



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC. SUCCESSION CAUSE NO. 15 OF 2018

(Formerly Kisii High Court Misc. Succession Cause No. 223 of 2011)

IN THE MATTER OF THE ESTATE OF IKWABE MOSETI SIRURI (DECEASED)

-between-

ROBI IKWABE & OTHERS.....OBJECTOR/APPLICANT

-versus-

ITUTU IKWABE MOSETI.....PETITIONER/RESPONDENT

RULING

1. By the Summons for revocation dated 02/11/2011 and evenly filed in Court, the Applicants herein applied for the revocation of the grant of the representation in respect of the estate of **Ikwabe Mosei Siruri** (hereinafter referred to as '*the deceased*') which was issued to **Itutu Ikwabe Mosei**, the Respondent herein who was the Petitioner before the then Resident Magistrate's Court's at **Kehancha** in **Succession Cause No. 10 of 2008**.

2. That grant was eventually confirmed by the Kehancha Court on 05/03/2009 and one of the properties forming part of the estate namely **Nyabasi/Busoga/918** was equally distributed among the **Petitioner, Manchare Ikwabe Mosei, Nyamohanga Ikwabe Mosei** and **Gati Nyaisawa** who were children from the second house. The deceased was survived by his two wives who also died before institution of the proceedings at Kehancha court.

3. The Applicants, who are also the children of the deceased from the other house, contended that the Petitioner did not involve them in the succession with a clear intention of disinheriting them. That, the Petitioner unlawfully sub-divided the original parcel of land belonging to the deceased which was **Nyabasi/Busoga/311** into **Nyabasi/Busoga/918** and **Nyabasi/Busoga/919** and allocated himself and his other siblings **Nyabasi/Busoga/918** and that the Petitioner has failed to administer the estate prudently by dealing in a piecemeal manner. The Applicants also contended that the lower court lacked pecuniary jurisdiction to entertain the matter. The Applicants then prayed for the revocation of the grant, the cancellation of the resultant titles from the original **Nyabasi/Busoga/311** and an injunction to preserve the *status quo*.

4. The Respondent opposed the application. He contended that the proceedings they instituted were only in respect of **Nyabasi/Busoga/918** and not **Nyabasi/Busoga/919**. That, the original **Nyabasi/Busoga/311** was equally sub-divided into two parcels being **Nyabasi/Busoga/918** and **Nyabasi/Busoga/919** and each of the two houses allocated one portion thereof and that he only petitioned for **Nyabasi/Busoga/918**. That, he left out the other portion, **Nyabasi/Busoga/919**, for the Applicants. The Respondent prayed that the application for revocation be dismissed.

5. Directions were taken and the application was disposed of by way of written submissions where both parties duly complied. Each party buttressed their positions in the pleadings.

6. I have carefully perused the application and the response together with the submissions. Several issues are not in dispute in this matter. There are two issues for determination in this application. One, whether a Petitioner(s) can competently institute succession proceedings on part of the estate in an instance where there is no dispute on the extent of the estate and two, whether the Petitioners complied with the law, *inter alia*, on distribution of the estate where the deceased was polygamous.

7. A Petitioner is ideally supposed to apply for a grant of the administration of the whole estate of a deceased especially in cases of total intestacy and where there is no dispute on what constitutes the estate of the deceased. That is the calling under **Section 51** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya (hereinafter referred to as '**the Act**'). There are however instances where a Petitioner(s) applies for part administration of an estate. In this matter there was no dispute on what constitutes the estate of the deceased and no reason was tendered for partial administration. Therefore, the ideal way out was for the Petitioner to apply for the administration of the entire estate. However, the Petitioner only applied to administer parcel of land known as Nyabasi/Busoga/918 leaving out other properties forming part of the estate. The Petitioner therefore contravened **Section 51** of the **Act**.

8. The other issue is whether the estate of the deceased who was polygamous was rightly dealt with. The Petitioner equally subdivided the original parcel of land left behind by the deceased into two and allocated one-half to each of the two houses. **Sections 35 to 40** inclusive of **the Act** provides for how estates are to devolve including where the deceased was polygamous. The approach taken by the Respondents seem not to be in line with **the Act** more so given that the allocations were not done by the deceased himself and there was no consensus among all the beneficiaries.

9. A careful analysis of the Petition for the Grant of representation and all the accompanying documents until the confirmation of the resultant grant point to the fact that the proceedings were contrary to law in many aspects. **Sections 51** and **71** of the **Law of Succession Act**, Chapter 160 of the Laws of Kenya as well as **Rules 7, 26, 40** and **41** of the **Probate and Administration Rules** were severely flouted. I am hence persuaded that the remedy thereof is in **Section 76** of **the Act** such that all parties are given an opportunity to take part in the processes and the entire estate is dealt with at once.

10. Resulting therefrom and in consideration of the provisions of **Section 66** of **the Act** and with a view to attain a quicker determination of this matter which undoubtedly involves so many beneficiaries, this Court now makes the following orders: -

(a) The Grant of Letters of Administration made to Itutu Ikwabe Mosei on 19/08/2008 and the resultant Certificate of Confirmation be and are hereby revoked and a Fresh Grant shall issue in the joint names of Itutu Ikwabe Mosei and Sarima Ikwabe Mosei.

(b) The sub-division of the original parcel of land known as Nyabasi/Busoga/311 and all the resultant registrations be and are hereby cancelled and the parcel of land shall revert to the name of Ikwabe Mosei Siruri, deceased.

(c) The Administrators and/or any of them shall file an application for confirmation of the fresh grant within 14 days of its issuance.

(d) As the matter involves family members and it is still on-going, each party shall bear its own costs of the application.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of February 2019.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of:

Mr. Agure Odera Counsel instructed by Messrs. Agure Odera & Company Advocates for the Applicants.

Itutu Ikwabe Mosei the Petitioner/Respondent in person.

Evelyne Nyauke – Court Assistant



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