REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE & ADMINSTRATION NO. 245 OF 2008

IN THE MATTER OF THE ESTATE OF

KADIMA OBONYO.....DECEASED

BETWEEN

THOMAS OJIAMBO KADIMA.....PETITIONER

ANDMARY NANG'AYO KADIMA..... OBJECTOR

ANTONY OKWECHE OBORE .....INTERESTED PARTY/APPLICANT

RULING

1. The interested party/applicant has moved the court under Order 45 Rule 1(b)2 *[sic]* of the Civil Procedure Rules and sections 3 &3A of the Civil Procedure Act for the following orders:

    a) That he be enjoined for the purposes of hearing the application dated 4th April 2015.

    b) That the orders of 17th June 2005 cancelling the registration of **L.R Nos**. **BUNYALA /BULEMIA/3903, 3904, 39O5** and **3906** and which reverted to **L.R NO. 195** be reviewed and set aside altogether.

    c) That the application dated 4th April 2015 be reinstated for inter-parties hearing.

    d) That the costs be in the cause.

2. The applicant based his application on the following grounds:

    a) That the orders of 17th June 2005 were obtained by concealment of material facts and information.

    b) That at the time the order was obtained land parcel number **BUNYALA /BULEMIA/195** had been subdivided into the following parcels**:**

        i) **BUNYALA /BULEMIA/3903;**

        ii) **BUNYALA /BULEMIA/3904;**

        iii) **BUNYALA /BULEMIA/3905;** and

        iv) **BUNYALA /BULEMIA/3906.**

    c) That at the time of the orders the registered owners were in occupation and were denied a right to be heard.

3. The application was opposed on grounds that:

    a) The petitioner/respondent is deceased and no substitution has been sought.

b) That the orders of 17th June 2015 have not been set aside.

c) That the application is incompetent.

4. One of the cardinal principles of fair hearing is that where a party is deceased, a substitution where the action survives the deceased must be made. We have been informed on oath that the petitioner herein is deceased. Since this was not disputed, orders for substitution ought to have been sought. In this case the applicant ought to have moved the court at first instance for orders of substitution. Failure to do so is fatal to the application which is rendered incompetent.

5. The Law of Succession Act is self –sufficient and only allows the invocation of other legal provisions in Rule 63 of the Probate and Administration Rules as follows:

> **(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 Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (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**

The present application does not fall under of the stated Orders. It therefore incompetent. In the case of **Priscilla Vugutsa Kamaliki vs. Mary Runyanyi Ochieng [2016] eKLR** judge Ruth Nekoye Sitati was confronted by a similar scenario and this is what she said:

> **The first issue for this Court to determine is whether the instant application is properly before the Court. The application is expressed to be brought under Section 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act Order 40 Rule 4 and Order 51 Rule 1 of the Civil Procedure Rules. 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.**

This being the case in the present application, it will suffer the same fate.

6. Although the parties did not raise the issue of competency of the application on the basis that the applicant's right lies elsewhere, this is the legal position. In his affidavit he stated that he bought land from Thomas Ojiambo Kadima (deceased). He can legally pursue his interest in the estate of the said Thomas Ojiambo Kadima (deceased) and not in the estate of Kadima Obonyo (deceased) and who is the subject of this succession cause.

7. From the foregoing analysis of the evidence on record I find that other than being incompetent for want of form, the application also lacks merit. I accordingly dismiss it with costs.

DELIVERED and **SIGNED** at **BUSIA** this **21st day** of May**, 2019**

KIARIE WAWERU KIARIE

JUDGE