



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 76 OF 2013

IN THE MATTER OF THE ESTATE OF:

JOHNSON IGENDIA ONTIRI.....
DECEASED

AND

IN THE MATTER OF LR.NO. SOUTH MUGIRANGO/BOIKANGA/686

AND

IN THE MATTER OF: RECTIFICATION OF THE REGISTER AND NULLIFICATION OF TITLE

AND

IN THE MATTER OF: LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA

BETWEEN

JAMES MASANYA ONTIRI IGENDIA.....PETITIONER/APPLICANT

AND

MAGERO MARUNGO.....1ST
RESPONDENT

JULIUS K. OMUGA.....2ND
RESPONDENT

RULING

1. The Petitioner/Applicant herein James Masanya Ontiri Igendia filed a summons for rectification of the register dated 12th November, 2013 under **Rules 47, 59, 63, 73 and 76** of the **Probate and Administration Rules** and **Section 55** of the **Law of Succession Act Cap 160** under certificate of urgency seeking:-

1. That pending the hearing and determination of this Application the Honourable court be pleased to grant an order of inhibition, inhibiting the transfer charge encumbrances and/or any other dealings, whatsoever in respect of LR. No. SOUTH MUGIRANGO/BOIKANGA/1686 FORMING PART OF THE Estate of the Deceased.

2. That this court be pleased to make a declaration that the sale and transfer of LR.NO. SOUTH MUGIRANGO/BOIKANGA/686 without confirmation of Grant of the Letters of Administration from the names of the late Johnson Igendia Ontiri is null and void.

3. That this Honourable court be pleased to rescind, recall, vary and/or annul the transfer and Registration of LR.No.South Mugirango/Boikanga/686, in the names of Julius K. Omuga in lieu and/or in place of the Deceased.

4. That this Honourable court be pleased to grant an order directing rectification of the register in respect of LR.NO. SOUTH MUGIRANGO/BOIKANGA/686 by deleting the name of Julius K. Omuga and restoring the names of the Deceased herein, as the legally registered owner, in respect of the subject land pending the confirmation of the grant of equal distribution of the estate.

5. That this Honourable court be pleased to make such other and/or further orders as maybe just and expedient in the circumstances.

6. That costs of this application be provided for.

2. The application was supported by the petitioner/applicants affidavit where he averred that he is one of the sons of the late Johnson Igendia Ontiri(now deceased) whose estate is the subject of these succession proceedings, that the respondents are strangers who have proceeded to retain transfer and registration of the deceased's estate without following the proper procedure and that by the time of the demise of the late Johnson Igendia Ontiri he was the legally registered owner of LR.No.South Mugirango/Boikanga/686 (the suit land).

3. He further averred that the fraudulent transfer and registration of the suit land into the names of the respondents was done after the demise of the deceased, on the 20th December, 2006, wherein the 1st respondent transferred L.R.No. South Mugirango/Boikanga/686 from the names of the late Johnson Igendia Ontiri into his name without obtaining the grant of confirmation in respect of the estate of the deceased.

4. Subsequently, after obtaining the aforesaid title the 1st respondent then transferred it to the 2nd respondent on 15th July, 2008; that the 2nd Respondent is also a stranger to the estate of the deceased, and that the transfer and registration was intended to defeat the ends of Justice; that the purported transfer of the aforesaid LR.No. South Mugirango Boikanga/686 amounted to intermeddling with the Estate of the Deceased Johnson Igendia Ontiri since no confirmation of grant of the letters of Administration had issued and therefore the transfer and registration of the suit land LR.No.South Mugirango/Boikanga/1686 in the names of the 1st respondent and later into the names of the 2nd respondent was done by fraud and in abuse of the due process of the court.

5. Furthermore, that no distribution/appropriation of the estate of the deceased can be undertaken prior to confirmation of the grant of letters of administration, the letters of administration issued herein having not been confirmed and consequently no transfer and/or alienation of the deceased's property could be undertaken whatsoever.

6. Lastly, the applicant averred that the respondents herein fraudulently caused the suit land to be transferred and Registered in the name of Julius K. Omuga with a view to denying and/or depriving the applicant/his lawful entitlements, and therefore that the actions of the respondents were irregular and illegal and that the sales transfer and registration of the suit land in favour of 2nd respondent ought to be recalled rescinded and/or nullified.

7. The respondents on their part each filed replying affidavits dated 4th December, 2013 through the firm of C.O. Nyamwange & Co. Advocates. However, when the instant matter came before me on 28th January, 2014 counsel for the petitioner/Applicant brought this court's attention to the fact that though the respondents had filed their replying affidavits there had been no appearance contrary to **Order 9 Rule 7**

of the **Civil Procedure Rules**. The respondents counsel was notably absent and consequently the Replying Affidavits sworn by Julius Karani Omuga and Magero Marungu were expunged from the records.

8. The application then proceeded more or less ex-parte with Mr. Nyambati counsel for the petitioner/applicant reiterating the averments in his client's supporting affidavit. After evaluating the above application together with all the annexures attached, the issue that arises for determination is whether the applicant has made out a case for the orders sought. **Section 55 of the Law of Succession Act Cap 160**(the Act) stipulates:-

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by section 71.”

Similarly **Section 8 (b)(ii)** of the Act provides that though personal representatives do have power to sell any asset vested in them,

“(ii) No immovable property shall be sold before confirmation of the grant” [my emphasis].”

9. From the petitioners/applicants documents he is the first born son of the deceased herein Johnson Igendia Ontiri. In his capacity as the first born son he got authority from his siblings to administer the property of their deceased father which is:-

LR.NO. South Mugirango/Boikanga/686

LR.No. North Mugirango/Bosanga/2713

A portion out of LR. No Kitutu Central/Mwogeto/110.

The petitioner/applicant then proceeded to apply for grant of letters of administration and the same was issued to him on 3rd July, 2013. However the said grant has not been confirmed.

10. According to a copy of the title deed certified by the Land Registrar Kisii, the suit land LR.NO. South Mugirango/Boikanga/686 was registered as a first registration in the names of the deceased in 1970. He was issued with a land certificate in 1971. According to the certificate of death, the deceased died on 20th September, 1997. The suit land was then registered in the name of the 1st respondent on 20th December, 2006 and later sold to the 2nd respondent on 15th July 2008. The 2nd Respondent acquired a title deed of the suit land on the same date. Later, the petitioner/applicant registered a caution on the title citing his interest as a beneficiary.

11. As I mentioned in the preceding paragraphs, the respondents' replying affidavits were expunged from the record for not complying with **Order 9 Rule 1** of the **Civil Procedure Rules**. However even if these affidavits were admitted, I still find it suspicious how the 1st Respondent who claims that the suit land was owned by the deceased had the same transferred into his name without even obtaining a grant of letters of administration and having the same confirmed. If he had done so, he would have filed the respective forms he had used in obtaining the same. Secondly, the 2nd respondent cannot be termed as a bonafide purchaser for value without notice since the 1st Respondent did not have a good title to pass on to him (2nd Respondent).

12. W. Musyoka in his casebook on the law of succession at page 581 states that:-

“Where the assets have been misapplied by personal representatives and are traceable into the hands of a particular person, the law allows the beneficiaries entitled to such assets to follow them into the hands of the person holding such property”.

However, the author goes on to cite **Re Diplock –vs- Wintle (1984) ch 485** which makes an exception to this general rule in a case where the holder of such property is a bonafide purchaser for value.

13. As I have observed above, the 2nd respondent in this case cannot be said to be a bonafide purchaser for value without notice because the 1st Respondent did not have a good title in his hands that he could pass to the 2nd Respondent since the 1st Respondent had not complied with **Section 55** of the **Law of Succession Act**. The applicant, who was in possession of the Grant of Letters of Administration Intestate, issued, to him on 3rd July 2013 was yet to apply for confirmation of the same. The transfer to the 2nd Respondent though done after the death of the deceased was done long before the Grant of Letters of Administration Intestate were issued to the applicant.

14. The actions of the 1st and 2nd respondents can be termed as intermeddling which is prohibited by **Section 45** of the **Act** which provides:-

“Except so far as is 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.”

Section 3 of the **Act** defines “free property” in the following terms:-

“Free property” in relation to a deceased person, means the property of which that person was legally freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.”

There is no doubt in the instant case that there was no free property of the deceased to be taken possession or disposed of by the 1st Respondent. He was clearly intermeddling with the estate of the deceased when he purported to dispose of the same before Grant of Letters of Administration.

15. In conclusion, I find and hold that the actions of the 1st and 2nd respondents can be termed as those of intermeddlers. This application by the petitioner/applicant is allowed in terms of prayers 2, 3 and 4 with costs of the application to the petitioner/applicant.

Once the process of the title of the suit property reverting to the deceased is completed the petitioner/applicant should proceed with confirmation of the Grant in accordance with the provisions of the law under the Act.

16. Orders accordingly.

Dated and delivered at Kisii this 30th day of May, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Miss Okwoyo for G.H. Nyambati (present) for

the Petitioner/Applicant

M/s C.O. Nyamwange (absent) for the Respondents

Mr. Edwin Mongare - Court Assistant

