



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIAMBU
SUCCESSION CAUSE NO. 80 OF 2016
IN THE ESTATE OF HARUN HORO KABUTU (DECEASED)

R U L I N G

1. The Petition herein was filed by **Robert Kuria Horo**, one of the sons of the deceased **Harun Horo Kabutu** who died in 1997. The inventory of assets in the Form P & A 5 includes the following land parcels:

- a) Longonot/Kijabe Block 5/1805
- b) Longonot/Kijabe Block 3/1018
- c) Limuru Bibirioni/T39

2. On 20TH April 2015, a grant was issued to the Petitioner and on 14th June 2016, the Petitioner filed a summons to confirm the grant. Proposing *inter alia* that the assets of the estate of the deceased be shared equally between himself and his brothers, namely, **Humphrey Ngigi Horo**, **Wilfred Njoroge Horo** and **Luka Mburu Horo**. This summons was met with a so-named affidavit in objection, which is in essence an affidavit in protest, filed on 2nd September 2016 by **Luka Mburu Horo**. He objected to the application and entire proceedings which he claimed were commenced in secrecy without his knowledge. The Protestor asserted that the assets in this matter were the subject of previous litigation and that some of the assets had already been alienated by sale and were no longer available for distribution. Moreover, that these assets belonged to the Protestor.

3. In his reply, the Petitioner asserted that the Kijabe properties belonged to the deceased herein but that the Protestor fraudulently obtained title thereto after the demise of the deceased. He too relied on previous litigation in respect of the properties.

4. The Protestor filed a further affidavit on 6th June 2017. The salient portions of the affidavit state that the Protestor jointly purchased the Bibirioni property with the deceased in 1961 and that his father and siblings who had no property of their own settled in the plot; that in 1975 the title issued in the name of the deceased; that in addition, despite a strained relationship with his father the Protestor allowed him to cultivate the Kijabe properties while the youngest brother **Wilfred Njoroge Horo** was allowed to settle thereon. Further, that due to alleged hostility from his brothers following the death of their father, the Protestor obtained an order to restrain them from using the Kijabe land parcels pending the determination of an appeal, arising from the **Naivasha Land Dispute Tribunal Dispute No. 15/2002** involving the Protestor and his brothers.

5. The Protestor deposed further that the said being **Appeal No.5 of 2003** before the **Provincial Land Disputes Appeals Tribunal** was dismissed and that the Protestor eventually sold the Kijabe properties. Thus, it is his position that for purposes of the present cause, the only available property is the Bibirioni property the acquisition of which he claims to have contributed $\frac{3}{4}$ of the purchase price. He reiterates material contained in the previous affidavit about the secrecy surrounding commencement of these proceedings, and annexing evidence of thwarted efforts he allegedly made after the demise of his father to call for meetings with his brothers.

6. On the date set for the hearing of the matter only the Protestor attended. The Petitioner and other brothers did not attend despite notice. The Protestor proceeded to give evidence in much the same terms as his various affidavits. Asserting title to the Bibirioni land, the Protestor stated that though it was registered in his father's name, he bought it in 1961 with income from his employment during the Emergency Period. That the Petitioner and other brothers have lived there since then, that he supported the entire family. He also stated that in his lifetime, his father had neither acquired nor inherited any property. He stated that the two parcels of land at Kijabe were his property but that he had elected to sell them.

7. From the depositions of the parties and the certificates of search filed into court with the Petition, there can be no dispute that while the land parcel **LIMURU/BIBIRIONI/T.39** is registered in the name of the deceased, the two parcels of land situated in Kijabe were registered in the name of the Protestor in 2001 and subsequently in 2011, the parcel **LONGONOT/KIJABE BLOCK 5/1805** was registered in the name of the **CIIRA NJOROGE**. The material presented by the parties shows that in 2002 the Protestor obtained an award in his favor before the **Naivasha Land Dispute Tribunal in Dispute No. 15/02** to the effect *inter alia* that the brothers **Humphrey Ngige Horo** and **Robert Kuria Horo** were trespassers on the two parcels, and that in November 2003 the Protestor obtained an order in **Naivasha Civil**

Misc. Case No. 9 of 2003 that his brothers be restrained from cultivating or using the Longonot land parcels pending the determination of the appeal to the **Provincial Dispute Appeals Committee – Appeal No. 5 of 2003**.

8. It appears that pursuant to the dismissal of the appeal in March 2011 and the disposition orders therein, the Protestor obtained an order against all his brothers in the same **Misc. Case No. 9 of 2003 (Naivasha)** in September 2013 for the police to **“be authorized to provide security and to supervise the compliance with the Decree of this Hon. Court dated 31st March 2011 – that is eviction of the Respondents from land parcels in Longonot.”** The Petition herein was filed in May 2014.

9. With regard to the disputed land parcels situated in Longonot\Kijabe, the Protestor evidently had a title in his name since 2001 but in 2011 had transferred the parcel BLOCK 5/1805 to one CIIRA NJOROGI. It appears that allegations that the Protestor had fraudulently obtained these parcels are not new and were canvassed before the two tribunals referred to earlier. The tribunal had clearly no mandate to inquire into the question of title to the property. Even so, the first Tribunal correctly noted that the Protestor was the registered proprietor of the Longonot\Kijabe plots. In my view, a succession cause is not the proper forum for determining the validity of the Protestor’s title to the Longonot\Kijabe land parcels or for an inquiry into the allegations of fraud raised by the Petitioner herein.

10. Rule 41(3) of the Probate and Administration Rules provides inter alia that:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject of the provisions of section 82 of the Act, by order appropriate and set aside the particular share of estate or the property comprising it to abide the determination of the question under Orders XXXVI, rule 1 of the Civil Procedure Rules and may there upon, subject to the proviso section 71(2) of the Act, proceed to confirm the grant.”

11. The court is of the view that in light of the evidence placed before it by both parties, it ought to exclude the Longonot/ Kijabe parcels of land while considering the confirmation of the grant.

12. Regarding the **Bibirioni** plot, the same was registered in the name of the deceased from 1961 until his death in 1997. It may well be that the Protestor contributed to the purchase of the said property, but before me no such evidence has been tendered. In the circumstances, there is no material to warrant the exclusion of all the children of the deceased from benefitting therefrom. The said asset measures 0.25 acres. Further, there is evidence that the Petitioner and other brothers all reside on the said land parcel. Based on the apparent serious differences between the brothers, it does not appear feasible that they could ever jointly use the said parcel.

13. It is also evident that the Petitioner did not seek the Protestor’s consent before commencing these proceedings – see form 38 in the Petition. This latter form, **form P & A5** and the Chief’s letter in the Petition also indicate the existence of a daughter to the deceased, one **Margaret Waithira Horo** who is listed among the brothers as having survived the deceased. However, she is excluded in the summons for confirmation filed by the Petitioner. No explanation is given for the omission. Nor was her consent and that of the Protestor and **Humphrey Ngigi Horo obtained** for purposes of the summons to confirm the grant.

14. In the circumstances, and pursuant to the provision of Section 71(2) of the Law of Succession Act, the court will make the following orders:

a. Pursuant to the provisions of Section 71(2) (b) of the Law of Succession Act a confirmed grant of letters of administration will issue in the names of **Luka Mburu Horo, Humphrey Ngigi Horo and Margaret Waithira Horo**.

b. The sole identified asset of the estate of the deceased, namely LIMURU/BIRIRIONI /T 39 is to be shared equally by all the five children of the deceased, that is **Luka Mburu Horo, Humphrey Ngigi Horo, Wilfred Njoroge Horo, Robert Kuria Horo and Margaret Waithira Horo**.

c. In light of the size of the above land parcel, and the evident animus existing between the Protestor and this brothers, the administrators are to dispose of the property in (b.) above by way of sale and the proceeds thereof to be shared equally between all the siblings in (b) above.

d. Pursuant to the provisions of Section 83(g) of the Law of Succession Act, the court further directs that the administrators named in (a) above do complete the administration of the estate within **10 (TEN) months** of today’s date and subsequently to file into court, not later than the 8th of February 2020, a full and accurate account of the completed administration. For this purpose, this matter will be mentioned on 26th February, 2020.

e. The parties will bear own costs considering the nature of the dispute.

DELIVERED AND SIGNED AT KIAMBU THIS 8TH DAY OF FEBRUARY 2019

C. MEOLI

JUDGE

In the Presence of:

Protestor – Luka Horo

Petitioner – Absent

Court Clerk - Nancy