



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

SUCCESSION CAUSE 416 OF 2011

SILVANO KINYUA MWATHE PETITIONER

VERSUS

NICETA WEVETI NJERU1ST RESPONDENT

PATRICK NGUNGI MWATHE2ND RESPONDENT

R U L I N G

The Applicant a beneficiary in the estate of Jacob mwahe Mutavo (deceased) has filed this application under Rule 59 & 73 of the Probate and Administration Rules for orders that;

- a)A temporary injunction to issue restraining any interference, transfer, alienating with land parcel No.Gaturi/Nembure/2574 and Gaturi/Nembure/2575 the subject of this application.
- b)The Grant confirmed on 30/4/1998 be rectified so as to reflect and state that the property of the deceased ought to be shared equally/proportionately between the houses.
- c)The property described as Gaturi/Nembure/2575 be merged and shared equally between the 1st and 2nd house.

The grounds are in the body of the application. There is also an affidavit sworn by Silvano Kinyua Mwahe on 21/9/2011.

Mr. Eddie Njiru for the 1st Respondent filed grounds of opposition which are;

- a)The 2nd Respondent is deceased and has not been substituted.
- b)The Law of Succession Act does not allow the filing of an application under the Civil Procedure Act.
- c)The Applicant ought to have filed for rectification of grant.
- d)Application instituted 13 years after issue of grant. There was no protest by the 2nd house before confirmation of grant.

Mr. Mungai for the Applicant in his submissions says when the estate was distributed the Applicant was a minor. He has realized the injustices to the 2nd house.

I have read the entire record plus the affidavits, grounds of opposition and the Applicant's submissions very keenly.

The origin of this is the estate of Jacob wathe Mutavo. He left 2 widows namely Janet Muthoni Njeru (2nd house) and Niceta Weveti Njeru (1st House). The administrator of the estate was Patrick Ngungi Mwathe. He was a son of the deceased.

On 30/4/1998 the grant was confirmed in terms of the schedule annexed. On this date the two widows were present and ably represented their children. The schedule is dated 14/4/1998. From it I can see that there was another piece of land No.1678 which went to Janet Muthoni wholly (2nd House). So in essence the 2nd house got two whole shares i.e. No.1678 and 2575 while the 1st house only got one whole share No.2574. The 1st house is not complaining. The reason why the Applicant is crying foul is that land No.2574 measures 1.2 hectares while No.2575 measures 0.9 hectares. The difference between them is 0.24 hectares!

The deceased died in 1991 and so the Law of Succession applies to his estate. He was a polygamist. Section 40 of the Act provides for the distribution of such estate;

“In the first instance, it shall be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children”.

So besides the number of houses, the number of children is also considered.

All that the Applicant is asking for is equal distribution. Section 40 of the Act does not mention anything about equal distribution. There must have been a basis for the distribution the way it was done at that time. The record does not show how many children were in each house. Neither has the Applicant shown that. The Applicant may have been a minor but he was well represented by his mother. Coming up to revive such an old matter for no apparent reason is an abuse of the due process of the court.

Secondly the 2nd Respondent (Administrator) is deceased. He has not been substituted. The Applicant is not an administrator and so has no locus standi to file anything on behalf of the estate of the late Jacob Mwathe Mutavo.

I find the application to have no merit. I dismiss it with costs.

SIGNED AND DELIVERED AT EMBU THIS 10th DAY OF MAY 2012

**H.I. ONG'UDI
J U D G E**

In the presence of;

Njue – C/c