



IN THE MATTER OF THE ESTATE OF - DAVID LUTSURU LUKOKOLO - DECEASED
WILSON SINYA PETITIONER/APPLICANT

V E R S U S

JOSEPH KITSURU.....1ST RESPONDENT

ISAYA MAYAVIRA KITSURU2ND RESPONDENT

R U L I N G

The application before me is brought pursuant to the provisions of Rule 73 of the Probate and Administration Rules. It seeks to set aside the orders made on 27th February 2008, to confirm the grant.

The application also seeks the consequential order, setting aside the certificate of confirmation, which was issued on 11th March 2008.

The applicant is the Petitioner, **WILSON SINYA**. He asserts that the affidavit in support of the application for confirmation was fraudulent, as he was not the signatory there to. He pointed out that he had sworn an affidavit on 21st September 1998, supporting the application for confirmation of the grant. In that affidavit, he says that he had set out the manner in which the property constituting the estate to the deceased was to be distributed between the beneficiaries.

The petitioner disowned the affidavit sworn on 18th September 2006, because, in his view, the said affidavit contained particulars which were different from those in the affidavit sworn by him on 21st September 1998.

He specifically stated that the signature on the affidavit sworn on 18th September 2006 was not his.

Interestingly, the petitioner concedes that he attended court on 27th February 2008, when the application for confirmation of the grant came up for hearing. However, he explains that when he indicated to the court that he was in agreement with the proposed distribution, he was relying upon the affidavit sworn on 21st September 1998.

The petitioner asserts, in his affidavit sworn on 31st March 2008, that the estate was to have been subdivided into three portions, as follows;

- (a) Wilson Sanya - 6 acres
- (b) Joseph Kutsuru - 2.75 acres
- (c) Isaya Muyavila Kutsuru - 2.5 acres

Those portions are at variance with those in the affidavit sworn on 18th September 2006, in which the

property was to be shared out as follows;

- (a) Wilson Sanya - 4 acres
- (b) Joseph Kutsuru - 3.5 acres
- (c) Isaya Muyavila Kutsuru - 3.5 acres

Although the petitioner served his two brothers with the application, neither of them filed any replying affidavit or grounds of opposition.

As no allegations were directed against either of the said 2 brothers, this court cannot say that simply because they did not respond to the application, it would imply that the affidavit purportedly sworn by the petitioner on 18th September 2006 was fraudulent or forged.

However, if the said brothers, or either of them, wished to challenge the petitioner's contention regarding the agreement on how to divide the property, they (or he) could have sworn an affidavit to respond to paragraph 13 of the petitioner's affidavit: that paragraph sets out what the petitioner says that he and his brothers had agreed upon.

As the two brothers of the petitioner have not challenged the petitioner in that respect, I find that it is more probable than not that the petitioner is factually correct about the agreement they arrived at on how the property was to have been divided.

But I also do find that the agreement, if any, was not incorporated into the affidavit sworn by the petitioner on 21st September 1998. I say so because at that stage, the petitioner was simply initiating the Succession Cause, by filing the petition as well as all the other requisite documents.

The affidavit sworn by the petitioner on 21st September 1998 was in accordance with "Form 5", as is clearly appearing on the face thereof.

By virtue of rule 7 of the Probate and Administration Rules, Form 5 is one of the kinds of affidavit that are sworn by an applicant who seeks a grant of letters of representation to the estate of a deceased person.

So, by executing an affidavit drawn up in accordance with Form 5, the petitioner was asking that he be granted letters of administration. He cannot have known, at that stage, whether or not the court would grant the letters to him.

On the other hand, "Form 9" is in the nature of an affidavit in support of summons for confirmation of grant of administration intestate. It can only be sworn by a person to whom the court had already issued letters of administration.

In effect, the petitioner cannot conceivably have been relying on the affidavit sworn when he first lodged the petition herein, to support an application for confirmation of the grant. In simple terms, the story put forward by the petitioner does not add up.

But the said story is unchallenged. And as the applicant seeks nothing more than a second opportunity at having the estate distributed, I hold the considered view that the beneficiaries will not be prejudiced.

Accordingly, the orders made on 27th February 2008 are set aside. Furthermore, the certificate of confirmation of grant dated 11th March 2008 is set aside.

The applicant herein is directed to file and serve a fresh application for confirmation of grant within the next 30 days from today. He cannot simply have the application dated 1st March 2000 heard afresh because the only affidavit which was alleged to be in support thereof has been disowned by the applicant

himself. There would therefore be no affidavit to support that application.

Finally, the applicant shall meet the costs of the application dated 31st March 2008 as he has not satisfied me that any other party or person should be liable for the same.

Dated, Signed and Delivered at Kakamega, this 16th .day of October 2008

FRED A. OCHIENG

J U D G E