

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Probate & Admin. Cause 656 of 2007

**IN THE MATTER OF ESTATE OF: BAKARI MARAKWELI
MWAKWISHA**

(DECEASED)

**OMARI BAKARI MTANGA
APPLICANT**

- Versus -

**BINTI HAMISI MWAKAKWENU MWAKISHA
RESPONDENT**

R U L I N G

This application was brought by a chamber summons dated 20th December, 2007, and taken out under sections 45 and 47 of the Law of Succession Act, and Rule 73 of the Probate and Administration Rules, Cap 160, Laws of Kenya.

After praying for the application to be certified urgent, the applicant also seeks orders –

1. THAT the Respondent herein by herself, her servants and/or agents or otherwise be restrained by injunction from selling, transferring or in any manner whatsoever disposing of all that parcel of land known as KWALE/UKUNDA/3666 or any part thereof until the determination of this application.
2. THAT costs of this application be provided for.

The application is supported by the Applicant's affidavit and is based on the grounds stated on the face of the application. When it came for hearing on 14th May, 2008, Mr. Denis Mabeya appeared for the applicant and the Respondent appeared in person. Mr. Mabeya argued that the Respondent had filed neither a replying affidavit nor grounds of opposition and thereupon urged the court to grant the orders as prayed.

The respondent could not explain why she had not filed any of the said documents. The closest she came to was telling the court was that her spouse had been taken ill, otherwise she was very cagey.

After considering the above state of affairs, the only issue is whether the applicant is entitled to the orders as prayed. I am afraid the applicant did not seek any orders which may be granted. His only substantive prayer was for the grant of an interlocutory injunction pending the hearing and determination of this application. That order was granted at the time when the application was certified urgent. It was to be in force pending the hearing and determination of the application. Once the application is heard and determined, that order will have served its purpose, and there will be nothing more to be done. Strictly speaking, indeed, there is no prayer to be heard. The applicant ought to have included a prayer for an injunction pending the hearing and determination of the petition for the grant of letters of administration intestate. But such injunction was not applied for, and the court cannot grant an order which is not prayed

for. In similar circumstances in SOUTHERN CREDIT BANKING CORP. LTD. v. CHARLES WACHIRA NGUNDO, Milimani HCCC No. 1780 of 2000, Onyango Otieno J., as he then was, had this to say –

“... It will be seen from the above that the main application is seeking injunction to be granted only until this application is heard and determined inter partes. Clearly, this prayer which is the main prayer in this application was presupposing that another prayer possibly for injunction pending the finalization of the suit which was to be heard and determined inter partes was made in the application. No such prayer for injunction pending the determination of this suit was brought ... I do not think I can draft a prayer for a party and sit to decide on that prayer. I can only decide on prayers before me. There is no prayer before me seeking injunction pending the determination of this suit. The prayer before me is injunction pending the inter partes hearing of the application. The application has been heard inter partes and I have nothing more before me to decide upon. As I cannot make decisions on a matter or prayer not before me and this application has by its very wording ceased to exist, I do dismiss it with costs to the respondent.”

I don't think I can improve on that. There is nothing more to be done in this matter. The moment Mr. Mabeya said he had nothing more to add, that was when the curtain came down. There is nothing else to be done. This matter is spent.

This is a rare occurrence where the plaintiff or petitioner has a reasonable case but blocks his own path on a technicality. The defendant has not filed any documents, and the merits of her case can neither be accessed nor assessed.

I accordingly make no order as to costs.

Dated and delivered at Mombasa this 16th day of May, 2008.

L. NJAGI

JUDGE