



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO. 117 OF 1999

IN THE MATTER OF THE ESTATE OF: OGUTU SIMAL
.....DECEASED
CHRISTOPHER OSIRO OGUTU
OBJECTOR
CORNEL KARANI ONYANGO
.....PETITIONER
AND
JAMES OLAYO WAUNA
J. O. B. OMONDI
ELIZABETH OKELLO.....INTERESTED
PARTY

RULING

The interested party has filed the application dated 9th February 2011 seeking the following relief:-

- (i) Temporary orders of injunction to restrain the respondent Christopher Ogutu and his agents from dealing or selling land parcel number UHOLO/UGUNJA 455.**
- (ii) Costs of this suit.**

The parties herein namely the objector, 1, 2, and 3rd interested party together with the interested party herein after shall be referred to as the “**Applicant**” chose to respond by filing their respective affidavits and the skeleton submission.

In his supporting affidavit the applicant contents that he purchased the suit property from the objector herein who proceeded after obtaining the relevant land control board consents to transfer land Parcel Number UHOLO/UGUNJA / 1993 measuring 0.02 Ha to the applicant. He was issued with the title deed on 19th August 2009. The purposes of the sale was for the objector herein to defend this succession cause against one **Cornel Karani Onyango**. The objector succeeded. The objector however by a consent dated 1st April 2009 the whole succession cause was compromised. The parcel number UHOLO / UGUNJA / 1993 was cancelled. The relevant part of the consent state:-

.....(d) That all the new titles arising out of parcel number UHOLO/UGUNJA / 455 namely UHOLO/UGUNJA / 1990, 1991, 1992 and 1993 be cancelled by the Siaya District Land Registrar and the same do revert back to UHOLO / UGUNJA / 455”.

Prayer (e) of the said consent introduces new registration numbers and proprietors who apparently does not include the applicant. Two things resulted from this registration namely, that the applicant land

namely UHOLO/UGUNJA / 1993 was extinguished and by extension the said title was cancelled. Apparently, this is where the applicants problems begin. The order adopted on 1st April 2009 did not include the applicant. According to him he was never notified. On the other hand the objector seemed not to have taken the interest of the applicant. Interestingly the objected titles was christened UHOLO/UGUNJA / 1383. As it were all the titles were issued. The argument for determination therefore is whether or not in the light of the above circumstances the applicant has any right over the deceased estate and thus his application to be allowed.

I have read the rival affidavits together with the annexures. I have also gone through the skeleton submission by the parties and I am of the following considered opinion.

(a) The objector by the time he sold the suit land to the applicant did not have the capacity to do so. He had not obtained the grant and have the same confirmed. The Applicant indeed confirms that he paid the purchase consideration to the objector for purposes of the same being used to defray the legal expenses the objector was incurring.

I'm alive to Section 82 (b) (iii) of the Law of Succession Act Cap 160 Laws of Kenya which states:-

“(82) Personal representatives shall, subject to any limitation imposed by their grant have the following power-

(a)

(b) To sale or otherwise turn to account, so far as seems necessary or desirable in the selection of their duties, all or any part of the assets vested in them as they think best.

(i) The purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) No immovable property shall be sold before confirmation of grant”.

From the above and the history of this matter the sell and the subsequent transfer by the objector of the suit land to the Applicant was void and illegal

(b) The records shows the applicant as an interested party. Indeed vide his application dated 26th April 2011 the applicant applied to be enjoined in this suit as an interested party. The said application was never canvassed.

Consequently, it's my considered opinion that the applicant has not brought himself in the case as required. The current application to say the least was premature. Needless to say its necessary to ponder the other bottlenecks that impede the applicant's application.

(c) The order entered by the objector and other parties excluding the applicant has never been challenged by any other party including the applicant. That order “took away” the applicants land. It nonetheless remains a valid order for all intent and purposes.

(d) The applicant's applicant prays for the orders of injunction in respect to land parcel number UHOLO/UGUNJA/ 455. With all due respect the same no longer exist and even if this court was to issue the same would be in vain.

(e) The prayer for injunction are provided for under the Civil Procedure Act Chapter 21 Laws of Kenya. A careful reading of the said Act Chapter 160 Laws of Kenya does not provide for such provisions. Succession Act Procedure is *sui jeneris* and its procedures regulate itself. The relevant sections which are imported from Chapter 21 (Civil Procedure Act) are clearly stated and it does not include Order 40. The inherent powers are provided vide Rule 73 of Cap 160 but the same ought to be used very sparingly. In this case the same does not apply.

(f) In terms of the succession Act Chapter 160 laws of Kenya the applicant is not a beneficiary. He is a creditor to the estate. The said Act is clear on who is and who is not a beneficiary. The applicant is not.

Having said that, this court finds that the application ought to fail. The only recourse available for the applicant is to pursue the objector perhaps in a civil court. I dismiss the application dated 9th February

2011 with costs. Any interim orders granted are hereby vacated.

Orders accordingly.

Dated, signed and delivered at Kisumu this 26th day of October 2011.

**H. K. CHEMITEI
JUDGE**

HKC/aao