

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE 274 OF 2000

IN THE MATTER OF THE ESTATE OF M'MURUNGI M'MAITIMA – DECEASED

JOSEPH KITHINJI M'ITONGA PETITIONER/RESPONDENT

VERSUS

MBAABU M'MURUNGIOBJECTOR/APPLICANT

RULING

The application before the court is dated 29.11.2004 but filed in court on 2.12.2004. It seeks the revocation and annulment of the Grant of Letters of Administration confirmed to the petitioner/respondent(sic) on 29.6.2004. The correct date of confirmation is actually 28.6.2004. The grounds upon which this application is based are that: -

- (1) The proceedings to obtain the Grant were defective in substance.
- (2) The Grant was obtained fraudulently by making false statements and concealing something material to the case from the court.
- (3) The Grant was obtained by means of untrue allegation of a fact essential in point of law to justify confirmation.

When the application came up for hearing, on 4.7.2005 a second time, the court established that the respondent who had been granted court indulgence to file documents with an order to pay court adjournment fees, had not paid costs despite the fact that a hearing date was to be obtained on a priority basis. As a result, that day's hearing had to be obtained by the applicant court's order by his paying the costs on behalf of the respondent. The respondent admitted to court his failure to pay those costs but casually and without showing much enthusiasm, sought more time. In a ruling based on the grounds therein this court denied the respondent the right of audience and granted the applicant leave to proceed *ex parte*.

The applicant relying on his affidavits stated that the petitioner/respondent had distributed part of the estate to his deceased father M'Itonga M'Murungi who had already obtained his share during the lifetime of the deceased M'Murungi M'Maitima, the petitioners grandfather, in terms of getting L.R. No.Abogeta/Upper Githangari/691 and L. R. Abogeta/Upper Kithangari/228. He also argued that petitioner concealed that his father had obtained the above pieces of land from the deceased M'Murungi M'Maitima. The deceased should therefore have not been included as a beneficiary in the distribution of the estate, he added. The applicant further argued that the Will upon which the Grant of letters was confirmed and upon which distribution was based was ambiguous and therefore fatally defective. He stated that it was defective because it provided part of the estate to the person who would bury him and such section of it required to be decided by all the beneficiaries or by court and the same has never been done. He argued also that such ascertainment could not be unilaterally made by the petitioner or his father who were interested parties. Applicant further argued that he was entitled to be in court on the day fixed for confirmation of the Grant of representation but was not so notified and was accordingly not in court. Applicant also argued that distribution of the estate, assuming that the deceased's Will was valid, should have been based upon the said Will, but instead it was based on a second Will drawn by the petitioner's father several years after the deceased had died. He also questioned the validity of the petitioner's father's Will, which appointed petitioner to be to the executor of his grandfathers Will, when the grandfathers' Will, had not so provided. And finally the applicant argued that as a beneficiary, he was entitled to sign the transfer forms giving each his party of the estate a parcel of land, which was not done

in this case.

The respondent petitioner, had filed a replying affidavit and a supplementary to it. The court carefully considered the replying affidavits despite the fact that the petitioner's advocate and petitioner were denied leave to submit in reply to applicant's case. The respondent in those affidavits, denied concealing any relevant facts or speaking any untruths. He argued that the distribution of the estate he administered, followed the provisions of the Will of the deceased, his grandfather M'Murungi M'Maitima. He said that he distributed 4 acres to the applicant, 4 acres to one Silas Kinyua Mutwiri and 4 acres to himself making in all 12 acres. The remaining 5 ½ acres he distributed to his father's estate in accordance with the provisions of the Will of the deceased which had provided that whoever would bury the deceased, would inherit the remaining part of the land. He then offered that it was his father who buried the deceased and that is why he gave the balance of the 5 ½ acres to his estate. The respondent said that when his father died the respondent, was lawfully appointed, under Meru High Court Succession Cause No.101 of 2001 as the holder of the Grant of Letters of Administration. He then sought and got appointed as a substitute of his father as the Administrator of his grandfather's estate, in the place of his deceased father. It was when the applicant learnt that the respondent had taken over as such Administrator, that he rushed to court seeking to be allowed to file late and out of time objection and cross-petition. His application was however, rejected. He averred that the two pieces of land that his father got outside the deceased's Will were not part of the Will. He concluded that the deceased's Will was not officially disputed by the applicant although he admitted that it was never read to the beneficiaries. He also stated that there was no dispute even, from the applicant, as to who buried the deceased. That it was undisputed fact that he should take over as the administrator of the deceased, since such was provided by his father's Will on the basis that his father was the appointed Executor of the deceased's Will and that his father's Will had as well appointed him to replace his father in grandfathers estate. The respondent also argued that the applicant was always aware of all the process that took place in relation to the deceased estate and should not be heard to argue otherwise. And finally, that, he has faithfully and diligently administered and distributed the deceased estate as would be required. He accordingly sought that the applicant's application is unmeritorious and should be dismissed.

I have carefully considered this application with great anxiety because the applicant, from the records, had tried to challenge the process that took place concerning the estate without success. He apparently either woke up a little late when he realized he was losing or when he got information that certain adverse steps to his interest had been taken. Whatever may have happened before however is in my view not this court's concern if this application is lawful and meritorious. To that issue we now turn.

That the petitioner's deceased father, M'Itonga M'Murungi had a share in the deceased's Will is not denied. The deceased had authority to choose whom to provide for in his own Will. The second issue is whether or not the Will was defective for being ambiguous. My view is that this is not the right time to decide that issue. However, the clause in it that the person who would bury the deceased, would be entitled to take the 5 ½ acres remaining of the estate after the named beneficiaries each took 4 acres, would in my opinion require to be decided. An acceptable resolution about it in my view and finding would need to be decided by all the beneficiaries possibly in a meeting with the administrator. It would not definitely, be decided by the administrator in exclusion of the beneficiaries. Alternatively, the issue would be left to the court to decide.

Thirdly, there is no dispute that the applicant was not in court when the grant was confirmed. The court record shows that Mr. Arithi for the petitioner was present and no appearance for respondent/objector. The application had been fixed by Mr. Mwenda for Arithi but the respondent/Objector was not present then. I am of the view and it is my finding, that, as a beneficiary whose interest would be affected one way or the other, the herein applicant's presence was necessary, especially since he had not served him with a hearing notice on this material day. It cannot in my view and understating be argued that the confirmation did not affect him adversely. Had he been present, he would have been allowed to say whatever he would say. As things stand, he was denied his basic right to be heard, and the same cannot be held lightly.

Did the respondent distribute the estate according to the provisions of the first or the 2nd Will? The

first Will provided that the remaining estate after the three 4-acre parts had been given out to specific people, should go to the person who should bury him. The 2nd Will, which is the Will of the respondent's deceased father, detailed out to whom the 5 ½ should go. They all happened to be the children of the respondent's father. This clearly means that the respondent distributed the estate in accordance with the provisions of both Wills. He clearly assumed that the 5 ½ acres belonged to the estate of his father while the issue as to whether or not it was his father or another's or his father's jointly with another who buried the deceased, had not been decided. And yet as earlier decided this is an issue which required a consent among the deceased's beneficiaries or a decision of court. In my view, therefore, the respondent had erred to unilaterally decide the ownership of the 5 ½ acres part of the estate, most probably to the detriment or prejudice of the applicant herein.

Lastly, it is doubtful whether the respondent's father, M'Itonga M'Murungi had power or authority to appoint the respondent herein to be the administrator of the deceased's Will without the consent of the other beneficiaries who would include the applicant herein. If the deceased M'Murungi M'Maitima, wanted that his grandson the respondent, should take over as an administrator of his estate in the event of the demise of his son, M'Itonga M'Murungi, he would have expressly provided so in his Will. While the respondent was free to be the executor of his father's Will, he was in my view and finding without power or authority to slip into his grandfather's Will, the subject matter of this suit. To belittle the assumption of non-existent powers or authority, as respondent has done herein, is to seriously err in law.

Having come to the various conclusions that I have, above, my final finding is that the applicant has demonstrated sufficient cause why the Grant of Letters of Administration confirmed on 28.6.2004, should be revoked or set aside. The application before me therefore succeeds. The said Grant of Letters of Administration is hereby revoked and set aside. The respondent is at liberty to start afresh. Each party to bear own costs. Orders accordingly.

DATED AND DELIVERED AT MERU THIS 21st DAY OF SEPTEMBER, 2005

D. A. ONYANCHA

JUDGE