



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO.151 OF 1989

JOHN WABWIRE ONIALA.....PETITIONER

VERSUS

PATER OKUMU.....1ST OBJECTOR

KELESENJIA NAFULA MANYURU.....2ND OBJECTOR

AND

ALEX RATEMO NYANGA.....1ST INTERESTED PARTY

FRANCIS MWOLLO BWIRE.....2ND INTERESTED PARTY/APPLICANT

JOHN ANTON MBANDA.....3RD INTERESTED PARTY

DAVID OBUYA OGADU.....4TH INTERESTED PARTY

M.P OKUMU MBANDU.....5TH INTERESTED PARTY

CHRISTOPHER RATEMO OUNDO.....6TH INTERESTED PARTY

JACOB MBAND MBANDA.....7TH INTERESTED PARTY

FABIAN LUBEMBE IBWAGA.....8TH INTERESTED PARTY

OKUMU MICHAEL JEREMONY.....9TH INTERESTED PARTY

RULING

The applicant's application is brought by way of Notice of Motion dated 30th November 2016 under Order 40 Rules 1, 2 &3 of the Civil Procedure Rules, Section 1A and 3A of the Civil Procedure Act and all other enabling provisions. The applicant is seeking orders as follows:-

- a. THAT** this Honourable Court be pleased to issue an injunction restraining the 1st and 2nd Objectors/Respondents, their authorized agents, servants and/or employees from using, entering, trespassing and/or otherwise dealing with Land Registration number **BUKHAYO/MUNDIKA/4226** pending the hearing and determination of this Application.
- b. THAT** this Honourable Court be pleased to issue an injunction restraining the 1st and the 2nd

Objectors/Respondents, their authorized agents, servants and/or employees from using, entering, trespassing and/or otherwise dealing with Land Registration number **BUKHAYO/MUNDIKA/4226** pending the hearing and determination of this suit.

c. **THAT** this Honourable Court be pleased to issue an order to the County Lands Registrar Busia to visit the suit land in order to demarcate the boundaries of land parcel **BUKHAYO/MUNDIKA/4226** in order to restore the original beacons.

d. **THAT** the Officer Commanding Busia Police Station (OCS) do enforce and/or ensure compliance of this order.

e. **THAT** the cost of this Application be provided for.

2. The application was opposed on the basis of the following grounds:

a. That the applicant has never been and is not in occupation, use of land parcel **BUKHAYO/MUNDIKA/4226** or the initial **BUKHAYO/MUNDIKA/395**.

b. That the applicant has not met the principles set in the **Giella Vs Cassman Brown case**.

c. That the objection/application seeking among other reliefs for revocation, cancellation of the said title dated 28.10.14 is pending.

d. That the applicant's and other titles are the subject of challenge in the aforesaid objection.

e. That there are no boundaries as size (sic) of land parcel **L.R. BUKHAYO/MUNDIKA/395** is intact.

f. That the averments in the supporting affidavit are false and or calculated to mislead this court.

g. That the application is a clear abuse of the court process calculated to embarrass and prejudice the objectors and delay the hearing of the objection.

h. That the application lacks merit.

3. The supporting affidavit of Willy Catherine Bwire is to the effect that she is the administrator of the estate of **FRANCIS GILBERT MWOLO BWIRE**. She annexed a copy of the ruling marked "**WCB4**." In the ruling the court inter alia said at paragraph 17:

*For now I dismiss the objectors' application for cancellation of the current entries to **BUKHAYO/MUNDIKA/4233** and **BUKHAYO/MUNDIKA/4226**. Further and final orders shall await a determination of the interests of the remaining third parties.*

4. In the same ruling the court at paragraph 7 made the following observations:

This court therefore finds merit in the objectors (sic) application that the (sic) court issued to the petitioner on 5th July 1990 and confirmed on 30th January 1991 should be revoked.

5. It is therefore abundantly clear that this is a succession matter that is yet to be finalized.

6. Rule 63 of the Probate and Administration Rules, 1980, provides as follows:

(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.

7. In the case of **PRISCILLA VUGUTSA KAMALIKI vs. MARY RUNYANYI OCHIENG [2016] eKLR** Lady Justice Ruth Nekoye Sitati addressing her mind to Rule 63 of the Probate and Administration Rules, 1980, observed:

The first issue for this Court to determine is whether the instant application is properly before the Court. The application is expressed to be brought under Section 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act Order 40 Rule 4 and Order 51 Rule 1 of the Civil Procedure Rules. It is worth noting that the Law of Succession Act is a self-contained Act and provisions of the Civil Procedure Act, unless specifically imported into it are not applicable. A look at Rule 63 of the Law of Succession Act reveals that the provisions under which the present application is brought are not some of the provisions imported into the Law of Succession Act. What this means therefore is that the instant application is incompetent for want of form and is therefore fit for striking out.

In the instant case, the application is premised on Order 40 Rules 1, 2 &3 of the Civil Procedure Rules, Section 1A and 3A of the Civil Procedure Act. These were not included in Rule 63(1) of the Probate and Administration Rules, 1980. I will reach the same conclusion as my sister did in the above case.

8. The application is accordingly struck out for it is incompetent for want of form. Each party to meet own costs.

DELIVERED and SIGNED at BUSIA this 15th day of March, 2018

KIARIE WAWERU KIARIE

JUDGE