



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**SUCCESSION CAUSE NO. 124 OF 2005**  
**IN THE MATTER OF THE ESTATE OF STANLEY ONDORO BORAYA (DECEASED)**  
**- AND -**  
**IN THE MATTER OF AN APPLICATION FOR LETTERS OF ADMINISTRATION**  
**INTESTATE BY**

**RHODA MONGINA ONDORO.....PETITIONER**

**VERSUS**

**NELSON GWARO BORAYA**

**NYAKORA BORAYA**

**JERIDAH MORAA NYANGAU**

**JOYCE MOENGA**

**WILDEK MORAA ONDORO**

**MOSES MOYWAYWA NYANGITO.....RESPONDENTS**

**RULING**

1. The application dated 28<sup>th</sup> November 2016, by **Joyce Moenga** also known as **Jane Bochere Makori** (applicant) is made under S.47 and S.45 of the Law of Succession Act against **Rhoda Mongina Ondoro** (respondent) for orders that:-

- 1) The respondent be committed to prison for a period not exceeding one year or pay a fine not exceeding Kshs. 10,000/=, or be liable to both such fine and imprisonment for intermeddling with the property of the deceased Stanley Ondoro Boraya.
- 2) The registration of the respondent on 2<sup>nd</sup> August 2016, as proprietor in the land register respecting land Parcel No. Gesima Scheme/345 in place of the deceased's name be cancelled and the title deed issued in her favour be nullified.
- 3) The name of the deceased be restored as proprietor in the said register pending confirmation of

grant and distribution of the deceased's estate amongst all the beneficiaries.

4) The Land Registrar Nyamira County do effect the restoration accordingly.

5) The court be pleased to issue a conservatory order protecting and preserving all the properties belonging to the estate prohibiting any form of alienations, dispositions, transfers or sale until further orders of the court.

6) The Land Registrar Nyamira County one K.E.M Bosire, be summoned to court to explain entry No. 3 of the Land Register for LR NO. Gesima Scheme/345 to the extent that it suggests that the entry was sanctioned through the process of this court to have collided (sic) with the respondent in intermeddling and the Land Registrar be liable to such imprisonment and/or sanctions as the court may order.

2. The grounds in support of the application are those contained in the body of the appropriate chamber summons dated 28<sup>th</sup> November 2016, as fortified by the averments contained in the supporting affidavit dated 28<sup>th</sup> November 2016 and the supplementary affidavit dated 22<sup>nd</sup> February 2017, both deposited by the applicant.

The respondent, in the replying affidavit deposited by herself dated 1<sup>st</sup> February 2017, opposes the application.

3. At the hearing of the application, the learned counsel, **Mr. Nyasimi**, appeared for the applicant while the learned counsel, **Mr. Okenye**, appeared for the respondent. They both presented oral submissions in which they more or less reiterated and/or highlighted the contents of the respective supporting and replying affidavits by the applicant and the respondent.

4. This court has given due consideration to the application and the rival submissions for and against. The basic ground for the application is that the respondent proceeded to register herself as the proprietor of LR NO. Gesima Scheme/345 (Plot No. 345) in place of the deceased in total disregard of the law and the court process for confirmation of grant and the pending objection proceedings and has thereby intermeddled with the deceased's free property with the intention to disinherit other beneficiaries of their share of the estate particularly LR NO. Gesima Scheme/345.

The applicant prays for protection and preservation of the estate until confirmation of the grant and distribution of the estate to the beneficiaries.

5. This main ground is the reason for prayers (1) and (2) of the application. Prayer (3) would be incidental to the first two prayers and so would prayer 5. Prayers (4) and (6) are unnecessary herein but may more or less be a subject of a separate suit within the realm of the Environment and Land Court. In any event, there is no indication that the Land Registrar Nyamira County was served with the application and the necessary hearing notice for him to defend himself. He cannot be condemned unheard.

6. S.45 of the Law of Succession Act provides that:-

**1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose i.e the possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**

**2) Any person who contravenes the provisions of this section shall:-**

**(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment and**

**(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of**

## **administration.**

This provision of the law essentially guards against intermeddling in any manner with property of a deceased person.

7. Under Rule 73 of the Probate and Administration Rules, the court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In her supporting affidavit, the applicant alleges that the respondent being a co-administrator of the estate of the deceased and aware that the grant is yet to be confirmed and also aware that there are objection proceedings pending in this matter went ahead to knowingly, unlawfully, fraudulently and maliciously transfer and register in her name the estate property i.e Plot No. 345, which belongs to the deceased.

The necessary documents including a copy of the green card or land record and search certificates were exhibited as Annexures "KN1", "KN 2" and "KN 3" to establish the fact. This allegation and the supporting documents were not addressed by the respondent and were therefore undisputed.

8. What the respondent has done is to address the issue of distribution of the estate in her replying affidavit. She has therein attempted to show the entitlement of each or some of the beneficiaries to the various immovable property belonging to the deceased including the property in dispute herein. She has also attempted to show that there have previously been acts of interfering with the estate by one of the administrators called Thomas Nyakora Ondoro. In spite of all that she has, most importantly, not denied that she herself interfered with the estate and in particular Plot No. 345 by having it registered in her name even before confirmation of the grant and/or determination of the pending objection proceedings. Her conduct brought her into conflict with S.45 of the Law of Succession Act and was indeed in total disregard of the law and the court process.

9. The respondent cannot be heard to say that she registered the property in her name in order to preserve it and her interest therein. This excuse is unacceptable and smacks of a don't care attitude on the part of the respondent. She had at her disposal lawful means to protect the property and her interest, but having it registered in her own name without following lawful court process translated to nothing short of impunity.

In any event, this court on the 24<sup>th</sup> July 2008, ordered that the status-quo obtaining in this matter be maintained until the grant is confirmed. This meant that no party was allowed to interfere in any manner with the estate of the deceased prior to the confirmation of the grant issued on 20<sup>th</sup> September 2005.

10. Any party going or acting against the order was liable to such punishment as provided under subsection (2) of S.45 of the Law of Succession Act. The respondent is liable to such punishment for registering part of the estate property in her name prior to confirmation of the grant and/or determination of the objection proceedings.

Accordingly, this application succeeds in terms of prayer (1), (2), (3) and (5) of the chamber summons dated 28<sup>th</sup> November 2016. The respondent shall forthwith pay a fine of Kshs. 10,000/= in default serve three (3) months imprisonment. The registration of Plot No. 345 in her name on 2<sup>nd</sup> August 2016 is hereby cancelled and the resultant title deed revoked. The name of the deceased shall be restored in the relevant register forthwith and any form of interfering with the entire estate without further orders of the court is prohibited forthwith. Parties must exercise patience and await the confirmation of the grant.

11. The "status-quo" existing as at the 24<sup>th</sup> July 2008, be restored and maintained. Any interference with the estate after that date be and is hereby treated as "null and void ab-initio." The pending summons for confirmation of grant dated 26<sup>th</sup> June 2009, be fixed for hearing together with any objection arising therefrom on a date to be fixed today in this court.

Each party shall bear own costs of the application.

Ordered accordingly.

**[Read and signed this 9<sup>th</sup> day of March 2017].**

**J. R. Karanjah**

**Judge**

**In the presence of**

Mr. Okenye for Objector

Mr. Sagwe holding brief for

Nyambati for Petitioner

CC Njoroge