



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.101 OF 2001

**IN THE MATTER OF THE ESTATE OF M'ITONGA M'MURUNGI alias BEDFORD
M'GITONGA M'MURUNGI (DECEASED)**

JOSEPH KITHINJI M'ITONGAPETITIONER/RESPONDENT

- VERSUS -

WILFRED MWIRIGI GITONGAINTERESTED PARTY/APPLICANT

RULING

1. The interested party/applicant through an application dated 28th February, 2011 brought pursuant to Section 47 and 83 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules the applicant seeks the following orders:-

(a) That this Honourable Court be pleased to order the petitioner/respondent to distribute to the interested party/applicant his entitlement in the deceased's estate in accordance with the confirmed grant issued on the 28th June 2004.

(b) That this Honourable court be pleased to compel the petitioner/respondent to execute all the relevant documents to facilitate transfer of the appellants rightful share of 4 acres excised from land parcel LR. No.Abogeta/U-Kithangari/691 in conformity with the confirmed grant.

(c) That costs of incidental to this application be borne by the petitioner/respondent.

2. This application is based on the grounds on the face of the application to wit; that without any valid reason and in total disregard of the powers bestowed on him as an administrator the petitioner/respondent has failed to transfer to the applicant his rightful share of the deceased estate and that the petitioner/respondent has transferred to other beneficiaries their rightful share but has failed to transfer to the applicant his entitlement.

3. The applicant further relied on his supportive affidavit dated and filed on 17th March 2011 in which he has deponed that the petitioner is his brother and has reiterated the ground he relied on in his affidavit. He added that the petitioner hived his share from where the interested party had occupied and took his tea bushes which he had inherited from his grandfather and had been harvesting for over 20 years; that the

petitioner proceed to sue the interested party in Nkubu PMCC. No. 8 of 2010 and got orders of injunction against the interested party since he had got title deed in respect of that area. He attached the court's order as annexure "WMG '1"; that the petitioner refused to compensate the interested party and has refused to transfer to the interested party his share of inheritance. He further deponed that he ranks equally with petitioner and as such the petitioner has no powers to dictate on when and how to transfer to the interested party his rightful share.

4. The petitioner/respondent opposed the application and filed a replying affidavit dated 6th June 2014. He has deponed that he has not transferred to any other beneficiary his share as alleged by the applicant. He averred that even before succession cause was completed all had agreed that they were to refund him costs of the succession cause equally and also share equally towards the costs for transferring their respective parcels; that all other beneficiaries have refunded their share of the amount the petitioner spent in this succession cause and also paid their contributions towards meeting the costs of transfer except for the applicant who wants to eat from the pockets of others; that the issue of tea bushes is misplaced as the tea bushes are on L.R.No. Abogeta/U-Kithangari/1738 which does not form part of the deceased estate; that Nkubu case is pending defence hearing and is not part of this cause; that the petitioner is concerned about his brother's family and their welfare; that the applicant separated with his wife who went away with three (3) children in 2009 and they live in rental house whereas the applicant has since married another wife with whom according to the petitioner they are planning to dispose the land and shift to different location; that as family they are concerned with what will become of the first wife and the children who might come back in the future; that the applicant is in occupation of the four (4) acres of LR. NO. Abogeta/U-Kithangari/691 and that if the applicant is ready to provide half of his share for his family and cater for the transfer costs, refund his share of costs of succession cause, the petitioner has deponed he is ready to transfer to him his share.

5. The applicant through his further supporting affidavit dated 11th August 2014 deponed that it is the petitioner who has refused to receive the applicant's equal contribution. He also challenged the petitioner allegation that Abogeta/U-Kithangari/1738 assertion that it does not form part of the deceased estate yet it is a subdivision of the deceased land parcel L.R. No. Abogeta/U-Kithangari/692. He further avers that the petitioner has not explained why he proceeded to have his share of the deceased estate excised on the portion of land the applicant occupies and failed to compensate him for his developments. He further averred that the petitioner has already executed relevant transfer documents and obtained consent for subdivisions and transfer from the Land Control Board in favour of other beneficiaries to his exclusion. He further averred that the petitioner has no business in the applicant's family affairs and that he should not dictate to him how to deal with his inheritance.

6. The court has carefully considered the application and the petitioner's response and the annexures thereto. The issue for consideration is whether the interested party application is merited and whether the same should be granted and if so on what conditions?

7. The petitioner and the interested party are brothers as per their affidavits and as per affidavit in support of application for confirmation of grant dated 9th October 2003. The petitioner was issued with temporary grant intestate on 12th November 2001 and the same was confirmed on 29th June 2004 in which the interested party was awarded 4 acres out of Abogeta/U-Kithangari/691 and the petitioner the balance. The other beneficiaries shares are from Abogeta/U-Kithangari/692 and 228 and Abogeta/U-Kithangari/661.

8. The petitioner does not deny that the applicant herein is entitled to four (4) acres out of Abogeta/U-Kithangari/691 as per confirmed grant but, he is giving conditions to the effect that he provides half of his share for his family in respect of the first wife and her children and cater for transfer costs, refund of costs of the succession cause after which the petitioner will be ready to transfer to the applicant his share. The petitioner is acting contrary to his duties by refusing to transfer the applicant's share whereas the applicant has offered to cater for transfer costs, refund his equal share of costs of the succession cause which the petitioner has unreasonably refused. The petitioner's insistence that before transfer of the applicant's share to him, he must be subjected to giving half share to his first wife is unreasonable and contrary to the confirmed grant. There has been no application for rectification of the grant in terms of the

conditions being set out by the petitioner and until that is done the share due to the applicant should be transferred. The petitioner should transfer to the applicant his share upon paying his equal refund of costs, cater for transfer costs as agreed in respect of the succession cause and transfer.

9. **Section 83 of the Law of Succession Act** sets out the duties of the personal representative and amongst the duties of the legal representative under 83 (f) of the Law of Succession Act is to distribute or to retain in trust (as the case may require) to the beneficiaries, respective interest without undue delay otherwise where the petitioner fails after due notice and without reasonable cause to proceed diligently with distribution of the estate the court may under **Section 76 (d)(ii) of the Law of Succession Act** revoke or annul the grant if the court is moved by an application by an interested party or decides so on its own motion.

10. Further under Rule **73 of the Probate and Administration Rules** nothing limits or otherwise affects the inherent power of court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

11. The applicant raised other matters concerning Nkubu PMCC No. 8 of 2010 in which injunction orders has been issued by the lower court and which matter is still pending at the lower court. He also complained of having not been compensated by the petitioner for having taken his tea bushes. He further complained parcel Abogeta/Kithangari/1738 formed part of the deceased estate while the petitioner found such assertion as misplaced and thus does not form part of the deceased estate. I have very carefully considered the pleadings and the issue before this court and with all due respect the matters raised by the applicant herein above are not part of the pleadings before this court. The issues raised are before a competent court and as such let the parties canvass the same before the said court rather than dwelling on irrelevant issues which have not been placed before this court for determination.

12. The upshot is that the interested party's applications succeeds subject to the following orders:-

(a) The petitioner is hereby ordered to distribute to the interested party/applicant his entitlement in respect of the deceased's estate in accordance with the confirmed grant issued on 28th June 2004 within 30 days from the day of this ruling subject to the interested party/applicant refunding his equal share of costs incurred by the petitioner in pursuing this succession cause, meet his equal share of subdivision of L.R. Abogeta/U-Kithangari/691 costs of transfer and all incidental costs that may be necessary in effecting transfer into interested party's name.

(b) That upon interested party complying with (a) above the petitioner/respondent to promptly and without undue delay execute all relevant documents to facilitate transfer of the interested party (applicant's rightful share of 4 acres) to be excised from Land Parcel No. Abogeta/Kithangari/691 in conformity with the confirmed grant.

(c) In default of compliance under (a) above by any of the parties there be liberty to apply.

(d) That as both parties are brothers I order each party to bear its own costs.

DATED AT MERU THIS 8th DAY OF OCTOBER, 2015.

J.A. MAKAU

JUDGE

8.10.2015

Delivered in open court in the presence of:

Mr. Gichunge Muthuri for interested party/applicant

M/s. Thibaru for petitioner/respondent

Court clerk – Faith/Ibrahim

F. GIKONYO

JUDGE

8.10.2015