



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

SUCCESSION CAUSE NO. 434 OF 2013.

IN THE MATTER OF THE ESTATE OF JONATHAN ISAYI ISOHE ::::: DECEASED.

AND

FRED LIJINA ISAYI ::;::::::PETITIONER.

VERSUS

LABAN LISILI ISAYI ::OBJECTOR.

R U L I N G.

1. By Chamber Summons dated 8th May, 2015, the applicant seeks revocation of grant made on 17th February, 2014. The grounds for the application are that the grants were obtained fraudulently by Fred Lijina Isayi, petitioner.
2. The application is supported by the affidavit of Laban Lisili Isayi sworn on 8th May, 2015. The application is opposed by Fred Lijina Isayi, petitioner/respondent who swore an affidavit on 14th July, 2015.
3. The matter was heard by way of viva voce evidence on 25th October, 2016. Each party called 2 witnesses to support their case.

Applicant’s case.

4. The applicant’s case is that they are brothers with petitioner same father and same mother. The petitioner lodged instant cause and obtained grant and in the proposed mode of distribution he indicated that he intended to share the estate land equally. On his part, he proposes to share the land Isukha/Virembe/1265 as follows:-

Him1.27 HA.

Fred Lijina 0.57 HA.

5. He intimates that this is in accord with the wish of his deceased father. In his testimony he testified that the deceased had 3 daughters who are married and 6 sons. Only him and his brother, petitioner are the surviving sons. The other 4 sons are deceased but with children surviving them.

6. Before deceased died, he had given lands to the other 5 sons namely:- Peter, Fred, Petitioner, Hezron, Laban and Charles. Gideon died before deceased. The deceased left LR. Isukha Virembe/1265 measuring 1.65 HA (4 acres).The deceased gave each a portion of land. On 14th February, 1990, the deceased gave each portions of land vide Exhibit 1.

7. The document signed by parties subdivided land equally for Fred, Hezron, Laban and Patrick. He seeks to share land as it is proposed in his affidavit. He testified that the children of the deceased sons are on suit land. He testified that he was given another portion by the deceased but he lives on the suit land. The petitioner was also given land elsewhere by the deceased. He seeks also to be a co-administrator. Peter has land besides 964 (2 acres) where his children live. Gideon has son who lives elsewhere.

8. PW2, Loice Mali is sister to the parties. She stated that she is married elsewhere. She says that the deceased in land in issue was shared to the parties and Charles and Hezron. The last 2 are deceased but their children are on the land. The land was shared 4 portions equally. Gideon is of another father, and he lives in Shinyalu with his other father. He is married with children. Her other 2 sisters are married although one is deceased and left children at her matrimonial home. PW3 Andrea Listah Harun is an in law to deceased who married his sister. He says that he knew the deceased shared land into 4 portions to the 2 parties, Charles and Hezron. He witnessed the sharing. It was done by deceased and the elders. The deceased's sons signed but petitioner has now changed his mind and he now wishes the sharing to be otherwise. The objector closed his case at this stage.

Petitioner's case.

9. In petitioner's case, he testified and called 2 witnesses. He reiterated the content of his replying affidavit. He stated that the deceased left suit land herein which is 4 acres. He stated that his other dead brothers have their lands such as Peter, Hezron and Charles. Gideon died without wife or children.

10. He stated that the suit property is to be shared by him and his brother (applicant). He admits to have signed the documents in which deceased divided the suit land into 4 equal portions. PExhibit 1. He says there is the agreement in sharing.

11. DW2 Samuel Mundi Isaka Mukaisi, a clan member testified. He is a neighbour to the parties. He attended elders meeting at petitioner's home where applicant never attended.

12. DW3, Hassanari Bariti, a neighbour testified that the deceased died before sharing his land. The petitioner bought land and moved out of said land. Objector occupies the suit land. Objector also bought land. He says that, the elders, they told parties to share equally. The case was closed after petitioner last witness.

Analysis and Determination.

13. The petitioner lodged the instant cause alone and mentioned applicant as a survivor cum beneficiaries jointly with him. He did not mention existence of his surviving sisters or grandchildren left by his deceased brothers who are said to live in suit land. He did not disclose the existence of documents showing division of the suit property by the deceased into 4 portions. He proposes to share suit land into 2 equal parts between himself and his brother/applicant.

14. He does not contest the applicant desire to be a co-administrator. This court will order the 2 be joint administrators. As for distribution, the witnesses PW1, 2 and petitioner are all in agreement that there is in existence a document on division of the suit land by the deceased and the elders. The documents shows division of the suit land into 4 equal portions to deceased's sons.

15. No daughter has shown desire to share the estate and the one who talked in court indicated that the deceased wished his land to be shared equally by the 4 sons. For the deceased's sons, their children will take what is due to their fathers. Under section 76 of Cap 160, the petitioner is guilty of concealing the fact as to existence of other beneficiaries and the document on sharing of the estate by the deceased.

16. The court therefore marks the following orders:-

(1) The grants are to be issued afresh with parties being joint administrators;

(2) The grants are confirmed with land Isukha/Virembe/1265 to be shared into 4 equal shares to the petitioner, applicant, Hezron Ikatwa Isayi's children and Patrick Shemala Yakhama's children as wished by the deceased.

(3) Parties to bear their own costs.

SIGNED, DATED and DELIVERED this 13TH day of DECEMBER, 2016.

C. KARIUKI.

JUDGE.

In the presence of:-

.....In person for the Petitioner.

.....In person for the Objector.

.....Anunda Court Assistant.