



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY

MISC. CIVIL SUIT NO. 10 OF 2016 (O.S)

IN THE MATTER OF THE ESTATE OF:

OCHOLA OSURI (DECEASED)

AND

**IN THE MATTER OF AN APPLICATION BY SAMUEL WYCLIFFE ADEE ONGIRI FOR THE
HONOURABLE COURT TO APPOINT KENNEDY OUMA NJOGA AND FELIX OTIENO
NJOGA AS ADMINISTRATORS OF THE ESTATE OF AKOTH NJOGA (DECEASED)**

BETWEEN

SAMWEL WYCLIFFE ADEE ONGIRI PLAINTIFF/APPLICANT

VERSUS

MOSES OTIENO OCHOLA..... 1ST DEFENDANT/RESPONDENT

JACOB OKEYO OCHOLA 2ND DEFENDANT/RESPONDENT

RULING

1. By an originating summons dated 6th June, 2016, the plaintiff/applicant SAMWEL WYCLIFFE ADEE ONGIRI seeks orders that MOSES OTIENO OCHOLA and JACOB OKEYO OCHOLA be declared and named the administrators of the estate of OCHOLA OSURI (deceased) for purposes of determining his rights as a creditor to the estate.
2. The impetus for this application is that the applicant has all along known the respondents as the biological children of the deceased OCHOLA OSURI and they infact presented themselves as such.
3. On 8th February 2009, the applicant purchased a parcel of land measuring 0.12 hectares known as East Karachuonyo/Kamser Saka/1087 from OCHOLA OSURI at a sum of Kshs.100,000/= by an agreement marked A. However the vendor/deceased passed on before the transfer could be effected.
4. The Respondents have been reluctant to be confirmed as administrators of the estate yet when the agreement was entered into they had participated as witnesses. What evidence is there that the respondents are children of the deceased? Surely witnessing an agreement of sale cannot be proof of a parental relationship especially when the agreement does not mention such relationship.
5. It is not very clear to me why the applicant's counsel has decided to move this court under **Order**

xxxvi Rule 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, yet Succession causes are governed by the Law of Succession Act (Cap 160).

6. Succession matters are governed by their own procedure and Civil Procedure Act and Rules only apply in such circumstances as are permitted by the Law of Succession Act and the Probate and Administration Rules under **Rule 63 P&A Rules, Section 3A of the Civil Procedure Act** is not applicable to Succession Cases.

Rule 63 provide:-

“Save as is in the Act or these rules the following provision of the Civil Procedure Rules namely Order V, X, XI, XV, XVIII, XXV, XLIV and XLIX shall apply.....” Order XXXV is not among them.

7. What is the legal position for one to realize their rights when confronted with a reluctant administrator?

8. I think the situation is addressed under **Part VI Rule 21 and 22 of the Probate and Administration Rules.**

9. The applicant ought to file a citation which would then be served on the member of the deceased's family requiring them to indicate their willingness as reluctance to take up letters of administration. It is from this point that the court would give directions.

10. In my view this application is incompetent and is dismissed.

11. The applicant is at liberty to move the court under the appropriate provision.

Delivered and dated this 30th day of November, 2016 at Homa Bay

H.A. OMONDI

JUDGE