



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 309 OF 2009

IN THE MATTER OF THE ESTATE OF PAUL MMBANGO OPATI-DECEASED

PAUL LAZARUS DISI.....1ST OBJECTOR/APPLICANT

MORRIS MAJONI PAUL.....2ND OBJECTOR/APPLICANT

VERSUS

FRANCIS AMAALA PAUL.....1ST PETITIONER/RESPONDENT

MARGARET KHABAYA PAUL.....2ND PETITIONER/RESPONDENT

RULING

1. By the Chamber Summons dated 27/10/2014 brought pursuant to rule 73 of the Probate and Administration Rules the applicant seeks for orders:
 1. THAT the partition of Land Parcel No. Butsotso/Indangalasia/247 be canceled.
 2. THAT a fresh partition be carried out with the existing homes making the bench mark.
 3. Costs of this application be provided for.
2. The application is premised on the grounds that the partition as done did not consider the existing homesteads as the applicants homesteads have been hived off and fall within the Respondents portions of land and that as a result thereof, the applicants are threatened with eviction. The 2nd Objector/Applicant swore an affidavit dated 21/10/2014 in support of the application. He depones that grant of letters of administration intestate for the estate of the deceased herein was confirmed on the 27/09/2011 in his presence and to his understanding the estate Land Parcel No. Butsotso/Indangalasia/247 was to be partitioned by the existing boundaries created by the deceased as shown on the annexure marked "MMP1". He claims that the partitioning did not conform to the boundaries on the ground and was done maliciously with the sole purpose of hiving off the applicant's home. He also claims the applicants' homes have been hived off and given to other beneficiaries who have threatened to evict them and lastly that the Respondents have also caused the arrest of the 1st Applicant on allegations of trespass as shown on the charge sheet marked "MMP-2".
3. The application is unopposed. There is an affidavit of service confirming that the application was duly served.
4. When the matter came up for hearing on the 26/02/2015 the court expected Mr. Amasakha for the Petitioner/Respondents but he did not show up even at 2.30 p.m. The matter proceeded ex-parte with Mr. Nandwa submitting on behalf of the Objectors/Applicants. He submitted that the petitioner partitioned the property without regard to the homesteads where applicants have stayed

for over 30 years. He submitted further that though the confirmation did not point out the boundaries they are now seeking the indulgence/intervention of this court since the applicants had built their houses in accordance with the sharing out by the deceased and they are ready to cede any other part of their share so that they retain their homesteads.

5. Rule 73 which deals with the inherent powers of the court, provides:-

“Nothing in these rules shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

6. It has been held in a number of cases that the inherent powers of the court are resorted to where there are no clear provisions governing the matter in controversy. The point was made by Khamoni J. In the matter of the Estate of Erastus Njoroge Gitau (deceased) Nairobi High Court Succession Cause No. 1930 of 1997 to the effect that Rule 73 is to be used only in deserving cases where no specific provisions exist to deal with the situation in question and that it is not an omnibus provision which allows the court to entertain all manner of applications. That Rule 73 only relates to gaps in the Law of succession Act and the Probate and Administration Rules.

7. I have made mention of **Rule 73** since the application herein is brought pursuant to the said rule and there is no specific provision in the succession act that deals with the grant of the orders sought by the applicant herein. Thus this court will exercise its inherent powers to grant the orders sought because the applicants claim that they have lived in their respective parcels of land for over 30 years. The applicant's claim has not been contested. I therefore find that it would be prejudicial for the applicants to be evicted from the land where they have stayed for over 30 years and which they call home. Further the Respondent have not denied that they partitioned the suit land without regard to the applicant's homesteads. I find merit in the application the same is allowed with no orders as to costs. The petitioner shall therefore curve out the respective parcels afresh while taking into account, as much as possible the homes of all the beneficiaries herein. The applicants shall pay for a surveyor to be on site to assist the petitioner in curving out the respective parcels of land.

8. It is so ordered.

Delivered, dated and signed in open court at Kakamega this 12th day of March 2015

RUTH N. SITATI

JUDGE

In the presence of

Mr. Osango ffor Nandwa for Objectors

Mr. Amasakha (absent) but for Petitioners

Mr. F. Juma for Court Assistant