



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 40 OF 2014

IN THE MATTER OF THE ESTATE OF.....ALPHONCE MUSINE

AMARE A.K.A ALPHONZE MUSINE AMARE.....DECEASED

AND

FLORENCE MAKUTSA MUSINE.....PETITIONER/RESPONDENT

AND

BERNADETTE MMBWANI MUTONGOI.....PROTESTOR/APPLICANT

R U L I N G

1. The protestor herein has filed an affidavit of protest against the petitioner's application for confirmation of grant dated 8th September 2016. The grounds of the protest are that the protestor owns 0.36 Ha of Isukha/Shirere/2659 that she acquired through buying. Further that the identification of shares of all persons beneficially entitled to the estate have not been properly ascertained and determined.

2. The application is supported by the affidavit of the protestor in which she depones that on or about the 1st May 1990 the deceased whose estate is the subject of these proceedings sold her a portion of his estate. That she took immediate possession of the purchased portion which she has been in occupation and utilization for 25 years. That on or about 8th March 1998, she purchased an additional portion of the said land from one **Evans Mukoyani Karani** who had bought the same from the deceased. That she also entered into occupation. She annexed to her affidavit copies of agreements of purchase of the two portions. The protestor contends that the size of the two portions of land is 0.36 Ha. She seeks that the grant be confirmed to that effect.

3. The petitioner on the other hand has proposed to distribute the estate as follows:

1. Petitioner (Florence Makutsa Musine) – 1.01 Ha

2. Protestor (Bernadette Mmbwani Mutongoi) - 0.08 Ha.

4. From the above it is clear that the dispute between the parties is the size of land that the protestor is entitled to, with the petitioner saying that her entitlement is 0.08 Ha while the protestor says it is 0.36 Ha.

5. In his submissions the advocate for the petitioner, **Mr. Mukavale** stated that the protestor bought and has been in occupation of 0.081 Ha out of the property forming the estate of the deceased. The advocate submitted that there is no evidence that the protestor bought 0.36 ha.

6. The copies of the agreements annexed to the protestor's affidavit indicates that the portion she bought from the deceased in 1990 measured 20 x 60 and that the one that she bought from Evans in 1998 measured 60 steps by 30 steps. It is not clear from the evidence whether what the protestor is occupying on the ground measures to what she alleges to have bought. It is not clear whether what she occupies measures 0.08 Ha or 0.36 Ha. No report of a surveyor was filed to ascertain this.

7. In view of the above, it is the considered view of this court that before the determination of the issues raised herein there is need for the parties to send a surveyor to the land in issue to ascertain the following:

1) The total hectares that the protestor is occupying on the ground.

2) Whether what the protestor is occupying measures 0.08 Ha or 0.36 Ha.

3) Whether what the protestor is occupying is equivalent to what she alleges to have bought i.e. 60 x 20 and 60 steps by 30 steps.

8. In the foregoing, the determination of this matter is stayed pending the filing of a report by a surveyor on the above stated issues. Both parties to meet the costs of the survey. The report of the surveyor to be filed with the court within three months from the date of delivery of this ruling. Once the report is filed parties to take a mention date at the registry.

Delivered, dated and in open court at Kakamega this 28th day of March, 2019.

J.NJAGI

JUDGE

In the presence of:

Mr. Indimuli Holding Brief Mukavale.....for petitioner

Parties

Petitionerpresent

Protestorpresent

Court Assistant.....George