



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO.596 OF 2012

IN THE MATTER OF THE ESTATE OF
ANDARANIKO BIGOGO BIKERI-DECEASED

AND

IN THE MATTER OF APPLICATION FOR GRANT OF LETTERS ADMINISTRATION INTESTATE

AND

IN THE MATTER OF THE LAW OF SUCCESSION ACT, CHAPTER 160, LAWS OF KENYA

BETWEEN

RONALD ONDABU BIGOGO - - - - 1ST PETITIONER/APPLICANT
HUDSON MOSE BIGOGO - - - - 2ND PETITIONER/APPLICANT
SEBASTIAN ONDERI BIGOGO - - - - 3RD PETITIONER/APPLICANT

VERSUS

KENNEDY KENYANZA BIGOGO - - - - - 1ST RESPONDENT
JAMES BIKERI BIGOGO - - - - - 2ND RESPONDENT

RULING

1. The Petitioners/Applicants through an untitled application dated **13th May 2015** brought under certificate of urgency pursuant to **Section 47** of the **Law of Succession Act**, and **Rules 59, 60** and **61** of the **Probate and Administration Rules** sought orders that:

1) Spent.

2) Pending inter partes hearing of the application court be pleased to grant temporary orders of injunction stopping the respondents, their workers or agents from doing any construction works, alterations, partitioning, collecting rents and/or intermeddling in any manner with the property of the estate herein namely Plot No.77B/**KEROKA TOWN**.

3) The court do issue orders restraining respondents by themselves, their agents or workers from doing any construction on the property of the estate namely Plot No. 77B/Keroka Town, making any alterations, partitions or subdivisions on premises on the property and from collecting, receiving or demanding rents from tenants on the said property pending determination and confirmation by this court of the respective shares of each and every beneficiary of the estate.

4) The court do issue a mandatory injunction directing the respondents to remove any partitions, alterations or any modifications they have erected or made on the premises on Plot No. 77B/Keroka Town at their own expenses within 7 days of issuance of such orders and in default the applicants/administrators of the estate cause the removal at the respondents' cost to be recovered from their share of the estate once the court ascertains and confirms their share of the estate.

5) The court do issue orders directing the first respondent **Kennedy Kenyanza Bigogo** to present to court a true statement of account showing the amount of rent he has collected from the premises on the said property namely Plot No. 77B/Keroka Town since 6th September 2008 to date and deposit the total amount of money he has so far collected in court pending confirmation and distribution of the estate by the court.

6) The court be pleased to issue such further orders for protection and conservation of the said property Plot No. 77B/Keroka Town and all other properties of the estate as listed in the consent of the parties herein filed on and dated 24th April 2014 pending the ascertainment and confirmation of the respective interest and shares of all beneficiaries by the court.

7) Costs of this application be borne by the respondents personally.

2. The said application was supported by the grounds on the body of the said application and the affidavit of the first applicant, **RONALD ONDABU BIGOGO**, sworn on 13th May 2015.

3. On 13th May 2015, the court certified the application as urgent and granted temporary orders of injunction;

“stopping the respondents, their workers or agents from doing any construction works, alterations, partitioning, collecting rents and/or intermeddling in any manner with the property of the estate herein, namely PLOT NO.77B/KEROKA TOWN pending inter partes hearing to this application.”

4. The two respondents filed two separate replying affidavits in opposition to the applicants said application.

5. During the hearing of the application, Mr. Nyasimi advocate for the applicants submitted that the applicants are the administrators to the estate of the deceased following the issuance of the grant of letters of administration to them on **23rd October 2014** which grant was still pending confirmation.

6. According to Mr. Nyasimi, the confirmation of the said grant was stalled due to the refusal/failure by the two respondents, who are beneficiaries to the estate, to sign the consent in respect to the agreed mode of distribution.

7. Counsel for the applicants added that instead of signing the consents, the respondents had embarked on identifying for themselves and partitioning the deceased's estate prior to the confirmation, an act which the applicants stated, amounted to intermeddling with the estate of the deceased in total disregard to the court process.

8. As proof of the respondent's alleged unlawful activities on the suit land, the applicants exhibited annexure '**BI**' attached to the affidavit that shows construction materials placed by the respondent on the suit property.

9. The applicant's counsel added that the purpose of this instant application was to protect the property of the estate until such a time that the court will determine each beneficiaries shares. The applicants sought orders that the respondents give an account for all the rents they had received from the subject property since the year 2008 by depositing the same in court.

10. The applicant's contended that the 2nd respondent was a repeat offender who had previously engaged in acts of intermeddling with the estate that culminated in this court, on **9th May 2014**, inviting the police to investigate alleged forgery claims.

11. Mr. Ochwangi counsel for the respondents opposed the application while relying on the respondent's affidavits.

12. Mr. Ochwangi submitted that Plot No. 77B/Keroka Town was part of the estate left behind by the deceased and that the respondents by virtue of being beneficiaries to the deceased's estate, had the right to occupy use and receive rent therefrom which rents they had been receiving even prior to and after the death of the deceased with the full knowledge of the applicants.

13. According to the respondents, the plot was their only source of livelihood and as such, any orders of injunction issued restraining them from utilizing the said plot would render them destitute especially the 1st respondent who is physically challenged.

14. Mr. Ochwangi further submitted that the respondents had assembled building materials on the plot in response to the Public Health Officers demand that the building in question be repaired or face closure for being unsuitable for occupation. Mr. Ochwangi submitted that an order for injunction against beneficiaries cannot issue in a succession case. In this regard he relied on the findings in the case of **Re-Estate of Kilungu (Deceased), (2002) 2KLR pgs 136-138.**

15. According to Mr. Ochwangi, the applicants had not proved that the respondents had refused to sign consent forms that would facilitate the process of confirmation of grant and that at no time had the respondents been the subject of arrest or investigations by any police officer in connection with orders issued by this court or at all.

16. Upon perusing the application together with the replying affidavits in opposition thereto and having heard the rival submissions of counsels for both parties, I am of the view that the said application raises the following fundamental issues and questions:

*1) Whether this court has powers to issue orders of injunction under **Section 47 Laws of Succession Act and Rule 73 of the Probate and Administration Rules.***

2) Whether the alleged actions of the respondents amount to intermeddling with the deceased's estate

3) Whether the respondents have done construction works, alterations, partitioning, collecting rents and/or intermeddling with the estate of the deceased.

17. The Petitioners/applicants were issued with grant of letters of administration intestate on 23rd October 2013 on the same day 23rd October 2013, a consent order was entered in which the parties herein agreed, inter alia,

“That all parties and beneficiaries herein do agree on the mode of sharing and distribution of the estate and file a written consent in respect thereof within a period of 30 days from the date hereof or within such other period as court and the parties may find convenient.”

Injunction:

18. Issuing an order of injunction would require that the court acts in accordance with the law.

19. Ordinarily, an injunction order would be sought pursuant to **Order 40** of the **Civil Procedure Rules**. The Probate and Administration Rules do not provide for injunctive relief as Order 40 of the Civil Procedure Rules is not one of the Civil Procedure Rules stipulated as being applicable to succession matters. (See **Rule 63(1) of the Probate and Administration Rules** in the **Estate of Kibomen Komen (deceased) NKR Succession Cause No.500 of 1997.**

20. However, by virtue of **Section 47** of the **Law of Succession Act**, this court must determine the issue brought before it in a fair manner.

21. **Section 45(1)** of the **Law of Succession Act** provides as follows:

“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, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

22. It has been demonstrated that the deceased died in the year 2008. It has not been denied that the respondents were occupying, receiving rent and utilizing the suit plot before and even after the death of the deceased. The reasons given that the respondents are constructing, partitioning, altering etc., the suit property have not been proved in any substantive manner save for a photo of building materials annexed to the applicants affidavit. To my mind the mere assembling of building materials cannot *per se*, be construed to constitute intermeddling with the estate. The respondents could as well be improving the conditions/structure of the property in question.

23. The reasons given for this application do not fall within the ambit of **Section 45(1)** of the **Law of Succession Act**. It has not been shown that the respondents are wasting or are about to waste the property in question so as to warrant the issuance of conservatory orders to preserve the estate of the deceased.

24. Similarly, it has not been proved, that the respondents have been receiving rents from the suit property and how much for that matter so that the court can make specific orders on the deposit of rents in court. It has also not been shown if the suit property herein, is the only property of the deceased or if there are other properties and if so, if they are rental, commercial or agricultural and if rental/commercial, who is receiving the rents and if those rents are being deposited in court.

25. However, a perusal of the court record especially the summons for revocation of grant filed on 22nd April 2014 shows that the deceased had several other properties namely:

a) LR. No. West Kitutu/Bogusero/589

b) LR. Nos. West Kitutu/Bogusero/7100, 7102, 7103, 7104 and 7105.

c) Nyaribari Masaba/Bokimotwe 1/268

d) West Kitutu/Bogusero/706

e) Plots Nos.14A and 13A Keroka Town Council.

26. If the above scenario holds true, then this court is apprehensive about issuing the injunctive orders sought as it would have the effect of having a section of the beneficiaries feeling disadvantaged as opposed to others who may freely be utilizing the deceased's other properties and enjoying the proceeds therefrom.

27. This current application is a battle pitting beneficiaries to an estate who have not agreed on the mode of distribution.

28. The applicants in the current application, who are the administrators of the estate of the deceased are under an obligation, after receiving the grant herein to apply for confirmation of the grant within reasonable time especially in a situation such as this where the beneficiaries are getting restless and emotions are starting to rise because each person feels entitled to the portion of the property that he occupies or utilizes.

29. The applicants contended that they were unable to file for confirmation of grant because the respondents were unwilling to give their consents. In this regard, I hold that there is no mandatory requirement that every beneficiary consents to the mode of distribution proposed by the administrators. The applicants are at liberty to file their own affidavit of distribution whereupon the respondents may file their affidavit of protest, if any, giving their own proposal after which the court may make a decision on distribution in the event of lack of a consensus on the same.

30. This current application, is in my view, a drift away from the real issue of confirmation of grant and distribution of the estate of the deceased which the applicants should be concerning themselves with instead of filing protracted applications and counter applications that may not finally determine the matter at hand.

31. From the foregoing, the orders sought by the applicants cannot issue and the said application is disallowed. The Interim Orders granted on **19th May 2015** are consequently hereby lifted, but to maintain calm and peace pending the distribution of the estate and indeed in the wider interest of justice, I order that the status quo prevailing regarding the estate of the deceased as at the time of the making of this order be maintained until the estate of the deceased is distributed through the confirmation of the grant.

32. Each party to this application shall bear his own costs.

33. It is so ordered.

Dated, signed and delivered in open court this 3rd day of February, 2016

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Ochwangi for the Respondent
- Mr. Kaburi holding brief for Nyasimi for the Objector.
- Omwoyo: Court clerk