



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 36 OF 2002

IN THE MATTER OF THE ESTATE OF THE LATE EVANSON NGUTI KAMANDA - (DECEASED)

JACINTER WANJIRU NGUTI.....ADMINISTRATOR/RESPONDENT

AND

SARAH WANJIRU.....1ST OBJECTOR

EVANS NGUTI GITAU.....2ND OBJECTOR

JAMES GITAU NAHASHON.....3RD OBJECTOR

WANJIRU MARY.....4TH OBJECTOR

EVANSON GASHAMBA NGUTI.....5TH OBJECTOR

RULING

1. By an application dated 7th January, 2019 made under **Section 3A** of the **Civil Procedure Act** and **Rules 59** of the **Probate and Administration Rules**, Law of Succession the Objector/Applicants seek that orders do issue;

a) Authorizing each party to appoint a professional surveyor to visit the suit land and prepare occupational/user survey and user positions per acreage on or before 25th March 2019,

b) That each surveyor do file and prepare occupational user survey report based on the acreage on the ground,

c) Costs of the application be provided for.

2. The basis for these prayers is that the suit property is owned in common and occupied by members (beneficiaries) belonging to the estate of **EVANSON NGUTI KAMANDA** and **TYRUS KAMANDA GITAU** in unequal proportions.

The Environment and Land Court in **E & L case No. 1919 of 2015 Evans Nguti Gitau Vs Jecinta Wanjiru Nguti** issued status quo orders retaining the position on the ground pending hearing and determination of this Succession Cause.

3. At no point was a draft **Part Development Plan** or **Survey Plan** presented to court to demonstrate the proximate acreage occupied by each party.

4. There is an alleged breach of court orders and a pending hearing that will require the input of a survey planner to clarify the position and acreage occupied by each estate – thus the urgency that each party appoints a professional surveyor to visit the site and ascertain;

(i) Mode of occupation,

(ii) Acreage,

(iii) User purpose accordingly, to guide the court in determination of the matters herein.

5. In the supporting affidavit sworn by **EVANS NGUTI GITAU** (who describes himself as one of the administrators of the Estate of **TIRUS**

GITAU KAMANDA), he deposes that **LR. SOY/1008** is owned in common and occupied by members (beneficiaries) belonging to the estate of **EVANSON NGUTI KAMANDA** and **TYRUS KAMANDA GITAU** in unequal proportions, although the title envisages equal sharing.

6. After obtaining orders in the E & L court, the Respondent **JENNIFER WANJIRU NGUTI** moved to court seeking his committal to civil jail for contempt. The E&L court had ordered that each party occupies the portions in their possession; and the parties on the ground know their boundaries of 351.5 acres. Often during the planting season, the Respondent employs police, so as to frustrate the applicant's effort to grow food on their share.

Then application is thus made to safeguard the interest of the estate of both deceaseds.

7. In opposing the application, the Respondent **JACINTER WANJIRU NGUTI** (also an administratrix of the estate) states that the application herein is made so as to defeat the contempt application dated **8th Jan.2019** and which is due for hearing on **25.02.2019**. She describes this application as an afterthought calculated to sanitize the illegal actions of the applicants. She sees the request for survey as an attempt to demarcate the suit property and dislodge her and her co-beneficiaries from their portions, yet the issues raised in this application were fully settled by the orders of **21st September 2015** and are therefore res judicata.

8. It is contended that this application simply seeks that this court reverse and/or sets aside orders made by the E & L No. 191 of 2015. That **EVANS KAMANDA NGUTI** has always been entitled to a larger share of land and upon his direction, grant over his estate was issued and confirmed on 23rd June 2004.

9. Thereafter his beneficiaries have lived in peaceful occupation of their portions, and some have even disposed of their portions for valuable consideration to 3rd parties.

10. Further, that in any event the applicants herein seek revocation of the confirmed grant more than 12 years later, and in a bid to steal a march and defeat the preservative orders of status quo issued by the Environment and Land Court on 1st Feb. 2016, they now seek to subdivide and demarcate the suit property into 2 equal portions. Granting the orders sought will avert to final orders being issued at an interlocutory stage.

11. The matter was disposed of by written submissions where the applicants counsel argues that the proposed survey will remove doubt as to who is occupying what part of the disputed co-owned land, especially because the Respondent uses police unreasonably to bar the applicants from using their father's portion

12. In response the Respondent's counsel submits that the issue of survey and placement of use should not over-ride the orders issued by the E & L Court which were preservative in nature, and whether that order was fair or not, it would be improper to allow the applicants to sanitize their behaviour by getting a survey report – the bottom line being, there was a court order which ought to have been obeyed. It is on account of this that the court is urged – **“DO NOT ALLOW SURVEY UNTIL THE CONTEMPT PROCEEDINGS ARE HEARD AND DETERMINED.”**

13. In support of this position, the Respondents cite the case of **ALBERT KIGERA KARUME & 2 OTHERS VS KUNGU GATABAKI & MARGARET KAMITHI (sued as Trustees of Njenga Karume Trust)** and 5 others [2015] eKLR, which made an emphasis that ensuring compliance of court orders is paramount and once an allegation of contempt has been raised, then that must first be addressed before any other matter.

14. What had initially come up for hearing before this court was an application by way of summons for revocation of a grant (which also sought rectification). Incidentally the same parties had gone before the Environment and Land Court and obtained orders dated 23.03.2016 where the court inter alia directed in E & L Case No. 191 of 2015.

· **That the ruling and proceedings herein be stayed pending the outcome of Eld. Succ. Cause No. 36 of 2002.**

15. Earlier on the court had issued orders obtained by consent of each party to occupy the portions of their possession, and no new boundary was to be created until the hearing and determination of the suit.

16. Later the Respondent sought orders in **ELC MISC. No.3 of 2016** to have the applicant show cause why he should not be committed to civil jail for disrespecting court orders issued by the ELC on 21st Sept. 2015.

These orders required that;

(a) each party to occupy the portions in their possession,

(b) no new boundary was to be created on the land.

Are there other contempt application orders specifically issued, by this court and pending hearing? There is the application dated 8th Jan. 2019 which complained that this court had issued orders dated 23.12.2014 restraining the Respondents from entering and sub-dividing LR. No.10018 yet the applicant herein had acted in disobedience.

17. It will therefore not be correct to purport that this court is being asked to review and set aside orders made by the E&L court there are orders contemporaneous to these by the E & L which were issued by the High Court in the Succession Cause – the E&L Court order simply

fortified what was already in place.

18. The only odd twist is that the orders issued on **23.12.2014** in this cause were made by the Judge designated to sit in the Environment and Land Court, but they were made in **High Court Succ. Cause No.36 of 2002.**

19. What is required is to first hear the application for contempt, let the Respondent (who is the applicant in the contempt proceedings demonstrate that there has been disobedience of those orders, and once both parties are heard, then the court may determine whether it is necessary to conduct the proposed survey.

20. I concur with the Respondents that at this stage, to order survey before hearing the contempt allegations would be aiding one party and bringing the matter to conclusion before it ever begun.

Consequently I decline to grant the orders sought.

DATED, SIGNED and DELIVERED at ELDORET this 21st day of February 2019.

H. A. OMONDI

JUDGE