



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 3 OF 2015

IN THE MATTER OF THE ESTATE OF WAITHAKA KITHAWA (DECEASED)

MUNYI WAITHAKA.....APPLICANT

VERSUS

EVANSON MUGO WAITHAKA.....PETITIONER/RESPONDENT

RULING

1. This is an application brought by chamber summons under sections 83, 94 and 95 (1) of the Law of Succession Act and under Rule 73 of the Probate and Administration Rules seeking an order to compel the petitioner/respondent to produce to the court a full and accurate account of the completed administration of the estate of the deceased and in particular land parcel No. Kyeni/Mufu/699. The applicant also seeks an order directing the Land Registrar to revert the suit land into the names of the deceased herein. The applicant also seeks an order to stop the Embu County Surveyor from sub-dividing the suit land. Finally, he also seeks an order to compel the petitioner to compensate the applicant for any loss that may be occasioned through the distribution of the estate of the deceased.
2. The application is based on the following grounds. First, that the suit land was to be shared between the petitioner who was to get 3.330 acres and the applicant was to get 1 acre. The second ground is that the petitioner had the suit land divided into three portions one for himself, another for the applicant and the remaining part was taken by Embu – Meru Road. The petitioner then proceeded to have himself registered as the owner of land parcel Kyeni/Mufu/3693 measuring 1.057 Ha and he then caused land parcel No. Kyeni/Mufu/3692 measuring 0.185 Ha to be registered in the name of their deceased father. Finally, the petitioner has refused and/or neglected to comply with the court's order of 27th May 1992.
3. The applicant's application is grounded in his supporting affidavit of 13th January 2015. In that affidavit, he has gone into the history of the confirmed grant which was issued on 3rd July 1989. He has also explained how the land was subdivided and distributed between the applicant and the respondent and the other portion being given to the Embu – Meru Road.
4. Counsel for the applicant submitted written submissions urging the court to find in favour of the applicant as set out in his grounds of opposition and the affidavit evidence.
5. The respondent filed a replying affidavit in which, he also explained the history of how the suit land was subdivided into three portions namely, one for the Embu – Meru Road and the two portions for themselves. In addition to his replying affidavit, his counsel filed written submissions in which she has set out the history of the suit land and how it was divided into three portions. According to counsel, there was a dispute in the manner in which the land was divided and that is why on 27th May 1992, the Resident Magistrate Court ruled that each party was to contribute a half share of the area occupied by the

Embu – Meru Road. In doing so, the court put into consideration the evidence of the applicant's brother namely the late Njiru Ireri and that of the two elders namely Njiru M'Riua and Njage Mwara.

6. Furthermore, according to counsel, the respondent refused to make any contributions to have the certificate of the confirmed grant implemented and that is why the respondent only completed the transaction in respect of his portion. There is the respondent's affidavit evidence which I believe that the applicant was compensated by being given another parcel of land.

7. The applicant was not satisfied with the confirmed grant in which he was to inherit an acre of the suit land with the respondent inheriting 3.30 acres. He then filed an application in the magisterial court at Embu in which he argued that he only ought to contribute a $\frac{1}{4}$ of the portion towards the road in question, since he was only inheriting 1 acre. The evidence of his late brother namely Njiru Ireri that the applicant had been given 2 acres in land parcel No. Kyeni/Kigumo/2056 was believed by that trial court. That court also believed the evidence that Munyi sold his 2 acres and that is why he was following to get a portion of the respondent's land. The ruling ordered the applicant and the respondent to contribute $\frac{1}{2}$ a share of the area which was to be taken by the Embu – Meru Road from their respective portions. The order was issued on 27th May 1992.

8. Furthermore, it seems that the applicant was not satisfied with the ruling of 27th May 1992. For this reason, he went further and filed another application effectively challenging the ruling of 27th May 1992. In a short ruling, that court dismissed his application and observed that the applicant had never been satisfied with the court's ruling of 27th May 1992, which ruling he had not challenged. And for that reason, the court dismissed his application while finding that he did not understand why the applicant was keeping the mutation forms. The last ruling in the matter was delivered in court on 7th July 1992.

9. In the light of the affidavit evidence and the rival submissions of both parties, I find the following to be the issues for determination. First, whether or not the respondent fully implemented the certificate of confirmation of grant issued to him on 3rd July 1989 in respect of the suit land Kyeni/Mufu/699. Second, whether or not the two rulings of the magisterial court affected the share of the applicant by virtue of a portion of the suit land being given to the Embu – Meru Road. The third issue is the effect of the ruling of 27th May 1992.

10. As regards the first issue I find that the respondent implemented the certificate of confirmation of grant in respect of his portion of land measuring 3.30 acres, while the portion of the applicant remained in the name of their deceased father. I find that the reason for this is that the applicant refused to contribute money to the implementation of the confirmed grant. I also find from the affidavit evidence that the applicant was compensated of his loss of part of the suit land by being given land elsewhere namely land parcel No. Kyeni/Mufu/2056.

11. As regards to the second issue, I find that the ruling of the magisterial court affected the share of the parcel of land that the applicant was to get out of the suit land. And that is why he was compensated elsewhere as I have already pointed out in the foregoing paragraphs. As regards the third issue, I find that the ruling of 27th May 1992 reduced the share of the applicant in respect of the suit land. Finally, I find that the applicant has not challenged the ruling that followed the certificate of confirmation of the grant. This ruling was conclusive of the issues in dispute between him and the respondent.

12. In the circumstances, I find that the application of the applicant is without merit and I hereby dismiss it with no order as to costs as both parties are members of the same family.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **5th** day of **JULY 2016**

In the presence of both Ms Muthoni for applicant and the respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

05.07.16