



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
SUCCESSION CAUSE NO. 406 OF 2009
IN THE MATTER OF THE ESTATE OF
JOSEPH NG'IELA MBORI (DECEASED)

ANDRONICO ONDORO NG'IELA PETITIONERS

MARY ACHIENG' NG'IELA

VERSUS

PEREZ POLY OBONYO OBJECTORS

MAZWELL MBORI OBONYO

RULING

1. Following the death of Joseph Ng'iel Mbori (herein, deceased) on the 16th December 2003, his son, **Andronico Ondoro Ng'iel,** (first petitioner) and daughter, **Mary Achieng' Ng'iel,** (second petitioner) petitioned this court for grant of letters of Administration Intestate respecting the deceased's estate said to comprise portions of land No.s 1950, 452, 1371, 1384, 474 and 1285 all at Central Kasipul/Kamuma and Plots No.s 202 and 35 within the Oyugis Town Council area. Other than the petitioners, the deceased was also survived by his two widows i.e **Suslia Amolo Ng'iel** and **Grace Aoko Ng'iel.**

2. The necessary grant of letters of Administration Intestate was issued on the 16th July 2011, but is yet to be confirmed.

The two petitioners were thus granted the authority to administer and manage the estate of the deceased pending confirmation of the grant.

Accordingly, on the basis of a chamber summons dated 19th July 2012, the petitioners sought interim orders against, **Peres Poly Obonyo** (first respondent) and **Mazwell Mbori Obonyo,** (second respondent) to restrain them either by themselves or their agents/servants or any one purporting to act on their behalf from interfering with the estate of the deceased and in particular, collecting rent from Plot No. 202 within Oyugis township or taking any property of the deceased and in any other manner doing anything adverse to the estate of the deceased.

3. The petitioners also sought orders that any income accruing from the estate of the deceased be paid into court pending the ascertainment of the respective shares of the beneficiaries.

The petitioners allege that the respondents are strangers to the estate of the deceased and without any colour of right took possession of Plot No. 202 Oyugis township, which is part of the estate of the deceased and from which they collect rent from tenants therein.

4. The chamber summons is essentially grounded on the averments contained in the supporting affidavit dated 19th July 2012, deposed by the first petitioner and is opposed on the basis of the averments contained in a replying affidavit dated 27th May 2013, and a further affidavit dated 4th April 2016, both deposed by the first respondent.

The respondents basically contend that the property subject of this application i.e Plot No. 202 Oyugis did not belong to the deceased as at the time of his death as it had already been transferred by him to other parties including themselves and no longer existed in its original form.

5. The application was canvassed by way of written submissions and in that regard the petitioners filed their submissions through **Messrs Oguttu Mboya & Co. Advocates**, while the respondents filed theirs through **Messrs G.M. Nyambati & Co. Advocates**.

This court has given due consideration to the rival submissions which when viewed alongside the grounds in support of the application and those in opposition thereto raise one crucial issue for determination and that is whether the material Plot No. 202 Oyugis town is part of the estate of the deceased in which case any person other than the petitioners, who deals with it in any manner would be regarded as an intermeddler.

Under S.45 of the Law of Succession Act, no person is allowed to take possession or dispose of or otherwise intermeddle with any property of a deceased person unless authorized by any law or by a grant of representation under the Act.

A person who intermeddles with the property of a deceased person commits a criminal offence punishable by payment of a fine or a term of imprisonment or both.

6. The present application presupposes that the material Plot No. 202 belonged to the deceased but is being interfered with by the respondents whose defence is that the said property ceased to belong to the deceased when during his lifetime he transferred it to other parties.

A search certificate annexed to the respondent's further affidavit and marked exhibit "PPO.OI" indicates that the plot is currently registered in the name of the first respondent under a new description to wit, Central Kasipul/Kamuma/5613.

It is thus implied that the description "**Plot No. 202 Oyugis**", became obsolete with the registration of the plot under a new description which we may herein shorten as Plot No. 5613.

7. In effect, the respondents are saying that Plot No. 202 Oyugis is nonexistent and therefore this present application by the petitioners is misconceived.

However, much as there is the likelihood that Plot No. 202 Oyugis may have transformed into Plot No. 5613 at a later stage, the search certificate (exhibit PPO.OI) clearly indicates that Plot No. 5613 was created from a sub-division of another Plot No. 5434 and not the material Plot No. 202 Oyugis. Further, the registration of Plot No. 5613 was a first registration which was effected on the 12th April 2011, just about three months prior to the issuance of the material grant of letters of Administration in favour of the petitioners.

8. While applying for the grant, the petitioners listed several immovable property as belonging to the deceased. These included the material Plot No. 202 Oyugis Township. However, the application was not accompanied by credible supporting documents to establish or prove the alleged ownership.

In view of the respondents' contention that Plot No. 202 Oyugis town became Plot No. 5613 after having

been transferred by the deceased during his lifetime, it would follow that the issue of ownership of the plot is not ripe for determination and may have to await the confirmation proceedings which are long overdue.

9. S. 71 of the Law of Succession Act, provides that a grant may be confirmed after the expiry of a period of six (6) months from the date of issue and in cases of intestacy such as the present one, the grant cannot be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled.

Herein, the respondents' claim of ownership of the material plot is seemingly based on a legal transfer allegedly made during the lifetime of the deceased. If indeed such a transaction took place, then it may be stated that the respondents have an interest in the estate of the deceased and in particular, with regard to the material Plot No. 202 Oyugis Town such that they may fall within the classification of persons referred to as beneficiaries or it may be stated that the material Plot No. 202 Oyugis Town is not part of the estate of the deceased and therefore unavailable for distribution to the deceased's heirs and/or beneficiaries.

10. The ownership of the material Plot No. 202 Oyugis Town is definitely the bone of contention and indeed the source of the current dispute between the petitioners and the respondents. Neither of them has proved to the satisfaction of the court at this juncture their alleged respective ownership of the plot.

Consequently, the present application is granted or allowed only to the extent that any rental income accruing from the material plot shall be deposited in court with effect from the 1st June 2016, if only to preserve that part of the estate pending the confirmation of the grant. It now behoves upon the petitioners to expeditiously take out the necessary summons for confirmation of grant and have the current dispute resolved once and for all.

11. As an alternative to depositing the rental income in court, the parties may consider opening an interest earning account in any of the commercial banks in the joint names of their respective advocates for the sole purpose of depositing the rental income pending finalization of the entire succession cause.

Otherwise, each party shall bear own costs of this application.

Ordered accordingly.

J.R. Karanjah

Judge

[Read and signed this 19th day of May 2016]