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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**Succession Cause 227 of 2005**

**IN THE MATTER OF THE ESTATE OF TATAYO WELAVISIA WASIA**

**(DECEASED)**

**MARGARET TATAYO ..... PETITIONER**

**V E R S U S**

**EVALINE NYANGAI PANDI ..... APPLICANT**

**R U L I N G**

In her application dated 20<sup>th</sup> March, 2009 the applicant is seeking orders to the effect that the petitioner be restrained from interfering with her occupation and use of a portion of a plot measuring 3 acres comprised in plot No. **SOUTH KABRAS/LUKUME/1814** pending the hearing and final disposal of the succession cause.

Mr. Amasakha, counsel for the applicant relied on the applicant's supporting affidavit sworn on 20<sup>th</sup> March, 2009. The applicant contends that she is one of the widows of the late **GABRIEL INDANA WASIA** and that she occupies part of plot No. **SOUTH KABRAS/LUKUME/1814** where she lives with her children. The deceased left her on that portion of land and the petitioner intends to lease that portion to strangers. The applicant contends that she has not remarried.

Mr. Kiveu, counsel for the petitioner opposed the application. Counsel relied on the petitioner's replying affidavit sworn on 21<sup>st</sup> July, 2009. The petitioner acknowledges that the applicant is a widow of the deceased but contends that she has remarried and has four children with one Samson Lishindu whom she has brought into the deceased's property. The petitioner would like the applicant to move out of the deceased's property and join her new husband as her rights have been extinguished by her re-marriage. The grant has not been confirmed.

From the record, the grant has not been confirmed. An application for confirmation of the grant dated 5<sup>th</sup> December, 2006 is still pending. From that application for confirmation of the grant, the petitioner's supporting affidavit include the applicant herein, Everlyn Nyangi Pandi, as one of the beneficiaries. The petitioner concedes that the applicant had children with the deceased and contends that she has no problem with the applicant's children.

Since the estate has not been distributed, the petitioner should not determine who is a proper beneficiary at this time. Further, the applicant's children have a right to live with their mother on their share of the estate should it be established that the applicant has remarried. Other than plot No. **SOUTH KABRAS/LUKUME/1814**, the deceased left plot No. **SOUTH KABRAS/LUKUME/1811** and **1813**. Plot **1814** measures **4.74** Hectares, Plot **1813** measures **1.19** Hectares while Plot No. **1811** is **3.47** Hectares.

I do find that the petitioner has no reason to evict the applicant from plot 1814 whether the applicant has remarried or not. The petitioner is hereby restrained from interfering with the applicant's occupation and use of a portion measuring three acres or thereabout comprised in plot No. number **SOUTH/KABRAS/LUKUME/1814** pending the hearing and final disposal of this cause. There shall be no order as to costs.

*Delivered, Dated and Signed at Kakamega this 26<sup>th</sup> day of November, 2009*

**SAID J. CHITEMBWE**  
**J U D G E**