



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO 1342 OF 2013

IN THE MATTER OF THE ESTATE OF EDWARD ORINGE ORUNGO (DECEASED)

AND

IN THE MATTER OF

AN APPLICATION BY AUSTIN ODUOR ORINGE

AND

IN THE MATTER OF

AN APPLICATION FOR ORDERS FOR INHIBITION IN RESPECT TO FORT TENAN/068/99

RULING

INTRODUCTION

1. In his Notice of Motion application dated and filed on 28th September 2020, the Objector herein sought an order of inhibition against any transaction relating to all that parcel of land known as Fort Tenan/068/99 (hereinafter referred to as “the subject premises”) pending the hearing and determination of this Succession Cause. His Affidavit in support of the application herein was sworn on 28th September 2020.
2. In opposition to the said application, Tobias Macksallan Oringe, an Administrator of the deceased’s estate swore a Replying Affidavit on 3rd February 2021. The same was filed on 5th February 2021.
3. There were two (2) sets of Written Submissions both titled Applicant’s Written Submissions. One (1) set was dated and filed on 6th December 2021 by M/S Oringe Waswa & Opany Advocates and was served upon the firm of M/S D.E.O. Anyul & Co Advocates. The second set of Written Submissions was dated 17th December 2021 and filed on 4th February 2022 by the firm of M/S S.M Onyango Associates Advocates. The same was served upon the firm of M/S D.O.E. Anyul & Co Advocates.
4. This Ruling is based on the Written Submissions that were filed herein which the parties herein relied upon in their entirety.

LEGAL ANALYSIS

5. Right from the onset, this court did not find it prudent to outline the arguments made by parties as it had perused the file and realised that the Notice of Motion application dated 28th September 2020 had already been determined by Cherere J on 5th October 2020 when all advocates representing the parties in this cause were present before court. The proceedings on the said date by the learned judge were as follows:

“1. Application dated 28/09/2020 isn’t opposed.

2. Application is allowed pending determination of the cause.

3. Petitioners are directed to apply for confirmation within 30 days from today.

4. Mention on 07/12/2020 to confirm compliance and for further orders.”

6. All that the parties and/or advocates were required to do was to file a Summons for Confirmation of Grant within thirty (30) days of the

said order of 5th October 2020, the said inhibition having been granted pending the hearing and determination of the Succession Cause.

7. On 14th June 2021, this very court observed that the advocates representing parties in this cause were ill – prepared and were misleading it as to the true position of the impugned application as it noted that the same had already been determined as aforesaid. It directed the parties to comply with the directions of the said learned judge and take a date at the Registry.

8. Instead, on 22nd November 2021, the advocates for the Petitioner and Objector once again informed the court that the Objector’s present application was coming up for hearing and indicated that they wished to canvass the same by way of Written Submissions. This court duly gave the said directions and reserved its Ruling herein to bring this matter to a close.

9. This court deemed it prudent to address itself to the Written Submissions and pleadings that were filed herein as they caused even more confusion herein.

10. Notably, the Written Submissions that were filed by M/S Oringe Waswa & Co Advocates supported the present application while those of M/S S.M. Onyango & Associates opposed the said application. It did therefore appear to this court that M/S Oringe Waswa & Co Advocates were representing the Objector while M/S S.M. Onyango & Associates were representing one of the Petitioners herein.

11. There was also an Objection to the making of a Grant dated 4th February 2015 that was filed by M/S D.O.E. Anyul & Co Advocates on even date. Notably, the present application was filed by the firm of M/S Aguko Osman & Co Advocates with the Certificate of Urgency that was under the name of Edward Oringe Waswa. The aforesaid Replying Affidavit was filed by M/S S.M. Onyango & Associates and served upon M/S Aguko, Osman & Co Advocates.

12. Clearly, there was an issue of representation of the parties herein that led this court to conclude that the advocates who were representing them may not have been aware of the Ruling of the aforesaid learned judge. They did not peruse the court file despite this court having informed them of the status of the present application thus wasting its valuable resource of time in its bid to unravel the confusion they were causing herein.

13. Whether the confusion was caused due to different advocates acting for the parties herein, nothing could change the fact that the present application had already been determined. As there was no other pending application in the file herein and the parties seemingly referred to the Objector’s Notice of Motion application dated and filed on 28th September 2020 in their respective Written Submissions, the said application was *res judicata* and could not be re-opened having been heard and determined by a court of equal and competent jurisdiction as this one.

14. Notably, Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) states that:-

“No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

15. In addition, the present application was previously not opposed before the aforesaid learned judge. It was not clear why and how the same could be opposed at this juncture. Having said so, parties are at liberty to bring to the attention of this court if at all there was another application that they were referring to apart from the one dated 28th September 2020 that had already been determined by this court.

16. As there was no application to hear and determine, this court found it prudent not to belabour the point and thus downed its tools.

DISPOSITION

17. For the foregoing reasons it is hereby directed that the parties herein comply with the orders that were issued by Cherere J on 5th October 2020 within thirty (30) days from the date of the Ruling herein. This matter will be mentioned on 18th July 2022 to confirm compliance and/or for further orders and/or directions.

18. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL 2022

J. KAMAU

JUDGE