

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
PROBATE AND ADMINISTRATION CASE NO. 22 OF 1998.

SIMON MUSE MASAKHA APPLICANTS

VERSUS

SELINA NASIPWONDI

SUSAN NAKHUMICHA

HENRY WANYONYI MUSE

MORRIS MASAKHA RESPONDENTS

RULING

The application before the court is dated 31.1.2003. It seeks orders that:-

- (a). The grant of probate issued to the Respondents above be revoked or annulled due to attendant irregularities and fraud.
- (b). That the Respondents be restrained by way of injunction from alienating, disposing or dealing with land parcel No. BOKOLI/CHWELE/736 AND 737 till this application be heard and finally determined.

The facts in the case show that the 1st Respondent had applied for a grant of letters of administration intestate of the late Simon Muse Masakha. Upon objection being filed by the brothers of the said petitioner, Selina Nakhumicha, the court, as a compromise, appointed three other petitioners – Susan Nakhumicha, Henry Wanyonyi Muse and Morris Masakha.

On 10.11.1998, the four were then allowed to go home and discuss the mode of distribution and on agreement, they would apply for confirmation. They finally agreed on distribution and on 11.12.01 this court through Kasanga Mulwa, J confirmed the grant of letters. The applicant seeking the revocation of the said confirmed grant of letters is Leonard Wanjala who is the grandson of the deceased Simon Muse Masakha. After he filed the application, he somehow obtained a revocation order.

However, on 19.7.07 the revocation order was compromised by his consent and that of the Petitioners/Respondents. The effect of the consent order as this court understands it, was to reinstate the confirmation order with distribution as all the parties had agreed. That left the application revocation intact and liable for prosecution by the applicant herein. Indeed the orders discharging the revocation order included an order that the applicant was at liberty to prosecute his application for revocation dated 31.1.2003.

Unfortunately the applicant slept on the application from 17.7.2007 until the same was fixed for hearing and prosecuted ex parte by the respondents/petitioners on 25.10.2010. The applicant failed to attend court despite being properly served. On 15.6.2010 the application was placed before me. Mr. Situma appeared for the applicant while Mr. Murunga represented the petitioners/Respondents herein. A mention was by consent fixed on 19.7.2010 by which time both sides were ordered to file their evidence affidavits.

On 19.7.2010 counsel for both sides fixed the objection hearing on 29.9.2010 through cross examination of the filed evidence. Incidentally only the petitioners/Respondents had by then filed their evidence affidavits while none had been filed by the objector. Despite this non-co-operation by the objector/applicant, the court bent backwards to still allow him more time to file his witness evidence

affidavits to support his objection. Meanwhile the hearing was fixed on 29.9.2010 as just stated herein above.

On 29.9.2010 the objector and his advocate failed to turn up in court. The 1st Respondent chose to proceed with the hearing which she did, for herself and on behalf of the other petitioners. Since no excuse for the objector's absence was recorded, this ruling was fixed for today, 23.11.2010.

I have carefully considered the evidence on record and perused the material in support and against the application for revocation. Since the objector failed to turn up to prosecute the application, the same would and is indeed dismissed for want of prosecution. Even considering the reasons for wanting to revoke the grant, the main grounds mentioned in the affidavit of the objector is that the 1st objector being a married daughter of the deceased was not entitled to petition for grant since that is against customary law. He also stated that some children of the deceased entitled to portions of the estate had been left out.

On the other hand, Selina Nasipwondi Wekesa filed a replying affidavit sworn on 7.10.2008. She depones that she was as a daughter of the deceased, like sons, entitled to petition for a grant of letters, as she did. She added that if her petition was wrong, then it was corrected by this court when the court added three more petitioners before the four applied for and obtained a confirmation of the grant after agreeing on distribution. She further deponed that when the mode of distribution was agreed upon, the father of the objector and even the objector himself did not raise any objection. As a result, confirmation had no dispute until much later when objector, in absence of his father, decided to object. Selina Nasipwondi further denied that any beneficiary entitled to a share of the estate, was left out.

I have considered the above sworn affidavit evidence plus the oral evidence recorded by the 1st Respondent/petitioner. I am satisfied that the objector's grounds have no merit. The summons for revocation in my view, was intended to stall the completion of the administration. That view is supported by the fact that the objector failed to prosecute his application or support it by any additional affidavit evidence or written submissions as ordered by the court from time to time.

For the above reasons, the objectors application seeking revocation is hereby dismissed with costs to the Respondents/petitioners.
Orders accordingly.

DATED and DELIVERED at Bungoma this 23rd day of November 2010.

**D.
JUDGE**

ONYANCHA