



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

SUCCESSION CAUSE NO.198 OF 2011

IN THE MATTER OF THE ESTATE OF:

TRUPHOSA INZAINI OJAGO.....DECEASED

BETWEEN

RASTO OJAGO.....1ST PETITIONER

MARGARET I. OJAGO.....2ND PETITIONER/APPLICANT

JOSEPH M. OJAGO.....3RD PETITIONER/APPLICANT

RULING

Joint letters of administration were issued to the Petitioners in respect of the estate of their mother Truphosa Inziani Ojago who died intestate on 4/11/2003. The deceased left 4 sons and 5 daughters. The Petitioners are some of these children. This application was brought by the 2nd and 3rd Petitioners against the 1st Petitioner. The 3rd Petitioner is a student in the United Kingdom where he stays. He has sworn that the 1st Petitioner is intermeddling and disposing of part of the estate and this is to the detriment of the beneficiaries. The application seeks that the 1st Petitioner be restrained from wasting, selling or in any other manner dealing with the estate until the letters issued to them are confirmed. Specifically, the 3rd Petitioner swore that the 1st Petitioner has sold plots nos.341 and 1098, the farm machinery (Plough Baldan – red), vehicles KQK 637, KZR 639 and 3 tons trailer, and 18 heads of cattle, and has leased portions of the land to 3rd parties. It is sought that any further dealings with the property in the state be restrained.

The 1st Petitioner denied all these allegations. He stated that he is the only son of the deceased who is staying in Kenya. He states that the 3rd Petitioner has been living in the UK since 1990. These brothers, he says, have little knowledge about the affairs in the estate. He denied that he has sold the farm machinery (Plough Baldan – red) or the vehicles. He stated that the deceased never, in the first place, owned the machinery. Regarding the 18 heads of cattle, his affidavit stated that they died in 1999 even before the deceased's death. He stated that plot no.1098 does not form part of the estate and produced official search to show it belongs to Japhet Nyongesa Kimunguyi. He denied leasing any land to third parties, but admitted that he has a cane farming contract with West Kenya Sugar Company Limited by which 50 acres of plot no.167 that belongs to the estate is contracted to the company for cane growing. He admits that he is temporarily benefiting from the estate and that all the other members of the family, except the 2nd and 3rd Petitioners, have no problem with that.

I received oral submissions from Mr. Mukele for the 2nd and 3rd Petitioners and Mr. Were for the 1st Petitioner. I have considered what they said and also the contents of the affidavits.

The Petitioners hold joint letters of administration. Under section 83 of the Law of Succession Act Cap. 160 they are supposed to gather and administer the property of the deceased, pay out all the debts and taxes and thereafter prepare a full and accurate inventory of all the assets and liabilities and a full and accurate account of all dealings in preparation of the confirmation of the grant, by which time they will have ascertained the respective identities and shares of all persons beneficially entitled to the estate. Under section 82 no immovable property is supposed to be sold before the confirmation of the grant. It can be seen that the responsibility of the Petitioners is enormous. They can be prosecuted under section 95 if they don't apply themselves in accordance with the law.

The 1st Petitioner had, alone, been dealing with family property prior to the death of the deceased. He has now to share that responsibility with the 2nd and 3rd Petitioners who will, at the end of the day, have to account to the rest of the beneficiaries and to court on the day of confirmation of the grant. There is no legal justification for the desire by the 1st Petitioner to benefit alone from the estate. All the three Petitioners have to account for every penny, as it were, of the estate.

The 1st Petitioner claims that plot no.1098 does not belong to the estate. However, when the parties filed the petition for letters of administration, they indicated this plot as being part of the estate. They swore an affidavit in this regard. Generally, the decision as to which property forms part of the estate cannot be unilaterally made by the 1st Petitioner. The 2nd and 3rd Petitioners will share in that decision. Further, a decision to contract any land to West Kenya Sugar company Limited, or to any other person, cannot be the sole prerogative of the 1st Petitioner. The other Petitioners have a legal say in the matter. How much the proceeds of such contract shall be, and how they will be, applied are issues that will legitimately concern the 2nd and 3rd Petitioners.

In short, this estate is crying for preservation and that is why the application has to be allowed.

There is merit in the submission by Mr. Were that the application is incompetent because it was brought by way of motion and not by summons. He took issue with the fact that the application was brought under section 3A of the Civil Procedure Act and Order 51 rule 4 of the Procedure Rules, both of which he submitted, were inapplicable in view of Rule 63 (1) of the Probate and Administration Rules of the Act. I agree. The inherent powers of the court are, however, saved by Rule 73. Lastly, counsel correctly pointed out that the supporting affidavit offended the provisions of section 5 of the Oaths and Statutory Declarations Act Cap.15 by not indicating the place where the same was sworn.

I have, however, found that the estate is in need of protection and preservation and that, so far, the 1st Petitioner is engaged in acts that are in conflict with the Law of Succession Act. These acts may ultimately expose the 2nd and 3rd Petitioners to penalty. I have decided that this is a proper case for the invocation of Article 159 (2) (d) of the Constitution of Kenya, 2010 so that substantial justice is done to the estate without undue regard to procedural technicalities.

I allow the application but order that costs be borne from the estate.

Dated, signed and delivered at Bungoma this 10th day of May, 2012.

A. O. MUCHELULE
JUDGE