



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**PROBATE & ADMINISTRATION NO. 47 OF 2015**

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

**WILFRIDA MAKOKHA SIKO .....DECEASED**

**BETWEEN**

**FREDRICK OKOTH OSIKO.....ADMINISTRATOR/APPLICANT**

**AND**

**JOSEPH OMONDI MUHENYA.....OBJECTOR/ RESPONDENT**

**RULING**

1. The applicant herein moved the court by a Notice of Motion dated 20<sup>th</sup> April 2020 under sections 1,1A, 3, 3A, & 63(e) of the Civil Procedure Act, Order 51 Rules 1, 4, 6, 10(1) & (2) of the Civil Procedure Rules. He is seeking the following orders:

- a) That this application be certified as urgent and be heard on priority basis ex-parte in the 1<sup>st</sup> instance. (Spent).
- b) That this court do issue an order of temporary injunction against the objector/respondent, his servants, workers, agents, 3<sup>rd</sup> parties or any other person claiming through him from constructing on, fencing off, cutting down trees or in any manner whatsoever interfering with the administrator's/Applicant's LR NO.BUKHAYO/MATAYOS/1538 pending the hearing and determining of this application.
- c) That this court do issue an order of temporary injunction against the objector/respondent, his servants, workers, agents, 3<sup>rd</sup> parties or any other person claiming through him for constructing on, fencing off, cutting down trees or in any manner whatsoever interfering with the administrator/applicant's LR NO.BUKHAYOMATAYOS/1538 pending the hearing and determination of this suit herein.
- d) That the O.C.S Busia Police Patrol Base do assist in effecting this order.
- e) That costs of this application be provided for.

2. The application was premised on the following grounds:

- a) That the objector/respondent without the consent of the administrator/applicant and without any justifiable reason and cause has entered into the administrator/applicant's L.R NO. BUKHAYO/MATAYOS/1538 and commenced fencing off, thereon.
- b) That the action by the objector/respondent is illegal and a clear infringement of the administrator's/applicant's rights of ownership.
- c) That the continued use by the objector/respondent of the administrator's/applicant's land together with the cutting down of trees is illegal and ought to be stopped by an order of the court.
- d) That this application has been made without undue delay and it is in the interest of justice that the orders herein be allowed, as the continued illegal use of the administrator's/applicant's suit parcel herein would cause him prejudice and the land would lose in

value.

3. The application was opposed on the following grounds:

a) That the applicant has not satisfied conditions for an injunction.

b) That the estate has not been distributed.

c) It is trite law that 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.**

4. In the instant case, the applicant premised his application under sections 1,1A, 3, 3A, & 63(e) of the Civil Procedure Act, Order 51 Rules 1, 4, 6, 10(1) & (2) of the Civil Procedure Rules. 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.

5. The grant herein was issued on 19<sup>th</sup> April 2018 but Fred Okoth Osiko (the applicant) has not taken the necessary steps for confirmation and distribution of the estate. If he does not take the necessary steps to facilitate the distribution of the estate, the grant herein will be automatically be annulled after 30 days of today's ruling.

6. Costs to the respondent.

**DELIVERED and SIGNED at BUSIA this 15<sup>th</sup> day of July, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**