



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO. 173 OF 2005

IN THE MATTER OF THE ESTATE OF KIMUTAI TUIMISING (DECEASED)

WILSON KIPTANUI.....1ST APPLICANT

JOHN KIPKOECH MUTAI.....2ND APPLICANT

VERSUS

SARAH CHERONO TUIMISING.....1ST RESPONDENT

DANIEL KIPRUTO MUTAI.....2ND RESPONDENT

RULING

By the Motion dated 10th June 2013, **Wilson Kiptanui Mutai** and **John Kipkoech Mutai**, hereinafter referred to as the Applicants, sought for the setting aside of the orders issued on 14th May 2013. The Motion is supported by the affidavit of Wilson Kiptanui Mutai sworn on 10th June 2013. **Sarah Cheronu Tuimising** and **Daniel Kipruto Mutai** hereinafter referred to as the Respondents opposed the Motion by relying on the replying affidavit of Daniel Kipruto Mutai sworn on 24th July 2013.

I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. It is the applicants' submission that they and their advocate were not aware that the cause had been fixed for hearing on 7th May 2013. They averred that they had not been served with a hearing notice. The applicants claimed that they were surprised when they received an order directing them to sign mutation and transfer forms to cause the estate land to be subdivided and distributed. For the above reason, this court was urged to set aside the aforesaid order and reinstate the summons dated 24/08/2011 for inter parties hearing. The Respondents on their part stated that the applicants' advocate had been served with a hearing notice hence they were required to be in court on 7th May 2013 but they chose to absent themselves. The Respondents further pointed out that the Applicants' motion has no merit in that the orders made on 7th May 2013 and issued on 14/5/2013 were meant to actualize the execution of the certificate of confirmation of grant dated 18th January 2013. After a careful consideration of the rival averments the following facts appear to be not in dispute in this cause: **First**, that on the 18th day of January 2011, the grant issued in the joint names of both the Applicants and the Respondents was confirmed. The certificate of confirmation of grant clearly show the schedule of distribution of the estate as follows:

Wilson K. Mutai- Kericho/Kabianga/781 -3.775 acres

John K. Mutai- Kericho/Kabianga/781 -2.775 acres

Richard K. Mutai- Kericho/Kabianga/781 -1.475 acres

Stanley K. Mutai- Kericho/Kabianga/781 -1.475 acres

Sarah C. Tuimising- Kericho/Kabianga/781 -1.00 acre

Daniel K. Mutai- Kericho/Kabianga/753 -0.7 Ha

Secondly, that Daniel K. Mutai filed the chamber summons dated 24th August 2011 in which he sought for *inter alia* an order directing Wilson Kiptanui and John K. Mutai to execute the mutation and transfer forms to give effect to the confirmed grant.

The aforesaid application was served and fixed for inter parties hearing on 7th May 2013. I have looked at the copy of the hearing notice attached to the replying affidavit of Daniel K. Mutai and it is clear that the firm of Chelule & Co. Advocates acknowledged receipt of the hearing notice by stamping on the face of it. It is therefore not true that the Applicants had no notice as to when the summons dated 24th August 2011 came up for inter parties hearing. In any case the Applicants did not oppose the aforesaid application and that is why this court found it not difficult to give the orders as prayed *ex parte*. The nature of the orders sought in the summons dated 24th August 2011 is to give effect to the confirmed grant. A critical examination of the averments made in the affidavit of Daniel Mutai sworn on 24th August 2011 and filed in support of the summons shows that the Applicants herein had deliberately refused to sign mutation and transfer forms to subdivide the estate land. This prompted the Respondents to apply for an order compelling the Applicants to execute those forms and in default the deputy registrar of this court be authorized to do so. This court has now been urged to set aside the order. I do not think the Applicants are entitled to the orders. They did not oppose the summons and neither have they appealed against the order confirming the grant. In the end I see no merit in the motion dated 10th June 2013. The same is dismissed with costs to the Respondents.

Dated, signed and delivered this 4th day of October 2013.

J.K.SERGON

JUDGE

In open court in the presence of

Mrs. Bett for the Respondents

Mr. Mutai for the Applicants

Mr. Koech- Court clerk