 5a(Transfer form by personal representative to person entitled under a will or an intestacy) annexed in the respondent’s replying affidavit sworn on 16th October,2012 was signed by the applicant or at all and file his report in court.”

The application is based on grounds 2A and 2B on the face of the application and on supportive affidavit of the applicant dated 5th November, 2012. The application is opposed by the respondents through affidavits filed herein.

When the matter came up for hearing the court heard oral submissions by both Counsel. It has also considered the pleadings and affidavits for and against the application as well as the opposing positions of both Counsel.

The prayers sought by the applicant is based on the fact that the applicant denies having signed the transfer form marked as annexure “PM 5(a)” (Transfer form) by personal representative to person entitled under a will or intestacy annexed in the respondents’ replying affidavit sworn on 16th October, 2012 and filed in court on 17th October, 2012. That the applicant challenges the signature as his, he contends the signature on the said transfer form should be examined and compared with applicant’s standard signatures.

The respondent contend that the applicant is the one who signed transfer form which is marked “PM5(a)” in their replying affidavit sworn by Peter Mwongera on 16th October, 2012 and filed in court on 17th October, 2012. That the same was signed before an Advocate by the name Mr. Ondieki . That the

signature is said to be similar to applicant's signature appearing in the sale agreement. The respondents contend that the applicant is the one who signed the aforesaid sale agreement, acknowledgment of receipt, and application for consent of the Land Control Board.

The respondent therefore felt in the circumstances it will not be necessary for the Government Document Examiner to establish whether the applicant signed the aforesaid transfer forms or not. There is no dispute in this matter that the matter in dispute concerns the execution of transfer forms. What is in dispute is who signed the document or is the document forged or not. The court will require evidence in such matter from an expert but not only from the parties. The court should on such cases not shout out the evidence of an expert which is crucial for fair and unbiased determination of the matter in issue.

Article 50 of the Constitution of Kenya, 2010 provides as follows:-

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Further under Rule 73 of the Probate and Administration Rules it is provided:-

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Under Section 47 of the Law of Succession Act High Court has jurisdiction to entertain any application and determine any dispute under the Law of Succession Act.

Section 47 of the Law of Succession Act provides:-

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.

Having considered the application and having noted the court shall require experts opinion on the questioned documents and the right of the litigants not to be denied their Constitutional rights to present before court of Law any evidence they consider relevant in support of their claim their position and that this being a matter involving land, which is always contested issue in this country and bearing in mind that courts are obliged to do justice to all parties without undue procedural technicalities, I therefore am obliged to grant the application.

I find the application to be meritorious and that as no party would be prejudiced in anyway in knowing the authenticity of the questioned document, the application is allowed. That as there are other issues to be canvassed in the application dated 5th November, 2012, costs of the application shall be upon determined of other prayers of this application.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF MARCH, 2013.

**J. A. MAKAU
JUDGE**

DATED, SIGNED AND DELIVERED AT MERU IN THE PRESENCE OF:

1. Mr. Muthomi for applicant

2. Miss Nelima h/b for Mr. J. G. Gitonga for the respondent

J. A. MAKAU
JUDGE