



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO.197 OF 2000

IN THE MATTER OF THE ESTATE OF ONGETI OMITI – DECEASED

JACKSON M. MIYOGO.....OBJECTOR

VERSUS

SIMEON MOSE OMITI..... PETITIONER

RULING

1. This ruling relates to an application dated 18th September, 2014 brought under **Section 95 (1) (a) of the Law of Succession Act, Rules 67 and 73 of the Probate and Administration Rules, Section 1 (A) 1 (B) and 3 of the Civil Procedure Act and Order 9 Rule 9 of the Civil Procedure Rules** in which the applicant seeks orders as follows:
 - a. That the firm of **B. N. Ogari & Co. Advocates** be granted leave to represent the applicant/objector in place of the firm of **Onyancha Bw'omote & Orora advocates**.
 - b. That **Pauline Obongo Miyogo and Isabelle Miyogo** be enjoined in the petition to represent the objector.
 - c. That the court finds that the petitioner has willfully misapplied 1 acre of **L. R. NYARIBARI MASABA/BOGUCHE/527** meant for the objector herein **JACKSON M. MIYOGO, (now deceased)** in terms of the consent order recorded on 9th February, 2001.
 - d. That the Petitioner be punished by way of one year imprisonment and a fine of **Kshs. 10,000/=**.
 - e. That the petitioner be ordered to transfer one (1) acre of **L. R. No. NYARIBARI MASABA/BOGUCHE/527** to the applicant/objector.
 - f. **The petitioner bears the costs of the application.**
2. The application is supported by the affidavit of one **Pauline Obonyo Miyogo** sworn on 18th September, 2014 in which she states that in another **succession cause No. 145 of 2002** she had been granted letters of administration together with one **Isabella Miyogo** to administer the estate of **Jackson Miyogo** the objector herein who is now deceased.
3. She further states that one of the properties belonging to the objector herein that she was to administer was **Kiomiti Secondary School** which is built on 1 acre plot from **L. R. No. NYARIBARI MASABA/BOGUCHE/527** (hereinafter in this ruling referred to as “the suit land”). It is the petitioner’s case that the one acre of land to be carved out of the suit land was by a consent order recorded on 9th February, 2001 earmarked for the objector after which mutation forms were prepared that subdivided the suit land thereby producing 2 numbers as 1601 and 1602, but the petitioner refused and/or failed to effect the said transfers.

4. The applicant contends that he needs to comply with **Order 9 Rule 9 of the Civil Procedure Rules** since judgment had already been recorded in this matter.
5. The applicant prays that the petitioner/respondent be punished for failing to comply with the order of 9th February, 2001.
6. The Petitioner opposed the application through his notice of preliminary objection dated 10th November, 2015 in which he states that the application is muddled up and the prayers sought incapable of being granted.
7. The Petitioner also states that the applicants ought to have sought leave to be enjoined in the suit first before seeking the other prayers contained in the application and further that the applicants could not be enjoined to this case as they had not obtained grant of letters of administration ad litem in respect to the original objector, Jackson Miyogo (deceased).
8. On 10th March, 2015, the firm of Onyancha Bw'omote & Orora advocates and B. N. Ogari & Co. Advocates filed a consent letter in which they agreed that B. N. Ogari and Co. advocates could come on record in the case for the Objectors.
9. When the application came up for hearing on 9th February, 2016, parties agreed to canvass their arguments by way of written submissions.

Analysis and Determination

10. I have considered the parties respective submissions and I note that the issues that require my determination are as follows:
 - a. **Whether Order 9 Rule 9 is applicable in this case.**
 - b. **Whether judgment had already been recorded in this matter**
 - c. **Whether the application is merited.**
 - d. **Whether the Petitioner is guilty of contempt of court.**

Order 9 Rule 9

11. On the applicability of **Order 9 Rule 9** to this proceedings both the applicant/objector and the petitioner/Respondent appear to allude that the said order and rule apply to this case.

Order 9 Rule 9 provides as follows.

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

12. **Rule 63 (1) of Probate and Administration Rules** provides for the Sections and Rules in the Civil Procedure Rules that are applicable to the Succession cases as follows:

“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.”

13. Clearly therefore, **Order 9 Rule 9 of the Civil Procedure Rules** is not one of the provisions that can be imported and applied in the succession cases. Furthermore, even assuming that **Order 9 Rule 9** was applicable in succession cases, I do not find the said order to be applicable in this case because strictly speaking no judgment had been recorded in the succession case so as to warrant the applicant to invoke the provisions of **Order 9 Rule 9 of the Civil Procedure Rules**. I say so because, strictly speaking, succession cases are not suits between contesting parties in which judgment can be entered for one party against another party except where there are objection proceedings. Succession cases are ordinarily instituted by petitioners seeking to administer the estate of a deceased person.
14. In the instant, there have been no objection proceedings filed in which a judgment can be said to have been entered against a party so as to warrant the invoking of the provisions of **Order 9 Rule 9 of the Civil Procedure Rules**.
15. A perusal of the court file reveals that a grant of letters of administration was issued to the petitioner on 15th February, 2001 however, prior to the issuance of the grant, an objection was filed by the objector/applicant herein and on 9th February, 2001 a consent was recorded to the effect that the objector's interest in the deceased land being **Nyaribari Masaba/Boguche/527** (hereinafter “**suit land**”) was one acre, and further that a title to the land shall be processed and transferred to the objector by the administrator of the estate.
16. It would appear to me that it is this consent order that has triggered the instant application.
17. A further perusal of the court file shows that there has been no further action on the matter after the consent order of 9th February, 201 and the grant issued on 15th February, 2001 has not been confirmed to date.
18. It thus follows that the suit land should still be in the name of the deceased as the applicants have not claimed that the suit land has already changed hands.
19. Under the above circumstances, the petitioner ought to have proceeded with the case to the confirmation state where the estate of the deceased can be distributed to all the deserving beneficiaries including the objector whose interest had already been noted and confirmed vide the consent order. It is only after the confirmation of each beneficiaries interest in the suit land that the court order, on confirmation, can be taken to the lands office for purposes of effecting the changes on the registration.
20. It is a no wonder therefore that the mutation forms prematurely prepared before the confirmation of grant could not be acted upon by the land registrar so as to effect the registration of the claimed 1 acre of land into the name of the objector.
21. To my mind, the consent recorded on 9th February, 2001 was not a judgment capable of being executed, but was an acknowledgment of the objector's interest in the deceased's land which acknowledgement could not translate into a transfer of the said interest before the consent could be actualized and/or confirmed during the confirmation of grant.
22. After the confirmation of grant the administrator becomes *funtus officio* and the responsibility to effect the transfers lie on each beneficiary to extract the court order and present it to the land registry for purposes of securing their own titles to the land. In this regard therefore, I find that the prayer that the petitioner be punished for disobeying a court order is misplaced because the petitioner administrator plays no role in the transfer of the beneficiaries' respective shares of land after the same has been determined by the court during the confirmation of grant.

23.I further find that the applicants, having demonstrated that they are the administrators of the estate of the original objector Jackson Miyogo (deceased) through their annexures “POMI” (certificate of confirmation of grant) could have been entitled to be enjoined in this suit as objectors in place of the deceased objector save for the fact that their advocates are not properly on record in this case having filed this application to be granted leave to come on record instead of M/s Onyancha Bw’omote & Orora instead of simply filing a notice of change of advocates.

24.I agree with the observations made by Mr. Abobo, advocate for the petitioner that the instant application is muddled up right from the representation of the applicants which has the effect of making the orders sought not tenable as they have been sought by an advocate who is not properly on record.

25.In view of the above observations, the order that commends itself to me is the order to strike out the application dated 18th September, 2014 with no orders as to costs.

26.The applicants counsel is at liberty to file a fresh application seeking to enjoin or substitute the applicants as objectors to the case in place of Jackson Miyogo upon regularizing their appearance on record after which the applicants will be at liberty to pursue the confirmation of the grant in line with the consent order of 9th February, 2001.

27.It is so ordered.

Dated, signed and delivered in open court this 7th day of June, 2016

HON. W. A OKWANY

JUDGE

In the presence of:

- Mr. Abobo for the Petitioner
- Mr. Ogari for the Objector
- Omwoyo: court clerk