



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**SUCCESSION CAUSE NO. 278 OF 2002**

**INTHE MATTER OF THE ESTATE OF CHRISTOPHER BIRUNDU OYARO (DECEASED)**

**ELIZABETH NYANCHAMA BIRUNDU**

**EUNICE NYARANGI BIRUNDU**

**MARY BIRUNDU**

**ANNASTACIA BIRUNDU**

**CLEMENCIA BIRUNDU.....APPLICANTS/OBJECTORS**

**VERSUS**

**ELIZABETH KEMUNTO NYANTIKA.....PETITIONER/RESPONDENT**

**RULING**

**Introduction**

1. Christopher Birundu Oyaro (hereinafter "the deceased") died intestate on 23rd March 2000. The deceased was survived by six (6) wives and owned several properties including land. After his demise, his 6th wife, **Elizabeth Kemunto Nyantika**, the petitioner herein, filed the present succession cause and obtained grant of letters of administration of the deceased's estate on 18th February 2003 after which she secured the registration of the deceased's land parcel numbers Nyaribari Chache/B/B/Boburia/3002 and West Kitutu/Bogusero/771 into her names apparently without the knowledge and consent of the rest of the widows. Upon realising what had happened, the petitioner's co-wives, the objectors herein, filed an application for revocation and annulment of grant of letters of administration issued to the petitioner. The application was heard by Hon. Justice Kaburu Bauni who in a ruling delivered on 18th May 2004 revoked the grant issued to the petitioner and in its place directed that a fresh grant be issued in the joint names of the petitioner and objector. Justice Kaburu also ordered that the prohibitory orders that had earlier been issued do remain in force until the cause is fully determined.

**Application**

2. The application that is the subject of this ruling is dated 28th October 2016. It is expressed to have been filed under Rules 45, 59, 63, 73 and 76 of the Probate and Administration Rules, Order 40 Rules 1 & 3 of the Civil Procedure Rules and Order 51 Rule 1, 3 & 4 of the Civil Procedure Act. In the said application, the objectors seek the following orders: -

**1. Spent.**

**2. Spent.**

**3. That pending hearing and determination of this cause, the Honourable court be pleased to grant an order of injunction restraining the Respondent and her servants, agents and employees from damaging doors, evicting the applicants and or forcefully evicting residents from houses on the parcel of land known as LR NO. NYARIBARI CHACHE/B/V/BOBURIA/3002(hereinafter "the suit land").**

**4. The court be pleased to cite and punish the petitioner for disobeying, ignoring and disregarding the lawful court orders issued or granted.**

**5. The honourable court be pleased to issue warrants of arrest to bring the petitioner before the court for committal to jail for disobedience.**

**6. The honourable court be pleased to commit the petitioner to jail for a duration not exceeding six (6) months and /such shorter period as the court may deem fit and expedient.**

**7. Costs of the application be borne by the petitioner.**

**8. Such further /other orders be made as the court may deem fit and expedient.**

3. The application is supported by the affidavit of Elizabeth Nyanchama Birundu, the 1st objector herein, wherein she avers that the objectors reside on the suit land where they have also put up rental houses and that the petitioner has in outright breach and in disobedience of court orders embarked on a mission of systematically evicting the tenants of the other beneficiaries with an aim of taking over the whole portion of land despite the fact that the estate of the deceased has not been distributed as the grant issued to them has not yet been confirmed. She states that the petitioner is using dirty tricks to cause the objectors' tenants to vacate the rented units on the suit land by removing doors with the sole aim of taking over possession of the whole suit land.

4. The application is opposed by the petitioner through her replying affidavit dated 25th October 2016 in which she states that she filed the instant succession cause way back in 2002 for the sole purpose of getting her share in the deceased estate. She concedes that she is the sixth widow of the deceased who, had prior to his death, allocated each widow her own separate parcel of land where he settled each one of them and that the suit land had been allocated to her and her children. She accused the objectors of encroaching on land that had been earmarked for her when they all had their separate parcels of land.

5. It was the petitioner's case that prior to the death of the deceased, all the wives of the deceased lived peacefully in their respective parcels of land but that trouble began after his demise when the objectors' children invaded her home ostensibly to share out the houses that had been constructed on the suit land. She states that it is the invasion of her home that prompted her to file the succession in order to secure her interests in the deceased's estate and added that even though the grant issued to her was revoked her registration as the owner of land parcel no. West Kitutu/Bogusero/771 was never cancelled/revoked. She attached a copy of certificate of official search which were marked as "EKN002."

6. It was the petitioner's case that at the time the court revoked grant earlier issued to her and ordered that a joint grant be issued to her and the objectors, the court also directed the parties to file lists of all the assets of the deceased. She further states that she immediately filed her list of assets but the objectors have to date not filed any lists and have instead opted to object to her proposed mode of distribution without making any proposal on their preferred mode of distribution. She therefore urged the court to distribute all the assets of the deceased equally among the six houses so as to bring this matter to an end.

7. She denied the claim that she disobeyed any court order and accused the objectors of bringing the present application with the aim of forcefully entering the suit land through the back door.

8. She contends that it is the objectors and their children who should be restrained from interfering with

her peaceful occupation of the matrimonial home that the deceased had put up for her.

9. In her further affidavit dated 23rd January 2017, the 1st objector explains how the deceased purchased and developed the parcels of land that he owned prior to his death and confirms that the deceased had allocated land to his wives and children prior to his death.

10. On her part, the petitioner filed a supplementary affidavit dated 6th February 2017 wherein she avers that the prohibitory order issued by this court 18th May, 2017 was only intended to prohibit transactions and dealings on the suit land in the land registry until the cause is heard and determined. According to the petitioner, she had not disobeyed the court's order of prohibition or made any dealings on the suit land so as to warrant the objectors application that she be cited for contempt of court. She reiterated that the objector's application was only meant to distract the court from the real issues of this cause.

11. When the above matter came before me on 20th February 2017, it was agreed that the said application be argued by way of written submissions. Both parties have filed their respective submissions and I have read the same. After considering application and the rival submissions by both parties to, I discern the issues for determination to be: -

**1. The meaning and import of a prohibitive order.**

**2. Whether the application for an order of injunction is merited.**

12. With regard to the first issue, I note that this court issued an order dated 3rd December 2003 as follows: -

**"That pending the determination of the application herein, there be and is hereby issued an order of inhibition on any dealing whatsoever, over L.R No. Nyaribari Chache B/B/Boburia/3002 and L.R No. West Kitutu/Bogusero/771."**

13. In a ruling dated 18th May 2004, Bauni J held that: -

**" As to the revocation of registration of land L.R NO. NYARIBARI CHACHE/B/BOBURIA/3002 and L.R NO. WEST KITUTU/BOGUSERO/771 the same is rejected until all assets of the deceased and properly listed and ready for distribution. The prohibitory order however issued to remain in force until the cause is fully determined."**

14. Section 128 of the Registered Land Act (now repealed) provided as follows: -

**"128(1) The court may make an order (herein after referred to as inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until further orders, the registration of any dealing with any land, lease or charge."**

15. In **Dorcas Muthoni & 2 Others v Michael Ireri Ngari [2016] eKLR** the court stated: -

**"An order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off."**

16. In the present case, the objectors contend that the petitioner has contravened the above order by Bauni J. on prohibition. However, after looking at the rival affidavit evidence filed by both parties, I note that there is no evidence to show that the petitioner has sold, subdivided, leased or transferred the suit land. It is therefore my finding that the petitioner has not contravened or disobeyed the prohibitory order issued by this court on 3rd December 2003 so as to necessitate the granting of the orders sought for contempt of court.

17. Notwithstanding the above finding, I also note that the objectors' complaint is that the petitioner is employing dirty tricks in order to evict their tenants from the suit land. Even though the petitioner contends that she is currently the registered owner of the suit land, it was not disputed that the subject land forms part of the estate of the deceased that is still awaiting distribution after the revocation of the initial grant that was issued to the petitioner. In an ideal situation, the court should have ordered that the suit land reverts back into the names of the deceased upon the revocation of the grant but the court in its wisdom decided not to cancel the petitioner's title to the suit property while awaiting the filing of the application for confirmation of grant and the full list of the deceased's assets by both parties.

18. Turning to the issue of the order for injunction, I note that the petitioner has not rebutted the objectors' claim that she has been employing dirty tricks in order to chase away the objectors' tenants. I also note that as much as Bauni J. declined to cancel the petitioner's title to the suit land, the court is yet to hear this matter to its finality. Issuing an order of injunction would however require that this court acts in accordance with the law. Ordinarily, an injunction order would be sought pursuant to **Order 40** of the **Civil Procedure Rules**. The Probate and Administration Rules do not provide for injunctive reliefs as Order 40 of the Civil Procedure Rules is not one of the Civil Procedure Rules stipulated as being applicable to succession matters. (See **Rule 63(1) of the Probate and Administration Rules** in the **Estate of Kibomen Komen (deceased) NKR Succession Cause No.500 of 1997.**)

19. The provisions of the above Order notwithstanding and by virtue of **Section 47** of the **Law of Succession Act**, this court must determine the issue brought before it in a fair manner.

20. **Section 45(1)** of the **Law of Succession Act** provides as follows:

*“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.”*

21. It has been demonstrated that the deceased died in the year 2000. It has not been denied that there are rental houses on the suit land which were constructed by the deceased prior to his death and which houses the objectors could be entitled to depending on the mode of distribution that may be agreed upon between the parties of determined by an order of the court. Whichever way the distribution of the assets of the estate of the deceased goes, it is not expected that any beneficiary, however much they may feel entitled to the estate, can take it upon himself to damage doors and forcefully evict tenants that may be lawfully occupying the said rental premises. To do so will be tantamount to intermeddling with the property of the deceased.

22. I find that the reasons given for this application do fall within the ambit of **Section 45(1)** of the **Law of Succession Act**. It has been shown that the respondent/petitioner is wasting the property in question and this warrants the issuance of conservatory orders to preserve the estate of the deceased. It was however not indicated by the objectors if the damaging of doors and eviction of tenants was a continuous occurrence or a one-off affair so as to warrant the issuance of orders of injunction. In view of the above, I am of the view that in order to maintain calm and peace pending the distribution of the estate and indeed in the wider interest of justice, an order that the status quo prevailing regarding the estate of the deceased as at the time of the making of this order be maintained until the estate of the deceased is distributed through the confirmation of the grant.

23. I note that the application is a battle spitting beneficiaries to an estate who have not agreed on the mode of distribution.

24. The applicants in the current application, who are the objectors and co-administrators of the estate of the deceased are under an obligation, after receiving the grant herein to apply for confirmation of the grant within reasonable time especially in a situation such as this where the beneficiaries are getting restless and emotions are starting to rise because each person feels entitled to the portion of the property that he occupies or utilizes.

25. While the petitioner states that she has already filed her application for confirmation of grant, I note, from the court record that the objectors have not moved the court in any way so as to fix the case for confirmation. The objectors have additionally not complied with the court order of 18th May, 2004 requiring them to file their list of assets of the deceased's estate. The scenario currently obtaining in this case is a very disturbing one considering that this is a fairly old case having been filed 15 years ago. The objectors have not explained why after successfully obtaining a revocation of the grant issued to the petitioner more than 14 years ago, they have not made any moves towards finalising the case.

26. When looked together with the delay that I have noted in this matter, one cannot help but get the feeling that this current application is a drift away from the real issue of confirmation of grant and distribution of the estate of the deceased which the applicants should be more concerned about instead of filing protracted applications and counter applications that may not finally determine the matter at hand.

27. From the foregoing, the orders sought by the applicants cannot issue and the said application is disallowed save for the order of maintenance of the status quo. Each party to this application shall bear his own costs.

28. Before signing off and having noted that this is an old matter which has never proceeded after Bauni J. delivered his ruling on 18th May 2004 directing that all parties file a list of deceased properties. I direct that each party files her list of deceased's schedule of assets before this court within the next 60 days to enable the distribution of the estate and the finalisation of the case.

29. Mention on 26<sup>th</sup> September 2017.

**Dated, signed and delivered in open court this 27<sup>th</sup> day of June, 2017**

**HON. W. A OKWANY**

**JUDGE**

**In the presence of:**

N/A for the petitioner

N/A for the objector

Omwoyo: court clerk