



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

SUCCESSION CAUSE NO. 195 OF 2017

FORMERLY MACHAKOS SUCC CAUSE NO. 102 OF 2013

IN THE MATTER OF THE ESTATE OF KAKUNIA MUKEKU NTHEI *alias* MUKEKU NTHEI (DECEASED)

ANASTASIA MBULA KAKUNIA.....1ST ADMINISTRATOR/RESPONDENT

JOSEPH MUTHAMA KAKUNIA.....2ND ADMINISTRATOR/RESPONDENT

VERSS

URBANUS MUTUNGA MAINGI.....PROTESTOR/APPLICANT

RULING

1. Before me is a Summons dated 25/11/2020 brought under section 47 of the Law of Succession Act (Cap.160), and Rule 73 of the Probate and Administration Rules, in which Urbanus Mutunga Maingi the protestor/applicant seeks the following orders –

1) That the application be certified as urgent and the same be heard ex-parte in the first instance.

2) That pending the hearing of this summons inter-partes the administrators/respondents either by themselves, their agents, surrogates, servants, relatives and any other person or persons acting or purporting to act on their behest be restrained from interfering with the protestors right of occupation and use of part of parcel number NZAUI/NZIU/70.

3) That pending hearing and determination of the protest hereof, the administrators/respondents either by themselves, or their agents, surrogates, servants, relatives and any other person or persons acting or purporting to act at their behest be restrained from interfering with the protestor's right of occupation and use of part of parcel number NZAUI/NZIU/70.

4) That the cost of this application be borne by the respondents,

2. At this stage, prayer 1 and 2 have already been spent.

3. The application is supported by an affidavit sworn on 25th November 2020 by the protestor/applicant Urbanus Mutunga Maingi, in which it was deposed that the applicant was a nephew of the deceased, and that the deceased was holding part of parcel number NZAUI/NZIU/70 in trust for the applicant's father. It was also deposed that they were all of the MUKEKU NTHEI family and entitled to a share of the deceased's estate, and further that the administrators had unlawfully and violently blocked the protestor/applicant from accessing and utilizing the portion of land, and that the family of the applicant were now at the risk of starvation as they were now prevented from cultivating their portion of land.

4. The application has been opposed through a replying affidavit sworn on 14th December 2020 by JOSEPH MUTHAMA KAKUNIA, one of the administrators in which it was deposed that the protestor/applicant had not been prevented from using the land, that the protestor/applicant was not a beneficiary of the estate of the late KAKUNIA MUKEKU NTHEI *alias* MUKEKU NTHEI, and that the protestor was interfering with beneficiaries of the deceased by preventing them from cultivating parts of land in parcel title number NZAUI/NZIU/70.

5. The application proceeded by way of filing written submissions. Counsel for the protestor/applicant L. N. Ngolya and counsel for the administrators Mutia S. M each filed their written submissions, which I have perused and considered.

6. From the above written submissions, I note that it has been admitted that the protestor/applicant had already filed a protest regarding distribution of assets of the deceased. I also note that there is no specific rebuttal by the administrators of the protestor's claim that he has been occupying and using part of the subject land, and that he is a nephew of the deceased. The only complaint by the administrators is that the protestor should not prevent the other beneficiaries from using or having access to the land.

7. In those circumstances, I am satisfied that if the orders sought herein are not granted, the protestor/applicant will suffer substantial loss. In my view, the applicant has satisfied the three requirements for interlocutory orders explained in the case of **Giella –vs-Cassman Brown & Company Ltd (1973) E.A 35** in that he has demonstrated a prima facie case, with probability of success, secondly, that he will suffer substantial loss if the interlocutory orders are not granted, and lastly, the balance of convenience is in his favour.

8. I thus allow the application and grant prayer 3, and in addition order that neither the protestor/applicant, nor the administrators or any of their agents, should block the entry to the land. There is liberty to apply in case of default by any party.

9. The costs of the application will await the decision in the pending succession cause herein.

Delivered, Signed & dated this 28th day of September 2021, in open court at Makueni.

GEORGE DULU

JUDGE