



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 89 OF 2011

(In the matter of the estate of JAMLICK NDWIGA NJERU Alias S. NDWIGA NJERU - Deceased)

MERGERY MARIGU NDWIGA.....APPLICANT/PETITIONER

VERSUS

FORTUNITUS MWANIKI NDWIGA & OTHERS.....RESPONDENT

R U L I N G

The application dated 29/01/2015 brought by Mergery Marigu Ndwiga the petitioner, seeks for several prayers. It is brought by the applicant in defence of her interests and those of her two sisters namely Ziporah Wanjira Ndwiga and Damaris Muthoni Ndwiga. The prayers may be summarized as follows:-

1. That the co-administrator Fortunatus Mwaniki Ndwiga and his brother and sister namely James Ileri Ndwiga and Margret Rwamba Ndwiga be restrained from evicting or interfering in anyway with the petitioner and the 2 others from occupying LR NO. GATURI/NEMBURE/579 until the hearing and determination of this succession cause.
2. That the said Fortunatus Mwaniki Ndwiga and James Ileri Ndwiga and their families be evicted from LR GATURI/NEMBURE/579 so as to move and occupy their land parcels LR GATURI/NEMBURE/580, 581 and 582 to facilitate the applicant and her two sisters Ziporah and Damaris settle on LR. 579.
3. That the co-administrator do vacate and deliver vacant possession of LR GATURI/NEMBURE/583 belonging to Peter Muriuki Ndwiga to give way to the applicant to develop it pending the return of Peter M. Ndwiga who disappeared from home.
4. That the co-administrator be ordered to account for all income received and earned from the deceased's pension scheme, tea produce and dividends from plot No. 25, Kianjokoma from the date of death of the deceased for the distribution to the beneficiaries.
5. That Kenya Tea Development Authority, Kianjokoma factory be ordered to register the applicant and her two sisters as members in order to deliver tea produce from LR GATURI/NEMBURE/579.
6. THAT OCS Manyatta police station be ordered to enforce the orders of the court.

The grounds supporting this application are that the respondents have forcefully chased away the applicant and her 2 sisters from deceased's land LR GATURI/NEMBURE/579. The act of eviction by the

respondents is causing hardship, anguish, puberty to the applicants and their families. There is therefore an urgent need for an injunction to restrain the respondents from their actions pending the determination of this cause.

It is argued further that the deceased had shared out his land to his five sons during his lifetime as follows;

- (a) Gaturi/Nembure/586 - 4 acres – Fortunatus Mwaniki
- (b) Gaturi/Nembure/581 – 4 acres – James Ileri Ndwiga
- (c) Gaturi/Nembure/582 – 4 acres - Elias Murathi (deceased)
- (d) Gaturi/Nembure/583 – 4 acres – Paul Nthiga (deceased)

The only two parcels in the name of the deceased as LR. GATURI/NEMBURE/579 and 583 to which only the daughters without land are entitled to inherit. The applicant and her two sisters should share LR. 579 and it is important that they take over occupation of the land and tea crop pending distribution. Parcel No. 583 belonged to one of the deceased's sons one who died after the land was bequeathed to him by his surviving son Peter Ndwiga Murathi who disappeared from home. The applicant and her sisters should be given vacant possession by the respondent to hold and develop it till Peter Murathi comes back home.

The application was opposed by the respondent through the affidavit of Fortunatus Ndwiga. He deponed that it is not true that deceased shared out his land to the his sons during his lifetime. The parcels registered in the names of the surviving sons belong to them and did not originate from the deceased. That the deceased has only 2 parcels of land in his names LR GATURI/NEMBURE/579 and 583 measuring 7.8 acres and 4 acres respectively. LR. No. 579 was charged with Kenya Commercial Bank over 30 years ago. The deceased has only one share in Plot No. 25 which he bought together with other people. It is denied that there is any monthly dividend or pension as alleged by the applicant. He denies chasing away or evicting the applicant and her sisters from LR No. 579.

The applicant has included in her application her proposal for distribution of LR GATURI/NEMBURE/579 between five daughters of the deceased. It is important to note that the court is not hearing the case for distribution of the land but an application seeking injunctive and eviction order against the respondents. However, I think the inclusion was intended to lay a basis for granting the eviction orders of the sons of the deceased from LR No. 579.

Distribution proceedings are yet to be heard in order to determine the shares of the beneficiaries. At this juncture, it would be inappropriate for this court to encourage or facilitate eviction of any of the beneficiaries before distribution is done. It would cause inconveniences to the affected parties and it is likely that distribution may change the location of the parties when it is finally done.

This cause was filled by the applicant while the respondent Fortunatus Mwaniki Ndwiga came in as the objector. On 02/07/2012 both the petitioner and the objector were appointed joint administrators of the deceased's estate. The applicant filed an application for confirmation of grant on 08/01/13 which was followed by an affidavit of protest by the respondent Fortunatus Mwaniki Ndwiga. The protest has not yet been heard.

The applicant has not annexed any evidence of dividends for the deceased's Plot No.25 Kianjokoma or for the alleged monthly pension of the deceased. The court will not make any orders in vain. He who alleges must prove. It was incumbent of the applicant to annex evidence to show that the protester is receiving income from the estate of the deceased which he has failed to render account. In the absence of any evidence to that effect, the applicant is not entitled to any orders against the protester.

This is a very contested succession cause between the applicant and her sisters on one hand and the

protester and his brothers on the other hand. In the interest of justice, and fairness to all the parties involved, the expeditious disposal of the protest is necessary. Granting any of the orders sought would generate further controversy between the beneficiaries. However, it should be noted that the orders are not merited for the foregoing reasons.

I dismiss the applications with no order as to costs.

It is hereby directed that the parties fix a date for hearing of the protest within 30 days and in default the joint grant to be revoke to give way to other serious administrators who will facilitate distribution of the estate of the deceased who died almost 20 years ago.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Applicant present

Respondent present

Margaret Rwamba