



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Succession Cause 149 of 2004

IN THE MATTER OF THE ESTATE OF NGARUNI MWITARI (DECEASED)

ZAKAYO GITIRAPETITIONER

VERSUS

ANESTELLA MUTHONI JOHNPROTESTOR

CONSTANTINE MUTHAMIARESPONDENT

RULING

On 7th October, 2002 the petitioner in this cause who is the applicant in this application (applicant) and the person named in the Chamber Summons under reference as respondent, Constantine Muthamia entered into an agreement in which the former agreed to sell to the latter 1 acre of his entitlement out of his late father's land, Igoji/Kianjogu 523. It was a term of that agreement half (Kshs.50,000/=) of the purchase price (Kshs.100,000/-) would be paid on execution of the agreement and the balance to be paid once a succession cause in respect of the estate of the applicant's father is filed, grant issued, land subdivided and appropriate portion transferred to the respondent. Subsequently on 27.2.2003 the applicant filed this cause and on 1.10.2003 a grant issued to him.

Meanwhile supplementary agreement was entered into where the applicant acknowledged receipt of further payment of Kshs.78,260/= as part payment of the 1 acre in question leaving a balance of Kshs.21,740/=, which parties agreed to be paid on finalization of the said Succession Cause and transfer of the land to the respondent. It was also agreed that the respondent would take possession after executing this last agreement.

On 17th October, 2005 the applicant applied to have the grant confirmed. In the application he proposed the distribution of land parcel No.Igoji/Kianjogu/538 as follows;

- Constantine Muthamia(Respondent) – 1 acre
- Japheth Kimathi Irambu – 1 acre
- Anastella Muthoni John – 2.70 acres
- Zakayo Gitiira (applicant) - 0.70 acres

While the application for confirmation of the grant was pending one of the beneficiaries, Anastella

Muthoni John, described as a daughter in law to the deceased filed an affidavit of protest to confirmation of the grant on the ground that the proposed distribution of the deceased's estate includes two strangers, the respondent being one of them.

That protest was considered by the court on 30th May, 2006 and it was ordered that No.Igoji/Kianjogu/523 measuring 5.5 acres be shared equally between the applicant and the protestor i.e 2.75 acres each. On that score the grant was confirmed.

It is averred that subsequent upon this confirmation, the respondent, on 23rd August, 2006 placed a caution on the suit land. It is this caution that the applicant, by this application is seeking to be lifted. He has argued that the caution has stalled the distribution of the land. That the contractual relationship created by the sale agreement did not create any rights or obligations in respect of the suit land.

The respondent on the other hand has stated in his replying affidavit that he moved to caution the suit land when the applicant refused to transfer the same to him in terms of agreements between them.

I have considered the application as well as submissions by counsel. The applicant and the respondent entered into an agreement in anticipation that the suit land would be allocated to the applicant after the conclusion of this succession cause, and that the applicant would transfer to him (the respondent) 1 acre. Towards this end the applicant filed this cause and indeed intended to have 1 acre given to the respondent but for the protestor who challenged the mode of distribution. To that extent the applicant cannot be accused of being dishonest, as claimed by counsel for the respondent. The terms of the two agreement are clear in clause 2 of the supplementary agreement which states;

“The balance of twenty one thousand seven hundred and forty (sic) shillings only Kshs.21,740/=) shall be paid on finalization of the said Succession Cause and transfer of the land to the purchaser “(emphasis added).

Similar provision was made in the first agreement, which provided,

“(ii) Fifty thousand shillings only (Kshs.50,000) shall be paid once a succession cause in respect of the estate of the deceased is filed, grant issued and the land sub-divided and the appropriate portion transferred to the purchaser”.

It is clear from the intention of the parties that the transaction would be concluded once the succession cause was finalized.

The succession cause has now been concluded. The applicant is unable to carry out the obligation in the above clause because he cannot engage surveyors or sub-divide the suit land so that he can have his entitlement of 2.75 acres for which the respondent's 1 acre can be carved out, due to the caution. I find that the respondent has not conducted himself properly in placing a caution on the entire suit land which does not belong to the applicant alone. That caution has affected the protestor's right although she is not privy to the two agreements. The respondent has his remedy elsewhere should the applicant fail to transfer to him the 1 acre. For now, he has acted prematurely.

In the result I allow this application with costs and order that the caution placed on the suit property on 23rd August, 2006 be lifted forthwith.

DATED AND DELIVERED AT MERU THIS 18th DAY OF May, 2007

W. OUKO

JUDGE