



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

PROBATE & ADMINISTRATION NO. 212 OF 2010

IN THE MATTER OF THE ESTATE OF:

MUKA ADUNGO.....DECEASED

BETWEEN

SIMON OGULUBERA IMUKA.....PETITIONER/ RESPONDENT

AND

PHILIP OMUSE OMANYALA.....OBJECTOR/APPLICANT

RULING

1. Philip Omuse Omanyala, the applicant herein moved the court by way of amended summons for revocation and/or rectification/review of grant dated 31st October 2017 under sections 47, 74 & 76 of the Law of Succession Act and Rules 43, 44 & 73 of Probate and Administration Rules. He is seeking the following orders:

- a) That the grant of probate (letters of administration) issued herein on 16th November 2011 and all consequential orders obtained pursuant thereto be revoked or annulled in terms of the distribution acreage of the parcel of land NO. SOUTH TESO/CHAKOL/40.
- b) That the applicant be given leave to substitute his late father and beneficiary Africanus Omanyala Muka (deceased) as his only son for purposes of this application rectification and re-distribution.
- c) That he is the only son of the second beneficiary Africanus Omanyala Muka who is now deceased and is desirous to replace the said deceased.
- d) That the grant of letters of administration issued to Sion Ogulubela Muka be rectified and/or reviewed in its confirmation to reflect the deceased Muka Adugo's wishes and the true position on the ground.

2. The application is premised on the following grounds:

- a) That the matter is utmost urgency as the petitioner has obtained letters of administration and certificate of confirmation which has errors since the acreage on the ground is more and the petitioner did not involve the surveyor to get the actual measurements.
- b) That the petitioner concealed material facts to the effect that prior to his demise, the deceased had sub-divided his land between the petitioner and the applicant's late father and plated a boundary which exists to date.
- c) That the confirmation does not reflect the deceased's wishes and the true position on the ground as the deceased allocated the applicant's father 2.0 Ha and the petitioner 0.6Ha and which position exists to date and has been respected today by the deceased's two sons.
- d) That the petitioner capitalized on the applicant's father's illiteracy, ignorance and sickness to secretly drag him to court to fraudulently secure confirmation of grant.
- e) That there is an error apparent on the face of the record as if the confirmation of grant is executed.

3. There was no objection for the applicant to be substituted for his deceased father but the other aspects of the application were opposed on the following grounds:

a) That there is no apparent error on the face of the record.

b) The purported wishes of the deceased is not supported by any evidence.

4. The application that the objector/applicant be substituted for his deceased father is allowed.

5. Africanus Omanyala Muka, the deceased father of the applicant herein, participated in the process of distribution and confirmation of the grant. During his lifetime and during the pendency of this succession cause, he did not at any time raise any objection in the mode of distribution of the estate.

6. Muka Adungo, the deceased in respect of this succession cause died on 24th August 1993. He died intestate. The applicant cannot therefore purport to claim that his wishes on distribution were ignored. In any case, his father, Africanus Omanyala Muka, was better placed to know of the wishes but he never brought this issue up. It is therefore clearly an afterthought.

7. The applicant has annexed a copy of a surveyor's report to his application. There was no application for the land to be surveyed. The document is mischievous and has no probative value.

8. The application for revocation or rectification is therefore dismissed. The distribution of the estate will be carried as indicated in the certificate of confirmation except for the substitution of Africanus Omanyala Muka with the applicant who must hold it for the estate of his deceased father, Africanus Omanyala Muka. Costs be in the cause.

DELIVERED and SIGNED at BUSIA this 6th day of October, 2020

KIARIE WAWERU KIARIE

JUDGE