



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 706 OF 2016**

**IN THE MATTER OF THE ESTATE OF SIMON MOMANYI ONCHWATI**

**DINAH MORAA ACHACHI... PROPOSED INTERESTED PARTY/APPLICANT**

**R U L I N G**

1. The application before court by the intended third-party **Dinah Moraa Achachi** dated 4<sup>th</sup> April 2018 is seeking for the following orders:
  - i. That pending the hearing and determination of the application the court do order that that Administrator **Mary Nyambura Richu** and all the beneficiaries named in the certificate of confirmation of Grant by themselves, their representative, agents, servants and/or successors be restrained by way of injunction from selling, transferring, disposing off, alienating, wasting, damaging, leasing, interfering, encumbering and/or in any other manner whatsoever and howsoever interfering with the property belonging to the deceased known as **Nairobi Block 134/382 – Komarock**.
  - ii. That the Applicant/proposed Interested Party/Creditor herein, **Dinah Moraa Achachi** be enjoined in this suit as an Interested Party.
  - iii. That costs of the application be provided for.
2. The application is predicated on grounds that the Interested Party is pursuing a decree upon property **L.R. No. Nairobi/Block 134/382 Komarock** and needs to be enjoined as a third party in order to ventilate her issues before court, that the administrator concealed material facts and made false statement. Further that unless the orders are granted the applicant who holds an equitable interest is likely to suffer irreparable loss.
3. The application was supported by the applicant's affidavit sworn and dated the 4<sup>th</sup> of April 2018 wherein the Applicant stated that sometime in the year 2009 she advanced monies to the deceased and the arrangement was reduced into writing by way of an agreement dated the 27<sup>th</sup> of July, 2009 between the two, for a loan amount of the sum of Kshs.3,500,000/- being monies advanced by the Applicant to the deceased. That title number **Nairobi/Block 134/382** was the security of the loan. Further that the deceased failed to settle the debt as agreed and the applicant filed a suit No. 5229 of 2014. That on 23<sup>rd</sup> October 2014 judgment was entered against the deceased for the said amount, costs and interest. However, the deceased passed on before the decree was executed and for that reason the Applicant seeks a declaration that her interest ranks in priority and for that interest to be safeguarded.
4. The application was objected to by **Mary Nyambura Richu**, a widow and administrator of the deceased estate who informed the court that the Applicant was all along aware of the death of the deceased, yet failed raise any issue regarding the alleged monies due to her though after the death of the deceased when the family went to get important documents from her as directed by the deceased she declined to release the said documents in her possession. Further the respondent deposed that the intentions of the Applicant are fraudulent as she did not advance the sum of Kshs.3,500,000/= as claimed as against the title in question as the value of the property was only Kshs.2,000,000/= in 2009. She further contended that her late husband was not served with any court papers in 2016 as alleged, further she made reference to a letter dated 16<sup>th</sup> April, 2010 where the Applicant had demanded Kshs.480,000/= from the deceased which sum she deposed was repaid.
5. I have considered the application and responses thereto and take note of the following:
  - a. An Objector **Esther Nthenya** who claims to have an interest in the estate as a widow does not object to the application.
  - b. There is a pending decree against the deceased.
  - c. The Applicant seeks to obtain restraining orders in a bid to safe guard her interest in (b).

6. Section 37 of the Civil Procedure Act which has a bearing on the circumstances of this matter before court provides as follows:

**“37. 1. Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.**

**(2) Where the decree is executed against such legal representative, or against any person as aforesaid, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability the court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit”.**

7. In **Bakari Ibrahim v Issa Ibrahim Court of Appeal case No. 55 of 2014**, the Court of Appeal had this to say on execution of decree against a deceased judgment debtor.

**“We are therefore in agreement with learned judge of the high Court when he held that “It was imperative that if any execution proceedings were to be undertaken against the deceased’s estate, the decree holder had to comply with the provisions of Section 37 of the Civil Procedure Act” and that in the absence of such application in this case the execution process against the deceased was “unlawful, null and void and of no consequence”.**

8. For the applicant to execute the decree, the applicant is to apply the route stipulated in Section 37 of the **Civil Procedure Act** and not seek to be enjoined in this matter. The application in my view is misplaced and it is hereby dismissed with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>th</sup> DAY OF November, 2018.**

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**ALI-ARONI**

**JUDGE**