



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

SUCCESSION CAUSE NO.65 OF 1998

**IN THE MATTER OF THE ESTATE OF THE LATE: SAMUEL KHISA
BARASA.....DECEASED**

AND

**IN THE MATTER OF AN APPLICATION: WILKSTAR NAKHUMICHA
KITUIAPPLICANT**

AND

**IN THE MATTER OF: MIRIAM NIGHT
BARASAPETITIONER/RESPONDENT**

RULING

This is a ruling on the application dated 14/10/2010 seeking for review of this court's ruling delivered on 7/10/2010. The Applicant's main ground is that her further affidavit was not considered and the court proceeded on the premise that there was no such response.

The ruling dated 7/10/2010 was for an application by the Applicant Wilkistar Nakhumicha seeking for injunctive orders that Plot No.233, Bukembe Market and land E. Bukusu/N.Sang'alo/1380 should not be sold until the confirmation of the grant. The court dismissed the application on grounds that the Applicant did not establish any legal interest in the estate of the deceased. In its ruling the court observed that the Applicant did not file a further affidavit despite being granted leave to do so.

The application was opposed by the Respondent Miriam Night Barasa on grounds that the application was dismissed only due to failure to file a further affidavit is not true. The truth is that the application was dismissed for the reason that the Applicant had not established any legal interest in the estate.

The counsels did not orally argue the application but agreed to file written submissions.

I have perused the record and seen the said affidavit filed on 29/10/2009 which is duly stamped by the court. However, the affidavit was not in the court file when I prepared the ruling. I take into consideration the fact that the registry had received the same and failed to file it. This led the court to proceed as it did. A document once received in court becomes part of the court record. I will therefore peruse the affidavit with a view of reviewing my ruling if need be.

The affidavit states that there was no divorce between the deceased and the Applicant as alleged in the replying affidavit. It also denies that the Applicant was ever married to other men after separating with the deceased. Further that the Applicant had two children with deceased a son and a daughter.

The Applicant's son Mathew Nyongesa filed the petition herein. The grant was revoked and the widow of the deceased Miriam Night Barasa became the Petitioner. I note that in the affidavit sworn on the 23rd July, 2009 by the Applicant in support of her application dated 23/7/2009, states that the Applicant had only one child with the deceased. In her affidavit sworn on 26th October, 2009 the Applicant depones that she had two children sired by the deceased a son and a daughter. Why this contradiction? The issue of a daughter must have been an afterthought. She denies that there was any divorce between her and the deceased. Yet in the minutes of a meeting called to discuss the property distribution of the deceased annexed to the affidavit of the applicant sworn on 23/07/2009, the applicant is referred to as "***the former wife of the deceased.***" This is actually what she is. The widow of the deceased Miriam N. Barasa and the son of the Applicant Michael Nyongesa are the ones who lived with the deceased before he died. The Applicant is a stranger to the estate of the deceased. If there are any children of the deceased, they are entitled to prove their claim but not a former wife.

I find that the further affidavit does not contain any facts to justify reviewing of my ruling dated 7th October, 2010.

I therefore dismiss the application dated 14/10/2010 with costs to the Respondent.

F. N. MUCHEMI

JUDGE

Ruling dated and delivered on the 9th day of March, 2011 in the presence of Mr. Kakoi for the Petitioner and the Applicant Wilkister Nakhumicha.

F. N. MUCHEMI

JUDGE

