



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

SUCCESSION CAUSE NO. 20 OF 2017

FORMERLY NAIROBI HC SUCC. CAUSE NO.2274 OF 2012

IN THE MATTER OF THE ESTATE OF:

PATROBA NDURI MBAI.....DECEASED

BETWEEN

HENRY HUMPHREY NDURI.....OBJECTOR/APPLICANT

VERSUS

MARY ADHIAMBO AGUTU.....1ST PETITIONER/RESPONDENT

MARTIN OKOTH NDURI.....2ND PETITIONER/RESPONDENT

KENNETH KENNEDY NDURI.....3RD PETITIONER/RESPONDENT

SAMUEL OKECH OMER.....4TH RESPONDENT

RULING

[1] The application dated 19th April 2018, is essentially made under **Section 45** of the **Law of Succession Act (Cap 160 Laws of Kenya)** and **Rules 49** and **50(1)** of the **Probate and Administration Rules**.

Section 45 of the **Succession Act** prohibits any person from intermeddling with property of a deceased person.

The application therefore seeks an order of the court restraining the respondent/objector from constructing a house on land parcel no. Central Karachuonyo/Konyango/2737 registered in the name of the deceased Patroba Nduri Mbai or dealing with the property or other property subject of this succession cause pending the hearing and determination of the cause and distribution of the estate property.

[2] The grounds in support of the application are in the body of the appropriate summons and are fortified by the applicants' supporting affidavit deponed by the first applicant, **MARY ADHIAMBO AGUTU**, on the 19th April 2018 and a further affidavit deponed on the 2nd July 2018.

The objector, **HENRY HUMPHREY NDURI**, opposes the application on the basis of the averments contained in his replying affidavit dated 22nd June 2018, and further replying affidavit dated 4th September 2018.

At the hearing of the application, learned counsel, **MR. OCHIENG**, appeared for the first, second and third applicants while learned counsel, **M/S NYARIGE**, appeared for the fourth applicant. The objector, appeared in person.

[3] The first, second and third applicants placed full reliance on their supporting grounds and affidavits and urged this court to allow the application. They added that interlocutory orders restraining the objector from constructing a house were issued on the 20th April 2018 and that the subject property forms part of the estate of the deceased.

They referred to a consent order dated 15th July 2014 issued by the High Court in Nairobi and indicated that the order allowed equal distribution of the estate of the deceased among his four houses and sanctioned a valuation of the estate property.

[4] The objector also placed full reliance on his replying affidavit and prayed for the dismissal of the application. He submitted that the consent order of the 15th July 2014, was made in the presence of three parties but only two of them accepted it. He rejected the consent and in that regard, it did not amount to a valid consent. He contended that he has not constructed on the disputed land as alleged. He maintained that he has only constructed on land which comprises his home and indicated that the applicants have also constructed on land comprising their own homes.

As for the fourth applicant, the objector contended that he is not a member of the family of the deceased nor a beneficiary. He ought to therefore be excluded from these proceedings as his dealings with any member of the deceased family is a matter between him and the affected member.

The objector contended that the failure by the applicants to respond to the issues raised in his replying affidavits meant that they accepted the issues.

[5] The fourth applicant contended that the application was not made by himself but the first, second and third applicants. He opined that the application may have been overtaken by events but nonetheless, left that matter to the court.

In responding to the objector, the first, second and third applicants contended that there was no will and it is therefore unknown whether or not the deceased gave out his land to members of his family. That, the order against construction was issued seven months ago and was duly served upon the objector. That the order was against construction on any portion of the estate property.

[6] From all the foregoing it is apparent that the first, second and third applicants allege and imply that, the objector is intermeddling or is in the process of intermeddling with the property of the deceased, Patroba Nduri Mbai and more so, in outright disregard of a court order made on 20th April 2018, restraining him from constructing on the subject portion of the estate. This issue is raised in ground nine (9) of the supporting grounds which indicates that the objector embarked on constructing a house on land parcel No. Central Karachuonyo/Konyango/2737 on the 19th April 2018, without any authority from the court. It was for this reason that the first, second and third applicants moved the court on 20th April 2018, and obtained temporary restraining orders against the objector in his absence. Thereafter, the matter was lifted for inter parties hearing on 11th May 2018, on which date the objector appeared and indicated that he had not been served with the application but only the interlocutory restraining order. The matter was thereafter stood over to the 11th June 2018, without the court extending the restraining order. This meant that the order lapsed on the 11th May 2018.

[7] Nonetheless, on the 11th June 2018, the application was stood over to 3rd July 2018, when it became apparent that the same was not or was not properly served upon the objector. From there onwards the matter was adjourned on two occasions to allow the filing of affidavits or further affidavits by the parties.

Ultimately, the matter was heard on 17th October 2018 and after due consideration of the same on the basis of the supporting grounds and those in opposition thereto and in the light of the submissions by the parties, it is clear that the basic issue for determination is whether the objector has intermeddled with the property of the deceased or whether he is in the process of intermeddling with it, such that he must be restrained from further intermeddling by an order of this court. This is indeed the essence of this application by the first, second and third respondent. The fourth respondent appeared to have been disinterested in the application but clearly agreed with the objector's suggestion that the matter has since been overtaken by events on account of the fact that the objector has already constructed a house on the disputed property which he claims to be his property.

[8] Intermeddling with property of a deceased person would constitute a criminal offence with penal consequences. The property in question here is the portion of land described as Central Karachuonyo/Konyango/2737 (plot No.2737).

This property is among those listed as belonging to the deceased in the petition for letters of administration intestate filed in the first instance at the High Court in Nairobi on the 21st September 2012 by the objector and the first, second and third applicants.

Pursuant to the petition, the grant of letters of administration Intestate was issued to the four people on the 26th April 2013. Thereafter, on the 5th June 2014, they took out summons for confirmation of the grant. These were filed in court on 10th June 2014, but on the 15th July 2014 the fourth respondent filed an affidavit of protest on the basis that part of plot No.2737 had been offered for sale to him by the objector and that a sum of Kshs.350, 000/= was paid as part payment of the purchase price in the sum of Kshs.1, 150,000/=.

[9] Apart from the fourth respondent, the objector also objected to confirmation of grant vide his affidavit deponed on 8th July 2014 and filed herein on 9th July 2014. His reason for the objection appears to have been that the family of the deceased had not agreed on the mode of distribution of the estate, specifically plot No.2737 and three others i.e. Central Karachuonyo/Konyango/15, 16 and 1499 (i.e. plots NO.15, 16 and 1499).

The court considered the summons for confirmation of the grant in the light of the objection by the objector and the fourth respondent and made the following order:-

“By consent, the four (4) parcels of land be valued and thereafter there shall be equal distribution of the same among the four (4) houses of the deceased to be held in trust by the widow for the children. The 2nd house will take care of the protestor's interest.”

[10] The order was in effect a consent order made in the presence of the applicants/petitioners' advocate, a **Miss Musyoka**, and the protestor's advocate, a **Mr. Goa**.

Those advocates had ostensible authority to act on behalf of their clients who included the objector as one of the petitioners cum objector. The contention by the objector in this matter that the consent order did not amount to a consent was erroneous and misconceived.

Be that as it may, on the 26th September 2014, the objector sought to have the consent order set aside vide a notice of motion also dated the 26th September 2014.

The court considered the application on the merits and dismissed it in its ruling of the 10th July 2015, on the basis that it was incompetent and/or defective inasmuch as it was brought under the provisions of the Civil Procedure Act rather than the provisions of the Law of Succession Act.

[11] Nonetheless, the objector presented a similar application vide a notice of motion dated 8th October 2015, which was considered again by the court on the merits and dismissed in a ruling delivered on the 26th October 2016. However, the objector on the 23rd November 2016, sought the leave of the court to appeal the ruling, but this was dismissed for want of merit on the 29th September 2017.

With that, the summons for confirmation of the grant dated 5th June 2014, for hearing on 4th December 2017, on which date this entire matter was transferred to this court from Nairobi for hearing of the summons and/or distribution of the estate of the deceased. On the 24th January 2018, the matter landed in this court's probate registry and was fixed for mention on 27th April 2018.

However, on the 20th April 2018, the present application dated 19th April 2018, was filed herein and temporary restraining orders were issued ex-parte against the objector.

As noted hereinabove, the orders lapsed on the 11th May 2018 as they were not extended by the court.

[12] In any event, it was alleged by the applicants that the objector's interference with the estate property was by way of constructing a house on parcel/plot No.2737 on 19th April 2018. This meant that the applicants' application was filed a day too late if the alleged construction was completed on the same 19th April 2018. There was no other allegation of interference by the objector – on subsequent days after. The issuance of the ex-parte temporary restraining order and during its operational period. Therefore, any suspicion that the objector was in contempt of a court order was misplaced and cannot hold in the absence of such order.

Nevertheless, with or without a court order, neither the objector nor the applicants is allowed to interfere in any manner with the estate property prior to the confirmation of the grant and/or distribution of the estate, among beneficiaries and/or dependants.

So, if any one of them is interfering or has interfered with any part of the estate knowing too well that the application for confirmation of grant dated 5th June 2014, is still pending determination and final orders, then they would be in conflict with the law and liable to a fine not exceeding Kshs.10, 000/= or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.

[13] The applicants have not provided tangible evidence of the objector's alleged interference with plot No.2737. They appear to have relied on unsubstantiated or unconfirmed reports of the fact. In any event, the objector vehemently denied the allegation and implied that if where he has currently put up a house is deemed to be part of the estate property, then the applicants have also put up houses in places deemed to be part of the estate property. He was thus saying "what's good for the goose is good for the gander". And, if that amounted to a concession that he has in fact interfered with the estate property, then the applicants are also guilty of similar interference. Nonetheless, there was herein no clear and unequivocal concession by the objector/respondent neither was there any evidence of the applicants' suspected interference with the estate property.

In sum, the present application is devoid of merit and is hereby dismissed. Each party shall bear their own costs of the application.

[14] Let it be pointed out that this matter has remained in the corridors of the court for far too long considering that it commenced in the year 2012 (approximately, seven (7) years ago).

It started off pretty well but differences between the beneficiaries emerged during the distribution stage when the summons for confirmation of grant dated 5th June 2014 and filed herein on 10th June 2014 were due for hearing.

That is also the time that the fourth respondent entered the scene claiming an interest in the estate property by virtue of a sale agreement entered between himself and the objector/respondent.

Ironically, the objector was one of the applicants for confirmation of the grant, yet he raised an objection in respect thereof and thus acquired the description of "objector" herein. He is evidently the cause of the delay in this matter. He's best advised that either he arrives at an amicable agreement with the applicants and other beneficiaries on a proposed mode of distribution of the estate or let the court undertake the distribution in accordance with the law. He cannot purport to now claim that this was a testate succession yet he was one of those who petitioned the court for letters of administration intestate thereby acknowledging that this was purely intestate succession. He was a party to the consent order made on 15th July 2014, and cannot now renege on it as long as it remains valid and has not been set aside by any court.

[15] If the objector is so aggrieved by the consent order, he had more than enough time and opportunity to have it set aside even after the dismissal of his initial application for setting aside orders. He cannot use the court order as a reason for the delay in this matter, neither can he use the narrative that this is a testate succession.

His conduct in this matter if not changed would definitely cause further delay much to the disadvantage of the entire testate of the deceased and its beneficiaries including himself. The court would in the circumstances be tempted to label him (objector) a “**vexatious litigant**” and would not sit back and watch the delay progress as it would use its powers under **section 76** of the **Succession Act** to revoke the grant and let the parties go back to the drawing board.

It is for the parties to either move forward by agreeing on a mode of distribution or to make a retreat by anyone of them applying for a revocation or annulment of the grant altogether. In the meantime, each one of them is cautioned against intermeddling with the estate of the deceased and in particular the four parcels of land subject of the consent order. For now, those parcels remain the property of the deceased and the deceased only.

J.R. KARANJAH

JUDGE

25.10.2018

[Read and signed this 25th day of **October, 2018**].