



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO. 103 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE HENRY MICAH OMINO

AND

IN THE MATTER OF A PETITION FOR GRANT OF LETTERS OF ADMINISTRATION

BY JOSEPHAT KOLA OMINO, LINDA APIYO OTIENO,

PHILISTAS OLILO OMINO AND ELIZABETH ANYANGO OMINO

AND

IN THE MATTER OF AN APPLICATION BY BEATRICE AWINO ONGARO

RULING

This application dated 31st March 2020 was brought by **BEATRICE AWINO ONGARO**, who is the widow.

1. The subject matter of the application is **L.R. NO. KISUMU/MANYATTA “B”/41**, which is one of the assets within the estate of the late **HENRY MICAH OMINO**.

2. The application was for two reliefs, namely;

(a) *An injunction restraining the respondent, **EDWARD OLANG’O OMINO** from developing or constructing any structures on or occupying any portion of the subject matter; and*

(b) *An order that all the structures which the respondent had erected on the subject matter be removed, to pave way for the survey of the said parcel of land, so that each beneficiary may get his or her legitimate share.*

3. It is common ground that the parcel of land which is the subject matter of the application herein is **0.09 Hectares** in size.

4. In the Ruling dated 17th September 2018 Majanja J. confirmed the grant and distributed the estate of the deceased. The learned Judge directed that the subject matter of the present application be distributed as follows;

(a) *Edward Olando 0.0375 Ha*

(b) *Josephat Kola..... 0.0375 Ha*

(c) *Nerman Oduor (Deceased)... 0.02 Ha*

(d) *Mathew Odhiambo..... 0.01 Ha*

(e) *Desma Awuor Oduor..... 0.01 Ha*

5. It is common ground that survey has not been undertaken, so as to enable each of the beneficiaries to identify the exact boundaries of their respective portions.
6. Nonetheless, the Respondent confirms that he had commenced construction on a portion of the subject matter.
7. A dispute has arisen between the beneficiaries because some of them believe that they were entitled to the portion of land upon which the Respondent had begun construction. The dispute had escalated to the level that it became the subject matter of a complaint that was lodged at the Kasagam/Nyabera Police Station.
8. Apparently, the building which the Respondent had started putting up, was torn down by one or more of the other beneficiaries.
9. The police officers made it clear to the parties that destruction of the structure may well constitute the criminal offence of Malicious Damage.
10. Whilst engaging the parties, the OCS Nyabera Police Station urged them to have the land surveyed, so that it could be sub-divided between the beneficiaries.
11. However, the matter was not resolved.
12. The Respondent insists that the family of the 1st widow, Mama Miriam Adera Omino, had already agreed on exactly how the beneficiaries were to get their respective portion of the parcel of land.
13. To my mind the dispute can be resolved very easily, through an official process of survey.
14. Whether or not the beneficiaries had agreed on how to sub-divide the parcel of land, on the ground, there would still be a need for a formal survey, which would thereafter give rise to new titles.
15. Even the Respondent, (at paragraph 29 of his replying affidavit) intimated that he had made several requests for survey.
16. If the results of the survey vindicate the Respondent, he would have the peace of mind, knowing that the structure which he had constructed would not be brought down.
17. On the other hand, if the Respondent continued construction before the survey and sub-division was finalized, there was a possibility that the building or a portion of it may have to be demolished if the survey report indicated that the building was on a portion which did not wholly belong to the Respondent.
18. I have done a quick calculation of the portions assigned to each of the beneficiaries, by the learned Judge. It does appear that the total acreage which was assigned to the said beneficiaries exceeds the size of land available under the specific title.
19. I therefore hold that justice can only be done if sub-division is carried out after the survey is conducted, so that each beneficiary will have his or her entitlement, before each of them can choose how to utilize their respective portions.
20. Accordingly, I now order that an injunction do issue forthwith to restrain the Respondent from carrying on construction or from occupying any portion of **L.R. NO. KISUMU/MANYATTA "B"/41** until after the said parcel of land is surveyed and sub-divided.
21. The survey can be undertaken by a surveyor appointed jointly by the Applicant and the Respondent. The said parties would share the costs of survey and sub-division, equally.
22. When I make reference to "*parties*" in this Ruling, I mean all the persons who have a share in the parcel of land in issue.
23. In the event that the parties cannot agree on one surveyor, each of them may appoint their respective surveyors, at their own cost.
24. However, the Court appreciates that when two or more surveyors are engaged, there was a possibility of reports which were not consistent. Therefore, in order to avoid the said possibility, I direct that if the Applicant and the Respondent cannot agree on one surveyor, they would be required to engage the Government Surveyor, in addition to their respective surveyors, **OR** instead of their said respective surveyors.
25. In order to avoid any unnecessary delays, I further order that the process of survey be carried out within the next **SIXTY (60) Days**.

26. I further order that the case will be mentioned before me, immediately after the lapse of the 60 Days period, so that the Court can verify compliance.

27. The Court reserves the right to choose a surveyor, if the process will not have been finalized within the 60 Days.

28. In the event, the case will be mentioned on a date to be fixed by the Court, immediately after I deliver this Ruling. The said Mention is intended to provide an opportunity to verify whether or not there had been compliance.

29. Ultimately, I order that each party will meet his or her own costs of the application. I so order because this is a family matter, and also because the steps to be taken are in the best interests of all the beneficiaries. In the circumstances, it would be imprudent to burden one or the other party with an order requiring him or her to bear the burden of the costs of the application.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 6TH DAY OF DECEMBER 2021.

FRED A. OCHIENG

JUDGE