



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**SUCCESSION CAUSE NO. 662 OF 2001**

**IN THE MATTER OF THE ESTATE OF**

**THE LATE MICHAEL ANGANA *Alias* MIKAL ARIRI**

**BENSON AMBOKO OKUKU**

*(Sued as personal representative of*

**NOAH OKUKU ETSIMILE (DECEASED).....PLAINTIFF/RESPONDENT**

**VERSUS**

**MORRIS ISAAC ODUKHO AMBOKO.....DEFENDANT/APPLICANT**

**RULING**

This application dated 16<sup>th</sup> December 2019 sought the substitution of the Plaintiff, **NOAH OKUKU ESTIMILE**.

1. Secondly, it sought the setting aside of the Ruling, Orders and Decree arising out of the application dated 25<sup>th</sup> June 2012.
2. It is common ground that Noah Okuku Etsimile is deceased.
3. His son, **BENSON AMBOKO OKUKU**, is the personal representative of the Estate of Noah. In that capacity, the said Benson Amboko Okuku appointed the Law Firm of **LUGADIRU & CO. ADVOCATES** to represent the Respondent.
4. In the circumstances, I find that, by his conduct, Benson Amboko Okuku has conceded the first relief in the application. Therefore, I do hereby order that Noah Okuku Etsimile (Deceased) be and is hereby substituted by Benson Amboko Okuku.
5. A perusal of the record of the proceedings herein reveals that the application dated 25<sup>th</sup> June 2012 sought an order in the following terms;

***“1. That the Land Registrar Siaya be ordered to transfer land No. North Gem/Marenyo/349 to Noah Okuku Etsimile.***

***2. That cost of this application be provided for.”***

6. The record of the proceedings reveals that when the application came up for hearing on 13<sup>th</sup> February 2013, the Respondent was not present. However, Chemitei J., who presided over the hearing of the application, proceeded to hear the application after satisfying himself that the Respondent had been duly served.
7. On 25<sup>th</sup> March 2013, the Court delivered its Ruling, which was primarily informed by the fact that the Respondent had not opposed the application. In the circumstances, the court allowed the application.
8. The Applicant has now told this court that although the Law Firm of **MADIALO & CO. ADVOCATES** had been retained by the Plaintiff to represent him in this case, the said Law Firm ceased to act for the Plaintiff when the court revoked the Grant that had been issued to **MORRIS ISAAC ODUKHO AMBOKO**.
9. The record of the proceedings shows that on 6<sup>th</sup> July 2004, B. K. Tanui J. revoked the Grant, after being satisfied that the said Grant had been granted irregularly.

10. According to the Applicant;

***“22. That the delay in bringing this application was caused purely by the Plaintiff in ELC 37 of 2018 or his advocate failing to serve me***

***with the application dated 25<sup>th</sup> June 2012, and that I only discovered the existence of this application about one week ago,***

***when perusing the court file in order to prepare my submission as was ordered by the court.”***

11. It was not until 16<sup>th</sup> December 2019 that the Applicant filed a Notice of Appointment of Advocate. His new advocates are Messrs **OCHANDA ONGURU & CO. ADVOCATES**.

12. By filing a Notice of Appointment of Advocate, the Applicant is deemed to have had no advocates who were representing him prior to the said appointment.

13. However, in this case, the Applicant readily confirmed that Messrs Madialo & Co. Advocates had been representing him. In the circumstances, if the Applicant wanted to change his Advocates, the new advocate would be required to file a Notice of Change of Advocates.

14. More importantly, when an advocate had come on record as acting for a particular party, it is the said advocate who would be served with pleadings, which are intended for his client.

15. In this case, as there was an advocate on the record, who was shown to have been representing the Applicant, I find that when the said advocate was served with the application dated 25<sup>th</sup> June 2012, it is deemed that the Applicant had been properly served.

16. If the Applicant had terminated the services of Madialo & Co. Advocates, he was obliged to ensure that the court and the other parties were duly notified of the said development.

17. Until and unless the Applicant had notified the court and the Respondent about the change of his representation, any Pleadings or other court documents would be served upon the advocates on record, as representing the Applicant.

18. The cessation of representation by an advocate, in a court case, cannot be a private issue between the said Advocate and his client.

19. Accordingly, the Applicant was wrong to blame the delay in bringing the current application, on the Respondent's failure to personally serve him with the application dated 25<sup>th</sup> June 2012.

20. Pursuant to **Order 9 Rule 1** of the **Civil Procedure Rules**;

***“Any application to or appearance or act in any court required or authorized by the law to be done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or his recognized agent, or by an advocate duly appointed to act on his behalf .....*”**

21. Therefore, receipt by the advocate, of service of the application which was brought against the Applicant herein, was as good as if it had been served upon him personally.

22. Pursuant to **Order 9 Rule 5** of the Civil Procedure Rules;

***“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”***

23. **Rule 8** stipulates that when a party wishes to act in person, after he had appointed an advocate, he would have to file a Notice To Act in Person, and the same should be served upon the other party.

24. Pursuant to those rules, I find that the Applicant was duly served with the application dated 25<sup>th</sup> June 2012. Therefore, the alleged non-service of the application dated 25<sup>th</sup> June 2012 cannot be a basis for setting aside the Ruling arising therefrom.

25. Nonetheless, I find that there are legitimate questions concerning the process through which the parcel of land **L.R. NO. NORTH GEM/MARENYO/349** was transferred to the Respondent.

26. In my understanding, the dispute about proprietorship of the said parcel of land is the subject matter of the case **BENSON AMBOKO OKUKU Vs MORICE ODUKHO AMBOKO (KISUMU) ELC CASE NO. 248 OF 2017**. Therefore, it is in the interests of justice to allow the said court the opportunity to make a determination.

27. At the same time, there is the Court Case No. **ELC 37 OF 2018**, which is pending at the Maseno Principal Magistrate's Court.
28. In effect, there are 3 different courts which are currently handling cases that relate to the same subject matter.
29. When more than one court are handling cases relating to the same subject matter, and in which the parties are similar, there was a real risk that the said courts could arrive at determinations which were inconsistent.
30. In such circumstances, it would normally be in the interests of justice to either have the cases consolidated or, in the alternative, stay all proceedings save for one.
31. In this case, there are 2 distinct kinds of cases. There is a Succession Cause, and there is a Civil Suit.
32. Ordinarily, there could be a challenge in trying to have such kinds of cases rolled together into one case. However, as the common denominator is the same parcel of land, **L.R. NO. NORTH GEM/MARENYO/349**, the court may have to give active consideration regarding how best to deal with the issues.
33. I refrain from delving into the question about how the issues in the 3 cases can be best handled, because it is not an issue which has been canvassed before me.
34. But I am certain about one thing; that the only legitimate process through which a person can acquire ownership of land which belongs to the Estate of a deceased, is through Succession.
35. Reverting to matter that is before me, I reject the application dated 16<sup>th</sup> December 2019.
36. And, as costs follow the event, I order that the Applicant will pay to the Respondent, the costs of the application.

**DATED, SIGNED and DELIVERED at KISUMU This 16<sup>th</sup> day of December 2020**

**FRED A. OCHIENG**

**JUDGE**