



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO.325 OF 1987

IN THE MATTER OF THE ESTATE OF MARGARET TOBOSO ISOYI – DECEASED

AND

ATHANAS LIPWAMA SHIAVA.....APPLICANT

VERSUS

LUKA MUHANDA MWABAKA.....RESPONDENT

RULING

1. The applicant herein, Athanas Lipwama Shiava, has filed an application for revocation of grant dated 29th January 2015 seeking for orders that:

1. THAT the Grant of Letters of Administration issued to the respondent in this cause on 17th January, 1989 and confirmed on 21st April, 1989 in respect of the estate of Margaret Toboso Isoyi, the deceased herein, be revoked.

2. THAT the two titles namely ISUKHA/SHIAKUNGU/1699 and ISUKHA/SHIAKUNGU/1700 created by subdivision of ISUKHA/SHIAKUNGU/911 be cancelled to restore the title of the deceased.

3. THAT the grant be issued to the applicant who will faithfully administer the estate of the deceased in accordance with the law.

4. THAT costs of this application be borne by the respondent.

2. The grounds in support of the application are that:-

(a) The deceased was the aunt to both the applicant and the respondent.

(b) The respondent has failed to accomplish the administration of the estate of the deceased.

(c) The respondent has failed to distribute the applicant's share of his legacy to him.

(d) The respondent subdivided the land of the deceased into two unequal shares and kept both portions of the land to himself which makes his credibility questionable.

3. The application was opposed by the respondent, Luka Muhanda Mwabaka through his replying

affidavit and his evidence in court.

4. The evidence for the applicant was that he and the respondent are brothers. That the subject land herein LR No. Isukha/Shiakungu/911 belonged to their aunt *Margaret Toboso Isoyi*, now deceased. The deceased did not have any children. Her heirs were he (the applicant), the respondent and their other brother Jackson Mukeya. That after the death of their aunt, they filed this succession cause. The grant of letters of administration were issued to the respondent. The respondent sub-divided the subject land into two unequal portions – LR Isukha/Shiakungu/1699 and Isukha/Shiakungu/1700. He registered both portions in his name. He did not give the applicant his share. The applicant has hence filed this application seeking that the grant issued to the respondent be revoked as the respondent has failed to fairly administer the estate of the deceased.

5. The evidence of the respondent was that the deceased herein was their aunt. That he, the applicant and their brother Jackson were the heirs to her land. That they filed this succession cause and financed it jointly. He, the respondent, was to get half share of the land and the other two were to share the other half equally. He, the respondent sub-divided the land into two portions LR Isukha/Shiakungu/1699 and Isukha/Shiakungu/1700. His parcel was 1699 and 1700 was meant for the applicant and Jackson. The applicant then sued Jackson in *Kakamega Civil Case No.448 of 1990* in an attempt to evict him from land parcel No.1700. The court ordered that the applicant and Jackson do share the said parcel of land equally.

6. The respondent annexed to his replying affidavit the judgment of the court in the above stated civil case. The applicant on the other hand filed together with his witness statements copies of green cards for parcel Nos. Kakamega/Shiakungu/911 and Kakamega/Shiakungu/1700 that show that the latter parcel of land is registered in the name of the respondent.

Jackson Mukeya is reported to have died in 2014 but he left behind a family.

7. The first question that the court has to ask itself is whether the matter is *res judicata* in that there is a former suit that ordered that land parcel Isukha/Shiakungu/1700 be shared by the applicant herein and Jackson Mukeya. *Section 7* of the Civil Procedure Rules reads as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom them or any of them, litigating under the same title, in a court competent to try such issue has been subsequently raised, and has been heard and finally decided by the court.”

8. Kakamega Civil Case No.448 of 1990 was between the applicant herein and Jackson Mukeya. The respondent herein was not a party to the said suit. The matter is therefore not *res judicata* as parties in the current case are different from the parties in the former suit. In any case both the applicant and his brother Jackson were litigating over a parcel of land that did not belong to any of them. The judgment of the court in the said civil case is of no effect.

9. The application is brought under *section 76(a),(b) and (c)* of the law of Succession Act and *Rules 44 and 73* of the Probate and Administration Rules. None of the sub-sections quoted in *section 76* of the Act are relevant to this case. However, *Rule 73* is relevant to the case. *Rule 73* of the Probate and Administration Rules reads as follows:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary to the ends of justice or to prevent abuse of the process of the court.”

10. The respondent has admitted that it is him and his two brothers, the applicant and Jackson, who were joint heirs to the estate of their aunt. He has confirmed that the three of them jointly financed the filing of this succession cause. It is however, clear from the evidence placed before the court that upon being issued with a grant of letters of administration, the respondent appropriated the whole land to himself after sub-dividing it into two portions. He did not give his two brothers their portions. There is no truth that he has given his two brothers Parcel No.1700 as the copy of green card produced in court shows that

the said land is registered in his name. It is then apparent that the respondent has failed to administer the estate of the deceased fairly and to distribute it fairly to the other heirs. There is no justice in the respondent appropriating the whole land to himself when it was meant for the three of them. The court has inherent powers under *Rule 73* of the Probate and Administration rules to make such an order as to correct the injustice metted out to the applicant by the respondent. In the circumstances, I find that the respondent did not proceed diligently with the administration of the estate of the deceased in that he failed to give his brothers their shares. There are sufficient grounds to revoke the grant issued to the respondent.

11. In the foregoing, the application dated 29th January 2015 is allowed in its entirety and fresh grant is to be issued to the applicant. The title deeds created by the respondent are hereby cancelled to revert to the deceased's name.

The respondent is to bear the costs of the application.

Delivered, dated and signed at Kakamega this 28th day of March 2017.

J. NJAGI

JUDGE

In the presence of:

Court clerk

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