



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**PROBATE & ADMINISTRATION NO. 191 OF 1993**

**IN THE MATTER OF THE ESTATE OF:**

**AUGUSTINE EKULO EKISA .....DECEASED**

**BETWEEN**

**VALENTINE EKISA .....1<sup>ST</sup> PROTEST/APPLICANT**

**MARISESLA IMELA .....2<sup>ND</sup> PROTESTOR/APPLICANT**

**PASCAL ADUNGO .....3<sup>RD</sup> PROTESTOR/APPLICANT**

**AND**

**KEFINA TADE ETORI .....1<sup>ST</sup> RESPONDENT**

**VINCENT ADUNGO .....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicants herein moved the court by a Notice of Motion dated 26<sup>th</sup> March 2019 under Order 51 of the Civil Procedure Rules 2010, section 3A of the Civil Procedure Act, sections 39 (1)(c), 79, 82 &83 of the law of Succession Act. They are seeking the following orders:

- a) This matter be certified urgent and be heard first on priority basis.(spent)
- b) Pending the hearing and determination of this application inter parties the Honourable Court be pleased to issue an order staying further hearing and proceedings in Busia CMCC Succession Cause No.431 of 2018.(spent)
- c) Pending the hearing and final determination of this application the Honourable Court be pleased to issue an Order staying further hearing and proceedings in Busia CMCC Succession Cause No.431 of 2018. (spent)
- d) An order be issued and is hereby issued to Kefina Tadi Etori and Adungo Vincent in there capacity and legal representatives and administrators of the estate of their late father Sabastiano Etori to administer fully, share out and distribute to the Protesters herein their share comprising of Land Parcel Number No. South Teso/Angoromo/199 and render accounts thereof.

2. The application was premised on the following grounds:

- a) That the Respondents herein are administrators of the estate of Sabastiano Etori Peter Adungo alias Sabastiano Adungo having been so appointed vide grant of Letters of Administration intestate dated 8<sup>th</sup> October 2018 issued in Busia CMCC SUCC.No.431 of 2018.
- b) That Sabastiano Etori Peter Adungo alias Sabastiano Adungo (deceased) at the time of his death was the administrator of the estate of his late brother Augustine Ekulo Ekisa whose estate proceedings herein were taken out with him (Sabastiano Etori Peter Adungo alias Sabastiano Adungo) becoming the sole heir thereof.

- c) That the estate of Augustine Ekulo Ekisa in respect of which these proceedings were taken out comprised of Land Parcel No. South Teso/Angoromo/199.
- d) That Sabastiano Etori Peter Adungo alias Sabastiano Adungo died before he could fully administer and render accounts in respect of his deceased brother's estate.
- e) That by the time of his death, Sabastiano Etori Peter Adungo alias Sabastiano Adungo was registered as the proprietor of land parcel No. South Teso/Angoromo/199 having become so registered by virtue of the proceedings herein.
- f) That however Augustine Ekulo Ekisa (deceased) had in his lifetime sold portions of his land parcel No. South Teso/Angoromo/199 to the Protestors herein who had taken possession thereof and settled with their portions being clearly defined and marked on ground, a fact that was well known by Sabastiano Etori Peter Adungo alias Sabastiano Adungo (Deceased) in his lifetime and also the respondents herein.
- g) That the respondent's herein while acknowledging that the protestors/applicants herein were purchasers in their deceased uncle's land(estate) and are in occupation thereof and therefore hold a legal claim against their uncle's (Augustine Ekulo Ekisa) estate as administered by their late father Sabastiano Etori Peter Adungo alias Sabastiano Adungo and now themselves in substitution of their late father have nonetheless proceeded on and are dealing/administering their deceased's uncle's estate comprising of Land Parcel No. South Teso/Angoromo/199 as held by their late father Sabastiano Etori Peter Adungo alias Sabastiano Adungo as if it his sole ignoring totally the legal claim and entitlement the protesters/applicant herein hold in the said estate.
- h) That the respondent would suffer no prejudice if the orders as sought herein are granted.

3. The application was opposed on the following grounds:

- a) That the application is defective and an afterthought.
- b) That the applicants herein do not have locus standi to bring the application of this nature against the respondents.

4. It is trite law Unless Rule 63 of the Law of Succession Act has specifically imported the provisions of the Civil Procedure Act, the said provisions are inapplicable in a succession cause. In the case of **Priscilla Vugutsa Kamaliki vs. Mary Runyanyi Ochieng [2016] eKLR** Lady Justice Ruth Nekoye Sitati observed:

**It is worth noting that the Law of Succession Act is a self-contained Act and provisions of the Civil Procedure Act, unless specifically imported into it are not applicable. A look at Rule 63 of the Law of Succession Act reveals that the provisions under which the present application is brought are not some of the provisions imported into the Law of Succession Act. What this means therefore is that the instant application is incompetent for want of form and is therefore fit for striking out.**

Rule 63 of the Law of Succession Act provides:

**(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.**

**(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.**

5. In the instant case, the applicants premised their application under Order 51 of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act together with other provisions of the Law of Succession Act. These are not provisions of the Civil Procedure Act that have been specifically imported by Rule 63 of the Law of Succession Act. To that extent the application is incompetent and fit for striking out.

6. The form of the application notwithstanding, the applicants have raised issues that can only be addressed by the Environment and Land Court and not by a Succession Court. These issues are:

- a) Whether there was a valid sale of land agreement between Augustine Ekulo Ekisa and Valentine Ekisa Emerikwa; and
- b) Whether the applicants have a stake in the parcel of land number South Teso/Angoromo/199.

The parties are therefore at liberty to seek the determination of these issues in that court. The application is struck out.

7. Each party will meet own costs.

**DELIVERED and SIGNED at BUSIA this 6<sup>th</sup> day of February, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**