



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

SUCCESSION CAUSE NO.109 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE TAPTELE W/O NYIGEI (DECEASED)

JOHN BUSIENEI.....PETITIONER/RESPONDENT

VERSUS

ALFONSE KIPTRUTO.....1ST RESPONDENT/APPLICANT

MUSA KIPKOSKEL.....2ND RESPONDENT/APPLICANT

KIPLANGAT SIGILAI.....3RD RESPONDENT/APPLICANT

RULING

1. Before me is an application by way of Chamber Summons dated 21st December 2018 brought under Rule 73 of the Probate and Administration Rules, section 47, 1A, 1B & 3A of the Civil Procedure Act (Cap.21) and Order 51 of the Civil Procedure Rules seeking that-

1. This honourable court be pleased to direct or order the Officer Commanding Police Division (OCPD), Sosiot Police Station to offer security to the District Land Surveyor one Mr. Isaac Kibet in re-surveying land parcel No.LR. Kericho/Kabianga/932 as per the court ruling dated 22nd October 2018.

2. That an injunction does issue against the petitioner and anyone claiming through him from evicting the respondents/applicants herein denying them the right to pluck and/or pick tea leaves on LR Kericho/Kabinaga/932 until this application is heard and determined.

3. That such further necessary directions be given by the honourable court as justice may require.

4. That costs of the application be provided for.

2. The grounds of the application are that there was concealing of information to the surveyor in executing the court order dated 22nd October 2018, and that on the date the surveyor visited the parcel of land, his activities were influenced by the petitioner to the detriment of the respondents/applicants.

3. The application was filed with a supporting affidavit sworn by Alfonse Kipruto the 1st respondent/applicant on 21st December 2018, in which it was deponed that on 10th December 2018, the surveyor visited the scene pursuant to the court ruling of 22nd October 2018 accompanied by police officers and proceeded to take measurements of the entire parcel to ascertain the exact portion of each beneficiary, but was hell bent on ensuring the survey was unfair and improper as the petitioner together with his siblings persuaded the surveyor to subdivide the applicant's portion in the middle, right in the middle in two parts; and the petitioner and his siblings took the entire tea tree plantation of the applicants/respondents though he invested heavily thereon.

4. That the applicants/respondents were not involved in the succession proceedings, yet the determination affected their livelihood, and the petitioner did not seek their consent at the time of applying for grant.

5. The application was opposed through a replying affidavit sworn on 15th May 2019 by John Busienei the petitioner who deponed that the applicants were aware of the succession proceedings and caused a caution to be registered against land parcel Kericho/Kabianga/932 to prevent distribution of the land; and that Grace Chepkwony filed Kericho Environment Land Case No.9 of 2015 which was heard and finalized.

6. It is also deponed that the 1st applicant occupied more than his entitlement, that is 1.25 Ha instead of 0.525 Ha, and that the applicants, were suggesting a survey that would deny beneficiaries access to the road; and that before the survey was done, the applicant was offered by the surveyor to elect the portion he would want his share and he preferred the homestead rather than tea bushes area. That the application had been overtaken by events as separate plots Kericho/Kabianga/5790, 5791, 5792 and 5793 had already been created. A mutation form was annexed to the affidavit.

7. At the hearing of the application, Mr. Motanya appeared for the applicants. Mr. Nyaingiri said he had been appointed to act for the 1st and 2nd applicants. Ms Koech appeared for the petitioners.

8. Mr. Motanya submitted that this was a request for re-survey, and protection from eviction and for the applicants not to be prevented from plucking tea. According to counsel the requests were necessitated as the surveyor did not take into consideration that the applicants had planted tea, which the surveyor hived off.

9. Counsel submitted that if re-survey was not done, then his client would not be protected in his homestead and his tea developments. Counsel suggested that re-survey be done in the presence of counsel.

10. Mr. Nyaingiri for 2nd and 3rd applicants on his part submitted that the survey report following the court orders of 22/10/2018 was not attached. Counsel submitted that under paragraph 4 of the replying affidavit, it was clear that the survey was conducted without the participation of the respondents/applicants. There was thus need for the court to protect the applicants.

11. Ms. Koech for the petitioner submitted that such application should have proceeded by way of oral evidence, as the parties complaining occupied more land than their entitlement. Counsel submitted that the court had ordered survey be supervised by police, and new parcels had already curved out. According to counsel, Grace will not be able to access the road, if re-survey suggested by the applicants was done.

12. I have considered the application and submissions of all counsel. The issues raised herein are factual in nature, but counsel elected to make oral submissions in the application.

13. Way back on 30th July 2012 the court confirmed the grant and distribution of assets was that Sigilai Chepkwony gets 1.05 Ha; Kipkosgei arap Chepkwony 1.05 Ha; Paul Kirui 1.05 Ha; Grace Chepkwony 0.525 Ha; and Michael Bore 0.525 Ha. No challenge has been alleged on this.

14. Subsequently, on 22nd October 2018, the court ordered that-

“the OCS Sosit Police Station be and is hereby directed to provide security to the applicant/petitioner for the purposes of enforcing peace during the survey and sub-division exercise to be carried out on LR Kericho/Kabianga/932 in order that the petitioner may distribute the estate of the deceased.”

15. From the above orders of the court, it is clear to me that there was resistance for peaceful survey, that is why after 6 years from confirmation of grant the court ordered that survey be done under police protection.

16. The survey which was done under police supervision was in my view done following a court order-under the distribution just as stated in the confirmed grant. Such cannot be faulted unless it is at variance with the confirmation order.

17. In my view, the substantive proceedings in a succession cause are concluded once the grant is confirmed. What remains is the execution or implementation of the orders of the court which are reflected in the confirmed grant.

18. All special considerations like how to deal with tea plants have to be dealt with and reflected in the ruling or decision in the confirmation stage. The confirmed grant does not reflect any special considerations for tea plants, and same cannot be raised in a subsequent application.

19. The application has no merits and the same is hereby dismissed. I make no orders as to costs, in this family matter.

Dated this 18th day of June 2019.

George Dulu

JUDGE