



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

PROBATE & ADMINISTRATION 153 OF 1997

**IN THE MATTER OF THE ESTATE OF: RASTO MASINDE NANGUBO
DECEASED**

**IN THE MATTER OF: MAKOKHA OPICHO JOB
PETITIONER/RESPONDENT**

AND

**IN THE MATTER OF: RICHARD NANGUBO MASINDE
OBJECTOR/APPLICANT**

RULING

This is a ruling on an application seeking leave to file an objection out of time brought under section 68 (1) of the Law of Succession Act, Cap 160 of the Laws of Kenya. The objector Richard Nangubo Masinde was represented by Wasilwa & Co. Advocates, while the petitioner is represented by Bulimo & Co. Advocates.

The grounds supporting the application are that the Petitioner filed this cause without informing the Objector who is a son of the deceased. The Objector came to discover that the Petitioner had filed this cause when it was finalized. He submits that the Petitioner had no *locus standi* to file the cause since he is not a son of the deceased. The Objector who is a son of the deceased was not included in the P&A form as a beneficiary though the names of his siblings were included.

The application was opposed by the Petitioner relying on his Replying Affidavit sworn on 18th February, 2007. He depones that the Applicant is the Petitioner's step – brother although it appears from their pleadings that the parties are cousins since their fathers were brothers. The father of the Petitioner died in 1953 and his land **BOKOLI/BOKOLI/612** measuring 34 acres was registered in joint names of the Petitioner and the Applicant's father Opicho Nangubo and Masinde Nangubo. In 1988 the father of the Applicant died intestate.

The Petitioner acquired absolute proprietorship of the land under section 118 of the Registered Land Act (RLA) and later sub-divided the same between the members of the two families of the two deceased persons who were the first registered proprietors. The original parcel **BOKOLI/BOKOLI/612** does not therefore exist.

The Petitioner filed a supplementary affidavit sworn on 14th May 2007 in which he depones that, the Applicant was given eight (8) acre portion of land by his deceased father during his life time. Further that the annexure to the replying affidavit which is an extract of the register for **BOKOLI/BOKOLI/612** is forged to give the impression that the land was owned in common with each registered proprietor holding half share.

The issue arising from this application is whether the objector has convinced the court that he deserves leave to file the intended objection out of time. This will depend on his interest in the estate of the deceased. The Objector is a son of the deceased which is not disputed by the Petitioner and may have a right in a succession cause to apply for a grant of letters of administration in his regard to his father's estate. However, in order to decide whether the Objector is entitled to such a right, the mode of registration of the land and its effect must first be analyzed.

I have perused the extract of register annexed to the Replying Affidavit marked "**MOJ – 1**". I note that the words, "**commonly owned ½ share**" are written in pen. It would be expected that such a document would have all its contents typed before the Land Registrar signs it. The writing of the said words by hand, puts in question its authenticity of the document. I am persuaded that this is most likely an addition made after the extract of register was obtained from the Land Registrar and then photocopied. The only inference that may be drawn herein is that the registration was one of joint proprietorship with no defined shares. In such type of registration, section 118 of the Registered Land Act provides:

"If one of two or more joint proprietors of any land, lease or charge dies, the Registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register."

The Respondent/Petitioner confirms that after the death of the joint proprietor, he applied to the Land Registrar under section 118 of the RLA who deleted the name of the deceased from the register. The Petitioner on transmission on death, became the proprietor of the land **BOKOLI/BOKOLI/612**. He has annexed evidence to show that he later caused the land to be sub-divided among the family of deceased and his own family. This action is a sign of good faith in that, the Petitioner took into account that that the family was family land inherited by his father and uncle from their ancestors and that the same should devolve to their descendants- Applicant including the brothers of the intended Objector. The petitioner did not take advantage of his new proprietorship status giving him absolute rights of ownership under section 27 of the RLA. out of time will not serve any useful purpose. The Objector has failed to show that he has suffered any prejudice as a result of the action taken by the Petitioner after the death of the Applicant's deceased father Opicho Nangabo.

I agree with the Applicant that the Petitioner would have no right to apply for grant of letters of administration intestate in the estate of the Applicant's father while deceased's children are surviving. However, this was not a case of succession but of transmission on death whose process was legal and procedurally carried out.

It is my finding that, the application before me is not merited. I therefore dismiss it accordingly. Each party to meet their own costs.

F. N. MUCHEMI

JUDGE

Dated, Delivered and Signed at Bungoma

This 9th day of July 2009 in the presence of Mr Situma for the respondent.