



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO.252 OF 2010

IN THE MATTER OF THE ESTATE OF:

SAMWEL OMURWA ISABOKE DECEASED

AND

**IN THE MATTER OF AN APPLICATION FOR LETTERS OF ADMINISTRATION
INTESTATE**

BY MUSA OMURWA, TOM OMURWA AND MOOCHI OMURWA

BETWEEN

MUSA OMURWA)

TOM OMURWA)

MOOCHI OMURWA)..... PETITIONERS/RESPONDENTS

VERSUS

FRED ISABOKE OMURWAAPPLICANT/OBJECTOR

AND

GLADYS KERUBO OMURWA)

DOUGLAS OMURWA)

DAVID MISATI OMURWA)..... APPLICANTS/OBJECTORS

RULING

1. The applicant/objector herein Fred Isaboke Omurwa filed Summons for Revocation of grant, the same having been made under **Section 76** of the **Law of Succession Act Cap 160 Laws of Kenya** and **Rule 44** of the **Probate and administration Rules** for orders:-

1. Spent.

2. That pending the hearing of this application interpartes the 2nd respondent/petitioner be

restrained from continuing with the construction of a permanent building on LR No. Kisii Town Block I/143.

3. That pending the hearing and determination of this succession cause the 2nd respondent/petitioner be restrained from continuing with the construction of a permanent building on LR No. Kisii Town Block I/143.

4. That pending the hearing of this application interpartes a mandatory injunction do issue directing the Kenya Tea Development Agency and Nyansiongo Tea Factory to deposit all tea proceeds and bonuses for payment for tea plucked from the property Nyansiongo settlement Scheme Plot 32 into court.

5. That pending the hearing and determination of this succession cause a mandatory injunction do issue directing the Kenya Tea Development agency and Nyansiongo tea Factory Co. Ltd to process and deposit all tea proceeds and bonuses for payment for tea plucked from the property Nyansiongo Settlement Scheme Plot No.32 into court.

6. That the limited grant of letters of administration issued to the petitioners/respondents be revoked.

7. That a limited grant of letters of administration be issued to the objector/applicant.

8. That such other or further order be made for the preservation of the estate of the deceased.

9. That the costs of this application be provided for.

2. The application was supported by an affidavit sworn by the applicant/ objector herein. Therein he deposes that: the deceased herein Samwel Omurwa Isaboke was his father and his mother's name was Mary Moraa Kiboma; his siblings are Rodgers Kiboma Omurwa, Ednah Omurwa, Jeremy Omurwa (deceased) and Janet Omurwa (deceased). The objector/applicant admitted that the respondents/petitioners are his step brothers but avers that when they (Petitioners) commenced the succession proceedings, his family as a whole were not informed or consulted.

3. He further averred that it is a mandatory requirement that all persons surviving a deceased person should be disclosed and their names entered in the probate and administration Form P&A 5; that his names and those of others as mentioned above were not included in the aforesaid form P&A 5, an omission which constitutes material concealment and the making of a false statement and therefore that the petitioners/respondents are being less than candid, dishonest and untruthful as they are out to shut him and his family from deceased's estate.

4. Furthermore, that the 2nd petitioner/respondent has started constructing on the property No. Kisii Town Block I/143, while the deceased's estate has not been succeeded and distributed thus the 2nd petitioner/respondent has no right that is superior to those of other beneficiaries. That the said construction is out to create a basis for laying claim on the property No. Kisii Town Block I/143 which property is prime and it would be in the best interests of all beneficiaries like himself that the estate of the deceased be preserved pending the distribution of it.

5. The application is opposed vide the Replying Affidavit sworn by Tom Omurwa on 4th November 2011. The said affidavit depones to the following matters:-

- The objector is a total stranger to the family of the deceased and has never either before or after the death of the deceased laid claim to the deceased's estate until now;
- The deceased had only three wives:-

i. Anne Moochi who died before the deceased;

ii. Rosa Kwamboka;

iii. Rachael Sarange.

- Sometime in 1983, the deceased convened a meeting of both immediate and extended family at which he settled his three wives as follows:-

i. Anne Moochi and her family at Geticha and the family was also given the property known as Kisii Town Block 1/126 which was registered in the name of the late Musa Omurwa a son of the deceased to hold in trust for his mother's house;

ii. Rosa Kwamboka and her children on Plot No.32 Nyansiongo settlement Scheme and was also given Kisii Town Block 1/135;

iii. Rachael Sarange and her house was settled at Nyakoe where she has lived to date and was also given a property in Kisii Town which property was later sold by a Bank due to non-payment of a loan for which the said property had been used to secure the loan;

iv. The deceased retained the following properties for himself:-

- Kisii Town Block 1/143;
- Central Kitutu/Daraja Mbili/520;
- Central Kitutu/Daraja Mbili/422

but later Kisii Town Block 1/143 and Daraja Mbili/520 were sold by deceased though transfers were not effected before death of deceased.

- Before petitioning for Grant of Letters of Administration Intestate the petitioners held a family meeting at which distribution of the deceased's estate was discussed and agreed;
- Mary Moraa Kiboma, mother of objector and alleged widow of the deceased never attended the family meeting referred to immediately hereinabove;
- The known wives and children of the deceased all participated in the deceased's funeral in February 1996 but none of the children of Mary Moraa Kiboma was among the deceased's children;
- The property known as Kisii Town Block 1/143 was given to Tom Omurwa so that he could service the loan owed to M/s Standard Chartered Bank Limited, Kisii branch and which loan the deceased had been unable to repay;
- Tom Omurwa cleared the loan with standard Chartered bank paid all outstanding rates to the County Council of Kisii after which he started the construction of a storied building thereon in the year 2010 and spent more than Kshs.5,000,000/= for the same;
- The tea plantation on Plot No.32 Nyansiongo Settlement Scheme was planted by Rosa Kwamboka and her children and whatever earnings come from the said plantation belong to the family of Rosa Kwamboka.

6. There is a second Summons for Revocation of Grant dated 11th November 2011 filed jointly by Gladys Kerubo Omurwa, Douglas Omurwa and David Misati Omurwa seeking orders similar to the orders sought by the objector/applicant vide the Summons dated 6th October 2011. The Summons is supported by the affidavit sworn by Douglas Omurwa in which he avers that Fred Isaboke Omurwa (1st Objector/Applicant), Musa Omurwa (1st Petitioner, now deceased), Tom Omurwa (2nd Petitioner/Respondent) are his blood brother, sister and brother respectively, all of them being the children of Anne Moochi (deceased), while the 3rd Objector/applicant David Misati Omurwa is his step brother being the son of Rachael Sarange.

7. Douglas Omurwa also deposes in his affidavit that Fred Isaboke Omurwa is a true son of the deceased, his mother being Mary Moraa Kiboma. Douglas further states that though the house of Anne Moochi is

represented in the succession proceedings through Musa Omurwa (deceased) and Tom Omurwa, and the house of Rosa Kwamboka by Moochi Omurwa, he is aware that the houses of Rachael Sarange and Mary Moraa Kiboma are not represented in the proceedings let alone the said houses being mentioned.

8. Douglas Omurwa also denies through his affidavit that he attended a family meeting at which it was decided that the petitioners were to represent the entire family in the succession proceedings; he denied signing the consent giving the petitioners the mandate to present the petition and further alleged that his signature on the consent was forged. Douglas wants the proceeds from the estate of the family to be paid into court.

9. Tom Omurwa swore an affidavit in opposition to the Summons dated 11th November 2011. He depones that Fred Isaboke Omurwa is not a son of the deceased; that Musa Omurwa, eldest son of the deceased has also since died; that Mary Moraa Kiboma has never been a wife of the deceased nor are her children the children of the deceased; that the deceased's only surviving wife is Rachael Sarange who currently resides in the United States of America; that Rachael Omurwa is the mother of David Misati Omurwa and that Rachael Sarange had no objection to the petitioners taking out the grant of representation.

10. Tom Omurwa also depones that on 5th April 2009, the objectors were present at a family meeting when the names of Musa Omurwa, Moochi Omurwa and himself were proposed to carry the family flag in petitioning for grant of letters of administration intestate to the estate of the deceased. Tom Omurwa reiterates that the deceased had three wives and that in 1983, the deceased settled all his three wives on their separate parcels of land.

11. Tom Omurwa also avers that Gladys Kerubo Omurwa is married and goes by the name Gladys Kerubo Wainaina; that the said Gladys was convicted of fraud charges in **Nairobi Criminal Case NO.2378 of 2002 – Republic -vs- Boniface Wainaina Njuguna alias Samson Njuguna Kimani & 2 others**; that the said Gladys has another pending fraud criminal case against her namely **Nairobi Criminal case No.2379 of 2002 – Republic -vs- Gladys Kerubo Omurwa alias Agnes Waringa Kinuthia & 2 others**.

12. It is also Tom Omurwa's contention in his replying affidavit that Douglas Omurwa together with Musa Omurwa (now deceased) forged grant of letters of administration purportedly issued in Nairobi HC Succession Cause No.2115 of 1999; that by a letter dated 15th January 2010, the Principal Deputy Registrar Family Division confirmed that no such proceedings had been lodged in the said court in respect of the estate of the deceased, which clearly shows that Gladys Kerubo Wainaina, Douglas Omurwa and Musa Omurwa are common criminals punishable by law.

13. Tom Omurwa further states in his affidavit that Musa Omurwa and Douglas Omurwa used the forged confirmation of grant purportedly issued in Nairobi HC Succession Cause No.2115 of 1999 to transfer parcel Number Central Kitutu/Daraja Mbili/422 to themselves after which they sold the same to one Sospeter Arasa, a fact all family members were aware of though the final payment and transfer process has not been completed to date; that the said parcel of land was disposed of in a fraudulent manner.

14. Tom Omurwa further depones that the late Musa Omurwa, Douglas Omurwa and Gladys Kerubo Omurwa attempted to sell other parcels of land namely Kisii Town Block 1/143; Kisii Town Block 1/135 and Central Kitutu Daraja Mbili/520. He also states that at a family meeting held on 17th September 2011 through Skype conference involving Rachael Sarange and other family members in the USA, the claim by Sospeter Arasa was discussed and the objectors herein Douglas Omurwa and Gladys Kerubo Omurwa vehemently opposed the matter and Douglas Omurwa in particular openly told other family members that any of them who supported Sospeter Arasa's claim would face dire consequences and that if the rest of the family did not disown Sospeter Arasa's claim, then he (Douglas Omurwa) and Gladys would now back the claim by Fred Isaboke Omurwa.

15. It is Tom Omurwa's strong belief and contention that the objection filed herein is motivated by ill motives intended to cover up the objector's activities over fake grants purportedly issued in Nairobi HC

Succession Cause No.2115 of 1999 and their thwarted efforts to fraudulently dispose of the deceased's other properties situated in Kisii Town. He also contends that the objectors' actions are aimed at creating chaos in the family. He urges the court to dismiss the objections.

16. On 10th February 2012 it was agreed by both counsel appearing to canvass both applications by way of written submissions. Both counsel accordingly filed their submissions and I have carefully read the same together with attached authorities. From a reading of both the application and the submissions these are the matters to be determined by this court:-

1. *Have the applicants/objectors satisfied this court that they have met the requirements of being granted injunctive orders?*
2. *Have the applicants/objectors satisfied this court that indeed the grant of letters of administration issued to the petitioners should be revoked?*

17. The application for injunction, has to be considered in light of the principles set out in the case of **Giella -vs- Cassman Brown Ltd [1973] E.A. 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 should the order sought not be granted; and*
3. *if in doubt, the court should determine the application on a balance of convenience.*

18. It is also to be remembered that since the order sought herein is an equitable remedy, the applicant must seek it with clean hands; so that even if the necessary conditions are satisfied an injunction may not issue if it is proved to the satisfaction of the court that the applicant is undeserving of such equitable relief – see Ringera J (as he then was) in **Albert Mario Cordetro -vs- Cyperr Enterprises Ltd. & others HCCC No.2340 of 1996** at Nairobi (unreported)

19. It is to be noted that though the principles established in **Giella case** (supra) apply to all kinds of injunctions, the applicants/objectors herein are seeking mandatory injunctions. The test for granting a mandatory injunction is on a higher threshold than in the case of prohibitive injunctions . The Court of Appeal in the case of **Kenya Breweries Limited -vs- Washington Okego [2002] E.A. 109** had occasion to discuss and consider the principles that govern the granting of mandatory injunctions. The Court held that the test for grant of a mandatory injunction was correctly stated in **Vol.24 Halsbury Laws of England, 4th Edition para.8 and 9** as follows:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks, it ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

20. In the English Case of **Locabail International Finance Ltd. -vs- Agro Export & ANR [1986] All ER 901** which our Court of Appeal has followed in its decisions, the court held:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had

been rightly granted, that being a different and higher standard than was required for a prohibitory injunction.”

21. The Court of Appeal quoted the above passage in the Localbail case (supra) with approval in the case of Shariff Abdi Hassan -vs- Madhif Jama Adan (Civil Appeal No.121 of 2005/2006 e KLR where the Court further observed:-

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that a party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass to property.”

22. The question that arises for determination now is whether the applicants'/objectors' application met the above requirements? In my considered opinion, the answer is no.

23. Firstly, the 1st applicant/objector Fred Omurwa contends that his mother one Mary Moraa was a wife to the deceased. However, he has not adduced any proof to support his allegation. For such an allegation to succeed, since it is not in doubt that the deceased was polygamous, his mother Mary Moraa Kiboma needed to swear an affidavit to support the 1st applicant's/objector's allegation that she was indeed married to the deceased. Furthermore, such polygamous customary marriages were obviously witnessed by members of the community and nothing prevented the 1st applicant/objector from availing an affidavit from a relative of the said Mary Moraa Kiboma or a chief of the area where the deceased resided to corroborate his contention that indeed the deceased was married to his mother.

24. Secondly, from the replying affidavit of the respondents/petitioners, it is very clear to the court that the deceased knew who his wives were and way back before his death in 1983 according to paragraph 6 of the replying affidavit dated 4th November 2011, the deceased shared out his property among his 3 wives. Moreover, when the deceased died, the newspaper cutting announcing his death featured his 3 wives namely Anne, Rose and Rachel. The 1st objector's/respondent's mother was never mentioned in the said newspaper cutting and none of the family members raised any alarm for not mentioning or recognizing her as a wife of the deceased.

25. Thirdly, the 2nd objector/applicant has not only been accused of forgery but the same has been substantiated by the petitioner/respondents by the fact that they have filed proceeding in Nairobi Criminal case No.378 of 2002 Republic -vs- Boniface Wainaina Njuguna & others and also by the fact that she (2nd objector/applicant)forged the confirmation of grant relating to the property of the deceased and consequently she was able to transfer title of land parcel No. Central Kitutu/Daraja Mbili/122 to herself and her accomplices. The court accepts these averments by the petitioners/respondents since none of the allegations by the petitioners/respondents have been rebutted by the objectors/applicants. Therefore this court takes these allegations to be a true statement of facts.

26. The law is very clear that an injunction is an equitable remedy and the applicants/objectors must seek it with clean hands. See Albert Mario (supra). The objectors/applicants in this case, have come to court with hands that are filthy and soiled.

27. That being the case, and due to the above reasons I have reached the conclusion that the objector/applicants are undeserving of the injunctive orders they seek. Their application does not meet the threshold of awarding a mandatory injunction and neither have they come to this court with clean hands. They are guilty of concealing material information which information was not only pleaded by the petitioners/respondents but also proved.

28. Since the first question has been answered in the negative, the second question as to whether the applicants'/objectors' application seeking to revoke the letters of administration issued to the

petitioners/respondents must also fail. I say so because they have not proved that the petitioners/respondents are guilty of non disclosing material facts or have mismanaged the estate of the deceased or the said grant of letters of administration were obtained by fraud as stipulated by **Section 76** of the **Law of Succession Act**.

29. As a matter of fact, the 2nd objector/applicant is lucky because none of the petitioners/respondents has filed criminal charges against her for the fraudulent confirmation of grant coupled with her inter meddling with the estate of the deceased person contrary to **Section 45** of the **Law of Succession Act** by registering the said property of the deceased in her own name and those of her accomplices and then purporting to sell it to a third party.

30. Before I conclude this ruling, prayer 5 of the application dated 6th October 2011 deserves some mention. In that prayer, the applicants are asking the court to issue a mandatory injunction directing the Kenya Tea development Agency and Nyansiongo Tea factory to process and deposit all tea proceeds and bonuses for payment for tea plucked from the property known as Nyansiongo Settlement Scheme Plot No.32 to court. IN my humble view, this prayer cannot be granted for the simple reason that the two parties sought to be injuncted are not parties to this suit. If the applicants were serious in their quest for such an order to have effect on the said parties, they should have enjoined them in this suit. In the circumstances, the prayer is dismissed.

31. In the premises, both applications for revocation of grant are hereby dismissed. Consequently, I also direct that the title issued to the late Musa Omurwa and Douglas Omurwa transferring parcel No. Central Kitutu/Daraja Mbili/422 is hereby revoked/cancelled and all the subsequent registrations of the said title are also revoked and cancelled. The objectors/applicants shall jointly bear the costs of this application. Such costs shall be assessed on the higher scale.

Delivered, dated and signed at Kisii this 23rd day of October, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Soire for C.A. Okenye for Minda & Co. for Applicants/Objectors

M/s Kenani & Co. (absent) for Petitioners/Respondents

Mr. Bibu - Court Assistant