



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**Succession Cause 361 of 2005**

**IN THE MATTER OF THE ESTATE OF SALIM OKITI NANJIRA ----- DECEASED**

**A N D**

**MWANATENA AUMA OKITI .....PETITIONER/APPLICANT**

**V E R S U S**

**ASMAN ONYANCHI WANGA .....OBJECTOR**

**A N D**

- 1. VIRGINIA FUMWA MAKONGOLO.....1<sup>ST</sup> RESPONDENT**
- 2. EDWIN MURUKA .....2<sup>ND</sup> RESPONDENT**
- 3. JOHNSTONE WERE.....3<sup>RD</sup> RESPONDENT**
- 4. RAMDHAN OLALIE .....4<sup>TH</sup> RESPONDENT**
- 5. ABDALLAH SHIKANDA .....5<sup>TH</sup> RESPONDENT**

**R U L I N G**

The petitioner has moved the court by way of a summons, which is expressed as having been made pursuant to *Rules 49 and 73* of the Probate and Administration Rules.

The following are the reliefs sought by petitioner;

- 1. THAT the status quo obtaining before filing of the succession cause herein in respect of the estate of the deceased SALIM OKITI NANJIRA be maintained.
- 2. THAT the 2<sup>nd</sup> up to the 6<sup>th</sup> Respondent named either by themselves, or through their agents, servants, workers, assignees and or any one acting under them be restrained by a permanent injunction from alienating, using, disposing of, selling, occupying, transferring and or in any way interfering with any part of the estate of the deceased SALIM OKITI NANJIRA comprised in all that parcel of land known as SOUTH/WANGA/LUREKO/871.

3. THAT any sale of any part of land parcel NO. SOUTH/WANGA/LUREKO/871 or any agreement purporting to dispose of or sale and transfer any of the properties comprising the estate of the deceased SALIM OKITI NANJIRA by the Respondents above named be and is hereby declared null and void.
4. THAT the second up to the 6<sup>th</sup> Respondent be ejected out of the estate land and any structures erected by the said respondents be demolished at their own cost jointly and severally.
5. THAT the costs of this application be provided for.”

The petitioner has brought this application in her capacity

as the administrator to the estate of the late SALIM OKITI NANJIRA.

It is her case that the 2<sup>nd</sup> up to the 5<sup>th</sup> respondents to this application were purchasers of parcels of land which had been carved out from the land which comprises the estate to the deceased. It was also her case that these respondents had been invited by the 1<sup>st</sup> respondent, to occupy the said parcels of land.

As far as the applicant was concerned, the actions of all the respondents were contrary to the Law of Succession Act, which vests in the court, the power to determine the heirs or beneficiaries of estates of deceased persons.

The 1<sup>st</sup> respondent is said to have taken action, in sub-dividing and then giving out parcels of land, without lawful sanction of the court.

The 2<sup>nd</sup> to 5<sup>th</sup> respondents are said not to have purchased the parcels which they now have, from the deceased. Therefore, the applicant believes that the said respondents were intermeddling with the estate.

It is for that reason that the applicant asks this court to order that the respondents be evicted from the property which constitutes parts of the estate.

In response to the application, the objector voiced his support for orders which would restrain the respondents from intermeddling. He emphasized that the estate be preserved pending confirmation of the grant of letters of administration.

The objector's view was that the applicant should also be restrained from selling any parts of the estate.

When the application came up for hearing, the only parties who attended court were the applicant, the objector and the 5<sup>th</sup> respondent. The other respondents did not attend court, even though the applicant had served them.

In effect, because the said respondents did not attend court, nor file any replying affidavits, the applicant submitted that the application was uncontroverted.

However, the 5<sup>th</sup> respondent filed a replying affidavit, in which he vehemently denied all the allegations leveled against him. He said that he had neither bought any part of the property in issue, nor occupied any portion thereof. He therefore asked that as against him, the application ought to be dismissed with costs.

But as against the other respondents, the 5<sup>th</sup> respondent said that they should not be permitted to intermeddle.

When called upon to reply to the objector and the 5<sup>th</sup> respondent, the applicant urged the court to ignore the assertion that she too should be restrained from intermeddling. Her reason for so saying was that the objector had not sworn an affidavit; all he had done was to get his advocate to make a statement from the

bar.

By virtue of the provisions of *section 45 (1)* of the Law of Succession Act;

*“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”*

Clearly therefore, if the respondents, or any of them, have taken possession of parcels curved out of the property of the deceased, such action would constitute intermeddling with the property, unless any of the said respondents can demonstrate that he was expressly authorized to do so.

Similarly, if the 1<sup>st</sup> respondent cannot demonstrate that he was authorized to sub-divide the property of the deceased, and to thereafter dispose of it by giving parts thereof to other people, he too would have intermeddled with the estate.

By virtue of the provisions of *section 45 (2)* of the Law of Succession Act, any person who intermeddles with the property of a deceased person is guilty of an offence, and is liable to a fine not exceeding KShs.10,000/= or to imprisonment for upto one year, or to both such fine and imprisonment.

Furthermore, any person who intermeddles with the estate of a deceased person is to be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled.

In this case, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents have not made any attempts to justify their actions, of taking possession of parcels curved out of the property of the deceased. Accordingly, they shall be presumed to have admitted the allegations made against them, to the effect that they had taken over possession of parcels of land which were curved out of the property of the deceased.

Even assuming that it is the 1<sup>st</sup> respondent who had purportedly sold the respective parcels of land to the other respondents, it is clear that he had no authority so to do.

*Section 55 (1)* of the Law of Succession Act provides as follows:-

*“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any decision of property, unless and until the grant has been confirmed as provided by section 71.”*

Pursuant to that provision, not even the applicant, who was issued with the grant herein would have power to distribute any of the capital assets of the estate of the deceased.

It must be emphasized that before a grant has been confirmed, the administrator to whom it has been issued, is basically mandated to gather together the properties of the deceased, and to protect the same.

Accordingly, I do now find and hold as follows:-

- (a) If any person has sub-divided the property of the deceased, or otherwise alienated, sold or purported to transfer any part thereof, such action lacks the requisite legal authority which would validate it. Such action constitutes intermeddling.
- (b) For as long as any person who has intermeddled in the estate continues to do so, they are committing a criminal offence, and are therefore liable to be punished in accordance with the law. Such persons will also be answerable to the rightful administrator, to the extent of the assets with which they have intermeddled.
- (c) Pending confirmation of the grant, the administrator has no authority to sub-divide the property of

the deceased.

(d) In the interest of justice to all persons who may have a legitimate interest in the property of the deceased, I do hereby invoke the power vested in me under section 73 of the Law of Succession Act, and direct the administrator to file and serve an application for confirmation of the grant within the next 30 days.

That application shall be served on all persons who the administrator deems to have a legitimate claim to the estate, together with all respondents herein.

(e) In the meantime, the property of the deceased is to be preserved.

(f) The costs of the application dated 11<sup>th</sup> July 2007 are awarded to the administrator.

*Dated, Signed and Delivered at Kakamega this 15<sup>th</sup> day of October 2008*

**FRED A. OCHIENG**

**J U D G E**