



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

FAMILY DIVISION
SUCC. CAUSE NO. E1249 OF 2020

IN THE MATTER OF THE ESTATE OF BOB ROBERT OKOTH (DECEASED)

SARAH ANYANGO OKOTH.....APPLICANT

VERSUS

GRACE WANJIRU ODHIAMBO.....1ST RESPONDENT

GEORGE JACKONIAH ODHIAMBO.....2ND RESPONDENT

RULING

1. The deceased Bob Roberts Okoth died intestate on 21st January 2015. He was survived by the widow Sarah Anyango Okoth (the applicant) with whom he got five children. He was the son of the late Eliazaro Odongo Odhiambo who died on 13th January 1989. Eliazaro had two wives and altogether five children. The deceased, the 2nd respondent George Jackoniah Odhiambo and Frank Otieno Odhiambo were from the first house. Frank Otieno Odhiambo subsequently died. The 1st respondent Grace Wanjiru Odhiambo is the widow of the late Frank Otieno Odhiambo.

2. Upon the death of Eliazaro, the deceased petitioned for the grant of letters of administration intestate. The grant was issued to him on 2nd September 1991, and confirmed on 3rd July 1992. One of the properties that Eliazaro left was LR No. 36/1/778 in Eastleigh in Nairobi. By consent, the grant was confirmed on the basis that the deceased, the 2nd respondent and the 1st respondent's husband were to equally share the property. Each was entitled to 1/3 of it. There is no dispute that the property is still in the name of Eliazaro. However, the deceased and the applicant have put up a four storey commercial residential building that has rent paying tenants. The applicant stated that the deceased invited his two brothers to raise money to undertake the development but they were uncooperative. The couple then developed the property. She stated that it was on the understanding that each of the three brothers would raise a third of the cost of the development that the grant was confirmed giving each a third share in the property. It would appear that the applicant's case is that the 2nd respondent and the 1st respondent's husband relinquished their claim to the property when they failed to raise money towards its development.

3. According to the respondents there was no agreement over this property; that the property belongs equally to the three as shown in the certificate of confirmation.

4. It is not disputed that Eliazaro owned parcel Rongai/Lengenet/Block 2/333 (Mawe). For some reason the property was not included in Eliazaro's Succession Cause (HC P & A No. 949 of 1990) that the deceased filed. The applicant stated that Eliazaro had shared the land to his family before he died, although the title still remained with him. He gave 15 acres to the deceased, 15 acres to the deceased's step brother James Oluoch and 3rd acres to the caretaker Simon Okoth. It would appear that long after Eliazaro had died the deceased somehow subdivided the parcel and got the title Rongai/Lengenet Block 2/639 (Mawe) in his name. It measures 11.37 Hectares and title was issued on 16th September 2014 Rongai/Lengenet Block 2/33 (Mawe) was 13¼ Hectares or so.

5. The respondents have in their respective affidavits challenged the deceased's acquisition of Rongai/Lengenet Block 2/639 (Mawe) without there having been a succession cause to inherit it. They accused the deceased of fraud in the acquisition. They denied that the deceased had shared the property as alleged, or at all.

6. The applicant filed a petition dated 29th September 2020 for the grant of letters of administration intestate in respect of the estate of the deceased. She listed the property of the deceased as:-

(a) LR No. Nairobi/Block 72/372;

(b) LR No. 36/1/778 Eastleigh Nairobi;

- (c) Rongai/Lengenet Block 2/33;
- (d) Kaswanga/Wanyama/2167;
- (e) vehicle KAS Toyota Corolla; and
- (f) Bank accounts.

7. With the petition was filed the present application under **sections 45 and 47** of the **Law of Succession Act** seeking the following orders:-

“2) THAT pending the hearing and determination of this application *inter partes*, the Honourable Court be pleased to issue a temporary injunction restraining the respondents either by themselves, their agents, servants assignees or any other person from accessing, entering, remaining in, encroaching, trespassing, working, developing, constructing, selling disposing off or intermeddling with the deceased’s estate particularly LR No. Nairobi/Block 72/371 being the Matrimonial Home; LR No. 36/1/778 Eastleigh Nairobi; Rongai/Lengenet Block 2/33; Kaswanga/Wanyama/ 2167; and Motor Vehicle KAS Toyota Corolla.

3) THAT pending the confirmation of the grant, this Honourable Court be pleased to issue a temporary injunction restraining the respondents either by themselves, their agents, servants, assignees or any other person from accessing, entering, remaining in, encroaching, trespassing, working, developing, constructing, selling, disposing off or intermeddling with the deceased’s estate particularly LR No. Nairobi/Block 72/371 being the Matrimonial Home; LR No. 36/1/778 Eastleigh Nairobi; Rongai/Lengenet Block 2/33; Kaswanga/Wanyama/2167; and Motor Vehicle KAS Toyota Corolla.

4) THAT pending the confirmation of the grant, this Honourable Court be pleased to issue restraining orders against the respondents either by themselves, their agents, servants assignees or any other person from humiliating, vilifying, threatening, intimidating and or otherwise harassing or ejecting any tenants particularly in LR No. 26/1/778 Eastleigh Nairobi.

5) THAT the Honourable Court be pleased to revoke/annul the alleged letter of administration issued on 2nd June 2019.

6) THAT this Honourable Court be pleased to issue summons to the respondents to appear before this court to show cause why she should not be punished by way of imprisonment for intermeddling with the Estate of the Late Bob Roberts Okoth and subjecting its assets to loss, damage and attrition.

7) THAT this Honourable Court be pleased to revoke the purported grant rectified on 19th June 2019.

8) THAT this honourable court be pleased to issue any other order that it deems fit for the ends of justice.

9) THAT costs be provided for.”

8. The applicant’s case in respect of what she calls the land at Kakrigu was that it was 10 acres and belonged to Eliazaro. Eliazaro gave 5 acres to each of his wives. She blames the 2nd respondent for having given the 5 acres meant for their house to the other house. I do not know whether this is the land that is referred to as Kaswanga/Wanyama/ 2167 in the petition. Either way, these parcels were not the subject of the succession cause in respect of the estate of Eliazaro.

9. No grant has been issued in respect of the estate of the deceased.

10. When one looks at the certificate of confirmation in the estate of Eliazaro, the respondents are each entitled to one third of LR No. 36/1/778 Eastleigh Nairobi. If that is true, then it would be difficult at this stage to issue a temporary injunction against the respondents over the property. The grant has not been issued, and one would not know which way the matter will go when the grant eventually comes for confirmation and the issue which property belonged or did not belong to the deceased is determined.

11. The other property subject of the application for temporary injunction was Rongai/Lengenet Block 2/33 (Mawe). The common ground was that this property belonged to Eliazaro, and not the deceased. An injunction would only issue to protect the estate of the deceased. The deceased did not own the property. The deceased subsequently subdivided the parcel and got a portion of it contained in Rongai/Lengenet/Block 2/639, but this was not the subject of the application. Further, a question mark has been raised on how the acquisition of this subdivision by the deceased was done.

12. Under **section 3** of the **Act**, the court can only protect the free property of the deceased. Where there is a dispute of ownership that was to be determined. Where an interlocutory injunction is sought on such a property, the applicant has to demonstrate a *prima facie* case with a probability of success; has to show that the will suffer irreparable damages if the injunction is not granted; and, in case of doubt, the court has to consider the balances of convenience (**Giella –v- Cassman Brown [1973] EA 358**).

13. Assuming that Kaswanga/Wanyama/2167 is the same as Kikrigu land, it belonged to Eliazaro and not to the deceased. It was not the subject of the estate of Eliazaro that the deceased was administering. The applicant did not produce at least a title document to show that the deceased owned it or had a claim over it that this court could be called upon to protect by injunction at this stage of the case.

14. There was no evidence to show that the respondents had interfered or intermeddled in any manner with Nairobi/Block72/372, or with the

motor vehicle KAS Toyota Corolla.

15. One of the prayers of the applicant in her application was that the grant issued to the 2nd respondent following a rectification in the estate of Eliazaro in **Cause No. 949 of 1990** be revoked. I agree with the respondents that if the applicant was aggrieved by the grant she needed to bring her application in that cause, and not in the present cause.

16. I hope I have said enough to show that the present application is not merit. It is consequently dismissed with costs.

DATED and DELIVERED at NAIROBI this 21ST day of JULY 2021.

A.O. MUCHELULE

JUDGE