



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

IN THE MATTER OF THE ESTATE OF ANDREA OOK NDIANGU (DECEASED)

SUCCESSION CAUSE No 5 OF 2009

ARISING FROM MED/SUCCESSION CAUSE No 7 OF 2018

B E T W E E N:

ESTHER ADIAMBO BARASA.....RESPONDENT

AND

(1) HASSAN AMIANI ANGACHE.....ADMINISTRATORS/

(2) ATHMAN SWALEH AKHONYA.....APPLICANTS

AND

GRACE OUDO OMWALO.....RESPONDENT

AND

WEST KENYA SUGAR COMPANY LTD.....INTERESTED PARTY

R U L I N G

1. The Court has before it numerous applications concerning the land the subject of this succession cause namely BUTSOTSO/ESUMEIYA/46 and various permutations of that land parcel. The Applications have been made in several courts and even in miscellaneous files. When the Matter came before this Court on 8th December 2020, this Court directed that the various applications must be resolved in sequence, starting with the earliest first. The earliest application is dated 7th November 2019 and filed the following day.

2. The Application is brought under a Certificate of Urgency. The Application was filed by the Administrators. Their Advocate, Mr G. I. Ondieki sets out the cause of the urgency thus:

“The urgency is that the Respondent has unlawfully harvested sugar cane from the estate of the deceased and delivered to the interested party herein by way of intermeddling and is likely to be paid off by the interested party anytime, unless the Honourable Court intervenes, the estate stands to suffer irreparably.”

3. The Application is brought by Notice of Motion on behalf of the Administrators/Applicants. It seeks the following Orders THAT:

“a) This application be certified urgent and its service be dispensed with in the first instance.

b) Pending the interparties hearing of this application, the interested party be temporarily enjoined in this application for the purposes of preserving the estate of the deceased and disposal of this application only.

c) Pending the interparties hearing of this application and pursuant to prayer (b) above, the interested party be directed not to release the sugar cane proceeds out of L.P. BUTSOTSO/ESUMEIYA/46 or any resultant Subdivisions i.e. BUTSOTSO/ESUMEIYA/2659,2660.4705 AND 4706 to GRACE OMWALO OUDO, LUCIA ATWENJE OMWALO or anyone

claiming under her and that the said sugar cane proceeds be deposited in court pending further orders and/or directions of the court

d) THAT the Respondent GRACE OMWALO OUDO be imprisoned for a term not exceeding one year for intermeddling with the estate of the deceased

e) THAT the costs of this application be in the cause”.

4. The Grounds relied upon appear on the face of the Application. It is said that:

“I. The applicant [meaning Grace Oundo] has illegally and forcefully [been] using the Police Officers from Navakholo DCI office and the area assistance chief to harvest sugarcane from the estate of the deceased.

II. That action amounts to intermeddling and the cane has been delivered to the interested party, which proceeds can be paid anytime from now.

III. That if the interested party is not temporarily brought into these proceedings, the orders of the court meant for preservation of the estate will be in vain.

IV. That it is for the best interest of Justice that the orders sought as there is no party that will be prejudiced with orders sought.

V. That Grace Omwalo Oundo is an outright intermeddler to the estate of the deceased as she was not authorized to deal with the estate in any manner.”.

5. The Application is Supported by the Affidavit of Athuman Swaleh Akhonya, the Second Administrator/Applicant. In the Affidavit, the Administrator states, that he is a co-Administrator and that he depones the Affidavit with the authority of his co-Administrator. He states that he is a resident of Navokholo area. He explains that the Estate of the Deceased comprised BUTSOTSO/ESUMEIYA/46 (about 19.5 hectares) which was illegally sub-divided to produce BUTSOTSO/ESUMEIYA/2659, 2660, 4705 AND 4706. The titles arising from those sub-divisions were cancelled by the Court on 30th May 2019 by the Ruling of Hon J. Njagi J. The Administrator states that he cultivated 19.5 hectares with sugar cane. He says that on 6th November 2019 GRACE OMWALO OUDO with the assistance and/or collusion of the Assistant Area Chief Navokholo and police officers from the DCI Navakholo Police Station forcefully entered into the land and illegally harvested all the cane from the Land which comprises the Estate of the Deceased. It was further said that the cane was delivered to the Interested Party – West Kenya Sugar Company Ltd on 7th November 2019 using tractors; Registration Nos KTCB 209M, KTCB 181X, KTCB 774H, KTCB 150X and others that were not recorded due to the interference of the police officers. The Applicant asks the Court to make the orders sought with a view to preservation of the Estate. In addition, the Applicant is asking the Court to declare the Respondent an intermeddler and punish her to a term of imprisonment of not more than 1 year as per the provisions of **Section 45** of the **Law of Succession Act**. The Orders were sought for a limited period until confirmation of the grant which was due on 19th November 2019.

6. On 7th November 2019, the Application came before Hon Mr Justice Musyoka on 14th November 2019. The Learned Judge made the following Orders:

“a) THAT the Interested Party be and is hereby enjoined in this application for the purposes of preserving the estate of the deceased.

b) THAT the Interested Party be and is hereby directed not to release the sugar cane proceeds out of L.P. NO. BUTSOTSO/ESUMEIYA/46 or any of the resultant subdivisions i.e. BUTSOTSO/ESUMEIYA/2659, 2660, 4705 AND 4706 TO GRACE OUDO OMWALO, LUCIA ATWENJE OMWALO or anyone claiming under her and that the said sugar cane proceeds be deposited in court pending further orders and or directions of the court.”.

4. THAT further directions and/or orders will be issued on 19th November 2019.

7. It is important to understand the context of the Application. The context is provided by the Order emanating from the Ruling of Hon Mr. Justice Njagi. That Order provides:

“1. That grant of letters of administration issued by this court to the petitioner on 19th November,2009 together within the Certificate of Confirmation of Grant issued on 13th April 2011 are hereby annulled and revoked.

2. That title numbers BUTSOTSO/ESUMEIYA 2659, 2660. 4705 and 4706 or any other titles issued pursuant to the sub-division of the land parcel No. BUTSOTSO/ESUMEIYA/46 are hereby cancelled and revoked.

3. THAT the suit land herein to revert to BUTSOTSO/ESUMEIYA/46 under the names of ANDREW OOKO TIANG’A

4. THAT a fresh grant of Letters of Administration to issue to the applicants HASSAN AMIANI ONGACHI and ATHUMAN SWALEH AKHONYA

5. THAT the applicants to file fresh summons for confirmation of grant within 45 days from date hereof.

A penal notice was attached to that order stating; *“This is a valid court order which should be obeyed. Any party found to be in disobedience of the same shall be found to be in contempt and shall be imprisoned for a period not exceeding six months a fine and/or both as the court deems just and expedient.”*.

8. The Letters of Administration referred to in the Order were issued on 6th August 2019. It records that the Deceased ANDREA OOKO NDIANGA alias ANDREW OOKO passed away on 18th April 2008. It appears that Esther Barasa was appointed as the Administrator on 19th November 2009. The grant was confirmed on 13th April 2011 and by way of distribution the whole Estate/parcel of land vested in Esther Barasa. Those are the Orders etc that were revoked and/or cancelled and/or set aside by the Ruling of 30th May 2019.

9. It is clear from the above, that with effect from 30th May 2019 the distribution effected pursuant to the certificate of confirmed grant was reversed meaning that all sub-divisions and sales entered into by Esther Barasa were revoked and/or reversed and/or cancelled and therefore of no effect thereafter. The First Applicant complains that, in his role as administrator, he cultivated the land with sugar cane. In November 2019, the Respondent Grace Oudo entered into the land by force, harvested the sugar cane and delivered it to the Interested Party in the hope of receiving payment. The Applicant alleges that conduct amounts to intermeddling in the Estate. In relation to the sugar cane, it is interesting to note that the Respondent does not say she put in any effort in the cultivation, only that she was entitled to the sugar cane and the proceeds of the sale.

10. It is clear from the Order of Hon J. Njagi of 30th May 2019, that Grace Oudo had not right to (a) enter the property and (b) the right to benefit from the land.

11. Grace Oudo Omwalo filed a Replying Affidavit on 3rd December 2019. In it she makes legal arguments. In that respect she states that the *“application is a non-starter, non-meritorious and an abuse of court process and ought to be struck out and/or dismissed altogether for want of both form and or substance as is prescribed under the rules.”*. In paragraph 5 she says she became aware of the revocation order made by Justice Njagi on 18th November 2011. She claims that nevertheless she was and still is the “registered proprietor of the parcel of land known as **L.R. No. BUTSOTSO/ESUMEIYA/2660** measuring 2.0 Hectares or thereabouts.”. She exhibits marked GOO-1 and GOO-2 the Green Card and Certificate of Official Search. The Green Card informs the Court that between 20th March 2014 and 27th March 2014, the Respondent Esther Barasa managed to subdivide the Estate of the Deceased (Plot 46 comprising 19.5 acres) was sub-divided (into 2659,2660, 4705, 4706) and part sold and transferred to Grace Oudo. In addition, it is clear that, 4 days later the Advocates then acting for the Administrator Applicants placed a restriction on the land to prevent dealing. That restriction amounts to notice. The Official Search conducted on 28th June 2019 suggests that a title deed was issued on either 1st April 2014 or 2nd May 2014. The latter is unlikely in light of the restriction. Notwithstanding her assertion that she did not know about the order until November, the exhibits show that almost immediate after the Order of Justice Njagi, Grace Oudo sought (on 27th June 2014) and obtained (on 28th June 2014) a search of the parcel in question. It seems the Court is asked to believe that is mere coincidence.

12. In paragraph 8 of her Affidavit Grace Oudo continues to assert that Esther Barasa was (1) the only surviving relative of Andrea Ooko Tianga and (2) she had obtained valid title. However, Esther Barasa filed her own (Supporting) Affidavit filed on 25th November 2019 states that the Deceased was survived by three Grandchildren. Surprisingly, there was no mention of those 3 children anywhere in the Petition or the earlier proceedings. In fact, Esther Barasa describes herself as the “daughter” of Andrea/Andrew Ooko Dianga. In her Affidavit she contracts herself by saying that she is (a) the sole surviving dependent and (b) that there are grandchildren entitled to the Estate.

13. Coming back to Grace’s case, she also asserts that her title derives from the title that vested in Esther on confirmation of the Grant. Esther states that the Certificate of Confirmed Grant was issued on 13th April 2011. She says she sold portions in 2014. However, in her Affidavit of Justification dated 6th January 2009 she recognizes Grace Oudo, Saleh Akhonoya and Ramadhan Angachi well before that date.

14. In relation to the orders of 30th May 2019, Grace Oudo says variously that they were made (i) without jurisdiction, (ii) un-procedurally and (iii) she is in the process of challenging them. However, she has not exhibited a memorandum of appeal. She alleges fraud against the Court by one Respondent. She again reverts to legal argument on the issue that the Applicant’s claim was statute barred.

15. The Respondent then swings between alleging that “her crop” of sugar can was either destroyed or delivered to West Kenya Sugar Company. She exhibits a permit which is in the name of her mother. The Respondent does not set out the date on which she claims her cane was damaged, however the crop damage report is dated 23rd July 2019, that is two months after the Order. By contrast, the permit relates to an illegible date in September and 23rd October 2019 and refers to a crop that is mature. That suggests that the Respondent waited 2-3 months to react to the damage. However, the fact that the Sugar Company wanted a mature crop, places a different explanation on the dates.

16. The exhibited crop damage report relates to sugarcane that was said to have been 12 months old and the area damaged was 0.25 acres. The Sugar Company were due to collect a harvest that was 25 months old. The discrepancy is clear.

17. In his Replying Affidavit, the Accountant of West Kenya Sugar Co Ltd stated at paragraph 3 *“THAT the allegation raised by the Administrators/Applicants’ in the proceedings herein Grace Oudo Omwalo through Lucia Atwenje Omwalo herein lately more so this year delivered sugar cane to the Interested Party are misplaced and untrue and therefore the Interested Party is not in custody of any such cane proceeds due to the Respondent”*. He goes on to say that his records show that the last time Grace Oudo Omwalo supplied sugarcane was in 2018.

18. On 23rd July 2014, the Assistant Chief of Esumeiya was able to assert (contrary to what is shown by the proceedings) that Grace Oudo was the proprietor of Plot No 2660. As at that day plot No. 2660 did not exist as it had reverted to the original title. The Applicants assert that the Administration and the Police were colluding with Grace Oudo to acquire their harvest.

19. From the long and convoluted history set out above, it would appear to be relatively straightforward, that Andrea Ooko owned a parcel of land, he had a son, the son was called Peter Barasa Ooko and he pre-deceased his Father. There were three grandchildren who were completely forgotten until they proved convenient in a later application. The daughter-in-law, parading as a biological daughter obtained letters of administration and then confirmed grant. It seems that prior to the grant being confirmed, she started selling off portions of the land. That is demonstrated by the listing of Grace Oudo as a liability in the Petition (see Chief's Letter of 2008 and Affidavit of 6 January 2009). Grace Oudo says she purchased land from the Administrator Esther Barasa after confirmation of grant. The original Letters of Administration were issued on 19th November 2009 and confirmed on 13th April 2011 but all the aforesaid liabilities were omitted from the summons for confirmation of grant. It is not surprising therefore that Justice Njagi revoked the Certificate of Confirmation issued on 13th April 2011.

20. What then is the relationship of the two Administrators appointed by Hon Justice Njagi to the Deceased and his Estate? The Proceedings and the records/evidence filed over the years shows that they claim purchase and their many efforts to have their ownership of their portion of the land parcel recognised. It is interesting to note that although Esther Barasa later claimed they were interlopers, she included each of them as a liability of the Estate – in her Petition and Affidavit of Justification. One of the Petitioner's sureties has a name similar to the Second Administrator. In her Application to remove a caution the Administrators had plated on the property, she claimed to be the WIFE of the late Andrea Ooko (see Affidavit dated 25th January 2010).

21. The two Respondents have filed separate applications to either review and/or set aside the orders of Hon Justice Njagi. This Court is not adjudicating on those issues at this point however, it is instructive nevertheless to look at the history of this succession cause.

22. The Land Parcel Butsotso/Esumeyia/46 was registered in the name of Andrea Ooko Ndiaga (hereinafter referred to as "the Deceased"). He had what is described as an "absolute title" in the certificate of land search dated 8th January 2009. It was 19.5 acres. It appears it was either acquired or registered in the name of the Deceased. At some point he sold 12 acres to Athuman Saleh Akhonya and then around the same time another portion to Ramadhan Angachi. When Ramadhan Angachi passed away he was survived by his widow (Zainabu Amboyi Ramadhan) and son, (Hasan Amiani Angachi). The Deceased passed away on 8th April 2008. He had one son a Peter Ooko. Peter Ooko was married to Esther Adhiambo Barasa. Esther Barasa has described herself in various documents as the wife of Peter, the Wife of the Deceased, the daughter of the Deceased and also daughter in law of the Deceased. It appears only the latter is the true position. Peter Ooko pre-deceased his Father, the Deceased. Shortly after the death of the Deceased, the two purchasers and/or their heirs have been attempting to obtain the titles to the properties/portions they purchased. This has included applications for cautions, petitions and so forth. At the same time Esther Barasa was selling of (either the same of different) portions of Andrea's land. Although she obtained letters of administrations and confirmed grant (now cancelled/revoked), from the Replying Affidavit of Grace Oudo, it appears the selling was done before either authority was vested in her.

23. Although the two Respondents are denying the proprietary rights of the Administrators, in the initial petition dated 6th January 2009, Esther Barasa recorded Saleh Akonya, Ramadhan Angachi and Grace Oudo as liabilities on the Estate.

24. In relation to Ramadhan Angachi his position was that he purchased 3 acres of the land from Andrea Ooko for a price of KShs.78,000/= which was paid in 1992 (see Supporting Affidavit, Application for Revocation 20th December 2011). It appears at that time the transfer to the Deceased was not complete. It seems that the land parcel Butsotso/Esumeyia/46 passed to Andrea Ooko through a **Succession Cause No 122/1992**. During the lifetime of the Deceased, the two Purchasers brought an application in **Kakamega Chief Magistrate's Court. Misc. Application No 7 of 1997**. The Magistrate Ordered the Deceased to transfer 3 acres to Ramadhan Angachi and 12 acres to Saleh Akhonya. Failing which an Executive Order was issued to allow the Magistrate to sign the transfer, The Executive Order read as follows:

"Please assist the bearers, Ramadhan Angachi and Saleh Akhonya to obtain executive order for subdivision and transfer of their land portions as ruled by SPM's Court on 25.6.96 Civil Case Misc. App. No. 7 of 1997."

and *"The said owner Andrew Ooko is in the process of re selling land to many people. He is a conman."*

25. Prior to the Application in the Magistrates' Court, the dispute had come before the Land Disputes Tribunal. The Tribunal rendered its decision on 25 June 1996 and that decision was adopted as a judgment of the Magistrate's Court. Over the years the individual have passed away and been replaced but the dispute remains, notwithstanding that it was adjudicated upon in 1996.

26. Esther Barasa, notwithstanding what she put in her Petition and Affidavit of Verification later depones by affidavit that both Saleh and the widow of Ramadhan Angachi had no right to be on the land. She claimed they were farming the land forcefully and she sought eviction orders.

27. From the above it appears that the Deceased started off with 19.5 acres. First, he sold 12 and then he sold 3. That means there were about 4.5 acres remaining. None of the Parties have filed any plan or map showing the demarcation of the plots they claim. However, the sub-divisions raise an interesting conundrum. According to the Certificate of Official search it appears that Grace Oudo Omwalo purportedly purchase 2.0 hectares, that amounts to roughly 4.9 acres.

28. Around the same time that she was selling land she did not have to Grace Oudo, Esther Barasa was selling other land, she did not have to other purchasers who are intended interested parties in later applications. These purported purchasers have filed their own application, to set aside the order on **20th June 2019**. They are David Moi Henry Muchelule and Boaz Lijodi Shipimilu. From the proceedings on the file, an Order made on 20th June 2019 is not apparent. The order emanating from the Ruling of 30th May 2019 appears to have been extracted and signed by the Hon Deputy Registrar on 20th June 2019.

29. When this matter came before the Court 2 as currently constituted, the Court gave directions for the filing of written submissions. Only the Submissions filed by Counsel for the Respondent Grace Oudo are on the file but it relates to the Application for setting aside the Ruling

and Order of Hon Justice Njagi J. The Administrators, in person, submitted that the Court should consider this file together with Miscellaneous Succession 4 of 2020: Ester Barasa and Grace Oudo vs Hassan Angachi and Athman Swaleh Akhonya.

30. Moving on to the prayers sought by the Administrators, for the reasons set out above, it is ordered and directed that:

(1) The Interested Party through an appropriate member of staff and/or management shall file an affidavit setting out from January 2014 (a) all the payments it has made for sugar cane harvested from any part of the Estate of the Deceased in particular LP No. Butso/Esmeiya/46 and/or its component parts and (b) identify the natural persons to whom the payments were made, (c) the amounts and (d) the date of payment. Supporting Documentation shall be exhibited to the Affidavit.

(2) All monies held by the Interested Party pursuant to the Orders of this Court shall be paid into an interest bearing account to be held for the Estate until confirmation and distribution is ordered. Such monies to include those subject to the order made by Hon Mr. Justice Musyoka J on 12th November 2019.

(3) This Ruling shall be served on the Office of the Director of Public Prosecutions as well as the DCIO for Lurambi, Kakamega for the appropriate officers to consider whether they will bring charges for (a) perjury and/or (b) intermeddling with an estate and/or fraud against each of the Respondents and/or any members of the Chief's Office who have colluded to undermine the decision of the CM's Court in *Misc Succession Cause No 7 of 1997*.

31. File for *Miscellaneous Succession No 4 of 2020* to be consolidated with this File. This File to be the lead file.

32. The Court apologises for the delay in delivering this Ruling. It was occasioned first by a bereavement and compounded by the application of the Covid Protocols including lockdown of the Nairobi region. Any inconvenience is regretted.

Dated 11th July 2021

Order Accordingly,

FARAH AMIN

JUDGE

Delivered, Dated and Signed this the 22nd day of July 2021 in Kakamega – online using the MS Teams Platform

In the Presence of:

Mr I. Ondieki

All persons present in Court 2 where there was a device set up for litigants in person to participate.