



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HCSUCC NO. 137 OF 2006**

***LESIIIT J.***

**IN THE MATTER OF THE ESTATE OF ITIRIA TWERIA ALIAS M'ITIRIA  
MUTWERI.....DECEASED**

**SIMEON KAMUNDE**

**ITIRIA.....PETITIONER**

**VERSUS**

**SAMWEL M. MBAABU.....1<sup>ST</sup>**

**RESPONDENT**

**BERNARD MWENDA KAMUNDI.....2<sup>ND</sup>**

**RESPONDENT**

**RULING**

The application coming up for consideration is the summons for rectification of grant dated 10<sup>th</sup> December 2008. It has been brought by the Petitioner under section 74 of the law of Succession Act and Rule 43 of the Probate and Administration Rules. It seeks to rectify the grant of letters of administration issued to the Petitioner Simeon Kamunde Itiria on the 3<sup>rd</sup> January 2007 in the following respect:

- (a) That LR No. NKUENE/UKUU/466 measuring 3.58 acres be distributed as follows:
- (i) 1.45 acres go to Samuel Mbaabu M'itiria to hold in trust for his children.
  - (ii) Balance of 2.13 acres to go to Simeon Kamunde Itiria to hold in trust for his children.

This application is supported by the affidavit of the Petitioner of even date. The 2<sup>nd</sup> Respondent Samwel Mbaabu has also filed a Replying Affidavit dated 21<sup>st</sup> December 2009 in support of the summons. There

is a Replying Affidavit by one Bernard Mwenda Kamunde dated 18<sup>th</sup> May 2010. That affidavit opposes the summons.

I have considered the application for rectification of grant. Mr. Mwirigi urged the application on behalf of the applicator while Samwel Mbaabu appeared in person. Bernard Mwenda did not appear at all.

Mr. Mwirigi for the Petitioner urged the court to allow the application. He submitted in brief that Bernard Mwenda who was opposing the summons for the rectification of the grant wanted to inherit directly from his father the Petitioner in the summons. Mr. Mwirigi submitted that Bernard Mwenda was a grandson of the deceased and that he could inherit directly from the deceased but rather from the petitioner who is his father.

I have perused all the documentations filed in this Succession Cause. This cause was filed on 20<sup>th</sup> August 2007. In the affidavit in support of summons for the confirmation of the grant it was declared that the deceased was survived by 3 children i.e the Petitioner Simeon Kamunde, Samwel Mbaabu and a daughter Monica Ncure. The same affidavit declared four dependants of the deceased Bernard Mwenda, James Kiogora, Pheneus Gichuru and Martin Kinyua. The affidavit also contained a paragraph suggesting how the estate should be distributed to the surviving children and grand children of the deceased.

Bernard Mwenda filed an application by way of Chamber Summons dated 15<sup>th</sup> December 2009. In that application the applicant Bernard Mwenda named his father the Petitioner in this cause and his uncle Samwel Mbaabu as the respondents. In that application part of the orders sought was a transfer of 0.76 acres out of the property NKUENE UKUU 466. It appears the application was never prosecuted instead the Petitioner filed the summons for rectification of the grant which is the subject matter of this application.

In the affidavit in support of the summons sworn by the Petitioner he deposes that the deceased was survived by two sons. He also deposes that the surviving members of the family held a meeting before the clan elders and before the chief and that it was settled that in accordance with the wishes of the deceased the land should be divided into two portions. The Petitioner deposes that the beneficiaries of the estate of the deceased were agreeable to the rectification as played for on the face of the application.

In the affidavit for Samwel he supports the summons for rectification of the grant. Samwel deposes at paragraph 5 of his affidavit that there was a meeting held before the area chief in which it was agreed that the land which is the only estate of the deceased should be subdivided equally between the surviving sons. Samwel deposes further that he sold 0.29 acres to the applicant Bernard Mwenda who is the son of the Petitioner. He says that as a consequent the portion due to him from the estate of the deceased should be less 0.29 acres which he sold to the petitioner's son. Samwel concludes by supporting the rectification in terms of Order 1 of the summons.

I have also perused the affidavit by Bernard Mwenda he opposes the rectification claiming that it would disinherit him and he says that he should have the share due to him transferred to him as per his application which is dated 15<sup>th</sup> December 2009 which I have alluded to earlier.

I have considered the entire application. I do find that the rectification proposed by the Petitioner is quite in order because it acknowledges that the deceased was survived by his two sons who should share the estate of the deceased equally. The proposed rectification has also taken into account a portion of 0.29 acres sold by Samwel Mbaabu to the Petitioner's son. In the proposed rectification the Petitioner gets 0.29 acres more than Samwel Mbaabu in order to cater for the portion sold by Samwel Mbaabu to the Petitioner's son. Bernard Mwenda is a grand son to the deceased along side other 3 grand sons. Apart from Bernard Mwenda it is not disclosed whose sons the other grand sons of the deceased are. That notwithstanding the correct position is that the sons of the deceased should inherit directly from the deceased person and that their sons should inherit from their father's portion. In this case Bernard Mwenda should inherit from the portion of the estate that was allocated to the Petitioner alongside his brothers but in addition he should get 0.29 acres being the portion he bought from his uncle Samwel Mbaabu. I dismiss Bernard Mwenda's opposition to the rectification as being baseless and without merit. In the result I will allow the summons for the rectification of the grant in the terms suggested by the petitioner as supported by the Petitioner's brother in the following terms:

- (a) That LR No. NKUENE/UKUU/466 measuring 3.58 acres be distributed as follows:
  - (i) 1.45 acres go to Samuel Mbaabu M'Itiria to hold in trust for his children.
  - (ii) Balance of 2.13 acres to go to Simeon Kamunde Itiria to hold in trust for his children.

The costs of the application be in the cause.

Dated Signed and delivered at Meru this 12<sup>th</sup> day of November, 2010

**LESIT, J**  
**JUDGE**

In the presence of the parties  
Kiriimi – Court Clerk.  
Kiutha Arithi advocate for the Petitioner  
Respondent in person

**LESIT, J**  
**JUDGE**