



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCC NO. 630 OF 2009

IN THE MATTER OF THE ESTATE OF M'MWIRICHIA MUTUERA alias

**MWIRICHIA MUTUERA alias MUTUERA MUKURI.....
(DECEASED)**

**SESINTA MUKAMI.....1ST
PETITIONER**

**GILBERT KIOGORA MWIRICHIA.....2ND
PETITIONER**

VERSUS

**NELSON MUGAMBI MWIRICHIA.....
PROTESTOR**

RULING

1. The petitioners Sesinta Mukami and Gilbert Kiogora Mwirichia through summons for confirmation of grant brought pursuant to Section 71 of the Law of Succession Act and Rule 40(1) of the Probate and Administration Rules dated 29th March, 2011 sought that the grant of letters of administration intestate made to them in this cause on 3rd September, 2010 be confirmed and the caution registered against the deceased's LR ABOGETA/U-KITHANGARI/123 on 27th August, 2008 by Nelson Mugambi Mwirichia be lifted. The applicants also sought for costs to the application.
2. The application is supported by annexed affidavit dated 29th March, 2011 deponed upon by the petitioners and consent to confirmation of grant and the mode of distribution of the estate date stamped 30th March, 2011 but not showing when the same was witnessed by the Commissioner for oaths and at what place. Both consents are signed by all beneficiaries save NELSON MUGAMBI MWIRICHIA.
3. The protestor NELSON MUGAMBI MWIRICHIA filed what he referred to as a replying affidavit of the protest dated 3rd November, 2011 opposing the proposed petitioners' mode of distribution and stating all family members are opposed to scheme of distribution proposed by the petitioner's and attached to the affidavit a copy of a letter purportedly signed by all beneficiaries as (annexture) "NMI" including 1st petitioner save the 2nd petitioner. He also attached agreement for

sale of land(NM2) between the 2nd petitioner a third party and purported that the 2nd petitioner in the said agreement is selling the whole land, that he a third party. The 2nd petitioner filed a supplementary affidavit dated 24th April, 2012 averring that the beneficiaries had agreed to the mode of distribution as per annexure(GKMI) and admitting he had sold away 1 acre out of his proposed 4 acres and not the whole land, that he had agreed to sell one of his sister's acre and has released the proceedings of Kshs.600,000/- into 1st petitioner's account which is acknowledged through(GKM2). He even averred the surveyor had carried out the necessary subdivision works and that he is being frustrated by the protestor after denying him a loan of Kshs.100,000/-. He further stated he is surprised why his sisters who had consented to the mode of distribution and confirmation of the grant signed, the protestor's letter objecting to confirmation of the grant.

4. That before the petitioners application dated 29th March, 2011 could be heard and determined. The protestor filed chamber summons(instead of summons) pursuant to Section 67 of the Law of the Succession Act and Rule 73 of the Probate and Administration Rules seeking that he be appointed as joint administrator to the estate of the deceased.
5. On 19th December, 2012 in presence of counsel court directed that the matter be determined by way of viva voce evidence in respect of summons dated 29th March, 2011. That on 11th March, 2013 the court directed that both application herein be set down for hearing on the same day, however, on 10th February, 2014 the counsel for petitioners moved the court to vacate its earlier orders and order the two applications be determined by way of written submissions. The court accordingly directed that the two applications be determined by way of written submissions. That following the directions counsel appeared before court on 7th April, 2014 and the petitioners confirmed having filed their submissions on 31st March, 2014. The protestor filed his on 15th April, 2014 and the petitioners filed reply to the protestors submission on 10th April, 2014.
6. I have carefully perused the two applications, affidavits in support and the submissions by counsel in support and in opposition of the two applications and the provisions of law relied upon by both counsel. The issue for consideration is whether in view of the parties conflicting affidavits the applications can be adequately determined without further evidence. The petitioners have attached consents duly signed by all beneficiaries consenting to mode of distribution and confirmation of the grant yet the same beneficiaries including even the 1st petitioner have signed a letter attached to protestor's affidavits objecting to the mode of distribution. That in effect means their consents to mode of distribution and confirmation of the grant are retracted and the confirmation is contested. Rule 40(8) of the Probate and Administration Rules requires in absence of beneficiaries or dependants during the hearing of application for confirmation of grant consent of all parties who do not appear before court be filed. The application in absence of written consent cannot therefore be allowed without the attendance of all beneficiaries or dependants who are entitled to the deceased estate. In the instant situation the court is faced with two conflicting affidavits and the court cannot opt to prefer one affidavit and reject the other in determining the issue before it without parties being given an opportunity to be heard as by failing to do so the court would be in breach of Article 50 of the Constitution as hearing would not be a fair one.
7. Similarly the protestor is seeking to be joined as a joint administrator without hearing the position of all beneficiaries and the petitioners. That it would be premature in view of the parties conflicting affidavits to determine the two applications on the basis of the affidavits and counsel submissions as such move may occasion injustice to all beneficiaries. In the interest of justice and doing the best court can do to ensure fairness and equitable distribution of the deceased estate both applications are ordered to be determined by way of viva voce evidence.
8. The parties are at liberty to take suitable date at the registry for hearing and determination of both applications together as earlier on ordered. Costs be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF JULY, 2014.

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:

1. Mr. Ringera for the petitioner
2. Mr. Anampiu for the protestor

J. A. MAKAU

JUDGE