



**REPUBLIC OF KENYA**

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

**(CORAM: A.K. NDUNG'U J.)**

**MISC. CIVIL APPLICATION NO. 51 OF 2017**

**IN THE MATTER OF THE ESTATE OF THE LATE BENJAMIN ONUONGA KEARI**

**MACTOSH MAKINI ONWONGA .....APPLICANT**

**VERSUS**

**MOSES OMAE ONUONGA .....RESPONDENT**

**RULING**

1. Before me is an application dated 16<sup>th</sup> September 2020 which has been brought under **Order 51 Rule 1** of the **Civil Procedure Rules 2010, Sections 1A**, and **1B, 3** and **3A** of the **Civil Procedure Act** and **Sections 45** and **48** of the **Succession Act**. The orders sought in the application are:

a. Spent;

b. That the status quo in the estate of the deceased herein Benjamin Onuonga Keri known as Kisii/Gesima Settlement /58 , Central Kitutu/Bogetaorio/721 and Kisii Municipality Block 1/746 be maintained pending the intended filing and determination of the succession cause of the deceased Benjamin Onuonga Keri's estate;

c. That peace be maintained by all the deceased Benjamin Onuonga Keri's beneficiaries as far as the deceased's estate is concerned;

d. That nobody should be allowed to intermeddle with the deceased Benjamin Onuonga Keri's estate at all costs until the intended succession cause of his estate has been finalized;

e. That costs of this application be in the course.

2. Mactosh Makini Onwonga, who claims to be one of the beneficiaries of the estate of the deceased, swore an affidavit in support of the application on 16<sup>th</sup> September 2020. He avers that Benjamin Onuonga Keri ("the deceased") died on 1<sup>st</sup> January 2020 and was survived by three widows and thirteen children who are entitled to inherit his estate. He avers that the deceased's estate consists of Central Kitutu/Bogetaorio/721, Kisii/Gesima Settlement /58 and Kisii Municipality Block 1/746.

3. Mactosh Onwonga deposes that the beneficiaries of the estate reside in various places and have never met to discuss the distribution of their late father's estate. He accuses one of his brothers, Moses Omae Onuonga, of threatening the other beneficiaries to dispose of the deceased's estate before filing a succession cause. He therefore urges the court to issue orders restraining the intermeddling of the deceased's estate.

4. The said Moses Omae Onuonga has not filed any response to the application despite service as evinced in an affidavit of service filed on 30<sup>th</sup> November 2020.

5. Interference with the estate of a deceased person is prohibited in **Section 45** of the **Succession Act**. The provision stipulates:

*45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*

(2) Any person who contravenes the provisions of this section.

6. The applicant has filed this application to forestall any dealing with the estate of the deceased before a succession cause is filed and concluded. His claim that the respondent has been pressurizing other beneficiaries to dispose of the estate before the succession cause is filed has not been challenged.

7. It is clear from the copy of the Certificate of Death annexed to the applicant's affidavit that the deceased died on 1<sup>st</sup> January 2020. A copy of Certificate of Lease for Kisii Municipality Block 1/746 has also been attached to the applicant's affidavit and provides *prima facie* proof that the deceased was the owner of that parcel of land. Although similar proof has not been provided to ascertain whether land parcels no. Central Kitutu/Bogetaorio/721, Kisii/Gesima Settlement /58 belonged to the deceased.

8. It is also noteworthy that the application to preserve the estate has been brought in a manner alien to the Succession Act. The application has been filed as a Notice of Motion vide a Miscellaneous Civil Application as opposed to Summons in a Succession Cause as provided in the Act. Ideally, a party who wishes to file a suit to protect the deceased's estate must first obtain a limited grant. That was the finding of the court in the case of ***Hawo Shanko v Mohamed Uta Shanko Civil Suit No.1 Of 2018 [2018] eKLR*** where the plaintiff had filed a civil suit against her brother seeking orders of injunction to restrain him from dealing with the property forming the estate of the deceased.

9. Nonetheless, the High Court is empowered by the **Succession Act** at **section 47** to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders as may be expedient. **Article 159 (2)(d)** of the **Constitution** also enjoins this court to administer justice without undue regard to procedural technicalities. Hence, in as much as the application before this court is defective in form, its substance is merited. The courts have held that if there is no evidence that such an error as to form is *mala fides* or meant to cause prejudice to the other side, the court will not dismiss the application solely on account of such an error. (See ***Gitau vs Muriuki (1986) KLR 211***)

10. Accordingly, I will in the interest of justice grant prayers c, d and e of the application dated 16<sup>th</sup> September 2020. The applicant is hereby directed to file a succession cause within 60 days of this ruling.

**Dated, signed and delivered at Kisii this 15th day of December, 2020.**

**A. K. NDUNG'U**

**JUDGE**