



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 8 of 1991

IN THE MATTER OF THE ESTATE OF M'MBIJIWE MUGUONGO..DECEASED
M'IKIARA M'MBIJIWE.....PETITIONER

V E R S U S

FRANKLINE MUGAMBI M'MBIJIWE & 4 OTHERS.....OBJECTORS

LAW OF SUCCESSION

- Enforcement of a Sale Agreement between beneficiaries is not matter for the Succession court – but a separate suit.

R U L I N G

1. Although this Ruling relates to the application-dated 22.9.2004, it is necessary to give a short background to the estate as a whole.
2. The cause herein was confirmed on 8th July 1992 that is the date borne by the Application of Confirmation of Grant by which the Applicant M'IKIARA M'MBIJIWE had the parcel of land known as title No. ABOGETA/UPPER CHURE/145 transferred to himself wholly.
3. Alarmed by the Applicant's taking the land alone his brothers or the beneficiaries of the estate, the Applicant went before the in Meru Chief Magistrate's Court Civil case No. 337 of 1994 where the following consent order was recorded and adopted as judgment of the court-

“Miss Mwangi:-

By Consent

(1) Land - Abogeta Upper Chure/145 measuring 5.31 acres currently registered in the name of the Defendant herein holding in trust for his brothers the Plaintiffs herein, be shared among the four brothers as follows:-

- : M'Ikiara M'Mbijiwe - 2.12 Acres
- : Franklin Mugambi - 1.70 acres
- : Alexander Muthama M'mbijiwe - 1.60 Acres

: Samuel Kinoti - 1.60 Acres

(2) All the sub-division and transfer expenses incurred in filing succession cause amounting to Ksh.9,000/- be paid by the 3 beneficiaries each paying Ksh.3,000/=. The amount be paid on or before 30.11.1999. The division to commence immediately after this agreement witnessed by all the beneficiaries. They will agree on the surveyor to do the job. The Plaintiff herein to remove the caution placed over the said land forthwith;

:Any expenses thereto be met by the 1st, 3rd and 5th Plaintiff.

:Subdivision be done in such a way that each party retains his property subsisting thereto;

:In the event of any crops, e.g. maize, sweet potatoes, bananas, yams etc if either of the parties hereto shall fall on the portion of the other, owner shall have a duration of 6 months to harvest or remove to his new portion;

:Tea; each of the 4 beneficiaries to continue harvesting his tea for 5 years calculated from 1/7/1999 to 30/6/2004 after which any tea lying outside each of the parties hereto's portion shall either be removed or bought by the parties on whose land it shall be lying at the rate subsisting then. No further growing of tea for the other parties. Any one in breach of this consent will pay Ksh. 50,000/- to the other enforceable by court.

Consent to be typed and a copy be given to each of the parties.

Mr. Oonge: I confirm the consent.

Order: Consent terms as above adopted as judgment of this court.

R.M. Mutitu

Chief Magistrate

4/2/1999

4. Following the said consent order the parties moved rapidly and had the subject parcel of Land Title No. ABOGETA/U.CHURE/145 subdivided and Title Nos. Abogeta/U-Chure/2009 (of approximately 0.433 Ha) issued in the name of Samuel Kinoti M'mbijiwe and ABOGETA/U.CHURE/2208 and 2211 in the name of M'IKIARA MBIJIWE the Applicant (both parcels being 0.433 Ha). I was unable to trace in the Court's records any title in respect of ABOGETA/U-CHURE/2210 the subject of the Application dated 22.09.2004 and which the Applicant claims from his brother GEOFFREY MUTWIRI M'MBIJIWE under an Agreement for Sale dated 19th December 1994 and which Agreement Mutwiri disowns.

5. Having recorded and implemented the Consent Order and judgment of the lower court, the parties continued to engage in utter confusion and obfuscation of issues in this cause. A further Consent Order was entered into in this Cause on 20.11.2002 and in which the following same beneficiaries who were recognized in the consent judgment in the lower court were also recognized in this cause. These and their portions of the suit land were:-

(a) Franklin Mugambi - 0.9 acres

(b) M'Ikiara Mbiijiwe - 0.9 acres

(c) Alexander Muthamia - 0.9 acres

(e) Samuel Kinoti - 0.9 acres

(f) Charity Kinoti - 0.8 acres

6. An attempt by the Applicant herein to have this Consent Order set aside was dismissed by Hon. Mr. Justice Kasanga in his Ruling dated 3rd July 2003.
7. An attempt by Mr. M.M. Kioga Esq. with the Respondents to have a new survey done in accordance with the new Consent Order of 25.11.2002 before Hon. Mr. Justice Kasanga Mulwa was not successful. So we must fall back on to the sub-division carried out pursuant to the Consent Order made before the lower court on 4.2.1999 and which produced new titles Nos. Abogeta/U. Chure/2008 – 2211, respectively. By the Application of 22.09.2004 the Applicant seeks an order of the court directing that Geoffrey Mutwiri Mbijiwe's share of 0.90 acres or thereabout of the deceased's estate be included and confirmed with the Applicant's/Petitioner's share and be part of the same, and that such share be incorporated into parcel NO. ABOGETA/U-CHURE/2210.
8. I am afraid this court will not accede to that prayer. This is a Court of succession or Family Court. It is not a civil court. In its jurisdiction on succession matters the court will only deal on matters of succession and not enforcement of agreements on sale of land. To grant the Applicant the prayer it seeks would be legitimize an agreement for sale which Geoffrey Mutwiri specifically rejects and calls a forgery. An affidavit of Wilson Mburugu stating that he drew up the agreement for sale is only helpful in a suit by the Applicant to that agreement but not in these proceedings. I therefore reject that prayer, and dismiss with costs to the Respondents the Applicant's Application dated 22.9.2004.
9. The dismissal of that Application is not however the end of this long drawn matter, and I doubt that the orders I am about to make below will be the end.
10. Having entered into the various consent orders, it is necessary to give complete force and effect to those orders as they (the orders), had the effect of rectifying the Certificate of Confirmation of the Grant issued on 8th July 1992.
11. Section 74 of the Law of Succession Act empowers the court to amend or rectify a Grant of Letters of Administration on the grounds of errors in the names and descriptions, as in setting out the time and place of the deceased's death or the purpose in a limited grant. The grant may also be amended or rectified for any other good cause. That is why the court is given wide discretion by section 47 of the Act to determine any dispute under the Act and to pronounce such decrees and make such orders as may be expedient.
12. In this matter, the parties having on 25.11.2002 consented both as to the beneficiaries, the sub-division and distribution of the parcel of land known as ABOGETA/U-CHURE/145 comprising of approximately 5.31 acres, into firstly 0.8 acres to Charity Nkuene and the balance equally among the sons of the late M'MBIJIWE MUGUONGO, 0.9 acres each, I direct that the Certificate of Confirmation of the Grant dated 8th July 1992 be and is hereby amended as follows:-

- (a) Frankline Mugambi - 0.9 acres
- (b) M'Ikiara M'mbijiwe - 0.9 acres
- (c) Alexander Muthamia - 0.9 acres
- (d) Geoffrey Mutwiri - 0.9 acres
- (e) Samuel Kinoti - 0.9 acres
- (f) Charity Nkuene - 0.8 acres

13. I further direct that the subdivisions carried out pursuant to the consent recorded in the Lower Court on 4th February 1999 are hereby cancelled, and for the avoidance of doubt the said order by R.M. Mutitu Chief Magistrate is quashed or set aside, and shall be of no effect whatsoever by virtue of this Ruling.
14. I also direct that each of the beneficiaries above cited, shall contribute to the costs of subdivision and registration of the new titles.

15. Any party aggrieved by this Ruling shall be at liberty to appeal within the period prescribed by law and in accord with the law applicable.
16. There shall be orders accordingly.

Dated, delivered and signed at Meru this 11th day of July 2008

M. J. ANYARA EMUKULE

JUDGE.