



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**Probate & Admin. Cause 4 of 1994**

**ELIZABETH CHEPKURUI CHIRCHIR.....PETITIONER/RESPONDENT**

**VERSUS**

**ESTHER CHEPKIRUI MOSONIK.....1<sup>ST</sup> OBJECTOR/APPLICANT**

**BORNES KIPKERING.....2<sup>ND</sup> OBJECTOR/APPLICANT**

**ALICE CHEPKOSKE KENDUIWA.....3<sup>RD</sup> OBJECTOR/APPLICANT**

**RULING**

The applicants Esther Chepkurui Mosonik, Bornes Kipkering and Alice Chepkurui Kenduiywa have filed an application under the provisions of **Section 71(2)(b) and Section 66 of The Law of Succession Act** seeking to have the award of the arbitrator confirmed as an order of this court. The applicant further prayed for an order of this court to have the titles in respect of the deceased estate to be rectified by the Land Registrar to reflect the said decision of the arbitrator. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Alice Chepkurui Kenduiywa, the 3<sup>rd</sup> applicant.

The application is opposed. Elizabeth Chepkurui Chirchir, the respondent has sworn a replying affidavit in opposition to the application. She has deponed that the arbitrator had arrived at the said decision in her absence. She further complained she had not been notified to attend court when the said order referring the dispute to the District Officer, Bomet was sought. She further deponed that two of the applicants namely Bornes Kipkering and Ester Chirchir were now deceased and therefore no application could be brought to this court on their behalf and in their name. She further deponed that the deceased's estate had substantially been distributed by the deceased and therefore the arbitrator's award was made contrary to the wishes of the deceased. She asked this court to disallow the application.

During the hearing of the application, I heard the submissions made by Mr. Rono on behalf of the applicants and by Mr. Matwere on behalf of the respondent. Having carefully considered the said submissions made and also having read the pleadings filed by the parties in this succession cause, the issue for determination by this court is whether this court should adopt the arbitrator's award as a judgment of this court. This succession cause relates to the estate of Kimitei arap Chirchir - deceased who according to the forms filed in court was married to five wives. The letters of administration for his estate were sought and obtained by Elizabeth Chepkurui Chirchir, one of the wives of the deceased. The said letters of administration were confirmed and the estate of the deceased distributed as per the proposal made by the said Elizabeth Chepkurui Chirchir, who is the respondent in this case. It appears that the other wives were not satisfied with the mode of distribution proposed by the respondent and adopted by the court. The three wives made an application to this court to have the said letters of administration revoked on the grounds that it was obtained fraudulently after the respondent had concealed material facts to this court. No directions were sought nor were the said objection proceedings listed for hearing.

However on the 27<sup>th</sup> of March 2003, Mrs Bett learned counsel for the applicants appeared before Visram J. and requested for the issues in dispute in this succession cause to be referred to the District Officer,

Silibwet Division, Bomet District for arbitration. The said District Officer was to be assisted by four elders who were to be nominated by the applicants and the respondent respectively. It is instructive that Mrs Bett sought the said order and was issued with the same in the absence of the respondent. The District Officer Silibwet Division heard the case in the absence of the respondent and reached a decision distributing the deceased's estate in accordance with the evidence which was presented to him by the witnesses who appeared before him. The said award was filed in court on the 6<sup>th</sup> of June 2003. It is this award that the applicants want this court to adopt as the judgment of this court. The respondent however is opposed to the said arbitrator's award.

I have considered the facts of this case and the applicable law. This being a succession cause, there is no provision in **The Succession Act** that empowers this court to refer a dispute involving the distribution of a deceased's estate for arbitration. Once a party challenges the issuance of the letters of administration to a petitioner by making an application for revocation or annulment of grant, such party ought to follow the procedure set out under **Section 76 of The Law of Succession Act and rule 44 of the Probate and Administration Rules**. The said Law does not envisage that the court would be called upon to refer an application for revocation or annulment of grant to be arbitrated upon by another tribunal. The High Court is the only court which is granted jurisdiction by **The Law of Succession Act** to deal with issues related to revocation and annulment of grants (*See Section 48 (1) of The Law of Succession Act*). In this case therefore the applicants were out of order when they sought to refer a dispute to be arbitrated by a tribunal which did not jurisdiction in law to hear and determine such disputes. Furthermore the manner in which the dispute was referred to arbitration by the District Officer, Bomet was contrary to the established rules. The respondent was neither consulted nor was she present in court when the said order was sought by the applicants.

I have noted that the complaints which were made by the applicants as regards the manner in which the letters of administration were issued to the respondent and were later confirmed by this court are substantial issues which ought to be heard and determined on merits. I therefore disallow the application by the applicants to have the said arbitrator's award adopted as a judgment of this court. The said arbitrator did not have jurisdiction in law to make the said award. For the interest of justice however, I will order that a caveat be placed on all the parcels of land which were previously registered in the name of the deceased prohibiting any transaction or transfer pending the hearing and determination of the objection proceedings filed by the applicants.

The respondent submitted that two of the applicants were now deceased while one of them was not mentally sound. I direct that appropriate applications be made to have the said deceased and mentally unsound applicants substituted so that the real issues in controversy may be resolved without being frustrated by legal technicalities. After the substitution of the applicants, either party shall be at liberty to seek further directions from this court so that these objection proceedings may be heard and determined. As this matter relates to a dispute between family members, there shall be orders as to costs.

**DATED at KERICHO this 28<sup>th</sup> day of March, 2006.**

**L. KIMARU**

**JUDGE**