



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Succession Cause 307 of 1995

IN THE MATTER OF THE ESTATE OF DEDAN WAMBU NGARAMA

BOB NJOROGE NGARAMA.....OBJECTOR/APPLICANT

VERSUS

**1. MARY WANJIRU NGARAMA
2. PAUL KURIA WAMBU.....PETITIONER/RESPONDENT**

RULING

By his application dated 29th May 2006, the Objector, Bon Njoroje Ngarama seeks four primary orders of the court namely:

- 2) That the Petitioner/Respondents be restrained from selling, alienating, transferring, charging or in any other way dealing adversely with LR No. 6607/1/MN (CR No. 21642) and LR No. 2344/VI/MW (CR No. 11689) pending the hearing and final determination of this cause or further orders of the court.
- 3) That M/S Dona Dona Investments Limited be restrained from selling, alienating, transferring, charging, collecting rents or in any other way dealing with LR No. 6607/1/MN (CR NO. 21642) pending the hearing and final determination of this cause or further orders of the court.
- 4) That the transfer dated 8th May 1998 by the respondents to Onesmus Ndonga and the one by Onesmus Ndonga to Dona Dona Investment Limited of LR No. 6607/1/MN (VR 21642) be declared illegal, unlawful and null and void and the same be cancelled.
- 5) That all proceeds and rents from the above properties be deposited in a joint account of advocates for the parties pending the hearing and determination of this cause or further orders of the court.

The application is based mainly on the grounds that (1) the letters of administration granted to the respondents did not confer to them any rights to transfer the immovable properties of the deceased; (2) that the respondents have kept the objector in the dark regarding the administration of the deceased's estate; (3) that the respondents have unlawfully purported to transfer LR No. 6607/1/MN (CR 21642) to Onesmus Ndonga for an under value of Kshs. 3,000,000/=; (4) that the said Onesmus Ndonga purported to further transfer the same property to Dona Dona Investments Limited for another under value of Kshs. 4,000,000; (5) that Dona Dona Investments may transfer the said property elsewhere and (6) that the respondents are keen to sell and transfer LR No. 2344/VI/MW (CR 11689) elsewhere.

In support of the application, the objector has sworn an affidavit in which he elaborates the above

grounds. The application is opposed and the respondents and the interested parties have filed affidavits in opposition. The substance of the opposition is that the court has no jurisdiction to grant the orders sought; that the application is incompetent and that the interested parties have acquired valid titles to the properties transferred and have the protection of the law.

The objector has invoked Section 82 of the Law of Succession Act, Rule 49 of the Probate and Administration Rules and Order XXXIX Rules 1, 2, 3, 4 and 9 of the Civil Procedure Rules. Rule 49 of the Probate and Administration Rules makes provision for the filing in chambers of any application relating to the estate of a deceased person in cases where no procedure is specified in the Rules. The objector has moved the court by way of Chamber Summons. It would appear therefore that he has adopted the correct procedure.

Rule 63 (1) of the same Rules makes provision for the application of certain orders of the Civil Procedure Rules. Order XXXIX of those Rules is not one of them. However, even the application of the specified orders is subject to orders of the court. Speaking for myself, I am inclined to adopt a liberal interpretation of that Rule and hold that the provisions of the other orders of the Civil Procedure Rules may be invoked in appropriate circumstances if such procedure would serve the ends of justice and does not prejudice the other side.

The parent proceedings herein have been filed under the Law of Succession Act. They may not be described as a "suit". But they have been originated under the said Act for the primary purpose of sorting out matters involving the estate of the deceased. Under the Civil Procedure Rules, a suit means "all civil proceedings commenced in any manner prescribed." Proceedings under the Law of Succession Act may be for the probate and administration of the estates of deceased persons but they are civil in character and proceedings commenced under the said Act may qualify as suits since "suit" as defined under the Civil Procedure Rules is open ended.

In the end, I am inclined to hold that invoking Order XXXIX of the Civil Procedure Rules would not vitiate the objector's application. I cannot therefore strike out the objector's application as incompetent.

I now turn to the merits and demerits of the objector's application. There are two properties cited in the Chamber Summons namely, Plot No. 6607/1/MN and registered as CR No. 21642 and Plot No. 2344/VI/MW and registered as CR No. 11689. The history of the 1st title is as follows. It was registered in the name of the deceased upto 11th May 1998 when the respondents registered a Grant of Probate to the estate of the deceased and on the same day transferred the title to Onesmus Ndonga the 1st interested party. The said Onesmus Ndonga then transferred the property to Dona Dona Investments Limited on 31st December 2004. There was no caveat or other encumbrance registered against the title when the property changed hands. It would appear, prima facie therefore, that the property is no longer an asset of the estate of the deceased available for distribution. The objector does not allege that the property was transferred by means of fraud to which the interested parties were parties. In the absence of fraud to which the interested parties were parties, the objector has no prima facie case against them. The objector has therefore failed the 1st test set in Giella – v – Cassman Brown & Company Limited [1973] EA 358. I need not therefore consider the other tests.

Having failed to establish a prima facie case with a probability of success at the trial, the order sought in paragraph 4 of the Chamber Summons is not available to the objector. In any event I doubt whether such an order can be made in an application such as this.

With regard to the 2nd title, namely Plot Number 2344/VI/MW and registered as CR 11689, the record shows that the same is still registered in the name of the deceased. The objector says he is one of the sons of the deceased. That fact is really not seriously disputed by the respondents. The respondents have already disposed of a substantial property of the deceased namely plot number 6607/1/MN registered as CR No. 21642. The only way the objector may protect his interest in the estate of the deceased is by way of injunction restraining the respondents as sought in the application. That means that with respect to that title the objector has established a prima facie case with a probability of success at the trial. I have also

no doubt that unless the injunction sought is granted the objector will suffer irreparable loss which may not be compensated in damages. Having found for the objector on the first two conditions for the grant of an inter locutory injunction, I need not consider the balance of convenience.

With regard to prayer 5 of the Chamber Summons, I have not been persuaded that the order sought therein should issue. The objector did not particularize his claim at all and in any event, whatever is received by the respondents by way of rent can be taken into account during the distribution of the deceased's estate. I therefore decline the relief sought in that prayer.

In the end, a temporary injunction shall issue in terms of prayer 2 of the Chamber Summons limited to title number 2344/VI/MW registered as CR 11689 pending the hearing and determination of this cause or further orders of the court. The order is issued on the condition that the objector shall file an undertaking on oath as to damages within the next seven (7) days.

The other orders sought are declined.

Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF OCTOBER 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Mulwa for the Objector, Adoch holding brief for Kariuki for the 2nd Interested Party and Mwakireti for the Petitioner.

F. AZANGALALA

JUDGE

8TH OCTOBER 200