

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 61 OF 2019

JOSEPH MUSUMBA PLAINTIFF/APPLICANT

VERSUS

BERTHA NAIT WANDERA DEFENDANT/RESPONDENT

RULING

1. For determination is the application brought by the plaintiff/applicant under the provisions of Order 40 rule 1 and Order 50 rule 1 of the Civil Procedure Rules seeking for orders;

1) Spent

2) An order of inhibition be issued against the defendant in accordance with Section 68 of the Land Registration Act, 2012 restraining the transfer, subdivision, disposition or charging of L.R No. South Teso/Apokor/1611 and South Teso/Apokor/1612 until the hearing and final determination of this suit.

3) Costs of this application be provided for.

2. The application is supported by the applicant's affidavit sworn on 26th September 2019. He deposed that his father Musumba Oyiela was the registered owner of L.R No. South Teso/Apokor/257 measuring 18.50 hectares. That his father died leaving behind two sons – the applicant himself and the late Eneriko Barasa Musumba. That Eneriko became registered as owner thereof after being appointed the administrator of their father's estate. The applicant deposed that he is entitled to 50% share of the suit land. He added that when Eneriko died, he was succeeded by Bertha Nait Wandera in cause No. 206 of 2017. Consequently Bertha Nait Wandera became registered as owner of the numbers partitioned from L.R South Teso/Apokor/257 to wit numbers 1611 and 1612 in her capacity as the administrator. That the applicant lives on this land and prays that an order of inhibition do issue prohibiting the transfer, dispossession or any dealing with the suit parcels pending determination of this suit.

3. The Respondent filed a replying affidavit on 12th November 2019 to oppose the grant of the orders sought in the motion. She deposed that she is the wife of Albert Wandera Barasa Musumba – deceased and the administrator in cause No. 206 of 2017 that deals with parcel No. L.R No. 1611 and 1612. The Respondent deposed that she is informed that Eneriko Barasa sub-divided L.R No. 257 because Musumba Oniala - deceased had sold a portion of this land during his life time.

4. That Eneriko was to complete the transfer of South Teso/Apokor/1612 to the buyers of the land. Consequently Land South Teso/Apokor/1611 measuring 14.25ha is what comprises the net estate of Musumba Oniala – deceased and which is available to be distributed in accordance with the deceased wishes in Succession Cause No. 206 of 2017 even though on the ground the demarcations were already done as per the instructions of Musumba Oniala. The Respondent deposed that this suit is meant to upset the status quo as it will derail the pending succession case. She urged the Court to dismiss the application which she describes as slanderous, frivolous and an abuse of the court process.

5. The parties argued the application by filing written submissions. The applicant stated that failure to preserve both parcels of land might result in this case being an exercise in futility. That it remains an allegation requiring proof that Eneriko Barasa had sold part of the land to 3rd parties. He urged the Court to allow his prayers. The defendant on his part submits that the plaintiff's claim fall within the confines of the Law of Succession Act and not the Land Registration Act. She cited the Case of *Bena Nafula Makana and 2 others Vs Nyaoro Akoth Muka Crescentia and 8 others (2019) eKLR* where the Court of Appeal stated that under Sections 47 and 70 of Cap 160,

“The Court has special jurisdiction to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders as may be expedient. The powers granted to the court are wide and can be invoked before making a Grant on whether or not there is a dispute as to the Grant including power to call for further evidence as to rights of persons claiming interest on intestacy and power to issue special citations to any person appearing to have reason to object to the application”.

6. I have considered the facts stated in the pleadings together with the submissions rendered. It is not in dispute that the Applicant's claim arises on account of his sonship to Musumba Oniala – deceased who was the registered owner of the Original parcel No. South Teso/Apokor/257. It is also not in dispute that there is an ongoing Succession Cause No. 206 of 2017 which was scheduled for confirmation of grant on 10th October 2019. The Respondent submitted that the Succession Court is clothed with jurisdiction to determine shares of each of the beneficiaries under Section 47 and 70 of the Law of Succession Act.

7. I am persuaded by the Respondent's argument that the law of Succession cloths a court with jurisdiction to determine the shares of the two sons of Musumba Oniala – deceased. If the Applicant will be unhappy with the mode of distribution, he has a right of appeal through the

laid down process. Consequently asking for orders of inhibition of the titles before distribution is premature and uncalled for. The Applicant is at liberty to apply for inhibition and or stay of execution orders if he will be unhappy with the mode of the intended distribution in Cause No. 206 of 2017 before the court handling the succession cause instead of bringing this application here. For now the application dated 26/9/2019 is struck out for being premature. Costs are ordered in the cause.

Dated, signed and delivered at BUSIA this 25th day of June, 2020.

A. OMOLLO

JUDGE