



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 463 OF 2011

In the Matter of the Estate of Naaman M' Mwarania (Deceased)

ELIZABETH NAAMAN.....PETITIONER

-VERSUS-

DAVID MWITI MWARANIA.....RESPONDENT/APPLICANT

LILIAN GAKII.....INTERESTED PARTY

RULING

[1] I have observed in previous rulings that this cause has been temporized by the parties who have resorted into filing applications upon applications. The court is alert; it will not entertain unending circumlocutions of parties. Thereto, I will give firm directions which will see the end of this litigation.

[2] I have considered the Summons dated 30th August 2013. I note that the application is seeking the following orders:

a).spent

b). ***THAT the honourable Court be pleased to cancel the transfer of plot No. 14 Kula Mawe within Isiolo County to Japhet Muthee Naaman and the same be reverted to the names of the deceased to await the finalization of the succession cause herein.***

c). ***THAT the Honourable Court be pleased to grant an order restraining Japhet Muthee Naaman from preventing Isiolo water and sewerage company to reconnect a water meter to the Applicant's houses on plot No. 15 Kula Mawe within Isiolo County.***

d). ***THAT the Honourable court be pleased to grant an order restraining Japheth Muthee Naaman from disconnecting electricity from plot No. 14 and 15 Kula Mawe within Isiolo County.***

e). ***THAT costs of this application be provided for.***

[3] Prayers (c) and (d) were granted On 5th September 2013. I hereby re-affirm that position. I say no more towards that end.

[4] The application is premised upon Section 47 of the Law of Succession Act CAP 160 Rule 49 and 73 of the Probate and Administration Rules. More specifically, it is seeking the court to invoke its inherent powers by virtue of it being a court law, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The arguments by the Applicant is that Japhet Muthee, one of the beneficiaries, fraudulently caused Plot No. 14 to be transferred into his names. Yet, it was his father's wish that Plot No. 14 Kula Mawe be inherited in equal shares between the Applicant and Japheth Muthee.

[5] Japheth Muthee deposed inter alia that his brother, and sister, a secretary to the County Governor of Isiolo had been interfering with official documents in order to show that the plot his father had transferred during his lifetime was transferred after his death. He averred that he had a deal with his father and his father transferred the said plot way back in 2005 but the transfer was not approved until 21st December 2005. He also stated that he lives on the said plot with his family.

[6] Japheth Muthee produced a letter dated 1st September 2008 by County Council of Isiolo confirming transfer of the said plot. The Applicant said that the said letter was a forgery and produced a letter by Isiolo County Government dated 24th July 2013, stating that the said transfer as alleged by Japheth Muthee did not exist in their records and was not known to them. This court takes cognizance of the fact that

fraud allegations are very serious matters. Accordingly, I hereby refer the matter for investigation by the CID, Isiolo and a report to be filed within 30 days. I have also heard arguments that it was the wish of the deceased that the said plot be shared between the Applicant and Japheth. Now, in light of the discrepancies of the two letters produced by the Applicant and Japheth Muthee, the accusations and counter accusations herein as well as the claim about the deceased's wishes on this ploy, this court is of the considered view that parties should adduce *viva voce* evidence in respect of this plot and distribution of the estate. Even if Japheth was to succeed in his claim, it will be on the basis that it was a gift *inter vivos* which shall be taken into account under section 42 of the Law of Succession Act in determining his ultimate entitlement. Until the court has determined the controversy in Plot No. 14 the plot shall be preserved.

[7] With regard to the Interested Party's claim; her affidavits deposes inter alia that Plot No.15 Kula Mawe belonged to her and not the deceased. She stated that, for that reason, the said property does not appear in the list of assets filed and contained in the affidavit in support of the petition. She averred that the said plot had never been part of the deceased's estate and should not be irregularly brought into this succession cause.

[8] I note that the Applicant has stated that he lives on plot No. 15 which the deceased had given to his sister Lillian Gakii (the Interested Party). There is general agreement that Plot No 15 belongs to Lilian Gakii, except some say it was allotted to her by defunct Isiolo County Council whilst others posit that it was given to her by the deceased. If the latter reigns, this plot will only be considered within the purview of section 42 of the Law of Succession Act. If the former holds, it will not be taken into account whatsoever when determining distribution of the estate. Whatever the case, I ordered that she be joined as an interested party so that she can defend her claim. Now therefore, I order that *viva voce* evidence shall be led on this plot as well as distribution of the estate.

[9] I have not determined the pertinent issues raised in this application for that will be done in the hearing of application for confirmation of grant upon taking of *viva voce* as well as documentary evidence from all parties herein. Accordingly, confirmation of grant shall be heard on 28th May, 2018. I hope no one will engage in any further circumlocutions. It is so ordered.

Dated, signed and delivered in open court at Meru this 20th day of March 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Kitheka advocate for interested party

Mr. Gichunge advocate for Rimita advocate for petitioner

Mr. Mutegi advocate for Kautha advocate for respondent.

F. GIKONYO

JUDGE