



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE 79 Of 2012

IN THE MATTER OF THE ESTATE OF YONAH MAHINDO MWAMBAYIU

BETWEEN

BRIGIT AWINO OLALO..... 1st Petitioner
SELINA AWINO INGUYESI..... 2nd Petitioner
RUTH ASIRA OPWOMBE.....3rd Petitioner
OMAR MZEE BAKARI..... 4th Petitioner
BEATRICE WERE INGUYESI..... 5th Petitioner

-and-

APOLLO OSOMA MAINDO..... Objector

RULING

1. The Court has before it an application brought under a Certificate of Urgency. The Application was filed on 20th August 2020. It is brought under **Section 47 of the Succession Act Cap 160 of the Laws of Kenya** and all enabling provisions of the law. The Application seeks the following Orders:

“1. THAT the application be certified urgent and heard on priority basis.

2. THAT the 4th Petitioner, Omar Mzee Bakari be restrained from intermeddling with the deceased estate by erecting permanent structures thereon pending the hearing of this application inter partes.

3. THAT the 4th Petitioner, Omar Mzee Bakari be restrained from intermeddling with the deceased’s estate by erecting permanent structures pending the hearing and determination of this cause.

4. THAT any other order this Court may deem just and expedient to grant.

5. THAT the costs of this application be provided for.”.

2. The Application relies on the Grounds that appear on its face namely that;

“(a) The grant herein was on the 8.5.2020 revoked and the Certificate of confirmation cancelled

(b) That the cause is pending confirmation

*(c) That the 4th petitioner is erecting permanent structures illegally on **L.R. NO. SOUTH WANGA/LUREKO/134**, which is yet to be distributed.*

(d) That reversing such illegal permanent structures will be costly in the event where they have been erected is given to the

Applicant or any other beneficiary.

(e) The Applicant stand to suffer irreparable loss and damage.

(f) The Respondent/4th petitioner stand to suffer no loss at all.

(g) In the interest of justice.

3. The Application is also Supported by the Affidavit of Apollo Osoma Maindo. In his Affidavit the Applicant informs the court that he is the objector in this matter. He explains that he resides in Mumias. In relation to the dispute before the Court he states that on 8th May 2020 the Court revoked the grant and cancelled the certificate of confirmation. He states that the 4th Petitioner a Omar Mzee Bakari is not a beneficiary of the Deceased Estate. That notwithstanding the 4th Petitioner has entered upon a part of the Estate known as LR No South Wanga/Lureko/135 and built certain permanent structures thereon before the Estate has been distributed. He complains that the construction of those structures is illegal because the Estate has not been distributed. In addition, should that part of the Estate vest in another party the costs of reversal will be expensive and it will be time consuming. Any remedy will be laborious. In addition, the actions of building on the land changes the evidence and is in contempt of an order of the Court

4. On 20th August 2020, the Application came before Hon Mr Justice Musyoka J. He ordered that the Application be heard inter partes. The Learned Judge also ordered that no additional structures be constructed on the land.

5. In his Replying Affidavit in response to the Application, Omar Mzee Bakari admits that he has occupied the land. He admits that he has developed the land and he says that is because he purchased the land. He does not state clearly from whom he purchased the land or when. He saying that he has carried on with construction because the Order of 31st August 2020 was not served upon him. He did however manage to respond to the Application within the time available before the inter partes hearing. He says that he is advised by his Advocate that the Application is overtaken by events and that the Order was in fact served on his Advocates by which time he had completed the construction. The former 2nd and 3rd Petitioners filed a joint affidavit. They say they are parties to the succession. They confirm that they are the people who sold that part of the Estate to the former 4th Petitioner. They say that part of the Estate is distinct from the part where the Applicant has built his home. They say the Applicant has another parcel of land, known as, **South Wanga/Lureko/131** which is separate and distant. They assert that the Applicant has no right to a share of the land because he benefitted inter vivos. The Affidavit demonstrates that they have not fully understood that the grant was revoked and as a consequence all action taken thereunder are subject to various consequences including reversal.

6. The Matter came before Hon Justice Njagi on 13th October 2020 when he gave directions for the filing of written submissions. The Parties filed their Written Submissions as directed. The former 4th Petitioner filed his Submissions on 30th October 2020. The put forward a different case from the Replying Affidavit. The Author argues that notwithstanding the Court order appointing the Applicant as Administrator, he has no locus. Neither the Replying Affidavit nor the Submissions address the question that the former 2nd and 3rd Petitioner's have admitted that he could be a potential beneficiary.

7. The Applicant too has used his Written Submissions to put forward facts rather than legal argument. He says that the former 4th Petitioner, with full knowledge of the interim order of the Court made on 20th August 2020 and which was extended by Justice Njagi, has added to the 2013 construction and continued building on the land.

8. In the circumstances, it is clear to this Court that the former 4th Petitioner was fully aware of the Order. The Former 4th Petitioner nevertheless continued to construct on the land.

9. It is therefore Ordered and directed that:

(1) The Former Petitioners and each of them are forbidden from treating any part of the Estate as if they or any of them have legal title. That includes but is not limited to construction and/or any acts that change the character of the land.

(2) The Former 4th Petitioner shall file an affidavit in Court setting out clearly which part of the construction he asserts was completed in 2013 and which was at a later date. In particular, he will set out any works done after 20th August 2020. He shall also exhibit to that Affidavit the agreement for sale, the transfer and proof of payment relating to his acquisition of the property.

(3) Penal Notice is attached.

Dated 2nd February 2020

Order accordingly,

Farah S. M. Amin

JUDGE

Delivered electronically signed and dated at Kakamega this the 8th day of February 2021

In the presence of:

Court Assistant: Fred Owegi

Mr. Athuma for the Objector – together with Mr Indumuli holding brief

Ms Eroba holding brief for Nandwa & Co for the Respondents