

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Succession Cause 38 of 2008

BARRACK OMUDHO ALIWA

GABRIEL OWINO ONGOMA PLAINTIFFS

V E R S U S

SALOME ARODI

B. M. AMWAYIDEFENDANTS

R U L I N G

The application before the court is by chamber summons dated 25th January, 2008, and taken out under Section 45 of the Law of Succession Act; Rule 73 of the Probate and Administration Rules; and all enabling provisions of the law. The main order sought by the applicants is that the Respondents be restrained either by themselves, their servants, agents and/or any other person from evicting and/or dispossessing the 2nd petitioner and dependants of Grace Imali Owino (deceased) from House No. MG/19/B at Hogley Road, Mombasa.

The facts of this case are that the late Grace Imali Owino was a civil servant. She lived with her family in the suit property. What was not disclosed is that she was housed in a Government quarter like other civil servants. According to the applicants, however, she was a tenant/purchaser of the suit premises from the Government.

Although parties were given sufficient time to file and serve written submissions, and although the Respondents duly filed and served their submissions, the applicants did not do so.

What has now come through from the pleadings of the Respondents is that the 1st Respondent, who is also a civil servant, was allocated the suit premises after the demise of the former occupier, Grace Imali Owino. The initially contemplated tenant/purchase scheme was discarded and the applicants advised to apply for a refund of their deposits. It is not clear whether Grace Imali Owino applied for and obtained a refund of her deposit. It is clear, however, that during her tenure in the premises, she used to pay to the Government of Kenya a monthly house rent of Kshs. 200.00. This fact is borne out of her payslips for the months of October and November, 2007, copies of which are attached to the application.

A second milestone in this matter is the fact that the 2nd Respondent is the District Building Surveyor Mombasa. It is not self evident why he was joined in this matter, but one can only relate his joinder (or is it misjoinder) to a letter which he wrote to the Tenant of the suit property (read the applicants) giving them notice to vacate the house by 31st January, 2008, or else face eviction. The applicants never made known to the court the existence of that letter, otherwise such disclosure would have laid bare the position of the 2nd Respondent, and the official capacity in which he was acting. Contrary to what the 2nd applicant deposes in his supplementary affidavit sworn on 27th February, 2008, the 2nd Respondent was acting in his official capacity all through, and there was no basis for instituting any action against him as a private citizen. Whatever he did in relation to this matter was done in his capacity as an agent of the Government, and therefore the Government was the real defendant in this matter. That being the case, the Government Proceedings Act, Cap. 40 of the Laws of Kenya, automatically came into play.

Section 13A of the aforesaid Act requires that no proceedings should be commenced against the Government until after the expiry of thirty days after a notice in writing has been served upon the Government in relation to those proceedings. In the instant case, no such notice was given, and in the absence of such notice, any intended proceedings against the Government cannot stand. Secondly, Section 16 of the said Act does not sanction the grant of any injunctions against the Government. If this suit was commenced against the Government, as it ought to have been, no injunction would have issued. However, the applicants cleverly brought the application ostensibly against private individuals in order to circumvent the restriction of Section 16 of the Government Proceedings Act which prohibits injunctions against the Government. By so doing, they obtained an injunction against individuals, but in essence that injunction was against the Government. To that extent, it was irregular.

The above reasons militate against any continued enjoyment of the interim injunction in this matter. The same is accordingly vacated. As the applicants do not even purport to have any grant of letters of administration intestate in respect of the estate of the late Grace Imali Owino, they have not demonstrated the requisite locus to enable them bring any action respecting the estate of the deceased. The application by chamber summons dated 25th January, 2008 is accordingly struck out with costs to the Respondents.

Dated and delivered at Mombasa this 13th day of March, 2009.

L. NJAGI

JUDGE