



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**ELC CASE NO.357 OF 2014**

**JOB OKUNA OYUGI.....1<sup>ST</sup> PLAINTIFF**

**DOUGLAS ODHIAMBO OYUGI.....2<sup>ND</sup> PLAINTIFF**

**JOSHUA OGANGO.....3<sup>RD</sup> PLAINTIFF**

**(Suing as personal representatives of the Estate of HEZEKIAH NELSON OYUGI**

**MARY AKUMU OYUGI.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**CHIEF LAND REGISTRAR.....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**NYANDO TOGO INVESTMENTSLIMITED.....3<sup>RD</sup> DEFENDANT**

**CIBIYA FARMS HOLDINGS LIMITED.....4<sup>TH</sup> DEFENDANT**

**MUHORON SUGAR COMPANY**

**LIMITED(IN RECEIVERSHIP).....5<sup>TH</sup> DEFENDANT**

**RULING**

**1. INTRODUCTION.**

**(a) Job Okuna Oyugi, Douglas Odhiambo Oyugi, Joshua Ogango,(Suing as personal representative of the Estate of Hezekiah Nelson Oyugi) and Mary Akumu Oyugi, hereinafter referred to as the plaintiffs commenced this suit through the plaint dated 24th December 2014 against Chief Land Registrar, Attorney General, Nyando Togo Investments Limited, Cibiya Farms Holdings Limited, Muhoroni Sugar Company Limited(In Receivership), hereinafter referred to as 1st to 5th Defendants respectively. The plaint contains nine prayers including declaratory order, rectification of register, permanent injunction, general damages, and costs.**

**(b) Contemporaneously filed with the plaint is the notice of motion of even date under Order XXXIX Rule 1, 2, 2A, 3 and Order V of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking seven prayers including temporary injunction and substituted service orders.**

(c) The plaint and Notice of Motion were filed at Nairobi Milimani Environment and Land Court on 24th December 2014 and the Duty Judge certified it urgent and ordered it be brought to this court for mention on 6th January 2015. On the 6th January 2015, the matter was mentioned before the Deputy Registrar and prayer 6 on substituted service granted in respect of 3rd and 4th Defendants/Respondents. The 4th Defendant filed a replying affidavit sworn by Newton O. Osiemo on 19th January 2015. The 4th Defendant also filed a statement of defence dated 19th February 2015. The 5th Defendant filed a statement of defence dated 14th April 2015.

(d) The 3rd Defendant then filed the Notice of Motion dated 7th May 2015 and Notice to raise a preliminary objection of the same date. The Notice of Motion seeks to have the plaint dated 24th December 2014 struck out and the suit against 3rd Defendant dismissed with costs. The Notice of Preliminary Objection has the following three grounds;

(1) That the suit relates to distribution of a deceased person's property and any challenge thereof should be in Succession Cause No.1581 of 1992.

(2) The plaintiffs claim should have been pursued in accordance with Section 45 of the Law of Succession Act.

(3) This court has no jurisdiction to hear and determine this suit and it ought to be struck out.

2. The parties counsel appeared before court on 11th May 2015. It was agreed that the Preliminary Objection be dealt with through written submissions. The 3rd Defendant counsel submissions dated 9th September 2015 were filed on the same date. The 4th Defendant's counsel's submissions dated 12th October 2015 were also filed on that same date while the plaintiffs counsel's submissions dated 15th September 2015 were filed on 17th September 2015.

## **2. SUMMARY OF THE SUBMISSIONS**

(a) The 3rd Defendant's counsel submitted that the issues raised in the plaintiff's plaint relates to distribution of the property of the estate of the late Hezekiah Nelson Oyugi, who died intestate and that there is pending Nairobi Succession Cause No.,1581 of 1992 about the administration and distribution of the estate. That the Succession Cause was commenced by the plaintiffs herein and that they have since obtained grant of administration and the issues in this suit should have been pursued through that cause instead of filing a fresh suit. That **Doreen Oyugi**, a director to the 3rd Defendant was one of the widows of the deceased and hence beneficiary to the estate subject matter of the Succession Cause. The counsel further submitted that the court would need to determine whether the plaintiffs and Doreen Oyugi are beneficiaries of the deceased estate, their entitlements to the estate and whether or not the distribution of the estate has been done legally or not which are issues that should be determined by the Succession Court and this court lacks jurisdiction in view of Article 162 (2) (b) of the Constitution and Section 4((1) of the Environment and Land Court Act No.9 of 2011. That it is the Succession Court that can determine whether or not plaintiffs annexure "C" being copies of assents and transfers were a fraud. The counsel referred the court to the following decisions:

**(i) PLR -V- JNR & another [2013 ] eKLR.**

**(ii) Peter Ndambuki Nzikali & Another - V- Onesmus Ndambu Musau [2015] eKLR.**

**(iii) Karisa Chengo & 2 others - V - Republic, Malindi CA Cr. Appeal No.44,45 and 76 of 2014.**

(b) The 4th Defendant's counsel submitted that as the subject matter of this suit is land parcel **L.R. 6016/1 West Muhoroni** which formed part of the estate of the late **Hezekiah Nelson Oyugi**, and is subject matter of **Nairobi HCC Bo.1581 of 1992**, which is still pending, then the plaintiffs capacity to file this suit is not settled as the issue of the grant of representation has not been resolved. That if the plaintiffs intention was to get in all the free property of the deceased, then they should have pursued the same in accordance with Section 82 of the Law of Succession Act and not a fresh suit. The counsel

finally submitted that the suit has been filed in the wrong court by persons without capacity.

(c) The plaintiffs counsel submitted that this court has jurisdiction to hear and determine this suit in line with Article 165 (5) (b), 166 (1) (b) and Section 7 of the Environment and Land Court Act. The counsel submitted that the ongoing HCC NO.1581 of 1992 seeks to devolve the property of the late **Hezekiah Nelson Oyugi** in the duly appointed personal representatives and is not concerned with the adjudication of the ownership of the suit property and rectification of the Land register and that the parties in the Succession Cause and the instant suit are different. The counsel submitted that the orders sought in this case cannot be issued by the family court. The counsel referred the court to the following decisions where superior court held that a succession Court cannot issue injunction as Order 40 of the Civil Procedure Rules is not part of the Probate and Administration rules.

1) **Re Estate of Kilungu** (deceased) (2002) 2 KLR 136

2) **Josephine Wambui wachuka & 2 others -V- Margret Jjoki Noroge** [2013] eKLR.

The counsel pointed out that the plaintiffs suit challenges the title of a registered proprietor under Section 26 of the Land Registration Act on the basis of fraud, misrepresentation and illegality and the preliminary objection should be dismissed with costs.

3. The main issues for determination are as follows:

(a) Whether this court has jurisdiction to deal with this suit and the Notice of Motion in view of the pending Nairobi **Succession Cause No.,1581 of 1992** on the administration of the estate of the **Late Hezekiah Nelson Oyugi**.

(b) Whether the issues raised in this suit should have been canvassed in the pending Nairobi HC Succession Cause No,1581 of 1992 instead of a fresh suit.

(4) The court has considered the grounds on the notice of Preliminary objection, submissions by counsel for 3rd and 4th Defendant in support and that of the plaintiffs counsel in opposition. The court has also perused the pleadings so far filed and the following are its conclusions:

(a) That by grant issued in Nairobi H.C Succession Cause No.1581 of 1992, the 1st, 2nd and 3rd plaintiffs were on 1st February 1994 appointed the administrators of the estate of **Hezekiah Nelson Oyugi Ogango** who passed on the 7th August 1992 (see copy of grant marked "A" annexed to the supporting affidavit of **Job Okuna Oyugi** sworn on 24th December 2014). The copy of the certificate of title attached to the said affidavit and marked "B", confirms that the suit Land I.R 40291 (L.R.No.6016/1) was registered in the names of **Hezekiah Nelson Oyugi** on 1st November 1985. The Certificate further shows that on 2nd October 2002 a grant of letters of administration was registered with the names of 1st to 3rd plaintiffs as personal representatives of the deceased, **Hezekiah Nelson Oyugi**. On the same date the property was transferred to **Betty Oyugi** and **Doreen Oyugi** as beneficiaries. This was followed by another transfer to **Nyando Togo Investments Limited** on the same date. Then on 13th April 2012, the property was transferred to **Cibiya Farm Holdings Limited** (4th Defendants). The court takes it that the plaintiffs are disputing all the registrations transferring the title from **Hezekiah Nelson Oyugi** names on the basis that it was done without the administrators knowledge and were therefore done fraudulently, unlawfully and illegally.

(b) That the law of Succession Act, Chapter 160 of Laws of Kenya is the applicable law in "all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons". (see Section 2(1) of the Act). The date of commencement is 1st July 1981 and **Hezekiah Nelson Oyugi** died on 7th August 1992 and therefore the estate is to be administered in accordance with the provisions of the Act. The provision of Section 55 (1) of the Act outlaws distribution of capital assets of an estate before the confirmations of the grant in accordance with Section 71. This position is further restated in Section 82 which deals with powers of personal representatives. The provisions of Section 45 of the said Act

protects the property of deceased person. It states as follows;

**" 45 No intermeddling with the property of deceased person.**

**(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 had intermeddled after deducting any payments made in the due course of administration."**

The personal representatives of a deceased person's estate have duties as set out under Section 83 of the Law of Succession Act. The duties includes " to get in all free property of the deceased." (sub section b). The 1st to 3rd plaintiffs being personal representatives of **Hezekiah Nelson Oyugi** and in accordance with the grant issued on the 1st February 1994 have the capacity to initiate or commence suits to collect the property of the estate of the deceased. They are therefore in order to commence this suit in their personal representative capacity.

(c) That the jurisdiction to determine the issues to do with administration of estates of deceased persons lies with the High Court and not this court. The main prayers in the plaint and Notice of Motion dated 24th December 2014 do not deal exclusively with the administration of the deceased estate. The pleadings brings out a question of the legality or otherwise of the transfer of the suit property. The prayers are about restoring the suit property to the names of the Personal representatives after cancelling the names of the 4th Defendant among others. These are issuing within the Powers of this court. This court, has the power to entertain prayers for injunctive orders in appropriate cases as the main suit is heard and determined unlike the Succession Court. [See **Josephine Wambui Wachuka & 2 others -V- Margaret Njoki Njoroge [2013] eKLR** and in **Re Estate of Kilungu (Deceased) (2002) 2 KLR 136.**]

5. That for reasons set out above, the court finds no merit in the preliminary objection by the 3rd Defendant. The preliminary objection is rejected and dismissed with costs to the plaintiffs.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

Dated and delivered this **25th day of January 2016**

In presence of;

PLAINTIFFS N/A

DEFENDANTS N/A

COUNSEL Mr Abisa for Ochieng for plaintiff and Mr Otieno for 4th Defendant h/b for rd Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**25/1/2016**

25/1/2016

S.M. Kibunja J.

Oyugi court assistant

Parties absent

Mr Osiemo for 4th defendant I hold brief for Otieno Opiyo for 3rd Defendant.

Mr Abiso for Ochieng for plaintiff.

Court: The ruling read over in open court in presence of Mr Abiso for Ochieng and Mr Osiemo for the 4th Defendant and h/b for 3rd Defendant.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**25/1/2016**