



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**Succession Cause 258 of 1994**

**IN THE MATTER OF THE ESTATE OF THE LATE SHADRACK MUKOYA SHITSESWA -----**  
**DECEASED**

**BETWEEN**

**ELIJAH SHITSESWA MUKOYA ..... PETITIONER**

**VERSUS**

**ISAIAH MUKOYA ..... OBJECTOR**

**RULING**

On 7<sup>th</sup> July, 2008 the objection proceedings were scheduled for hearing. Both the petitioner and the objector were present in court.

However, the advocate for the petitioner was not present in court, when the case was first called out, with a view to having time allotted for it to be heard.

The Petitioner sought an adjournment, as his advocate, Mr. Nyikuli, was not in court. However, Miss Akala, learned advocate for the objector, opposed the application for adjournment. The principal reason for the opposition to the adjournment was the fact that the case was an old one.

After giving consideration to the application for adjournment, I rejected it, primarily because the objection proceedings were instituted in 1995, which was some 13 years prior to the hearing date. However, in order to give to the petitioner, time to get his advocate to attend court, the matter was set down for hearing at 2.30 p.m.

Regrettably, even though the case was only reached at 2.40 p.m., the advocate for the petitioner was still not present.

As a result, the petitioner, once again, sought an adjournment; although on that occasion he asked that his advocate be allowed upto 3.20 p.m., to attend court.

Having rejected the application for adjournment earlier in the day, and because the court had already fixed other cases for the time which the petitioner's advocate found convenient, the court declined to accommodate the said advocate.

The advocate for the objector then notified the court that she would be relying on the objector's affidavits which were filed in court on 10<sup>th</sup> April 2005 and on 3<sup>rd</sup> October 2006, respectively.

It is noteworthy that on 23<sup>rd</sup> May 1995, the court had given Directions that the objection proceedings would proceed by way of oral evidence.

Thereafter, on 22<sup>nd</sup> November 2001, the parties consented to a variation of the Directions. Consequently, the court ordered, by consent of the parties, that the application by the objector, for the revocation of the grant, be disposed of by way of submissions. The parties also agreed that their respective submissions would be founded upon the affidavits which were on record.

By his submissions, the objector submitted that the petitioner had erred by including amongst the heirs to the estate of SHADRACK MUKOYA SHITESWA, a person who was a stranger to the said estate. The alleged stranger was one JUMA SIAMBIRI.

In support of his application, the objector placed reliance upon a report by a Council of Elders, who met and distributed the estate of the deceased, SHADRACK MUKOYA SHITESWA.

According to the objector, Juma Siambiri was a stranger to the estate of the deceased because the report by the elders did not name him as one of the beneficiaries thereto.

It was the submission of the objector that had the petitioner got proof that Juma Siambiri was indeed entitled to share in the estate of the deceased, the petitioner would have sworn an affidavit to verify that entitlement.

As the petitioner had not sworn an affidavit to explain how Juma Siambiri was a beneficiary to the estate of the deceased, the objector submitted that that supported his case.

The objector also submitted that FRANCIS OBULLITZA, who was a grandson to the deceased, was a dependant to the said deceased, as he had been brought up by the deceased.

Francis Obulitza was the son to one of the daughters to the deceased.

According to the objector, Francis Obulitza was born outside wedlock, and his grandfather thereafter raised him as if he were his own son.

A perusal of the record of proceedings reveals that the petitioner filed a letter dated 20<sup>th</sup> June 1994, from the Chief of North Butso Location. The said letter cited the following heirs to the estate of the late SAHADRACK MUKOYA SHITESWA;

- “(1) Mr. Elijah Shitseswa – Son.
- (2) Isaya Mukoya – Son.
- (3) Mrs. Rose Mukoya – Daughter-in-law.
- (4) Allan Alava Opete – Grandson.
- (5) Juma Siambiri – Willing Buyer.
- (6) Jessen Shibenji Mukoya – Grandson.”

Unless the Chief was shown to have been misleading the court, it would appear that JUMA SIAMBIRI was not a stranger to the estate of the deceased.

Given the fact that the Grant was confirmed by the court on 18<sup>th</sup> January 1995; and bearing in mind the fact that Juma Siambiri was allocated 1.6 hectares, I hold the considered view that it would be necessary for this court to give to the said Juma Siambiri an opportunity to be heard, before any further orders can be made.

In my considered view, given the long period of time that has lapsed since the Grant was confirmed, giving land to, inter alia, Juma Siambiri, it is necessary for the court to verify the factual position on the ground.

If Juma Siambiri, and the other potential beneficiaries are not accorded a hearing before the court gives its determination on the issues raised by the objector, there is a real possibility that the court could end up acting in vain.

The need to give to all the potential beneficiaries an opportunity to be heard is partly informed by the fact that whereas the report by the Council of Elders has suggested that the property be divided as follows;

(a) Petitioner - 13 acres

(b) Objector - 13 acres

(c) Rydon Mukoya - 13 acres

(d) David Mukoya - 13 acres

(e) Francis Abulista - 5 acres

The objector disputes that proposed distribution, in his supplementary affidavit, sworn on 2<sup>nd</sup> October 2006.

Surely, the objector cannot seek to rely on the report by the Council of Elders to only support one aspect of his case, whilst rejecting the actual recommended sub-divisions.

In any event, the objector did not demonstrate to the court, how the Council of Elders obtained jurisdiction to determine an issue which had already been adjudicated upon by the High Court.

But assuming that the said Council of Elders did have the requisite jurisdiction, (which to my mind is very doubtful), the objector has not indicated to this court if the beneficiaries were given an opportunity to make their representations before the elders, before a decision was arrived at.

I am not satisfied that there is any legal basis for accepting the report by the Council of Elders in evidence.

For now, I find no reason to revoke or annul the confirmed grant herein. However, given the unique circumstances prevailing in this case, and in the interests of justice, I direct that the application be served on all potential beneficiaries, including JUMA SIAMBIRI. The application shall thereafter be listed for further hearing, after there is proof of service on the said potential beneficiaries.

Costs shall remain in the cause, in the objection proceedings.

*Dated, Signed and Delivered at Kakamega, this 14<sup>th</sup> day of October, 2008.*

**FRED A. OCHIENG**

**J U D G E**