



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 236 OF 2015**

**IN THE MATTER OF THE ESTATE OF THE LATE BARRACK DEYA OKUL (DECEASED)**

**EDWARD O. OKUL.....1ST PETITIONER**

**TOM MBOYA OKUL.....2ND PETITIONER**

**-VERSUS-**

**HEBISIBAH MORAA ONDIEKI.....INTERESTED PARTY**

**RULING**

1.The application before court is dated 12/5/2016. Vide this application Hebisibah Moraa Ondieki (interested party) seeks orders;

**(a) Spent**

**(b) Spent**

**(c) To direct the Petitioners to settle the debt on account of Title No. NAKURU MUNICIPALITY BLOCK 1 (LANGA-LANGA)/744 and to distribute or transfer the same to the name of the interested party.**

**(d) The Petitioners to meet the quantified costs of this application.**

2.The application is premised on the grounds that;

1. The duties of personal representatives or administrators as set out in Section 83 of the Law of Succession Act supporting this application.
2. The court will support the law as it is established in the Constitution, 2010 with regard to accessibilities to justice and the fight against discrimination.
3. The Petitioners withheld vital information which is aimed at disinheriting the interested party her proprietary rights.
4. The content and substance of the interested party by the name HEBISIBAH MORAA ONDIEKI.

3.In addition the applicant has sworn a supporting affidavit on the 12/5/2016, the gist of the grounds and the supporting affidavit is that the deceased herein, Barrack Deya Okul sold title number Nakuru Municipality Block 1(Langa-Langa)/744 to Manoah Kisame Arachi.

4.Upon the death of Manoah, the deceased (Okul) received Kshs. 300,000/= for the applicant which he demanded in order to transfer the property. A petty cash voucher is annexed.

5.Subsequently the deceased (Okul) gave the applicant a copy of his identity card and pin which he duly signed. The 3 documents are annexed save to note that the transfer forms appears signed by the transfer but with no details filed as required.

6.It is urged that unfortunately the deceased sold the property which he had used as security with Thabiti Bank (in liquidation).

- 7.This property has been listed as an asset of the deceased without disclosure of the applicant's interest in the same.
- 8.The application is opposed. Edward Okul has sworn an affidavit stating that the sale agreement between Manoah K. Aradi and the deceased herein fell through and that is why the property was not transferred to the said Aradi.
- 9.It is the respondent's case that Mr. Aradi was allowed to take possession and collect rent from the premises in order to recoup the money which was part payment of the purchase pursuant to the agreement above stated. That is why there was no dispute or exchange of correspondence between the deceased and Mr. Aradi all those years they were alive.
- 10.It is urged that the fact that the applicant was willing and prepared to purchase the suit property from the deceased in 2008, he demonstrates that the applicant was aware that the agreement between Mr. Aradi and deceased had not been successfully concluded. Indeed this property was not included as part of the estate of Manoah Kisame Aradi (deceased). A copy of rectified certificate of grant is exhibited.
- 11.In a further affidavit, the applicant depones that the agreement never failed but was obstructed by the shrewdness of the deceased herein who took advantage of the friendship and trust Manoah placed on him.
- 12.I have considered the application, the grounds, the affidavit evidence and submissions by counsel.
- 13.For determination is whether the court should order the distribution of title number Nakuru Municipality Block 1(Langa- Langa)/744 to the interested party. I have to determine, too, who bears the costs of this application.
- 14.The undisputed fact is that the property in issue is registered in the names of the deceased herein. Administrators of the estate are in place, a grant having been issued. That grant is not confirmed but a summons for confirmation of grant is in record.
- 15.The applicant lays a claim on the subject property on the basis of an alleged agreement for sale which did not result in the expected transfer of the property. The respondent's case is that the said agreement existed but it fell through. More importantly, the said title is said to be held by Thabiti Bank Limited (in liquidation) over a change executed by the deceased.
- 16.There is clearly a contested issue as to whether the deceased sold the land in question.
- 17.The interested party (applicant) is not in the strict sense a beneficiary of the estate of the deceased. However, his right can be protected if it is proved that the estate of Manoah Aradi is a creditor to the estate of Barrack Deya Okul.
- 18.The facts as pleaded disclose a serious dispute related to the use, occupation of and title to land.
- 19.The interested party ought to ventilate these issues not in the probate court but in a court clothed with the necessary jurisdiction, appropriate statutes and subsidiary legislation providing that court with convenient mechanism for determination of the ownership of the property in question.
- 20.As held in **High Court Succession Cause Number 864 of 1996 [2015] eKLR;**

**“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of the property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.**

**Consequently and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.**

**In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”**

- 21.That said, this court must go a step further in protecting the rights of the interested party by ensuring that the subject property in these proceedings is not dealt with in a manner that may jeopardize the outcome of any such proceedings taken out by the interested party or rendering them nugatory.
- 22.That can be insulated by suspending any action limited specifically to the affected property for a specific period to give room to the interested party to ventilate the claim. This court being a court of both law and equity must step in to ensure justice to all the parties before it.
- 23.I need to mention an issue emerging from the proceedings relating to the representation of the administrators of the estate herein by counsel who purportedly executed the contested agreement. That is a matter for counsel to consider (especially when the specific claim is filed in the appropriate court). It is worth noting though, the sentiments in **Rakusen vs. Ellis Munday and Clarke (1912) ICH831**, it was held;

**“That there is no general rule that a solicitor who acted for some person either before or after litigation began could in no case act for the opposite side. The court must be satisfied in each case that no mischief would result from his so acting; that there could no longer danger of any breach of confidence if the solicitor acted for the company.”**

24. The end result is that the application dated 12/5/2016 is without merit and is dismissed. Orders shall flow as hereunder;

**(a) The application dated 12/5/2016 is dismissed.**

**(b) Each party to bear its own costs.**

**(c) Any action in respect of title number Nakuru Municipality Block 1(Langa-Langa)/744 is suspended for 12 months to enable the interested party take the necessary remedial measure if so desired.**

**(d) This cause shall proceed in regard to other assets of the estate.**

**(e) A date be fixed for the hearing and disposal of the summons for confirmation of grant.**

**Dated and Signed at Nakuru this 20th day of September, 2018.**

**A. K. NDUNG'U**

**JUDGE**