



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 239 OF 1996

IN THE MATTER OF THE ESTATE OF JAPHETH KITHINJI MWIRABUA (DECEASED)

JANET NKATHA KITHINJIPETITIONER

VERSUS

RODAH KAGWIRIA KITHINJI INTERESTED PARTY/APPLICANT

RULING

1. The Petitioner **JANET NKATHA KITHINJI** was issued with a temporary grant on 22nd July 1997 and same was confirmed on 26th January 1998 granting all the deceased property to the petitioner. The interested party filed summons for revocation and/or annulment of the grant dated 26th January, 2010. The applicant/interested party subsequently filed chamber summons seeking orders for inhibition amongst others. The petitioner filed a reply to the application for revocation of grant through an affidavit dated 1st November 2014 to which the interested party/applc ant filed a supplementary affidavit dated 28th November 2011. The petitioner in turn filed a further replying affidavit dated 17th January 2012.
2. On 30th January 2012 court granted an order of inhibition restraining any dealings whatsoever with
with Land Reference Nos. Kiiirua/Naari/46, Kiiirua/Naari/956, Ntima/Igoki/4657, Nyaki/Nyakube/130, Plot No. 124 Meru Town, Plot No. 682 Meru Town, Kulamawe/32, Bula pesa/12, Igoki/Ntima/3772 and Rwarera/825 until cause was heard and determined and until further orders of this court. The court gave directions that the application for revocation of the grant be determined by way of *viva voce* evidence.
3. The court record reveal that the counsel for interested party/applicant without withdrawing or prosecuting the application for revocation of the grant dated 26th January 2010, proceeded on 26th April 2014 to file what is referred to as “***Affidavit of proposed mode of distribution by Rodah Kagwiria Kithinji, interested party/applicant.***” Similarly the petitioners counsel proceeded to file what is headed as “***Affidavit of proposed mode of distribution by the petitioner (Administratix) Janet Nkatha Kithinji*** dated 7th June 2014.

4. The interested party/applicant counsel filed submissions on mode of distribution dated 24th June 2014 and the petitioner's counsel followed suit by filing his submission on the mode of distribution followed further by interested party's written submission dated 17th December, 2014. The Advocates for both parties attached several copies of authorities in support of their submissions.

5. I have taken a lot of pain to go through all the pleadings and court proceedings in this cause. The court proceedings reveal that directions were given that the application for revocation and/or annulment of the grant be determined by way of *viva voce* evidence as early as on 30th January, 2012. The parties subsequently fixed the matter for hearing on 7th May 2013 proposing to seek further directions. The matter was once again fixed on 11th November 2013 for directions on which date both counsel sought a hearing date. This matter was fixed for hearing on 12th March 2014 when both counsel sought for time to put in written submissions. The counsel subsequently put in submissions on their client's respective proposal on mode of distribution and one seeking court's ruling on distribution.

6. I have very carefully considered the pleadings, the court proceedings, the parties proposals on mode of distribution and counsel oral submissions. The issues for consideration are;

(a) Whether the application for revocation or annulment has been determined as per court's direction?

(b) Whether the parties' proposal in the matter can be entertained by this court in view of the confirmed grant dated 27th January 1998 having not been revoked or annulled?

(c) Whether the parties proposal on mode of distribution is proper at this stage?

7. Directions for determination of the interested party/applicant application for revocation and or annulment of grant dated 26th January 2010 were given by the court on 30th January 2010. The application was to be determined by way of *viva voce* evidence. The interested party/applicant and the petitioner did not call any evidence nor was there any application reviewing or varying the directions. The parties instead of calling evidence filed proposals on mode of distribution followed by submissions. That was all wrong and unjustified in view of the fact that the application for the revocation and/or annulment of the grant had not been heard and determined. The application is still pending as it has never been heard or withdrawn.

8. The temporary grant issued by this court was confirmed on 26th January 1998. The certificate of confirmation of grant was issued to the petitioner distributing the deceased estate to the petitioner alone. That as it stands now the estate has been distributed and for the parties proposal to be considered, the first step is to have the confirmed grant of 27th January 1998 revoked and/or annulled. The parties counsel are in my view in error to have filed proposals on the mode of distribution together with their supportive affidavits when distribution had been done many years ago. The logical step is to have the grant either revoked or annulled before proposals on the mode of distribution can be considered. I therefore find and hold that the proposals filed by both counsels are premature and an abuse of the court process. I find there is nothing to entertain in respect of the purported proposals on mode of distribution as there is nothing to distribute as of this moment and not until the confirmed grant is either revoked and/or annulled.

9. In view of what is stated as regards there being a valid confirmed grant which is yet to be revoked or annulled I am satisfied that the proposal on mode of distribution are premature and improper before this court. The said proposals ought in my view to be struck out.

10. The upshot is that the parties proposals on distribution are premature, bad in law and an abuse of the court process. I therefore make the following orders:-

(a) The interested party/applicant proposal on mode of distribution dated 17th April 2014 and the petitioner's proposal for distribution dated 7th June 2014 are incompetent and are struck out.

(b) The interested party's application for revocation and/an annulment of grant dated 26th January 2010 must be set down for hearing on priority basis.

(c) Costs be in the cause.

DATED at Meru this 18th day of June 2015.

J.A. MAKAU

JUDGE

18.6.2015

Delivered in open court in the presence of:

M/s. Gituma for Interested party/applicant

Mr. Kiogora for the petitioner

J.A. MAKAU

JUDGE

18.6.2015