



**REPUBLIC OF KENYA**

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

**PROBATE & ADMINISTRATION CAUSE NO. 48 OF 1999**

**IN THE MATTER OF THE ESTATE OF ODOYO MALOBA ---DECEASED**

**AND**

**ELIZABETH ATIENO SIUNDU----- PETITIONER**

**VERSUS**

**PHILIP OKWOIRO OFISI-----OBJECTOR**

**AND**

**JULIAN MALOBA-----1<sup>ST</sup> INTERESTED PARTY**

**JOHN WABERE-----2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The Application this Court has to deal with is the Notice of Motion dated 18<sup>th</sup> June 2015 which requests for the following prayers:-
  1. **That the Restrictions placed on land reference Number BUKHAYO/NASEWA/52 by JULIANA MALOBA on 26.3.2006 and JOHN WABWIRE ODONYO on 30.10.14 are removed by Order of this Court.**
  2. **That the Land Registrar Busia County do implement the Certificate of Confirmation of the grant in Busia High Court Succession Cause No. 48 of 1999 issued on 8.4.2006**
  3. **That costs of this application be borne by the Interested Parties.**
2. In the Grounds in support of the Motion and the Affidavit of the Applicant sworn on 17<sup>th</sup> June 2015, it is revealed that the Applicant is the Administratrix of the Estate of Maloba Odonyo (Deceased) having obtained Confirmation of Grant on 8<sup>th</sup> April 2006. Confirmation was made after an Objection by one Philip Okwiro Ofisi (The Objector) was heard by Court and dismissed.
3. The complaint by the Administratrix is that she is unable to implement the Confirmed Grant because of Restrictions placed on the Register to Bukhayo/Nasewa/52 by Julian Maloba (The 1<sup>st</sup> Interested Party) and John Wabwire Odongo (The 2<sup>nd</sup> Interested Party). The Administratrix believes that the Restrictions have been placed by Interested Parties at the behest of the Objector.
4. In opposition to the Application the Objector filed Grounds of opposition on 27<sup>th</sup> April 2016. Essentially, the grounds are some alleged facts which really should have been in an affidavit. The Interested Parties did not file any papers in opposition to the Motion. On 25<sup>th</sup> February 2016, the

- 1<sup>st</sup> Interested Party told Court that she was not opposed to the application, while at the hearing, the 2<sup>nd</sup> Interested Party stated that he supported the Objector.
5. A copy of a certificate of Official Search to Bukhayo/Nasewa/52 is annexed to the Affidavit of the Applicant. In the proprietorship section, the following are stated to be the proprietors:-

**26.7.2006 Elizabeth Atsieno Siundu ½ share**

**John Guvinyo each**

**Taabu Guvinyo, Pascal Gusinyo and Daniel Omuke Egenga – each to get 2 acres from Elizabeth Atsieno’s share.**

The Search shows that the entry of proprietorship was made on 26<sup>th</sup> July 2006.

6. In the Section of Restrictions, the following entries appear;

**Restriction: No dealing without the consent of Juliana Maloba (until partition is done)**

**31.10.2014 Restriction: No dealing without the consent of John Wabwire Odonoy vide Korongo & Advocates Co. dated 20.10.2014.**

7. Having set out the entries subsisting in the Register to Bukhayo/Nasewa/52 as revealed in the Certificate of Official Search dated 9<sup>th</sup> December 2014, I propose to start by dealing with prayer 2 of the Motion. The prayer is that this Court should order that the Land Registrar Busia County do implement “the Certificate of Confirmation of Grant” issued herein on 8<sup>th</sup> April 2006. My observation is that the entries made on 26<sup>th</sup> July 2006 very substantially implemented that Confirmation order. The Order on distribution was as follows:-

| <b>Name</b>                   | <b>Description Of Property</b> | <b>Share of heir</b> |
|-------------------------------|--------------------------------|----------------------|
| <b>ELIZABETH A. SIUNDU</b>    | <b>BUKHAYO/NASEWA/51</b>       | <b>½ HALF SHARE</b>  |
| <b>JOHN GUSINYO</b>           | “                              | <b>½ HALF SHARE</b>  |
| <b>TAABU GUSINYO</b>          |                                | <b>EACH TO GET</b>   |
| <b>PASCAL GUSINYO</b>         | “                              | <b>2 ACRES</b>       |
| <b>DANIEL OMUKE EGANA</b>     | “                              | <b>FROM</b>          |
| <b>JULIANA MALOBA</b>         | “                              | <b>ELIZABETH</b>     |
| <b>ATSIENO SIUNDA’S SHARE</b> |                                |                      |

The Entry in the proprietorship section was made on 26<sup>th</sup> July 2006 following that order on Distribution save that the share of Juliana Maloba is left out. There is no evidence as to whether that omission is deliberate or accidental. Whatever the reason, this Court shall be making orders that the order of Confirmation be faithfully and accurately implemented.

8. As correctly pointed out by the Applicant, the Restrictions placed to the registry are placed by persons other than the Objector. They are placed by the Interested Parties. It is also observed that, by virtue of the entry of 26<sup>th</sup> July 2006 to the Register, the Applicant is now a co-proprietor to the land. How then is the Applicant to deal with these restrictions?
9. Sections 76, 77 and 78 of the Land Registration Act (Act No. 3 of 2012) sets out the procedure for the Placement, notification, Removal and variation of Restrictions. Section 78 would be of

particular interest here. It reads:-

- 78.(1) The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order that the removal or variation of a restriction.**
- 2. Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.**
- 10.A Proprietor affected by a Restriction would either apply for its removal to the Registrar under subsection (1) or to the Court under Subsection (2)

The Petitioner (now a co-proprietor) has resorted to Court through the Notice of Motion before me.

- 11.But two issues immediately arise. First, on a plain reading of section 78(2), a Court may order the removal or variation or make any such order in respect to a Restriction only upon notice of the Applicant to the Registrar. In the matter before me there is no proof that the Registrar was served. That said, this Court takes the same position as Ouko, J (as he then was) took in **Hellen W. Mungai vs Humphrey V. Mungai** [2010] eKLR when considering a similar question in respect to Section 138(2) of The retired Registered Land Act from which Section 78(2) was replicated. The Judge stated;

**“There was no proof that the Registrar was served. However, it is my considered view that such service will only be necessary where the restriction is registered by the Registrar on own motion”.(sic)**

In the matter before me the Restriction was placed by the Registrar at the instance of the two Interested Parties. I hold that service upon the Registrar was not essential and I do hereby excuse it.

- 12.As noted earlier, the Restrictions were placed by the Two Interested Parties. Until enjoined to this Motion, the two have not been party to these proceedings. A challenge to the Restriction placed by them ordinarily needed to have been taken up in separate proceedings. However as stated earlier, the 1<sup>st</sup> Interested Party conceded to the Application, while the 2<sup>nd</sup> Interested Party simply identified with the Objector.
- 13.In opposing the Application, the Objector substantially criticized the Grant of Letter to the Petitioner. In other words, the Objector supported the Restrictions on the ground that Letters of Administration made to the Petitioner were not deserved or otherwise improper. It is only for the reason that the Restrictions are intimately connected to this Probate and Administration matter that this Court is willing to hear and determine their challenge within these Proceedings.
- 14.This Court has considered the matter at hand. The history of this matter is that through an affidavit sworn on 20<sup>th</sup> October 2001 and filed on 21<sup>st</sup> November 2001, the Objector filed a protest to the Confirmation of grant in favour of the Petitioner herein. That protest was heard by Seron J who found no merit in it and held as follows:-

**In this case the Petitioner being a daughter in law ranks in preference as opposed to Philip Okwaro Ofisi who is a distant grandson and a clan appointed guardian. I am satisfied that the Grant of representation was properly given to her.....**

**I have not been given any reason why I should not confirm the grant. I hereby confirm the grant issued on the 4<sup>th</sup> day of October 2000. Pursuant to the provisions of Rule 41(2) of the Probate and Administration Rules. The Protestor Philip Okwaro Ofisi, is condemned to pay costs of the protest which is dismissed in its entirety.**

15. That Decision appears to have left the Objector disgruntled. From the conduct of the 2<sup>nd</sup> Interested Party who simply identified with the Objector, the Restrictions were placed at the behest of the Objector. The Objector was using the Restriction as a collateral attack on the Grant obtained by the Petitioner. This cannot be allowed to stand as the Court had already made a determination of the Objector's protest.
16. For that reason I find merit in prayer(1) of the Application. As I had also found that the Land Registrar had not fully implemented the order of Confirmation, prayer (2) is also merited. The result is that I allow the Notice of Motion dated 18<sup>th</sup> June 2015 in its entirety. The Objector and 2<sup>nd</sup> Interested Party shall meet the costs of the successful Motion.

Dated, signed and delivered at Busia 26<sup>th</sup> day of May 2016.

F. TUIYOTT

**J U D G E**

In the presence of :-

.....C/Assistant

..... for the Petitioner

.....for the Objector

.....for the Interested Parties.