



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

Probate & Admin Cause 47 of 1995

**IN THE MATTER OF THE ESTATE OF
KIPKOROS TUIKONG (DECEASED)**

KIPRUTO ARAP KIBOSIAAPPLICANT

VERSUS

RICHARD STANLEY KIPKETER OBJECTOR

RULING

This is an application by way of Notice of Motion purported to be brought under section 3A of the Civil Procedure Act (Cap.21) and Order L rule 1 of the Civil Procedure Rules. The application is dated 13th May 2005 and was filed by Messrs. Kitiwa and Company Advocates on behalf of the applicant Kipruto arap Kibosia. The application seeks for orders that –

- a) This Honourable court do order the Land Registrar Uasin Gishu to go to the ground and ascertain the actual acreage of the land parcel number Karuna/SoSiani/Block 1 (Arababuch) 041.**
- b) The said Land Registrar be provided with security to carry out the said work.**
- c) Costs of this application be provided for.**

The application has grounds on the face of the Notice of Motion and is supported by the affidavit of Kipruto arap Kibosia sworn on 13th May 2005.

The grounds of the application are firstly, that the dispute herein involves the petitioner's claim of part of the above quoted parcel of land. Secondly, that the said claim constitutes the petitioner's interest in the deceased's estate. Thirdly, that it is therefore fair and in the interest of justice that the said acreage on the ground of the said parcel of land be ascertained. Fourthly that the objector would not suffer any prejudice.

The application is opposed and a replying affidavit sworn on 23rd May 2005 by the objector Richard Stanley Kipketer was filed.

At the hearing of the application Mr. Kitiwa for the applicant submitted that the applicant had applied for letters of administration. His interest was land. Therefore the applicant wanted the Land Registrar to ascertain the acreage of the land on the ground. The issues raised in the replying affidavit of the objector that the applicant did not have a claim in the estate, were the issues to be determined by the court.

The applicant was also asking for provision of security to the Land Registrar, as the applicant feared that

the objectors were likely to interfere with the work of the Land Registrar. He submitted that the applicant would pay the expenses of the exercise.

Mr. Chemitei for the objector opposed the application. He submitted that the applicant had made the application under the Civil Procedure Act (Cap.21) and not under the Law of Succession Act (Cap.160) as required by law. The Law of Succession Act (Cap.160) did not permit the use of the provisions under the Civil Procedure Act (Cap.21) which were used in this application. The application was therefore defective and should not be allowed.

He further submitted that the applicant was merely fishing for evidence. The applicant appeared to be doubting whether he had 2½ acres of land. He should have ascertained that fact before coming to court, that is, before applying for letters of administration. No reason had been given as to why the applicant wanted to be allowed to go back to the land after a witness had already given evidence.

He submitted further, that the objector had come to court to apply for cancellation of letters of administration and not on the issue of size of land. He also submitted that it would be costly to do the intended survey as it would affect other members of a settlement scheme who were not parties to this suit. The surveyor or the Land Registrar would be called to testify in court without the need for carrying out a survey. This application was meant to derail and delay the proceedings.

I have considered the application and the submissions of both counsel for the parties. This application arises from a summons for revocation of grant filed by the objector dated 19th April 2002. That application has proceeded for hearing by way of viva voce evidence. One witness testified for the objector and then this application requesting for an order that the Land Registrar goes to survey or determine the size of the land was filed by the applicant.

I will give some background to this matter in order to put this application in proper context.

The applicant herein was granted letters of administration in this Probate and Administration Cause No.47 of 1995 to the estate of the late Kipkoros Tuikong, as a debtor. The said letters of administration were confirmed on 3rd May 2001. Prior to the applicant filing this Probate and Administration Cause, the widow of Kipkoros Tuikong, now also deceased, had filed Eldoret High Court Probate & Administration Cause No.139 of 1991 – which appears to be still pending in court.

On 16th January 2002, the applicant got an order from Hon. Justice Nambuye enforcing an order made on 3rd May 2001 granting him 4.3 acres of the suit land, that is, **L. R. No. Karuna/Sosiani/Block 1 (Arababuch/014)**. The orders granted by Hon. Justice Nambuye were that –

i) 4.3 acres be excised from the deceased's estate LR.NO. KARUNA/SOSIANI/BLOCK1(ARABABUCH/014) and be transferred to the administrator.

ii) The remaining estate to be in the name of the deceased.

Consequent to that order of the court, the applicant went to enforce the court order on the subject land. Then the summons for annulment of grant was filed on 19th April 2002. Pending the hearing of the summons for revocation or annulment of the grant of letters of administration, an order was issued by Hon. Justice Etyang on 13th June 2002 in the following terms –

a) Summons for revocation of grant confirmed on 3/5/2001 and filed on 19th April 2002 is hereby adjourned for hearing on 4th July 2002.

b) There be stay of court order issued on 16/1/2002 for subdivision and transfer of land parcel number Karuna/Sosiani/Block 1 (Arababuch/014).

Later, it was agreed by the parties that the application for annulment or revocation of grant of letters of administration proceeds for hearing by way of viva voce evidence. One witness testified before this

application for the Land Registrar to go to the site was filed in court.

The substantive application before me is an application for revocation or annulment of letters of administration which were issued to the applicant and confirmed by the court. The reasons given for the application for revocation or annulment of grant are –

(a) The proceedings to obtain the grant were defective in substance.

(b) The grant was obtained fraudulently by the making of a false statement and concealment from court of material facts.

(c) The grant was obtained by untrue allegations of facts essential in point of law to justify the grant.

The applicant was, according to record, granted 4.3 acres of plot No. **LR.NO.**

KARUNA/SOSIANI/BLOCK1(ARABABUCH/014) which was to be excised and transferred to him. From all the documents filed by the objector and the applicant, there is no apparent dispute on the location, size or boundaries of the subject land to be excised. The issue in the application for revocation or annulment of grant has been whether the grant of letters of administration, which was confirmed, granting the applicant 4.3 acres of land from plot **LR.NO.**

KARUNA/SOSIANI/BLOCK1(ARABABUCH/014) should be annulled or revoked. There is no issue as to whether the said 4.3 acres of land have been excised, surveyed or demarcated or whether there is a boundary dispute.

Therefore, in my view, this application is based on the wrong premise. There is no issue before this court on the identity, size, location, or boundaries of the said 4.3 acres. In my view, that can arise later depending on the results of the application for revocation or annulment of the grant. It is not an issue to be determined now. Therefore, I find that this application for the Land Registrar to go to the land lacks merit and has to be dismissed. That is not all. This application has been brought under the provisions of the Civil Procedure Rules rather than provisions of the Law of Succession Act (Cap.160). Proceedings in probate and administration causes are governed by the provisions of the Law of Succession Act (Cap.160) and the Rules made thereunder. Section 2(1) of the Act provides as follows –

“2(1) Except as otherwise provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of the estates of those persons.”

It is clear from the above provisions of Law that the provisions of the Law of Succession Act (Cap.160) govern all matters of Succession to deceased's estates except where specifically provided for under the Law of Succession Act (Cap.160) or any other written law. The Civil Procedure Act (Cap.21) does not provide that it applies to Probate and Administration matters. Rule 63 of the Probate & Administration Rules applies certain Orders under the Civil Procedure Rules as well as the High Court (Practice and Procedure) Rules to probate and administration causes. Rule 63 (1) and (2) provides as follows –

“63(1) Save as is in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules namely Order V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and to these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

From the provisions of Rule 63(1) of the Probate and Administration Rules above, it is clear that only certain rules under the Civil procedure Rules have been applied to probate and administration causes. Order L rule 1 Civil Procedure Rules as well as section 3A of the Civil Procedure Act (Cap.21) under which the application was brought, are not listed as being applicable to probate and administration causes. I therefore find that the application was brought under the wrong and inapplicable provisions of the law. The application is therefore incompetent and has to be dismissed.

For the above reasons, I dismiss the application with costs to the objector.

Dated and delivered at Eldoret this 18th day of July 2005.

George Dulu

Ag. Judge