



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 953 OF 2007

IN THE MATTER OF THE ESTATE OF REUBEN WILLIAM OTUTU – DECEASED

ESERES NAFWA OTUTU.....PETITIONER/RESPONDENT

VERSUS

JOSHUA AMINO OTUTU.....OBJECTOR/APPLICANT

R U L I N G

1. The applicant herein, **JOSHUA AMINO OTUTU** , has filed an application dated 9th February, 2017 seeking for orders that _

1. Spent

2. Spent

3. THAT there be an order of temporary injunction against the petitioner either in person or through her agents, servants, relatives or any other person working under her instructions restraining her from evicting the applicant from the portion of land he occupies , pending the hearing and determination of this dispute.

4. THAT the Honourable Court be pleased to review and or vary the distribution of the deceased's estate and the applicant be allowed to continue occupying the portion of land where his homestead stands and where he has been utilizing /or farming.

5. That costs hereof be provided for

2. The application is based on grounds on the face thereof and is supported by the affidavit of the applicant. The applicant depones in his affidavit that he is one of the beneficiaries of the estate of his late father, **Reuben Wiliam Otutu**. That a grant of letters of confirmation in the matter was confirmed and he was given 1.23 hectares. That he has been occupying and utilizing his share of the deceased's estate. That he has a homestead on the land where he grows food crops including sugarcane. That he has always believed that he was given what he is occupying. That the petitioner herein has been surveying the land with a view of evicting him. That the petitioner has sold part of the estate to people who want to evict him.

3. That the petitioner through her agents has even started destroying his sugar cane with a view to creating new boundaries and his home may be demolished any time. That he is the only beneficiary in actual occupation of the estate. That he stands to suffer great loss and damage should he be evicted. He is thereby seeking that the court reviews and or vary the distribution of the deceased's estate and he be allowed to continue occupying the portion of land where his homestead stands and where he has been utilizing/or farming.

4. The application was opposed by the petitioner in the matter, **Eseres Nafwa Otutu** through her replying affidavit sworn on the 10th March, 2017. The petitioner depones in the affidavit that the application is an abuse of the court process, lacks merit and is based on untrue allegations . That the applicant has not been in occupation of his share of the estate of the deceased and has instead refused to occupy his own share and insists on residing on the share that was left to the applicant as the widow of the deceased. That the applicant is residing on the portion allocated to the petitioner. That the applicant has not shown which parcel of land he resides on and if he is the owner thereof.

5. Further that pursuant to the certificate of confirmation of grant issued on 23rd January, 2012, the deceased's estate was sub divided, surveyed and beneficiaries issued with their title deeds. That despite the applicant having a title deed to his own share, he went ahead to occupy the petitioner's portion and built thereon. The petitioner denied that she has surveyed or sold the applicant's portion. She says that the applicant's portion remains intact. That the other beneficiaries are in occupation and use of their portions of the land and they would be greatly affected by a redistribution.

The petitioner annexed a photocopy of her title deed to her replying affidavit.

6. The advocates for the petitioner **M/s Amasakha & Co. Advocates** submitted that after the confirmation of grant, the estate of the deceased herein was surveyed and the estate distributed to the beneficiaries who now have title deeds. That the applicant is forcibly occupying land currently registered in the name of the petitioner. That since there is no application for revocation of grant orders of injunction will not serve any purpose.

7. The advocates for the applicant, **M/s Anziya & Co. Advocates** submitted that the applicant has made out a case for an injunction to be issued as he has demonstrated that he stands to lose his crops and homestead should the injunction not be granted. That he has also demonstrated that his protest has high chances of success.

8. The advocates submitted that there is a protest by the applicant dated 1st October, 2015 that is yet to be heard and determined by the court. That the petitioner moved and produced new titles on 23rd May, 2016 when there existed in record an affidavit of protest. That the affidavit of protest should be disposed of before any other step is undertaken in the case.

DETERMINATION

9. The advocates for the applicant stated in their submissions that there is an application of protest dated 1st October, 2015 that is still pending determination by the court. I have gone through the court file and I have not seen such an application. The grounds in support of the application dated 9th February 2017 also do not mention such an application. The submission is therefore not supported by the pleadings before the court.

10. The applicant admits that title deeds have been issued after the grant herein was confirmed by this court. He wants the court to revisit the distribution of the estate yet the estate has been distributed and title deeds issued. There is no application for cancellation of the title deeds that has been made to the court. There is no basis for the court issuing an order of injunction when there are title deeds in place that are not being challenged. Injunctive orders cannot issue in a vacuum.

11. Section 26(1) of the Land Registration Act 2012 states that :-

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon registration or by transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party, or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

As the title deeds are not being challenged the presumption is that they were lawfully acquired.

12. In the foregoing, the application dated 9th February 2017 has no merits. The same is dismissed with costs to the petitioner.

Delivered, Dated and Signed at Kakamega this 12th day of July, 2018

J.NJAGI

JUDGE

In the presence of :

Miss Mahani.....for petitioner/ respondent

N/A.....for objector/applicant

George.....court assistant

Parties:

Petitioner.....present

Applicant.....absent