



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**SUCCESSION CAUSE NO.413 OF 1995**

**GEOFFREY MWIMALI OTINGA GEORGE.....ADMINISTRATOR**

**JOHN OMUYULA M. ODINGA**

**JOHNSON WYCLIFF AMBANI.....APPLICANTS**

**VERSUS**

**MICHAEL MWIMALI OTINGA.....1<sup>ST</sup> OBJECTOR**

**HENRY LUBANGA.....2<sup>ND</sup> OBJECTOR**

**RULING**

1. The objectors herein, *Michael Mwimali Otinga* and *Henry Lubanga*, have filed an application dated 30<sup>th</sup> September 2015 seeking for orders against the administrator of the estate of the late **Charles Mwimali Otinga** that the confirmed grant issued to *Godfrey Mwimali Otinga George* on 19<sup>th</sup> March 1996 be annulled on the grounds that:

- (a) the confirmed grant was obtained fraudulently by making of false statements to the court.
- (b) the grant was obtained fraudulently by concealment from the court that:
  - (i) *Land Parcel No. E/Wabga/Malaha/167* could not be shared between the beneficiaries as it appears on the certificate of the confirmed grant since the acreage in the grant is not the acreage on the ground.
  - (ii) the grant as confirmed and issued is incapable of being implemented.,
  - (iii) some beneficiaries have been disinherited.

2. While the said application was pending two brothers of the administrator *John Omuyula M. Odinga* and *Johnson Wycliffe Ambani* filed an application dated 11<sup>th</sup> April 2016 seeking for orders that the 1<sup>st</sup> and 2<sup>nd</sup> objectors be restrained from entering or interfering with the applicants' peaceful use and occupation of land *Parcel No. L.R. No. E/Wanga/Malaha/1163* and *1165* pending the hearing and determination of the application dated 30<sup>th</sup> September, 2015. That the objectors be punished for disobedience of court order of 1<sup>st</sup> February 2016.

**APPLICATION DATED 30/9/15:**

3. The application is supported by affidavits of the objectors. The first objector Michael Mwimali Otinga says in his affidavit that after the grant was issued, title deeds for the respective beneficiaries were processed. That according to the grant he was allocated 4.3 acres but that the land he was allocated is on the ground approximately 1 acre. That there is no demarcation on the ground and that the State is causing a lot of animosity. That the dispute can only be solved by annulling the grant and cancelling the sub-division to enable the beneficiaries to do a fresh survey so that fresh grant can be issued.

4. The 2<sup>nd</sup> objector Henry Lubanga says in his affidavit that in the confirmed grant he was allocated 6 acres but that on the ground the portion is less than 2 acres. He says that it is only fair for the grant to be nullified to enable the beneficiaries to share the estate afresh in reflection of the size of the land on the ground.

5. The application was opposed by the administrator of the estate, Godfrey Mwimali Odinga George through his replying affidavit in which he states, *inter alia*, that:

(a) The objectors are his brothers

(b) That there are 5 other brothers who will be affected by the reliefs being sought.

(c) That the grant herein was confirmed on 19/3/96 following a family discussion and agreement which included the objectors and their mother.

(d) That the process of sub-division of the land was followed including demarcation by a surveyor, signing of various forms by the beneficiaries and registration of various parcels for the beneficiaries.

(e) That the land for each beneficiary was duly registered and each issued with a title deed.

(f) That it was then agreed that each beneficiary moved to his registered parcel of land but that when surveyors came to show the 1<sup>st</sup> objector his parcel of land he chased them away.

(g) That the 2<sup>nd</sup> objector got the biggest share of 6 acres out of the estate and therefore he has nothing to complain about.

6. The first ground in support of the application is that the grant was obtained fraudulently by concealing some material fact that the acreage in the grant is not the acreage on the ground. The administrator of the estate, Godfrey Mwamali Otinga, attached some documents to the application showing that after the confirmed grant was issued, due process was followed to register the land, the process to which the objectors participated. That the objectors' parcels were also registered. The objectors have not questioned the process of registration.

7. The District Surveyor has filed with the court a survey report dated 1<sup>st</sup> August 2016 indicating that he visited the land in issue, took measurements of the land and found the total acreage to be 12.7 HA (31.38 acres). The total allocated acreage as per the confirmed grant is 30.9 acres which means that the land as allocated in the grant is enough for the 8 beneficiaries. In the premises the contention by the objectors that the grant is incapable of being implemented is far from the truth as the land is sufficient for all the beneficiaries.

8. The Administrator has deposed in his affidavit that it is the 1<sup>st</sup> objector and his sons who chased away the surveyor when the surveyor went to show him his parcel of land. The 1<sup>st</sup> objector did not contradict this statement. It is clear that it is the objectors who have made it difficult to implement the grant by refusing to move to their portions of land. The 1<sup>st</sup> objector was allocated 6 acres whereas there are other beneficiaries who were allocated as little as 2 acres. The 2<sup>nd</sup> objector was allocated 4.3 acres. Those who were given as little as 2 acres are not complaining. The objectors then have no reason to complain.

9. The other ground in support of the application is that there were some beneficiaries who have been disinherited. However, the objectors did not state a single beneficiary who has been disinherited. All the 8 brothers were allocated land. The other six apart from the objectors are not complaining. There is thereby no substance that there are some beneficiaries who have been disinherited.

The objectors participated in the process of sub-division and registration of the land. They cannot now turn around and demand fresh sub-division and registration. They should just move to their registered parcels of land. There are no sufficient reasons adduced to warrant revocation and/or annulment of the grant issued on 9<sup>th</sup> March, 1996. The application dated 30<sup>th</sup> September, 2015 lacks merit and is thereby dismissed with costs to the respondent/administrator.

APPLICATION DATED 11/4/2016:

10. The grounds in support of the application are that the applicants are the registered owners of land Parcels No. E/Wanga/Malaha/1163 and 1165 respectively. That the objectors have encroached into the applicants' parcels of land and ploughed them. That the objectors' actions are in contravention of the court order issued on 1<sup>st</sup> February 2016 maintaining the status quo at the time of filing of the objectors' application dated 30<sup>th</sup> September, 2015.

11. The said application was opposed by the objectors who stated that it is them who were in actual occupation of the land in issue when the application dated 30<sup>th</sup> September, 2015 was filed. Therefore that the status quo ordered by the court was for them to continue using the land until the application was determined. That they are not in contravention of the order of the court issued on 1<sup>st</sup> February, 2016. Further that the issue of ownership of the land cannot arise at this stage as there are no demarcations on the ground and that the sharing of the subject land is still to be determined by this court.

12. On the 1<sup>st</sup> February 2016, the court issued the following order:

*"... This court further extends the interim orders issued on 3/11/15. The status quo appertaining as of 3/11/15 is to be maintained."*

The application dated 30<sup>th</sup> September 2015 came before **Justice Njoki Mwangi ex parte** on 3<sup>rd</sup> November 2015. She ordered for an order of inhibition to issue prohibiting any transactions in land Parcels named in the application pending the hearing of the application.

13. The objectors contend in their replying affidavits that when they made the application dated 30<sup>th</sup> September, 2015 they are the ones who were in occupation of the parcels of land in issue. That they had ploughed the land in readiness for planting. That with the onset of the long rains they planted food crops on the parcels of land. That therefore that the status quo ordered by the court meant that they were the ones to continue using the land pending the hearing of the application.

14. The applicants did not file further supplementary affidavits to contradict the objectors' replying affidavits. The applicants do not say in their application the time when the objectors ploughed the parcels of land in issue. Their application only states that the respondents have encroached into the applicants' parcels of land and ploughed them without mentioning the date when the respondents did so. This leaves the question whether the objectors ploughed the parcels of land on or before 3<sup>rd</sup> November, 2015 unanswered. The status quo ordered by the court on 1<sup>st</sup> February 2016 was for whoever was in occupation of the land before 3<sup>rd</sup> November, 2015 to continue using it pending the hearing of the application dated 30<sup>th</sup> September, 2015. The applicants have thereby not shown that the objectors are not the ones who were in occupation of the land on or before 3<sup>rd</sup> November 2015. Consequently the applicants have not shown that the objectors were in contravention of the court order issued on 1<sup>st</sup> February 2016..

15. For the foregoing reasons the application dated 11<sup>th</sup> April 2016 is unsubstantiated and is dismissed.

Each party to bear its own costs.

**Delivered, dated and signed at Kakamega this 11<sup>th</sup> day of May, 2017.**

**J. NJAGI**

**JUDGE**

In the presence of:

Cc Paul/Gerorge

Osango HB Mukisu for objectors