



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Succession Cause 60 of 2004

ISHMAEL GIKUNDA.....PETITIONER

VERSUS

STEPHEN RIUNGU MUTUERANDU.....OBJECTOR

RULING

In this application by way of Chamber Summons the applicant seeks, in the main, an order of inhibition of two parcels of land, L.R Abogeta/U-Chure/1499 and L.R Abogeta/U-Chure/37 as well as an order of revocation or annulment of the grant confirmed on 3rd July, 2006.

The application is brought on the basis that the applicant is the son of the deceased while the petitioner is the son of the deceased's unmarried daughter, Elizabeth Kanyambu.

That he filed the cause secretly, without the applicant's knowledge or consent. That the applicant learnt of the cause on 20th December, 2006. That by this time the petitioner had distributed the estate against the deceased's wishes and contrary to the law.

Despite notice of the hearing of this application being duly served upon the petitioner there was no attendance by either him or his counsel on the hearing day. The application therefore proceeded *ex parte*. The petitioner, however, had filed a replying affidavit in response to the application in which he avers that the averments of the applicants are not truthful. That indeed he (the petitioner) received the blessing of all the family members of the deceased before he filed this succession cause because none of them could afford to do so.

The petitioner concedes that although he is a grandson of the deceased, he has distribute the estate according to the deceased's wishes.

That the applicant has brought this application only after failing to convince his siblings to allow him to get a bigger share of the estate. The petitioner also states in the affidavit that the parcel number of the land in question having changed, no order of inhibition can issue.

It is further averred that all the other beneficiaries are in agreement with the distribution. Before I consider this application, the background ought to be brought out. The deceased M'Twerandu Mweraria (the deceased) died on 5th March, 2001, leaving a 1.7344 Hectares of land known as Abogeta/Upper Chure/499 and 2.06 Hectares in Abogeta/Upper Chure/37.

According to a letter issued by the Chief of Igoki Location dated 24th January, 2003, the deceased was

survived by a widow, four daughters and two sons, one of whom being the applicant herein. Indeed all the documents filed in this cause confirm that the applicant is one of the two sons to the deceased.

Although the petitioner is represented as the son of the deceased, it has now emerged that he is in fact a grandson of the deceased. He filed this cause on 23rd March, 2004 after all the other beneficiaries consented. Subsequently a grant of letters of administration intestate was issued to him and the same confirmed on 25th July, 2006 in respect of the above two parcels of land and Account NO.1-200391-3 Meru Central Farmers Sacco.

According to Certificate of Confirmation of a grant, the petitioner got no share of the estate but distributed the same to the rest of the beneficiaries with the applicant getting 1 acre of Abogeta/Upper Chure/1499 and sharing the balance of the same property with Faith Karoki after distributing to Elizabeth Kanyamu and Hellen Kinanu one acre each. Regarding Abogeta/Upper Chure/37, Faith Karoki got 2 acres and the balance went to the applicant.

Faith Karoki also got the proceeds in A/C No.1-200391-3 Meru Central Farmers Sacco. Shortly after the certificate of confirmation was issued, the applicant brought this application seeking the two main orders alluded to above.

As I have stated there are 2 main grounds upon which this application is premised, namely that the petitioner did not involve the applicant who is a son of the deceased and secondly that the petitioner /did not qualify to apply for letters of administration.

The petitioner has disputed these grounds saying that he filed the cause with the blessing of all the members of the deceased family. The first issue for determination is whether the petitioner who is only a grandson of the deceased was qualified to apply for grant of representation.

Section 64 of the Law of Succession Act donates a final discretion to the court as to the person to whom a grant of letters of administration shall in the best interest of all concerned, be made.

The Section, without prejudice, to this discretion provides a general guide as to the order of preference as to who may apply for letters of administration. It follows that although the petitioner is neither a child or spouse of the deceased, the court in its discretion appointed him to administer the estate, and unless it is shown that the court did not exercise that discretion judicially, that decision cannot be faulted.

The second issue is whether the petitioner obtained the grant of representation secretly. The General Form for consent to confirmation of Grant issued under Rule 40(8) of the Probate and Administration Rules filed in court on 26th May, 2006 reflect the name of the applicant, his signature and identification card number, among those of the other beneficiaries. This fact has not been challenged by the applicant.

It therefore remains as pleaded that the applicant gave his consent to have the grant confirmed in the terms prayed. Secondly on 3rd July, 2006, before Lenaola, J, the record is clear that all the beneficiaries were present before the court and none of them objected to the application for confirmation.

Affidavit sworn by the other beneficiaries confirm that the applicant was in court. It should be clear from this that I am not persuaded that the applicant has discharged the burden of proving his application.

The same must, therefore, fail. But before concluding, I only wish to observe that it was not candid on the petitioner's part to describe himself as a son of the deceased. But because he has conceded and stated his correct relationship with the deceased I find no prejudice. Secondly he has not benefited from the estate. He simply provided the finance and has distributed the estate in a manner satisfactory to all the other beneficiaries who have filed an affidavit in support of the petitioner.

See also Rule 27 of the Probate and Administration Rules. This application is dismissed with costs to the petitioner.

DATED AND DELIVERED AT MERU THIS 22ND DAY OF JUNE, 2007

W. OUKO

JUDGE