



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

SUCCESSION CAUSE NO. 29 OF 2017

IN THE MATTER OF THE ESTATE OF THE LATE EZRA KIPNGENG ARAP MBOGA

REBECCA JELAGAT MINING.....PETITIONER/APPLICANT

VERSUS

DAVID MINING.....1ST RESPONDENT

HESBON NGENG.....2ND RESPONDENT

RULING

The applicant filed the present application under certificate of urgency seeking that the applicant be appointed as co-administrator of the estate and all other beneficiaries be allowed to utilize the land parcel no. KAPSARET/KAPSARET BLOCK 9(KIPKAREN)/8 pending the hearing of the case. The applicants also sought an injunction against the respondents, restraining them from interfering with the aforementioned land parcel. Further, that the respondents be compelled to give account of the proceeds of the estate of the deceased from the date of his death.

The application is based on the grounds that the respondents want to disinherit the applicants and that the respondents are meddling with the estate by disposing the land to strangers to the detriment of the applicant.

APPLICANT'S CASE

The applicant submitted that the respondents are children of the deceased but could not agree on how to live peacefully on land they claim under inheritance. She referred to the case of *Re estate of M'mukira Mwaganu (deceased) 2018 eKLR* where the court made orders pursuant to *Section 47 and rule 73 of the Law of Succession Act and Probate Rules* that the parties equally utilize the portion of land pending distribution.

The applicant submitted that upon the death of the deceased she petitioned for letters of administration intestate and the respondents had no interest to institute succession proceedings for ulterior motives.

The applicant further submitted that the respondents were intermeddling with the estate. That the respondents relied on falsehoods that the land had been distributed by the deceased in his lifetime. The respondents have not given reasons as to why they are opposed to her appointment as a co-administrator. They have not provided minutes to show how the property was allegedly subdivided. Further, that they have mismanaged the property and hence cannot render the accounts.

The applicant contended that under *Section 80(2) of the Law of Succession Act*, the administrators are bound in law to account for all the income the assets have generated since the demise of the deceased. As trustees they must account for every single cent that comes into their hands as they are in a fiduciary position. By virtue of *Section 76(d)(iii) of the Act* it is a sufficient ground for a grant to be revoked.

The applicant submitted that she was married and her marriage broke down hence her return home to the deceased who allocated her 20 acres of the suit land. After his demise the respondents chased her away on account that she is a woman. She further submitted that the respondents discriminated against her as she is a woman which is against *Article 27 of the Constitution of Kenya*. She relied on *Section 29 of the Law of Succession Act* which in recognizing children of the deceased do not classify them as sons, daughters, married and unmarried. She further relied on *Section 38 of the Law of Succession Act* on equal division of the estate among surviving children of the deceased. She relied on the case of *Esther Wanjiku Achatha v Timothy Gitura & 4 others (2015) eKLR* amongst other authorities.

RESPONDENTS' CASE

The respondent filed a replying affidavit and submissions in opposition to the application. They also filed a cross-petition for letters of administration orally testate.

The respondents submitted that the family met and resolved that the respondents be made administrators of the estate. He attached minutes of the family meeting. The deceased distributed his estate amongst the beneficiaries as per the minutes and he had distributed them vide an oral will. The beneficiaries settled on their respective portions way before the demise of the deceased. It is not true that the land is 160 acres. It measures 17.74Ha as per the title deed annexed to the replying affidavit.

The respondents relied on *Section 56* of the *Law of Succession Act* in stating that it is fair and in the interest of justice that the respondents be made administrators of the deceased's estate.

There has been no cogent evidence of intermeddling and it is a criminal offence which the applicant should have reported to the police. It is clear that the deceased had already settled the beneficiaries in their respective pieces of land and therefore it would be unreasonable for the court to restrain them from utilizing their respective portions of land.

Prayer (d) is premature as the respondents can only account for the proceedings after they have been appointed as administrators of the estate pursuant to *Section 56(1)* as read together with *Section 83* of the *Law of Succession Act*. There is nothing to be accounted for as each of the family members is utilizing and occupying his/her respective portion of land.

ISSUES FOR DETERMINATION

- a) Whether the Applicant can be appointed as a co-administrator
- b) Whether the Applicant should be granted an injunction against the respondents
- c) Whether there has been intermeddling
- d) Whether the respondents should give accounts of the proceeds of the estate.

WHETHER THE APPLICANT CAN BE APPOINTED AS A CO- ADMINISTRATOR

Section 67 of the *Law of Succession Act* provides;

“No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.”

There have been objections to the petition and a cross-petition filed by the objectors. The cross-petition should be determined before any grants of representation are issued to any parties. It therefore follows that the applicant cannot be appointed as a co-administrator at this juncture.

WHETHER THERE HAS BEEN INTERMEDDLING

Section 45 of the *Succession Act* provides;

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

In the case of *Gitau and 2 others – Vs – Wandai & 5 others (1989) KLR 23, Tanui J*, as he then was stated as follows: -

“According to Section 45 of The Law of Succession Act, Cap.160 intermeddling with the property of a deceased man consists of taking possession, disposing or otherwise intermeddling with any free property.”

The applicant has not provided any proof of intermeddling. There are no sale agreements or any other pieces of evidence to indeed show that there has been an attempt to intermeddle.

WHETHER THE RESPONDENTS SHOULD GIVE ACCOUNTS OF THE PROCEEDS OF THE ESTATE

Section 83 of the *Law of Succession Act* provides the duties of personal representatives of the estate. It provides;

Personal representatives shall have the following duties—

- a) ...
- b) ...

c) ...

d) ...

e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

There have been no administrators appointed therefore the respondents are not in a position to give accounts of the proceeds of the estate at this point in time. Further, the prayer that the applicant be appointed administrator and beneficiaries be allowed to use the land pending the determination of the cause is not merited as the other beneficiaries are already in occupation of the land and do not oppose the current state of affairs. The best the court can do for now is to order that the status quo be maintained. Distribution of the estate will be done upon determination of the cross-petition and the petition herein.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 15th day of May, 2019.

In the absence of:-

Mr. Kagunza for petitioner

Mr. Nabasenge for 1st Respondent and 2nd Respondent

And in the presence of Ms. Sarah - Court clerk