



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.234 OF 2000**

**IN THE MATTER OF THE ESTATE OF NYACHIEO OSINDI ..... DECEASED**

**AND**

**IN THE MATTER OF MARIA KERUBO MBOGA ..... PETITIONER**

**VERSUS**

**MONYENYE OSINDI }  
ISAAC ONGUBO OSINDI }  
CHARLES OGERO OSINDI } .....OBJECTORS  
DANIEL MAGORI OSINDI }  
PASCARIA MWANCHA TOEL }  
JOHN NYANGARESI OSINDI }**

**RULING**

1. The objectors/applicants herein filed a Notice of Motion dated 24<sup>th</sup> May 2014 under **Order 40 Rules 1 and 2** of the **Civil Procedure Rules** seeking orders that:-

1. Spent.
2. Pending hearing and determination of this application inter partes, an interim order of injunction do issue restraining the petitioner by herself, her agents, servants and/or employees from demarcating, subdividing, transferring, alienating or in any manner whatsoever parting with title and/or interfering with the objectors/applicants' occupation of parts of the suit land.
3. Pending hearing and determination of this succession cause, an order of temporary injunction do issue restraining the petitioner by herself, her agents, servants and/or employees from demarcating, sub dividing, transferring, alienating or in any manner whatsoever parting with title and/or interfering with objectors/applicants' occupation of parts of the suit land.
4. The costs of this application be provided for.

2. The application is supported by the affidavit sworn by Charles Ogero Osindi on 5<sup>th</sup> May 2014. The deponent avers to the following:-

- *The deceased Nyachieo Osindi whose estate these proceedings concern was the father in-law of the petitioner and 1<sup>st</sup> objector herein and grand father of the rest of the objectors.*
- *The deceased had two sons namely: Mboga Nyachieo and Osindi Nyachieo both of whom are deceased.*
- *Mboga Nyachieo was husband of petitioner while Osindi Nyachieo was the husband of the 1<sup>st</sup> objector and father of the rest of the objectors.*
- *Deceased before he died, demarcated the suit land herein namely LR No. Central Kitutu/Mwamanwa/820 measuring 9.5 acres or thereabout and gave out portions to his sons as follows:-*
  - *Mboga Nyachieo 7.5 acres and*
  - *Osindi Nyachieo 2.0 acres*
  - *Upon the said demarcation, each of the sons was put in occupation of their respective portions.*
  - *Osindi Nyachieo, the husband of the 1<sup>st</sup> objector and father of the rest of the objectors occupied the two acres which they have developed by planting coffee, trees, maize, bananas currently growing thereon.*
  - *However, petitioner has obtained transmission of the suit land into her name before this succession proceedings are finalized.*
  - *No grant of letters of administration has been confirmed.*
  - *The petitioner has now invited the Land registrar and Surveyor to sub divide the suit land.*
  - *If the suit land is sub divided, the objectors will be left out and they shall lose their inheritance and suffer loss and damage.*

3. The petitioner/respondent on her part though served with the application chose not to enter any appearance nor file a replying affidavit.

4. When the matter came up before me on 9<sup>th</sup> July 2014, Mrs. Asati, counsel for the objectors/applicants submitted that the petitioner filed a petition without involving the objectors especially 1<sup>st</sup> objector. As a result the objectors filed an objection. Thereafter, there was a proposal to negotiate for settlement but the same did not succeed.

5. In the meantime, the petitioner caused the estate to be transmitted to her name, hence the instant application.

6. In conclusion counsel submitted that the injunctive orders sought are to prevent process of sub division. Referring annexure “C003” being certificate of official search in respect of the suit land, she submitted that same shows that the suit land is now in the name of petitioner. On the other hand, annexure “C002” shows that as at the time of filing these proceedings, the same was in the name of the deceased.

7. The requirements for granting an interim injunction have now been established by **Giella -vs- Cassman Brown [1973] EA 358** which are:-

1. *That the applicant must satisfy the court that he has a prima facie case with a probability of success;*
2. *That the applicant will otherwise suffer irreparable injury which is uncompensable in damages; and*
3. *If in doubt, the court will determine the application on a balance of convenience.*

8. Have the objectors/applicants made out a *prima facie* case with a probability of success? In the case of **Mrao Ltd. -vs- First American Bank of Kenya and Two others [2003] KLR 125** a *prima facie* case was described as:-

**“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an**

**explanation or rebuttal from the latter.”**

9. Turning to the present case, the question this court needs to answer is whether or not the objectors/applicants have satisfied the three conditions for awarding a temporary injunction as set out in the **Giella case** (supra). I would say that they have. I say so because of the following:-

1. According to Form P&A 5, the petitioner has listed 10 beneficiaries including herself as the survivors of the deceased without including the objectors as survivors of the deceased's estate.
2. The petitioner in Form P&A 5 has stated that some of the deceased's survivors are minors. In such a case a continuing trust arises and 2 people are needed to administer such an estate. See **Section 58 (1) of the Law of Succession Act, Cap 160 of the Laws of Kenya** provides that:-

**“(1)Where a continuing trust ariseS:-**

**No grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is the Public Trustee or a Trust Corporation.”**

3. The petitioner was gazetted on 17<sup>th</sup> November 2000 as the person who applied to administer the estate of the deceased. However, since November 2000, the said grant has never been confirmed nor were letters of administration intestate ever been issued to the petitioner.
4. However, in a complete turn of events, the certificate of official search dated 13<sup>th</sup> February 2014 shows that the petitioner was registered as the proprietor of the suit land on 2<sup>nd</sup> June 2009 and the title deed was issued on 3<sup>rd</sup> August 2009. To my mind this action by the petitioner can be termed as intermeddling.

**Section 45 of the Law of Succession Act** prohibits dealing with the estates of the deceased without obtaining grant of letters of administration and provides:-

**“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 persons.”**

10. In the instant case, I can say without doubt that the petitioner has intermeddled with the estate of the deceased without first obtaining grant of letters of administration by transmitting the suit property to herself. Under **Section 45 (2) (a) of Cap 160**, she is guilty of a criminal offence. Furthermore, she failed to seek consent from the objectors while applying for the letters of administration especially the 1<sup>st</sup> objector who is ranked of equal or the same priority with the petitioner since they are both daughters in-law of the deceased. The petitioner thus contravened **Section 66 of Cap 160** and **Rule 7 (7) of the Probate and Administration Rules**.

11. Section 66 of the **Law of Succession Act** provides:-

**“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall in the best interests of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the following order of preference-**

- a. **Surviving spouse, or spouses, with or without association of other beneficiaries;**
- b. ....
- c. ....

.....”

12. **Rule 7 (7) of the Probate and Administration Rules** provides

that:-

**“Where a person who is not a person in the order of preference set out in Section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has:-**

- a. renounced his right generally to apply for a grant;**
- b. consented in writing to the making of the grant to the applicant; or**
- c. been issued with a citation calling upon him either to renounce such right or to apply for a grant.**

13. In the instant case, the petitioner has contravened every section and rule in the book in her quest to become the sole beneficiary of the deceased's estate. The Law of Succession Act sets out in very clear terms the detailed requirements to be fulfilled by anybody seeking a grant of Letters of Administration Intestate. Those requirements are indeed the litmus test for such applicants. The petitioner herein miserably failed the test, and as such she should not be allowed to make one step further in intermeddling with the deceased's estate.

14. It follows therefore that the objectors have indeed demonstrated they deserve the orders prayed for and in the circumstances I allow prayers 2 and 3 of the Notice of Motion dated 5<sup>th</sup> May 2014. The objectors shall have the costs of the application.

**Dated and delivered at Kisii this 31<sup>st</sup> day of July, 2014**

**R.N. SITATI**

**JUDGE.**

In the presence of:-

Miss Nekesa for Asati for Objectors

N/A for Petitioner

Mr. Bibu - Court Assistant