



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**SUCCESSION 270 OF 2010**

**IN THE MATTER OF THE ESTATE OF THE LATE NYAMINSA OSORO - DECEASED**

**AND**

**IN THE MATTER OF THE TITLE NO. NYARIBARI MASABA/BONYAMASICHO/498**

**AND**

**IN THE MATTER OF RECTIFICATION OF THE REGISTER AND NULLIFICATION OF  
TITLE**

**AND**

**IN THE MATTER OF THE SUCCESSION ACT CAP 160 LAWS OF KENYA**

**BETWEEN**

**FRANCIS ORARE ONSERIO .....PETITIONER**

**VERSUS**

**BENARD OGORO OSORO.....RESPONDENT**

**RULING**

**Background**

1. NYAMINSA OSORO (hereinafter “the deceased”) was the wife of **OSORO NYAMORI**, (also deceased). Apart from the deceased herein, the said Ogoro Nyamori also had another wife, LUCIA MORAA OSORO. It is alleged that prior to his death, OSORO NYAMORI sub-divided his land among his 2 wives as follows;

a) NYAMINSA OSORO- Land Parcel No. MASABA/BONYAMASICHO/498 (hereinafter “the suit land”)

b) LUCIA MORAA OSORO land parcel No. MASABA/BONYAMASICHO/500.

2. This succession cause relates to the estate of NYAMINSA OSORO and the suit land.

3. The petitioner/Applicant herein is the son of LUCIA MORAA OSORO while the respondent is the son of the deceased herein. In effect therefore, the petitioner is the step brother of the respondent by virtue of

being sons of the same father from different mothers.

4. In July 2010, the petitioner herein filed citation proceedings against the respondent which proceedings are still pending determination even though on 19<sup>th</sup> July 2011, the petitioner obtained orders rescinding the respondents' registration as the owner of the suit land on grounds that the said registration was illegal in view of the fact that it was obtained before any grant of letters of administration in respect to the deceased's estate had been issued or confirmed.

5. Even though the parties herein are referred to as the petitioner and respondent, I note that their correct description should be **citor** and **citee** respectively in view of the fact that a succession cause has not yet been filed as the instant proceedings were, as I have already noted in this ruling, initiated through citation proceedings.

### **Application**

6. This ruling relates to the application dated 8<sup>th</sup> June 2016 brought under **Order 51 of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act**. The applicant seeks the following orders:

**1. Spent**

**2. THAT pending the hearing and determination of this application, the Respondent, his servants and/or agents or otherwise howsoever be restrained from making any form of dealings on the parcel of land known as NYARIBARI MASABA/BONYAMASICHO/498.**

**3. THAT pending hearing and determination of Succession Cause no. 270 of 2010, the Respondent, his servants and/or agents or otherwise howsoever be restrained from making any form of dealings on the parcel of land known as NYARIBARI MASABA/BONYAMASICHO/498.**

**4. THAT the OCS Kisii Police Station to oversee and ensure compliance of the issued Court Orders.**

**5. THAT the costs of this Application be provided for.**

7. The application is supported by the applicant's affidavit sworn on 8<sup>th</sup> June 2016 in which he states that he obtained grant of letters of administration in respect to the estate of his Grandfather Onserio Osoro who gave the suit land to his father Osoro Nyamori but that the said Osoro Nyamori married the deceased herein, Nyaminsa Osoro as the 2<sup>nd</sup> wife and mother to the respondent herein. He goes further to give the historical background of the suit and refers to previous proceedings that took place before the Land Control Board the High Court and village elders.

8. The applicant refers to this court's orders of 19<sup>th</sup> July 2011 wherein the respondent's registration as the owner of the suit land was rescinded and orders made that the registration of the suit land be restored to the name of the deceased Nyaminsa wife of Osoro.

9. The applicant avers that the respondent has violated the said court's order of 19<sup>th</sup> July 2011 by carrying out farming activities on the suit land and he therefore seeks the orders of this court to stop the respondent forthwith from conducting any further unlawful dealings or accessing to the suit land until the case is heard and settled.

10. The respondent opposed the application through the grounds of opposition filed on 31<sup>st</sup> August 2016 in which he states that the application lacks merit, is incompetent, fatally defective, vague and is intended to disinherit him from the suit land.

11. When the application came up for hearing before me on 6<sup>th</sup> December 2016, parties agreed to canvass it by way of written submissions which I have perused.

### **Analysis and Determination**

12. Upon considering the instant application together with the parties' respective submissions, I note that the main issue for determination is whether the said application is merited and further, whether the applicant is entitled to the orders sought.

13. The main prayer sought by the applicant is for interim injunction to restrain the respondent from making any form of dealings on the suit land. An injunction is essentially a provisional order intended to restrain the doing of a particular act or to require a certain state of affairs to be halted temporarily until the trial of a suit or until further orders. (See **Richard Kuloba – “Principles of Injunctions” Oxford University Press 1987**).

14. Courts have on many occasions grappled with the question of whether orders of injunction can be made in succession cases with the main question being whether the court is clothed with the powers to grant such orders. Orders of injunction are ordinarily sought under **Order 40 of the Civil Procedure Rules**. The instant application is however expressed to have been filed under **Order 51 of the Civil Procedure Rules** which provides the procedure for filing of applications generally and at Rule 1 thereof states that all applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.

15. Probate and Administration Rules, under which this instant application ought to have been anchored, in view of the fact that it relates to a succession cause, do not provide for an injunctive relief since **Order 40 of the Civil Procedure Rules** is not one of the Civil Procedure Rules envisaged and covered by **Rule 63 (1) of the Probate and Administration Rules** as being applicable to Succession cases. (See **Estate of Kibomen Komen (Deceased) Nakuru Succ. No.500 of 1997**).

16. I however find that even though the Probate and Administration Rules do not have express provisions empowering this court to make orders for injunction, Rule 73 thereof grants the court inherent powers and states as follows:

***“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

Inherent powers of the court are usually resorted to where there are no clear provisions.

17. In the matter of the **Estate of Erastus Njoroge Gitau (deceased) Nairobi HC SUCC.NO.1930 of 1997** Khamoni J. held that **Rule 73** is to be used only in deserving cases where no specific provisions exist to deal with the situation in question. It is not an omnibus provision which allows the court to entertain all manner of applications. **Rule 73** only relates to gaps in the **Law of Succession Act** and the **Probate and Administration Rules**.

18. In the **Estate of Kilungu (Deceased) (2002) 2KLR 136**, Khamoni J, still on the subject of **Rule 73** observed that the rule cannot be used to do what the Law of Succession Act does not allow the court to do. The law of Succession Act does not grant the court any powers to grant injunctions. Injunctions are, by their very nature, very drastic orders that have the effect of restraining a party from doing a particular thing that is clearly spelt out in the order with a rider that if the order is disobeyed, the restrained party may face certain sanctions or consequences. The drastic injunctive orders should in my humble view, be sought only in a proper suit in which the applicant will have to fulfill and the mandatory conditions for the granting of orders of interlocutory injunctions that were spelt out in the celebrated case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358** as follows:-

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in***

**East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

19. In the instant case, the applicant seeks orders to restrain the respondent from making any form of dealings on the suit land pending the hearing and determination of the succession cause. Which brings to focus the question on whether the instant case meets the threshold of the conditions set in the Giella case (supra). I am afraid that the answer to the above question is negative because, firstly; there is no substantive suit between the applicant and the defendant on which the court can ascertain if the applicant has overwhelming chances of success. What is before this court are citation proceedings which have not yet even crystallized into a proper succession cause. Citation proceedings cannot be said to be substantive suits because they are merely miscellaneous proceedings initiated by a citor in order to prompt a citee to file a succession cause. This means that at this stage of the citation case, no administrator has been appointed to administer the estate of the deceased and it is therefore not clear on what basis the applicant seeks to restrain the respondent from making any form of dealing on the suit land.

20. Furthermore, as I have already noted in this ruling, on 19<sup>th</sup> July 2011, this court, differently constituted, ordered that registration of the suit land reverts back to the name of the deceased in which case it is not easy to fathom what kind of dealings the applicant seeks to restrain the respondent from doing in view of the fact that the suit land is still in the name of the deceased. The applicant alluded to the fact that respondent should be stopped from gaining access to the suit land or conducting farming activities thereon. The respondent, on the other hand, stated in his written submissions that he was a bona fide beneficiary to the estate of the deceased by virtue of being her son, a fact which has not been denied by the applicant. Under the above circumstances, I find that it will not be fair or just to restrain the respondent from using or occupying land that belongs to his deceased mother and on which he is a potential beneficiary. I find that the applicant did not demonstrate that the respondent was wasting or about to dispose of the suit land so as to justify the issuance on the injunctive orders sought.

21. As I have already observed in this ruling, the applicant and the respondent are step brothers and could at any rate be entitled to inherit the suit land should they establish their entitlement during the confirmation of grant. It is however noteworthy that even though both parties claim an interest in the suit land, neither the applicant nor the respondent has filed any succession cause so as to enable the court deal with substantive issue of the distribution of the estate of the deceased almost 7 years after the citation proceedings were filed.

22. Under the above circumstances, I find that the applicant has not made out a proper case to warrant the granting of the orders of injunction sought and therefore the order that commends itself to me is the order to dismiss the application dated 8<sup>th</sup> June 2016 with no orders as to costs in view of the fact that the disputants are relatives.

**Dated, signed and delivered in open court this 7<sup>th</sup> day of June, 2017**

**HON. W. A OKWANY**

**JUDGE**

**In the presence of:**

Miss Momanyi for Ndeda for the Applicant

Ngethe for Ochoki for the Respondent

Omwoyo: court clerk