



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

SUCCESSION CAUSE NO. 61 OF 2005.

KIPTANUI KIMAGET.....DECEASED.

VERSUS

JOHN TANUI KOSKEI.....APPLICANT.

R U L I N G.

1. The late **Kiptanui Kimarget** (deceased) died intestate on 3rd March, 1996. He was survived by 3 widows and about 18 children. The deceased's family arrived at an agreement how the estate of the deceased should be distributed and that consent was filed in court on 8th September, 2006. One of the deceased's sons **John Tanui Koskei**, applied for letters of administration on 7th March, 2005, and the grant was issued on 3rd November, 2005. The petitioner applied for confirmation of the grant according to the agreed mode of distribution by members of the family.

2. However, on 27th March, 2007, **Barnabas Mungo Longit** filed a Caveat under Rule 15 (2) of the P & A rules against the confirmation of the grant. The caveat was issued with a warning to either file an affidavit of protest or withdraw the caveat on 8th May, 2007 and he filed an affidavit of protest on 22nd May, 2007. The affidavit of protest was heard by way of submissions. According to the protester he bought a parcel of land known as **Cherangany/Kapkanyoror/55** (formerly known as plot No. 23) from **one Biwot Mutul** (deceased). The protester annexed a handwritten piece of paper which he contends was the agreement of sale with the late **Biwot**. The protester claims that he has been in possession of the suit land from 1972 without any interruption. In 1976 after the death of **Biwot Mutul**, the deceased in this matter told him that he too had bought the same piece of land from the same **Biwot Mutul**. However, the deceased never made any efforts to claim the suit land until he died and the petitioner with his brothers started demanding that the protester should move from the suit premises.

3. The protester had also filed a caution over the suit land claiming purchaser's interest. The protester was not aware that the deceased was issued with a title over the suit premises until 22nd May, 1992 despite the fact that he had lodged a caution. The protester argues that if the deceased estate is distributed as per the proposed mode of distribution, he will suffer irreparable damage. He contends that by virtue of having occupied the suit land from 1972, he acquired the title by way of adverse possession.

4. His affidavit of protest was opposed by the petitioner, Mr. **Kiarie**, learned counsel for the petitioner relied on the replying affidavit sworn by **John Tanui Kosgei** in response to the affidavit of protest. It was argued that the protester has no interests over the deceased's estate because he is not a son of the deceased. The deceased also did not sell to the protester any land, thus the protester is not a beneficiary of the deceased's estate by any stretch of imagination. The petitioner contends that the protester has been occupying plot no. 54, but he illegally encroached on plot No. 55, which matter was duly reported to the police. Moreover, the protester had filed a suit against the petitioner being (**Eldoret HCCC No. 271 of 1996** which subsequently became **Kitale HCCC No. 27 of 1997**)

5. In that suit the protester was claiming adverse possession over plot No. 55 but the suit was struck out on 13th May, 2003

with costs. Technical issues were also raised by **Mr. Kiarie** regarding the protester's failure to comply with the provisions of rule 60 of the P & A Rules. The protester did not enter appearance as provided for in the rules that every interested person who wishes to be heard on any application is supposed to enter appearance by way of Form 26. It was also submitted that plot No. 55 is registered in the name of deceased from the 9th July, 1976. The plot No. 55 is a subdivision of plot No. 23 which gave rise to plot No. 54 and 55. The deceased purchased plot No. 55 while plot No. 54 remained in the name of the original owner and the protester encroached plot No. 55 when he is supposed to reside on plot No. 54. The court was urged to dismiss the protest because the protester is not a beneficiary of the deceased's estate and a claim of adverse possession cannot be litigated in a Succession cause.

6. The issue for determination in this affidavit of protest is whether the protester is entitled by way of adverse possession to the suit premises being Cherangany/Kapkayor/55 which is in the name of the deceased. I agree with counsel for the petitioners that the P & A proceedings are not the correct avenue for the protester to seek his claim of adverse possession of the suit premises. The Law of Succession Act deals with the succession of the deceased and the administration of the deceased's estate. There is no dispute in this matter over the beneficiaries of the deceased's estate and how the estate should be distributed among the beneficiaries except the protester who claims to have acquired rights by way of adverse possession. The beneficiaries of the deceased have agreed on the mode of distribution. The protester's claim cannot be determined in this succession matter. The protester should file a substantive suit against the estate in a civil matter.

7. Accordingly, I dismiss the affidavit of protest with costs to the petitioners. The summons for confirmation is confirmed and the deceased's estate is to be distributed according to the family agreement on distribution which was filed on 8th September, 2006.

Judgment read and signed this 23rd day of September, 2011.

MARTHA KOOME.

JUDGE.