



IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE & ADMINISTRATION NO. 332 OF 2010

IN THE ESTATE OF OBWAKU ADUNGO.....DECEASED

BETWEEN

SYLVESTER JOSEPH OBWAKU.....PETITIONER/RESPONDENT

AND

THADEUS OMUSE.....OBJECTOR /APPLICANT

RULING

1. **Thadeus Omuse**, the objector herein filed an application dated 28th August 2012 under section 3A Civil Procedure Act, section 128 of the Registered Land Act and Rule 44(1) of the Probate and Administration rules. He is seeking the following orders:

- a) That directions be given on how to proceed in this matter.
- b) That the petitioner /respondent be ordered to supply his copy of identity card and PIN certificate for the purposes of registering the relevant forms.
- c) That costs of this application be in the cause.

2. The application is premised on the following grounds:

- a) That the court issued a grant in this matter on 26th March 2012.
- b) The petitioner was ordered by court to include the objector's name in the succession cause.
- c) That the petitioner /respondent has refused to supply copies of identity card and PIN certificate for the purposes of registering the relevant forms at the land Registry.
- d) That the orders sought are necessary to prevent the end of justice(sic).

3. The application was opposed by the petitioner who claimed that he gave the objector 4 acres which he paid for.

4. The first issue for this Court to determine is whether the instant application is properly before the Court. The application is grounded under section 3A Civil Procedure Act, section 128 of the Registered Land Act and Rule 44(1) of the Probate and Administration rules. If the Law of Succession Act is deficient, it specifically imports other legal provisions under Rule 63 of the Law of Succession Act. This is what Rule 63 states:

(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.

It is clear therefore, that the legal provisions cited by the objector have not been incorporated into the Law of succession. The application is therefore bad for want of form.

5. The deceased herein died on 18th July 1984. The first agreement between the objector and the petitioner was on 31st August 1980. The land parcel which he was buying was not described. If it was to be exercised from SOUTH TESO/APOKOR/209, then he had no capacity to transact the sale. The land was in the name of Obwaku Adungo, the deceased herein who was still alive. Without evidence that he had authority from the registered owner, the said sale was a nullity.

6. The subsequent payments after the demise of the deceased herein, are equally illegal. This was in contravention of section 45 of the Law of Succession Act which provides as follows:

(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 shall— (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

Any dealings in the estate of the deceased Obwaku Adungo after his death therefore amounted to intermeddling which is a criminal offence.

7. The objector ought to have known that the registered proprietor was not the petitioner when he entered into the contract for sale. Had the contract been entered with the deceased herein, then he would have a stake in the estate. He is therefore a stranger in the estate. He can pursue his claim with the petitioner personally but not from the estate.

8. From the foregoing, the objection is dismissed with costs. I also make an order that the petitioner to file an application for confirmation within 60 days failure of which the grant will be revoked without any reference to the parties.

DELIVERED and SIGNED at BUSIA this 25th day of February, 2019

KIARIE WAWERU KIARIE

JUDGE