



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO 225 OF 2000**

**IN THE MATTER OF THE ESTATE OF MUCHAI GACHUIKA (DECEASED)**

**MURITHI MITAMBO .....APPLICANT**

**Versus**

**MARETE MUCHAI .....RESPONDENT**

**RULING**

[1] By a summons dated 7<sup>th</sup> August, 2015, the Petitioner sought the following three (3) significant orders:

- (a) That this court issue an order barring Kionyo Tea Factory from issuing payment cheques to the Respondent in respect of compensation for the by-pass passing through LR NO. ABOGETHA/U-KIUNGONE/3778.**
- (b) That instead, the said compensation be paid to the petitioner; and**
- (c) Costs of this application be borne by the Respondent.**

[2] The application is expressed to be brought under Rule 49 of the Probate and Administration Rules and other enabling provisions of the law. It is supported by the affidavit of Marete Muchai. The Respondent opposed the application and filed a Replying affidavit sworn by him on 7<sup>th</sup> September 2015. The Respondent did not file any submissions; he informed the court that he will entirely rely on the Replying Affidavit.

[3] The major arguments presented in support of this application are that:

- (1) LR NO. ABOGETA(U-KIUNGONE/3778 is registered in the name of the Applicant as absolute proprietor. It, therefore, belongs to him.
- (2) That the by-pass passes through his said land and he should be paid the compensation.
- (3) That the Respondent and some other persons namely Michael Kiambi, Julius Mwenda, Mbaabu Nkanata and Lawrence Mutwiri were paid compensation in respect of the by-pass that passed through their land parcel No. ABOGETA (U-

KIUNGONE/1362 but are now bent at receiving compensation due to the Applicant;

(4) That the Applicant had wanted his compensation to be paid to his son Kenneth Mwiti.

(5) Accordingly, if his compensation cheque is paid to the Respondent he will suffer irreparable damage.

[4] The Applicant filed very brief submissions and emphasized that only beneficiaries of the estate of Muchai Gachuikia ought to benefit from any proceeds related to the estate of the deceased. Therefore, the Respondents are not eligible for this compensation.

[5] The Respondent opposed the application and averred in his replying affidavit that;

(1) That he is the son of the deceased,

(2) That he lives on and has developed the suit property which is a subdivision of the original LR. No. ABOGETA/U-KIUONGENE/ 405,

(3) That the compensation is for these developments

(4) That the petitioner does not have any property on the suit land and thus he had nothing to be compensated for. He urged court to reject the application.

(5) That the Applicant fraudulently obtained titles to the suit property while this succession cause is still going on.

## **DETERMINATION**

[6] The two disputants are sons of the deceased and therefore beneficiaries of the estate of the deceased. The Applicant is the administrator of the estate of the deceased although he has claimed that his name was fraudulently used in the filing of these proceedings. Nonetheless, a grant of representation was made to him and confirmed on 17<sup>th</sup> April 2001 and 22<sup>nd</sup> April 2002, respectively. The confirmation of the grant was done by Kasanga Mulwa J (as he then was) in the presence of all the beneficiaries and after they had confirmed distribution to be as set out in the affidavit in support of summons for confirmation. Pursuant to the confirmation of grant the original title no. ABOGETA/KIUNGONE/405 was registered in the name of the petitioner by transmission (as administrator of the estate) on 26<sup>th</sup> February 2008. Again, on 20.1.2014, the said original title was closed following a subdivision thereon into new Nos. 3776-3778. New titles were issued on these new numbers in the names of Applicant on 20<sup>th</sup> January, 2014. Title NO. 3778 remained in the name of the petitioner while title nos. 3776 and 3777 were transmitted or transferred to Keneth Mwiti ID no. 29280712 on 21<sup>st</sup> January, 2014 and title issued to the said Keneth Mwiti on 23<sup>rd</sup> January, 2014. According to the petition and Certificate of Confirmation of Grant issued on 22<sup>nd</sup> April, 2002, persons listed as heirs of the estate are:

**(a) M'Mitambo Muchai      4.41 acres**

**(b) Marete Muchai      3.92 acres**

**(c) Mbaabu M'Nkanata      0.52 acres**

[7] I have perused the record and the following information is relevant to this Ruling. On 19<sup>th</sup> February, 2014, the Respondent Muriithi Mitambo applied in a summons of instant date seeking *inter alia*; (1) Revocation of the grant made to the Applicant petitioner; and(2) inhibition of all dealings on the new subdivisions arising out of the original, title no. 405. Reasons given for the said application for revocation

are striking; that the Applicant used a forged grant of letters of administration to transmit L.R.NO ABOGETA/U-KIUNGONE/3776, 3777 and 3778 to himself and a stranger. He termed the act as pure fraud on and intermeddling with the estate of the deceased. I have seen the forged confirmed grant of letter which is not the grant that was confirmed by Kasanga Mulwa J (as he then was) on 22<sup>nd</sup> April, 2002, at least reading from information provided in the petition on the beneficiaries/children of the deceased. Makau J in consideration of the said application had even issued *ex parte* orders of inhibition on these lands until determination of the said application.

[8] There is yet another twist added by the Applicant: That his late father had transferred *inter vivos* his lands namely ABOGETA/U-KIUONGONE/1361,1362,1363 and 1381 to M'Ithinji Muchai, Mitambo Muchai, Paul David, Nkanata Muchai and Njau Gachianga. He stated that he is the only dependant (son) who was not given any provision of land *inter vivos* except he averred that his late father left the suit property herein i.e.no. 405 to himself and which was to be inherited by the Applicant as his last born son. I have seen Green Cards on these properties which were allegedly given *inter vivos*; they are have been annexed and are part of record. Of importance to note is that the application dated 19<sup>th</sup>February, 2014 is yet to be determined on *viva voce* evidence as was directed by the court directed on 4<sup>th</sup> March, 2015.

[9] I am not determining any of the above issues. Except, however, recapitulation of these facts is pointed recast of the peculiar circumstances of the case, and which will greatly influence my decision. The accusations and counter-accusation by the parties constitute the major issues in controversy before court. The issues leave a lot to be desire and are yet to be resolved by the court. One will appreciate that, at this stage, it is difficult for the court to believe one of these parties and not the other. In the circumstances, I will have to employ high wit of the court in fashioning the most appropriate order. Doubtless, compensation is due on the suit property which stands in the name of the Applicant. But, there are issues around the manner in which the property was transmitted to the Applicant. Also, these proceedings are yet to be finally resolved. Without doubt, there is absolute need that the compensation should be received, collected and preserved as the parties are feuding. That obligation is there. But again, who shall preserve it? The compensation cannot be paid to either of the parties as their entitlement before the issues around rightful owner of the compensation are resolved. Those are the central issues in this succession for now. I must admit, however, that, despite the challenge to the grant of representation herein, the Applicant is still the administrator of the estate of the deceased. But, yet still and I have said this already, in the circumstances of this case, it will not be appropriate to leave matters of the estate entirely in the hands of the Applicant. Therefore, the orders which commend to me should be those which gives the court full grip of the compensation as property of the estate until all issues are resolved. Accordingly, I order:-

**(1) That an interest-earning account in the joint names of the Administrator (the Applicant) and the Deputy Registrar shall be opened in Kenya Commercial Bank Limited, Meru Branch within 7 days of today.**

**(2) That Kionyo Tea Factory shall pay the compensation cheque in respect of by-pass traversing through L.R NO ABOGETA/U-KIUNGONE/3778 directly to the account opened pursuant to (1) above within 21 days of its opening. The Deputy Registrar shall ensure this order and account details are served upon Kionyo Tea Factory without delay.**

**(3) That no funds shall be paid out of the said account except upon a duly certified order of the court.**

**(4) That the Application for revocation dated 19<sup>th</sup> day of February 2014 shall be fixed for hearing immediately upon delivery of this Ruling. It is so ordered.**

**Dated, Signed and Delivered in open court at Meru this 1<sup>st</sup> day of March 2016.**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Riungu advocate for Mr.Nyenyire Advocate for respondent

Mr. Wamache Advocate for the appellant.

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**F. GIKONYO**

**JUDGE**