



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Misc Civ Appli 124 of 2001

IN THE MATTER OF THE SUCCESSION ACT CHAPTER 160 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE PROBATE AND ADMINISTRATION RULES SUCCESSION CAUSE NO. 4 OF 1997 IN THE RESIDENT MAGISTRATES COURT AT ITEN

AND

IN THE MATTER OF THE ESTATE OF JOSEPH KITUM KIPKORE (DECEASED) AND THE ESTATE ASSETS NAMELY MOIBEN /KIMNAI/327 AND KAPSOWR TRADING CENTRE PLOT NUMBER 13

AND

IN THE MATTER OF THE DEPENDANTS OF THE ESTATE OF JOSEPH KITUM KIPKORE – DECEASED BETWEEN

1. HENRY HOSEA KIPKEMOI

2. JASON KIMUTAI KITUM:.....APPLICANTS

VS

FLORA TERIKI KITUM:.....RESPONDENT

RULING

This is an application by way of Chamber Summons dated 17th July,2001 brought by Joseph Cheptarus & company Advocates on behalf of the applicants Henry Hosea Kipkemoi and Jason Kimutai Kiptum. It is purported to be brought under rule 49,59,60,61,62,63 and 64 of the Probate and Administration Rules and section 35,47,50 and 76 of the Laws of Succession Act (cap) 160) Laws of Kenya. It seeks for four (4) Orders, two of which have been spent as follows:

1. (spent)
2. There be and is hereby (sic) transfer of the Iten Resident Magistrates Court Probate and Administration Cause (P & A) No. 4 of 1997 in respect of the estate of Joseph Kitum Kipkore deceased from there to this Honourable Court for hearing and determination of the dispute over the estate of the said deceased between the applicants and the respondent on merits.
3. (Spent)
4. Costs be provided for.

The application is supported by the joint affidavit of Henry Hosea Kipkemoi and Jason Kimutai Kiptum

sworn on 17th July,2001. The application was opposed and a replying affidavit sworn by Flora Teriki Kiptum the Petitioner on 17th June 2004 was filed.At the hearing of the application, Mr. Cheptarus for the applicants submitted that the applicants want Iten Probate & Administration Cause No. 4 of 1997 to be transferred to this Court for hearing and disposal, because there was a dispute in that Probate & Administration cause. They were also asking for stay of proceedings before the Iten Court, as well as stay of the order dated 3rd July,2001. He submitted that the applicant did not know that the Probate & Administration proceedings were brought at Iten Court by the respondent. They were only brought to the proceeding when there was an application in respect of land MOIBEN/KIMNAI/327. He submitted that the title to the subject land was with Standard Bank Ltd, and that the order of 3/7/2001 was issued in error.The applicants were also contesting the distribution of the estate because they were not aware of the Probate & Administration cause. Under Rule 62(2) of the Probate and Administration Rules, the applicants had a right to appeal to this court.

Ms. Wambua for the respondent opposed the application. She submitted that Under Rule 62(2) of the Probate and Administration Rules, there was no provision for an appeal from the decision of the Magistrate. That rule related to appeals from the decision of the Registrar.She also submitted that there was no provision for appeal to this court. The Chamber Summons procedure adopted to bring this application was also not provided for under the Probate and Administration Rules. The applicants could only apply for revocation, not an appeal. The Letters of Administration had already been confirmed on 6th September,2000. She also argued that the application was defective as it had no grounds, nor had it been signed by the Registrar as required under the Probate and Administration Rules.

I have considered the application and submissions of both Counsels. It is not in dispute that this Probate & Administration cause was filed in the Kapsabet Senior Resident Magistrates Court. The application herein arises from an order or decision of the Kapsabet Court. It is not in dispute that the Letters of Administration were actually confirmed on 6th September, 2000. The assets in the estate were distributed in that confirmation order.

Having considered this application, I am of the view that it cannot succeed. Firstly, though applicants Counsel suggests in his submissions that this is an appeal, that is not what is stated in the application. If it was an appeal, he should have clearly stated so. He did not do so therefore I treat this as an application rather than an appeal.

Coming now to the application, it was brought by way of Chamber Summons which is not provided for under the Law of Succession Act (cap 160). Under Rule 59 of the Probate and Administration Rules, applications in Probate & Administration causes have to be brought by way of Petition, Caveat or Summons. The said rule provides as follows:-

“59(1) save where otherwise provided in these Rules every application shall be brought in the form of a petition, caveat or summons as the case may be appropriate.”

The above provisions of the law are mandatory. A chamber summon is not the proper way to bring an application such as the one before me. The application is fatally defective.

This is not all. This application was made after confirmation of a grant. It could only be an application for annulment or revocation of a grant not an application for transfer of a case as herein sought. Such application for annulment or revocation of grant can only be made by way of summons for annulment & revocation of grant under Form 107 of the schedule to the Law of Succession Act(cap.160). Such an application, in terms of the requirements under Forms 104 and 107 would require to be signed by the Registrar.

The application herein was not signed by the Registrar. It is therefore defective. I am alive to the fact that the law under Rule 44 of the Probate and Administration Rules, confers powers on the High Court to annual or revoke the Letters of Administration issued by subordinate courts. However, this application is neither an application for annulment or revocation of grant of letters of administration, nor has it been brought through the mandatory procedure provided for by law.It is not seeking for the orders that are

allowed by the law under rule 44 of the Probate and Administration Rules, that is whether the applicant seeks to have the grant revoked or annulled. Instead the applicant seeks to transfer the Kapsabet P & A matter to this court for hearing and determination of a dispute. The orders sought are not provided for by law and I am not able to grant the same. The application has to be dismissed.

For the above reason, I dismiss this application with costs to the respondent.

Date at Eldoret this 8th day of November, 2005.

George Dulu

A.G. JUDGE

IN THE PRESENCE OF: