



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 350 OF 2007

IN THE MATTER OF THE ESTATE OF JOSEPH MAGURU (DECEASED)

ISAAC NJAGI NJERU.....PETITIONER/APPLICANT

VERSUS

APIJA IGOKI NJERU.....RESPONDENT

RULING

1. The application is for stay of the orders of this court issued on 18th June 2009 pending the hearing and determination of this application. The application also seeks that the respondent (Apija Igoki Njeru) and the Embu District Land Surveyor to be restrained from sub-dividing and/or causing land parcel No. Kyeni/Mufu/1964 to be sub-divided, so as to excise 3.40 acres out of the said land parcel Kyeni/Mufu/1964, pending the hearing and determination of this application.
2. Additionally the applicant also seeks a restraining order against the defendant from distributing and/or purporting to distribute the estate of Joseph Maguru Kanyuguti, without the grant of letters of administration intestate being confirmed. Furthermore, the applicant also seeks **that the** magisterial order made on 11th April, 1997 purporting to distribute the estate and the High Court order made on 18th June 2009 be reviewed and be set aside. It is important to point out that the order of 18th June 2009 allowed the respondent to excise and curve out her share of 3.40 acres out of land parcel No. Kyeni/ Mufu/1964. That order also authorized the Deputy Registrar of this court to execute the necessary documents, to enable the respondent to get her share out of the said parcel of land. And finally, an order of the court is also sought to allow the applicant to file an application for confirmation of grant in this matter and to have the grant confirmed as by law provided and costs of this application to be provided for.
3. The application is grounded on the affidavit of the applicant and the grounds which appear on the face of the summons. Those grounds are that there is no certificate of confirmation of the grant in respect of the estate. The other ground is that the respondent is attempting to unlawfully distribute the estate, which is the function of the petitioner as an administrator.
4. In his supporting affidavit, the applicant has stated that he is the administrator of the estate of the deceased. He also says that the grant in this cause has not been confirmed and for that reason, the estate cannot be distributed in the absence of the certificate of confirmation of the grant. Furthermore, according to his affidavit evidence, this cause was initially filed in the Principal Magistrate's Court at Embu and thereafter it was transferred to this court.
5. The applicant has also stated that the respondent is a widow of one of the brothers to the applicant. On 18th June 2009, the respondent obtained orders to have 3.40 acres of land excised out of land parcel No. Kyeni/Mufu/1964. The order of 18th June 2009 also provided that all documents to be signed by the Deputy Registrar of the High Court to implement the same orders. The order sought to be implemented was granted on the application dated 24th August 2008 of the

- respondent, which the respondent had filed on 27th February 1997.
6. The respondent had sought the grant to be confirmed in terms of her wishes which gave to Margery Ciamwithi Joseph (widow of Joseph Maguru), Milliam Wamugo Joseph (widow of Joseph Maguru) and the respondent (also a widow of the deceased) each 3.40 acres out of land parcel No. Kyeni/Mufu/1964. Furthermore, the applicant has stated that the respondent is attempting to distribute the above estate unlawfully and unprocedurally, because the grant of letters of administration intestate had not been confirmed. More importantly, the applicant has stated that he received a letter dated 2nd October 2012 from the District Surveyor Embu that he was going to carry out a survey of the suit land following the order of the court.
 7. He has also stated that there was no hearing conducted of the application for revocation of the grant as envisaged by law and the application filed on 27th February, 1997 by the respondent was therefore heard in a summary manner. On 11th April 2007 the Resident Magistrate Embu allowed the respondent's application summarily allowing her to get 3.40 acres of the suit premises, which application she had filed on 27th February 1997. Her application was a protest. Additionally, the applicant has stated that there is an error apparent on the face of the record. And finally, he has stated that Margery Ciamwithi Joseph and Milliam Wamugo Joseph are now all deceased.
 8. The applicant's counsel filed written submissions urging the court to dismiss the application. According to him, the respondent cannot purport to distribute the estate of the deceased in the absence of a confirmed grant. she is not the administrator of the estate. Counsel has further submitted that the respondent's protest of 27th February 1997 was not set down for hearing but was summarily disposed of, which in his view amounted to an error apparent on the face of the record. And it is for that reason, that the order issued should be reviewed and/or set aside. He has also submitted that Order 45 of the 2010 Civil Procedure Rules is applicable and has set out the requirements of that Order which I do not need to restate here.
 9. Counsel has also submitted that any attempt to distribute the estate in the absence of a confirmed grant would be unlawful and will amount to inter-meddling with the estate of the deceased which is contrary to section 45 of the Succession Act (Cap 160) Laws of Kenya. This submission has also set out other matters which I have set out in the foregoing paragraphs which I do not need to repeat here.
 10. Counsel for the respondent has submitted that the application lacks merit, is bad in law, and ought to be dismissed. According to him, the applicant is seeking to review and/or stay orders made on 18th June 2009 and on 11th April 1997, which he says is after a period of almost 20 years. According to counsel, the delay in bringing the application is unreasonable. He has further submitted that the applicant has not stated that he learned of the existence of the orders recently. He has also not stated that he has discovered new evidence to warrant the setting aside of the court's earlier orders in terms of Order 45 of the 2010 Civil Procedure Rules.
 11. The respondent's counsel has also submitted that the grant of letters of administration intestate were issued on 10th June 1997 and the applicant did not apply for confirmation of that grant. It is because of that delay of about ten years that the respondent moved the court on 27th July 1997 and her protest application was allowed summarily giving her a share of 3.40 acres of the suit land. Thereafter, on 24th April 2007, the respondent made an application in the High Court to allow her carve out her share of 3.40 acres out of parcel of land No. Kyeni/Mufu/1964 and the same was allowed.
 12. Finally, counsel has submitted that the orders complained of by the applicant were both made in the interest of justice and a succession matter is not supposed to be in court forever.
 13. I have considered the affidavit evidence and the submissions of both counsel. It is common cause that the grant of letters of administration intestate, which were issued to the applicant were not confirmed by the court. It is also common cause that the respondent obtained orders from the magisterial court to have the suit land shared out among the three widows including herself with each to get 3.40 acres of the suit land. Furthermore, it is also common cause that the respondent obtained the orders of this court differently constituted (*Karanja, J*) which ordered that her share of the land measuring 3.40 acres be carved out of land parcel No. Kyeni/Mufu/1964 and that parcel of land was to be shared equally among the three houses of the deceased. It is also common cause that this order of the High Court was not challenged and the orders are still in force.
 14. The applicant has moved the court to review the orders complained of in terms of Order 45 of the

2010 Civil Procedure Rules. According to counsel for the applicant, there is an error apparent on the face of the record. Counsel for the respondent has also submitted that there has been unreasonable delay in bringing this Order 45 review application. I find that there has been unreasonable delay in bringing this application. The grant of letters of administration intestate were issued in 1987. The applicant did not apply for confirmation. This forced the respondent to apply to have the suit land subdivided into three equal shares among the three widows in 1997. The applicant did not challenge this.

15. Furthermore, I find that there will be no prejudice to the beneficiaries of the estate, because the suit land was equally shared out among the three houses of the deceased. The applicant is to blame for being inactive. It is too late in the day for the applicant to complain that the respondent has usurped his powers as the administrator of the estate. Additionally, the overriding objective in section 1A of the 2010 Civil Procedure Act, requires the court to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. And in terms of section 3B of the Civil Procedure Act, the court is required to further the overriding objective by handling disputes justly, efficiently, expeditious and at a cost affordable by the parties. These provisions require that litigation must be expedited in order to achieve affordable and efficient administration of justice.
16. In view of the foregoing, I find that there has been unreasonable delay in bringing this application. Additionally I also find that to allow the application will defeat the primary objectives of sections 1A and 1B of the Civil Procedure Act.
17. In the circumstances, the applicant's application is hereby dismissed in its entirety.
18. There will be no orders as to costs because it is a family dispute.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **22nd** day of **JUNE 2016**

In the presence of Mr. Okwaro for the Applicant and and Mr. Kathungu for the Respondent.

Court clerk Njue

J.M. BWONWONGA

JUDGE

22.06.16