



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**Succession Cause 262 of 1994**

**IN THE MATTER OF THE ESTATE OF BENARD SITIENEI KOTUT –**

**DECEASED**

**RULING**

The objectors, Marcella Chepkurui Kotut and Thomas Busienei have made an application under the provisions of Rule 43 of the Probate and Administration Rules and Section 133 of the Registered Land Act seeking the following orders of this court;

***“(a) THAT this court be pleased to remove and or order (the) removal of (the) caution placed against Kericho/Chemagel/434 by one Dennis Busienei of the 3rd House represented by Gabriel Ledama Busienei.***

***(b) THAT this court be pleased to order the grant of letters of administration issued to Marcella Chepkurui Kotut, Thomas Busienei and Gabriel Ledama Busienei in this matter on the 3rd of November 1999 be rectified in respect of Kaplong Farm as follows;***

***(a) Marcella Chepkurui Kotut – 18 acres instead of 19 acres.***

***(b) Thomas Busienei – 14 acres instead of 13 acres.”***

The application is supported by the annexed affidavits of Thomas Busienei and Marcella Chepkurui Kotut. The application is opposed. Dennis Busienei has sworn a replying affidavit opposing the application. When the application was first listed for hearing before this court on the 7th of July 2004, the respondent – Dennis Busienei – raised a preliminary objection objecting to this application. The preliminary objection was argued. This court delivered its ruling on the 21st of September 2004. At page 4 of the said ruling, this court stated as hereunder:

***“The letters of administration to the deceased’s estate were issued and confirmed to the administrators of the estate who comprised members of each household of the deceased’s family. The deceased had been married to three wives. The issue of distribution of the deceased’s estate was referred to the District Officer, Sotik who filed an award which was adopted by the court. The said award by the District Officer, Sotik was adopted in the confirmation of grant. The applicant in this case was to inherit part of the parcel of land known as Kericho/Chemagel/434. None of the beneficiaries filed an objection to the said distribution of the deceased’s estate by the District Officer. Unfortunately it appears that the respondent in this case has sought to frustrate the applicant from getting what is rightfully due to him.”***

This court dismissed the preliminary objection and ordered the application filed by the applicants to be heard. At the hearing of the application, Mr Nyamwange, Learned Counsel for the applicant reiterated the contents of the application and the grounds filed in support thereof. He also relied on the affidavits filed by the applicants. He submitted that in view of this court’s ruling delivered on the 21st of September 2004, the application should be allowed. Mr Kahiga, Learned Counsel for the respondent opposed the application. He relied on the replying affidavit filed by the respondent. He submitted that stay of the grant had been issued by this court on the 21st of December 2000 pending the hearing of the appeal. He submitted that the said appeal was still pending and the respondent should be given a chance to ventilate it. He submitted that the applicants would suffer no prejudice if the application is disallowed.

Having considered the said submissions made by the parties to this application, the issue for

determination by this court is whether the applicants have laid a basis to be granted the said orders sought. As this court stated in its ruling delivered on the 21st of September 2004, the estate of the deceased was distributed and the confirmation of grant issued. The three families of the deceased have settled in their respective portions as confirmed by this court in the confirmation of grant save for a minor rectification which the two concerned houses have agreed by consent to give effect to. The respondent in this case does not have any legal reason to prevent the two families (not his own) from having the land which they had lawfully inherited from being transferred to their names. The respondents concern that part of the said parcel of land had been sold off to the detriment of the said two families is neither here nor there. The respondent cannot arrogate himself the responsibility of being the prefect of his deceased father's families.

The respondent has argued that he should be given a chance to ventilate his appeal which he has filed to the Court of Appeal challenging the said distribution of the deceased's estate. Having carefully read the proceedings in this case, there is no evidence that the respondent has filed any appeal. It is after the delivery of the ruling of this court on the 21st of September 2004 that the respondent was galvanized in his bid to put the appeal process on track. The respondent has even gone to the extent of obtaining a certificate of delay from the Deputy Registrar of this court which states that the time for preparing and the delivery of the typed copies took a whole 1173 days! It is clear that the respondent never intended in the first place to appeal against the decision of this court distributing the deceased estate. His only interest, as stated earlier by this court, is to frustrate the other two families from inheriting what is rightly due to them.

I do not see any reason why the applicants' application should not be allowed. The respondent can take all the time he wants to pursue his appeal; But he should not do so at the expense of the applicants. The application dated the 5th of March 2004 is therefore allowed. The caution placed by the respondent on the parcel number **Kericho/Chemagel/434** is ordered removed. The confirmation of grant issued by this court on the 3rd of November 1999 shall be rectified as regards the acreage to be inherited by the applicants in respect of Kaplong Farm; Marcella Chepkurui shall inherit 18 acres instead of 19 acres whilst Thomas Busienei shall inherit 14 acres instead of 13 acres. The applicants shall have the costs of this application.

**DATED at NAKURU this 11th day of November 2005.**

**L. KIMARU**

**JUDGE**