

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Miscellaneous Civil Application 57 of 2007

MARY KUNGA OSILO APPLICANT

V E R S U S

JANE ONGOCHE AYUBU 1ST RESPONDENT

SAMUEL MUYELA AMAKHANGA 2ND RESPONDENT

R U L I N G

The applicant filed her application dated 17th December, 2007 seeking orders that the Vihiga Succession Cause file No. 98 of 2006 be transferred to this court and that the Grant issued by the Vihiga Court be revoked or annulled. The applicant contends that she does not know how the property was sold. The property, Plot No. East Bunyore/Iboona/666 belonged to the late Anembe Muchenda who was a brother to her husband. The person who sold the land is a grand daughter. The applicant contends that she has been using the land since 1960.

Mr. Nandwa for the respondents submitted that the 1st respondent is the daughter of the deceased. She ranked higher than the applicant and she applied for the Letters of Administration and thereafter sold the land to the 2nd respondent. The application is defective as the same is not brought under section 76 and Rule 44 of the Succession Act. Counsel urged the court to dismiss the application.

In the Succession cause before the Vihiga court, the Chief for Wekhomo location wrote a letter dated 27th November, 2006 indicating that Jane Ongoché Ayubu is the daughter of Anembe Muchende (deceased). An official search dated 28th November, 2006 show that Plot No. E/Bunyore/Iboona/666 was registered in the name of Anemba Muchende on 1st June, 1965.

The application is brought under Order XLVI Rule 5 of the Civil Procedure Act. The applicant contends that the 1st respondent is a granddaughter of the deceased whereas the area chief contend that the 1st respondent is the deceased's daughter. In the affidavit in support of the petition for Letters of Administration, the 1st respondent indicated that she was a daughter of the deceased.

I do find that the application herein has no merit. The same is brought under the wrong provisions of the law. The applicant does not clearly indicate what is her relationship with the deceased. The Vihiga Succession Cause No.98 of 2006 shall be retained at the Kakamega

High Court. The registry is hereby ordered to allocate a new Succession Cause number. The applicant is at liberty to file another application for nullification of the grant through the new Succession Cause number.

In the end, the application dated 17th December, 2007 is dismissed. Other than the prayer for the transfer of the file Vihiga Succession Cause number 98 of 2006 to this court that is granted, the other prayers are dismissed. Each party shall meet his own costs.

Delivered, dated and signed at Kakamega this 12th day of November, 2009

SAID J. CHITEMBWE

J U D G E