



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Succession Cause 314 of 1993

IN THE MATTER OF THE ESTATE OF HENRY E. INGUTIA - DECEASED

BETWEEN

MESHACK SHAMALA MASINDE -----PETITIONER

VERSUS

HABIL MUKHWANA ESHITEMI ----- OBJECTOR

JUDGEMENT

In his application dated 21st December 1995, the Objector seeks orders that the Grant issued to the Petitioner be revoked, that the Petitioner be ordered to file an account as to how he has dealt with the estate of the deceased, that the Petitioner deposit in court all the monies and title documents that came to him as the administrator and the petitioner be restrained from dealing with plot **NO. BUTSOTSO/BUKURA/1125**.

Mrs. Osodo, counsel for the Objector, submitted that the Petitioner is a total stranger to the estate and is not related to the deceased.

The Objector testified and called one witness. In his testimony, the objector, **HABIL ESHITEMI** testified that he does not know the Petitioner, **MESHACK SHAMALA MASINDE** and that the Petitioner is not the deceased's son. The Petitioner was charged with forgery and he was sentenced to 18 months imprisonment. The deceased had three sons and four daughters and all of them were not included in the Succession. He is the first born son and urged the court to revoke the grant or he be made the Administrator and the Petitioner's name be removed from the Land Registry.

The Objector's second witness was **Felister Nalianya** who testified that she does not know the Petitioner. She is the elder sister to **Philis Mutenda**, the Petitioner's witness.

On his part the Petitioner testified that the deceased was his father. The deceased had three wives namely **ALIONO, RESPER** and **GORET**. Aliono was the first wife and she had no child. Respa had two children, the Petitioner and Atai Margaret. Third wife, Goret had seven (7) children who include the objector. The Petitioner further testified that the other beneficiaries refused to follow up the Succession Cause. He is willing to have the objector enjoined as a co-administrator. He withdrew Kshs.1,900/= from one of the bank accounts and used it to pursue the Succession Cause.

The Petitioner called one witness, PHILIS MUTANDA who is the Objector's sister. The witness's testimony is that the Petitioner is her brother. The deceased had three wives and her mother was the last wife. The Petitioner's mother is Resper who was the second wife. The Petitioner lives in Kabras. The deceased divided his plot for his four sons. The upper part was for the Objector and Ingutia while the lower part was for the Petitioner and Albert. The Petitioner wanted to effect what the deceased had intended but was stopped. The Petitioner's mother is alive and lives in Kabras.

The Grant herein was confirmed on 17th January, 1994. It is unfortunate that the Objector's application took over thirteen years to be heard. It is further unfortunate that given the evidence adduced by both parties, it is difficult to make a reasoned decision based on the truth. It is clear from the evidence that the court is not being told the truth as to whether the Petitioner is the deceased's son or not. Whereas the Objector and his sister maintain that the Petitioner is not their brother, Philis Mutenda testified on Oath that the Petitioner is her elder brother. The Petitioner was able to name all the deceased's nine (9) children and three wives. The area Chief wrote a letter dated 20th July 1993 indicating that the Petitioner is the deceased's eldest son.

From the evidence on record, it is the word of Philis Mutenda against that of Felister Nalianya as I do not expect the Petitioner and the Objector not to support their positions. This being the case I will allow the Objector's application in the following terms:-

- i. ***The Grant issued to the Petitioner is hereby revoked.***

- ii. ***A fresh Grant shall be issued in the joint names of the Objector HABIL MUKHWANA and his sister PHYLIS MUTANDA.***

- iii. ***The Plot BUTSOTSO/BUKURA/1125 shall remain registered in the Petitioner's name but the Prohibition orders issued on 11th September 2003 shall remain in force.***

I will not make any order of filing of accounts as it is evident from the evidence adduced that the accounts had minimal sums that was used to facilitate the processing of the Grant. The new Administrators should make an application for the confirmation of the Grant. Each party shall meet its own costs.

Delivered, dated and signed at Kakamega this 27th day of October, 2009.

SAID J. CHITEMBWE

JUDGE