In re Estate of Adriano Welikhe Muliali (Deceased) (Succession Cause 153 of 2011) [2024] KEHC 10681 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEHC 10681 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

SUCCESSION CAUSE 153 OF 2011

REA OUGO, J

JULY 24, 2024

IN THE MATTER OF ESTATE OF ADRIANO WELIKHE MULIALI (DECEASED)

BETWEEN

LUKAS WAMALWA WELIKHE ..... PETITIONER

AND

EUNICE NASIMIYU MUMARAKI ..... OBJECTOR

RULING

1. In a Chamber Summons dated the 21st March 2024 brought under section 47 of the *Law of Succession Act* and Rule 73 of the *probate and administration* 1st petitioner seeks the following orders;

   i. An order of inhibition against any dealing on L. R. No. East Bukusu / East Sang'alo/4720.

   ii. That the regional surveyor western be ordered to visit the original L.R. E. Busuku/East Sang'alo/50 and determine its acreage and a report be filed in this court

   iii. Costs be provided for.

2. The application is supported by the affidavit of Lucas Wamalwa Welikhe, the applicant, dated 21st March 2024. The applicant avers that on the 29th May 2020, this court confirmed a grant through its judgment and he got 2 acres and the 2nd petitioner and her daughter were to get joint 3.4 acres. The Bungoma County surveyor misled the court to the effect that L.R. No. E. Bukusu/ E. Sang'alo/50 is less than 5.4 acres. He was not present when the re-survey was done. To the best of his knowledge L.R. E. Bukusu/E. Sang'alo /50 is 5.4 acres. The basing on the foregoing this court rectified the grant issued on 22.3.2023. If indeed it's true that the suit land is less than 5.4 acres then the ratio of reduction to each party is discriminatory orchestrated by the Bungoma County Surveyor and for fairness his application be allowed. The respondent and her daughter have already sold the new title L.R. No. E. Bukusu/E. Sang'alo /4720 to one Saul Wekesa. He has conducted the re-survey using a private surveyor and the

land L.R. No. E. Bukusu/ E. Sang'alo /50 is 2.04 acres. The respondent will not suffer any harm if the orders sought are granted.

3. In a replying affidavit dated 3rd April 2024 Eunice Nasimiyu Mumaraki depones as follows; the application is an afterthought and an abuse of the court process. It is not true that the surveyor misled the court in the report very alive that the land on confirmation grant was 5.4 acres but on the ground the acreage was less by 1.81Ha/4.47acres. The said findings are captured in the confirmed grant tally with the copy of the search. After the confirmation of the grant, it was discovered after visiting the ground that the land was less than what was on the search. Her advocate on record made an application to rectify the confirmed grant to tally with what was on the ground. The said application was duly served upon the applicant's advocates and affidavit of service was duly filed in court. The applicant after amendment of the confirmation grant was served with the necessary papers to facilitate the transfer of the respondents share. It is true that they sold their share and bought land elsewhere to avoid the squabbles with the applicant. Looking at the county surveyor's report it is clear that the same was issued on the 20.01.2023 which report was available to the applicant all this time and even though the application same was filed in court for amendment of the confirmed grant the applicant never challenged it till March 2024 which is an afterthought and an abuse of the due court process. The applicant was well aware of what was happening and could not turn around and say that he was not present. The applicant cannot deal with land parcel No. E. Bukusu/E. Sang'alo/ 4720 as the same is registered in another person's name who is not a party to this case.

4. The applicant filed a supplementary affidavit in which he avers the contents of the respondent is full of falsehood as he is aware that the survey was done on the suit land. The report by the county surveyor was manufactured so that he could get less land contrary to the certificate of confirmation. He was informed by Wamalwa R advocate that he was not served with any application to rectify the confirmed grant. His advocate is email address is robawamalwa4@gmail.com and not emmanuelwanyonyiadvocate@gmail.com. The truth will be established only after the western region surveyor was ordered to re-survey the original LR No. E. Bukusu/ E. Sang'alo/50. He was not aware of any report by the county surveyor and that is why he stayed till March 2024 when lodged his complaint and that there would be no harm the respondent will suffer if his application is allowed.

Analysis And Determination

5. The application was canvassed by way of oral submissions. Mr. R Wamalwa for the applicant reiterated what was deposed in the applicant's supporting affidavit. He averred further that the respondent is out to hide the facts of the case to avoid a re-survey of the land parcel no. 4720,that the report by the Bungoma County Surveyor was made in bad faith and that the applicant seeks that the application be allowed.

6. The applicant is alleging that the report that was tendered in court on the acreage on L.R. East Bukusu / East Sang'alo /50 is wrong and the surveyor misled the court. The acreage was thus reduced to both parties. The applicant also claims that he was not present during the said survey. I note that the report dated 20.01.2023 does not include his name. He was not a party to the survey that was done on the 18th of January 2023. Nor was his counsel served with the application that proposed the reduction of acreage to each beneficiary. Matters involving land are very emotive. This matter needs to be sorted out so that the parties can confirm the acreage on the ground. In my view, no prejudice will be caused to the respondent in this matter if the order of re-survey is granted. This court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. I am persuaded that the orders sought by the applicant are necessary. I therefore make the following order; the Regional Surveyor Western will visit the original land L.R. No. East Bukusu /

East Sang'alo/50 and determine the acreage and file a report in court within 30 days. The costs of the surveyor shall be paid by the applicant. Costs of this applicant shall be in the cause.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF JULY 2024.

R.OUGO

JUDGE

In the presence of:

Applicant - Absent

Miss Ayieko h/b Mr.S.Wamalwa -For the Respondents

Wilkister/ Diana - C/A