



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 406 OF 2009

INTHE MATTER OF THE ESTATE OF JOSEPH NGIELA MBORI (DECEASED)

ANDRONICO ONDORO NG'IELA

MARY ACHEING NG'EILA.....PETITIONERS

VERSUS

PEREZ POLY OBONYO

MAZWEL MBORI OBONYO.....OBJECTORS

RULING

Introduction

1. **Joseph Ngiela Mbori** (hereinafter "the deceased") died intestate on 16th December 2003. Grant of letters of administration in respect to his estate was issued to the petitioners herein on 6th July 2011 who thereafter filed Summons for Confirmation of Grant dated 5th December 2016. Following the filing of the application for confirmation of grant, the objectors herein filed an affidavit of protest sworn on 24th March 2017 which affidavit is the subject of this ruling.

2. The objectors' protest is premised on the grounds that in obtaining the grant, the petitioners failed to disclose the full and material facts regarding the estate of the deceased by purporting that Land Parcel No. Central Kasipul/Kamuma/5613 (hereinafter "the suit land") was plot No. 202 in Oyugis Town thereby leading this court, in a previous ruling, to make orders that rents received from the said plot No. 202 in Oyugis town (hereinafter "the rental premises") to be deposited in court. It is because of the order directing that rents received from the rental premises be deposited in court that the objector filed the affidavit of protest.

3. The objectors contend that the petitioners misled the court into believing that plot No. 202 Oyugis Town exists on the ground while in actual fact they intend to impose it on the suit property which is registered in the name of the 1st objector. The objectors' case is that the petitioners listed plot No. 202 as one of the assets of the deceased that was free for distribution without disclosing to the court that the objector was the owner of the suit land and that it was therefore not free for distribution.

4. The 2nd petitioner swore a replying affidavit dated 17th May 2017 in response to the affidavit of protest, in which she states that the affidavit of protest is replete with deliberate falsehoods, misrepresentations and concealment of material facts intended to mislead the court.

5. The petitioners assert that the estate of the deceased comprises of specified and designated assets which have been well captured in form P & A5 and which include the suit plot that was allocated to the deceased by the now defunct county council of South Nyanza as shown in annexure marked “MANI”.

6. The 2nd petitioner deposes that the suit plot is distinct and separate from the suit land as the same are not connected in any way given the nature of the titles involved. It was the 2nd petitioner’s case that the suit land does not form part of the estate of the deceased and is in any event not captured in Form P&A5 in which all the assets of the deceased were listed. She further states that the objectors are not beneficiaries of the estate of the deceased and therefore have no basis for objecting or protesting to the confirmation of the grant in respect to the deceased’s estate.

7. She suggests that in the event that the objectors have a problem with the ground location of the suit plot then that is an issue that can only be resolved by the County Physical Planner and Land Registrar who are the officers charged with the responsibility of dealing with issues of delineation of and determination of ground location.

8. It is the petitioner’s contention that the issues raised by the objectors in the affidavit of protest are issues that can only be ventilated before the Environment and Land Court. The 2nd petitioner attached a letter from County Government of Homa Bay dated 28th July 2012 (marked as “MAN2”) to confirm that the suit plot belongs to the deceased.

9. The 2nd petitioner further avers that protest is devoid of merit, amounts to abuse of the process of the court process and ought to be dismissed with costs.

10. When the protest came up for hearing, parties agreed to canvass it by way of written submissions which I have perused and considered.

Analysis and determination.

11. I have anxiously considered the affidavit of protest filed by the objectors herein, the petitioners’ answer to the protest and the parties respective submissions. The main issue for determination is whether the protest is merited.

12. A determination of the merit of the protest will mean that the court determines whether the suit plot (No. 202 Oyugis Town) is one and the same as the suit land (LR. No. Central Kasipul/Kamuma/5613).

13. It was not disputed that the suit plot and the suit land belong to the deceased and the 1st objector respectively.

14. An affidavit of protest to confirmation of grant may be filed by any person wishing to object to the proposed confirmation of grant who is in most cases, a beneficiary to the estate of a deceased person. The provisions of **Rule 40(6)** of the **Probate and Administration Rules** which states thus:

“Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.”

15. In the instant case, however it is not in dispute that the affidavit of protest was filed by persons who are not beneficiaries to the deceased’s estate and on that ground alone, this objection/protest should fail. However, assuming that this court is wrong on the objectors’ capacity or lack thereof to file the affidavit of protest and over looks the same, the lingering question that requires an answer is whether or not the protest is merited.

16. The objectors’ case is that the suit plot and the suit land are one and the same property and the petitioners on the other hand have produced a letter marked as “MAN2” to confirm that the suit plot

belongs to the deceased.

17. It was also not in dispute that the suit land is registered in the name of the 1st objector. Clearly therefore, the 2 properties are distinct and separate not only in terms of their ownership and also in their regime/mode of registration because while the suit land is a freehold property, the rental premises is a leasehold. It is my view therefore that if the objectors claim that two properties are actually one and the same, then they ought to have tendered cogent proof of their allegations going by the known adage in civil matters that he who alleges must prove.

18. I find that this proof was lacking in this case and that apart from the objectors' mere allegation that the two properties were one and the same, no document or expert evidence was tendered to support the claim.

19. My finding is that no sufficient evidence or material was placed before this court on which it can make a finding that the suit plot and the suit land are actually one and the same property. The nexus if any, between the two properties was not proved and for the above reasons, I find that the affidavit of protest is not merited and dismiss it with costs to the petitioners.

Dated, signed and delivered in open court this 19th day of July, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

N/A Oguttu Mboya for the petitioner

Miss Nyaega for the objectors

Omwoyo: court clerk