



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION 66 OF 2007

**IN THE MATTER OF THE ESTATE OF THE LATE ONKWARE MAOSA
.....DECEASED**

AND

JOSEPH NYANGARESI OMOSA PETITIONER

VERSUS

WILKSTER BEARI ONGUBO

ZACHARIAH ONSONGO MOSETI .

JOSEPH NYABOGA.....OBJECTORS

RULING

Background

1. **ONKWARE MAOSA**, (hereinafter “the deceased”) died on 15th June 1976. Grant of letters of administration intestate in respect to his estate was made to **JOSEPH NYANGARESI OMOSA** (the petitioner herein) on 18th February 2008 which grant was confirmed on 12th June 2009. The deceased was, prior to his death, the registered owner of LR. NO. WEST KITUTU/BOGESERO/590 which was after the said confirmation of grant sub-divided into several parcels of land that were then transferred to different people.

2. On 3rd July 2009, the objectors herein, filed an application dated 2nd July 2009 seeking to revoke/annul the grant issued to the petitioner. The said application to revoke grant was opposed by the petitioner through a replying affidavit and Notice of Preliminary Objection dated 15th March 2010.

3. When the objection came up for hearing before Makhandia J (as he then was) on 3rd June 2011 parties agreed by consent as follows:

1. THAT the District Land Registrar and Surveyor Kisii Central do visit land parcel WEST KITUTU/BOGUSERO/590, 2737, 3434, 4130, 4593 and 4592 and mark out the existence of boundaries of the said parcels of land.

2. THAT report to be filed on or before 8th day of July 2011 when the matter shall be mentioned for further orders and/or directions.

3. THAT the expenses involved be shared equally by the parties.

4. The said consent order was later extracted and served on the District Land Registrar and the District Surveyor who visited the land and filed a report which is the subject of the application that is the subject of this ruling.

Application

5. Through a notice of motion application dated 7th November 2011, the 2nd objector herein, ZACHARIAH ONSONGO MOSETI sought the following orders:

a) THAT the Report made by Kisii Central District Land Registrar and the Surveyor dated 27th September 2011, in respect of parcels of land known as Kitutu Chache/Bugusero/590, 4592, 4593, 2737, 3433, 3434 and 4130 be set aside, varied and or be nullified as the said District Land Registrar misconducted themselves during the exercise as he portrayed a lot of prejudice against the objectors.

b) Costs of this application be provided for.

6. The application is supported by the 2nd objector's affidavit dated 7th November 2011 in which he accuses the District Land Registrar and the surveyor of corruption and misconduct during their survey work on the disputed parcels of land. He avers that the registrar and surveyor did not identify the boundaries as ordered by the court thereby filing a report which was shoddy incomplete and prepared without the participation of all the parties. He urged the court to disregard the said report.

7. The application was opposed by the petitioner through his replying affidavit dated 4th June 2015 in which he avers that the application is an afterthought, founded on falsehoods and an abuse of the court process. He reiterates that his father had, prior to his death, sold land to the 1st, 2nd and 3rd objectors and titles were then issued to them but that the land in dispute belonged to his uncle, the deceased herein. He further avers that the objectors' claim is without basis and ought not to be allowed.

8. On 26th October 2016, the case came up for directions before me when the parties agreed to canvass the instant application by way of written submission which I have perused.

Determination

9. The issue that arises in this application is whether the application dated 7th November 2011 is merited.

10. The said application is expressed to have been filed under **Order 46 Rule 16 of the Civil Procedure Rules** and **Section 1A and 3A of the Civil Procedure Act**.

11. Order 46 Rule 16 of the Civil Procedure Rules stipulates as follows:

"[Order 46, rule 16.] Grounds for setting aside award.

16. (1) The court may set aside an award on the following grounds only —

(a) corruption or misconduct of the arbitrator or umpire; or

(b) that either party has fraudulently concealed any matter which he ought to have disclosed, or has willfully misled or deceived the arbitrator or umpire.

(2) An Application under this rule shall be served on the arbitrator or umpire.

(3) Where an award is set aside under this rule the court shall supersede the arbitration and

shall proceed with the suit.”

12. This is however a succession case in which the law and rules applicable are the Law of Succession and the Probate and Administration Rules. The petitioner submitted that **Rule 63 of the Probate and Administration Rules** clearly provides for the Civil Procedure Rules that are applicable to succession proceedings and **Order 46 of the Civil Procedure Rules** is clearly not one of the rules envisioned by **Rule 63 of the Probate and Administration Rules**.

13. **Rule 63 of the Probate and Administration Rules** stipulates as follows:

“63.Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

14. In view of the above provisions, I find that this application is incompetent in so far as it is made under the Civil Procedure Rules that are not applicable in succession cases.

15. Be that as it may even assuming that this court overlooks the rules of procedure under which the instant application has been filed and instead focuses on the bigger picture which is to dispense justice without undue regard to procedural technicalities in line with **Article 159 (2) (d) of the Constitution**, would the instant application pass the merit test?

16. I am afraid the answer to the above question is to the negative because the instant application seeks the main prayer that this court sets aside, varies and or nullifies the report filed by the Kisii Land Registrar and Surveyor on 27th September 2011 on grounds that I have already highlighted hereinabove. I find that the impugned report is not a court order capable of being set aside varied or nullified. It is merely a report filed by the 2 experts and in the event the objectors are aggrieved by it or feel that the survey was not properly carried out, they have the option of requesting the court to summon the affected officers to come to court and be cross examined on the validity or credibility of their report, in which case, the objectors will still be at liberty to request for a second opinion from different experts in the same filed. It is only after taking evidence on the circumstances under which the impugned report was made that this court can make a determination on whether or not the report will be useful in this cause.

17. The bottom-line however is that the report by the Land Registrar and Surveyor is not an order of this court capable of being set aside, varied or nullified. It is merely a piece of evidence which the court may or may not adopt in arriving at its decision.

18. In view of my above findings and observations, I find that the instant application lacks merit and I therefore dismiss it with orders that costs will abide the outcome of the main objection proceedings that are still pending.

Dated, signed and delivered in open court this 6th day of June, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

- G.S. Okoth for Ombachi for the petitioner
- N/A for the Respondent
- Omwoyo: court clerk