



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
MISC SUCCESSION CAUSE NO. 3 OF 2015

IN THE MATTER OF THE ESTATE OF WAITHAKA KATHAWA
MUNYI WAITHAKA.....APPLICANT

VERSUS

EVANSON MUGO WAITHAKA.....PETITIONER/RESPONDENT

RULING

Counsel for the applicant have moved the court through their chamber summons dated 13th January, 2015 for orders that:

1. The respondent be compelled to produce in court a full accurate accounts of the completed administration of the estate of the deceased including land parcel No. Kyeni/Mugu/699.
2. The Embu County Land Registrar to revert land parcel No. Kyeni/Mufu/699 into the names of the deceased.
3. The Embu County Surveyor to sub-divide land parcel No. Kyeni/Mufu/299 as per the certificate of confirmation of grant issued on 3rd July, 1989 and carve out a portion of 0.478 Ha for Embu – Meru Road.
4. The Respondent be ordered to compensate the applicant for any loss or damage occasioned to the applicant due to the Respondent's dishonesty in the course of distributing the estate of the deceased.
5. The court directs as to the mode of payment of costs.

The chamber summons is grounded on the supporting affidavit of the applicant dated 13th January, 2015. The affidavit has elaborated and expanded in evidentiary terms on the orders sought.

In paragraph 8 of the said affidavit, the applicant has alleged that “.....contrary to the certificate of confirmation of grant, the Petitioner/Respondent herein directed the District Survey, Embu to subdivide the said land No. Kyeni/Mufu/699 into two being land parcel No. Kyeni/Mufu/3692 measuring 0.185 Ha and Kyeni/Mufu/3693 measuring 1.057 HA while the remaining area of 0.478 Ha was taken by the Embu – Meru road (Annexed and marked as MW – 3 is a copy of the mutation form for land parcel No. Kyeni/Mufu/699)”.

And in paragraph 9 the applicant has also alleged that “.....the Petitioner/Respondent herein registered himself with land parcel No. Kyeni/Mufu/3693 measuring 1.057 Ha and caused land parcel No.

Kyeni/Mufu/3692 measuring 0.185 Ha to be registered in the names of our deceased father WAITHAKA KATHAWA. (Annexed and marked as MW – 4 (a) & (b) respectively are copies of the Certificate of Official Search for land parcels No. Kyeni/Mufu/3693 & Kyeni/Mufu/3692)”.

Again in paragraph 11, the applicant has also alleged that “.....despite the court giving me a share of 1 acre of land parcel No. Kyeni/Mufu/699, I have no land registered in my names and consequently, I occupy a portion measuring around ¼ acre while the respondent occupies over 2 ½ acres”.

In response to the affidavit evidence, the Respondent has stated in his paragraph 4 of his replying affidavit that “*It is true that 0.47 Ha was taken by Meru – Embu Road but my father had been compensated for the said land parcel, which money he used to purchase 2 acres of land for my brother the applicant who later disposed it off, which was land parcel No. Kyeni/Kigumo/2056.*”

And finally in paragraph 12, the respondent has stated “*that the applicant disposed off his portion of land which my father had bought him together with my brother only to come back and claim my share.*”

In his further affidavit of 24th June, 2015 the applicant has denied having been compensated by their father as alleged by the Respondent (paragraph 4 of the further affidavit.)

Furthermore, the applicant has alleged that the Respondent not only swindled him of his 1 acre share of the estate but he also swindled their late deceased brother Njiru Ileri of his share of 1 acre. In this regard, the applicant stated “*.....the Petitioner herein did not only swindle me my share of 1 acre but he also swindled my deceased brother Njiru Ileri his share of 1 acre a matter which Gladys Igandu Njiru the widow of Njiru Ileri took to the District Land Tribunal being case No. 56/2005 and the said dispute was heard and the award adopted as judgement of the court in the SPMC Award No. 12 of 2006 and the court ordered I be given 1 acre, Gladys Njiru 1 acre and the Petitioner 2.12 acres. (Annexed and marked as MW – 2 is a copy of the decree of the said award)”.*

In their submissions, counsel for the applicant has submitted that their father did not purchase land parcel No. Kyeni/Kigumo/2056 as compensation for the applicant, which the Respondent alleges that he took into account in distributing the estate. Counsel has further submitted that the respondent has misled the court in not disclosing that 0.478 Ha had been taken up by the Embu – Meru Road during the lifetime of the deceased. This portion ought to have been carved out before the distribution of the estate as it was a liability to the estate.

In their submissions counsel for the Respondent has in part submitted that the applicant had been given the land by their brother Njiru Ileri being land parcel No. Kyeni/Mufu/2056 as compensation.

Findings:

I have considered the affidavit evidence, the certificate of confirmation of grant and the related magisterial court ruling together with the decree arising out of the Land Disputes Tribunal award.

I find that there is serious conflict in the affidavit evidence of the applicant and that of the respondent as to whether land parcel No. Kyeni/Mufu/2056 was given to the applicant as compensation by their late father or by their late brother, Njiru Ileri.

Furthermore, it is this compensation that the Respondent says he took into account in distributing the estate, a matter that is also denied by the applicant.

In addition to the foregoing, there are serious allegations of fraud by the applicant, which he says have been committed by the Respondent in distributing the estate. For instance, the applicant alleges that the Respondent caused part of the estate to be registered in the name of their late father, contrary to the certificate of confirmation of the grant issued by the court.

In the light of the affidavit evidence of both parties, I have come to the conclusion that the applicant has

made out a case for the grant of his application in prayer 1 of the chamber summons, which I hereby grant. I make no finding in respect of prayer 2, 3 and 4 at this stage, since they depend on the outcome of the main enquiry, which will be conducted later.

In the light of the foregoing considerations, I direct that oral evidence be produced to resolve the conflict in the evidence of the parties including the allegations of fraud.

Costs of this application will be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this.. **26th**.....day of October, **.2015**

In the presence of counsel for the parties.

J.M. BWONWONGA

JUDGE

26.10.15