



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 84 OF 2006

**IN THE MATTER OF THE ESTATE OF LATE NYAMBANE ONSOI & OBAIGWA ONSOTI
(DECEASED)**

AND

**IN THE MATTER OF PETITION FOR GRANT OF LETTERS OF ADMINISTRATION
INTESTATE**

BETWEEN

CHRISTOPHER AUTA MORURI.....1ST OBJECTOR/APPLICANT

JOSHUA NYAKANGI OMASIRE.....2ND OBJECTOR/APPLICANT

AND

JOHN ONDIEKI ONDIGO.....1ST PETITIONER/RESPONDENT

JAMES ATEI OBAIGWA.....2ND PETITIONER/RESPONDENT

RULING

1. This ruling relates to 3 separate applications dated 8th February 2016, 19th April, 2016 and 2nd June 2016.
2. The deceased persons herein Nyambane Olisoi and Obaigwa Onsoti (hereinafter **“the deceased”**) died intestate on 1st February 1980 and 22nd October 2003 respectively.
3. Prior to their death, the deceased were the joint owners of **LR. NO. WEST MUGIRANGO/NYAMAIYA/1519** (hereinafter **“the suit property”**) in equal shares.
4. On 2nd June 2006, the petitioners herein, JOHN ONDIEKI ONDIGO and JAMES ATEI OBAIGWA, filed a joint petition for grant of letters of administration in respect to the estate of the deceased.
5. On 17th August 2006, the 1st Objector herein CHRISTOPHER AUTA MORURI filed an objection to making of grant while the 2nd objector JOSHUA NYAKANGI OMASIRE filed another objection to making of grant on 5th February 2013.
6. The grant of letters of administration has not been issued to the petitioners in this succession case and

neither have the 2 objections to making of grant been heard. Instead, the parties to the succession cause, who currently include 3 interested parties, have been engaged in the filing and prosecution of several applications, one after the other culminating in the 3 pending application that are now the subject of this ruling.

7. The application dated 8th February 2016 is brought by the objector under the title “SUMMONS FOR EVICTION AND PRESERVATION OF THE ESTATE OF THE DECEASED.”It is brought under Section 45 and 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.

8. The Objectors seek the following prayers in the said application:

1. That pending the hearing and determination of this application, the Honourable Court be pleased to issue interim orders of injunction restraining the Respondents herein from destroying crops, interfering with the applicant’s peaceful occupation and/or further intermeddling with any portion of LR W/M/NYAMAIYA/1519 and building or erecting structures thereon.

2. The honourable court be pleased to grant an order of eviction evicting the Respondents and/or interested parties, their servants, agents, employees or any other person acting under them from the parcel otherwise known as LR W/M/NYAMAIYA/1519, belonging to the deceased herein pending the hearing and determination of the objection herein.

3. An order declaring that the fake title deed being uttered by the Respondents herein, to wit, LR W/M/NYAMAIYA/1519, are illegal, null and void and of no legal consequence and incapable of being used to stake a claim on the part of the estate of the deceased herein.

4. An order and directing the OCS Nyamira Police Station and any authorized Court bailiff/Auctioneers, to evict and use all lawful and reasonable means to evict, prevent, restrain and prohibit the Respondents herein, from entering, destroying crops, interfering with the Applicant’s peaceful occupation or in any way intermeddling with the estate of the deceased, in particular, land parcel number LR W/M/NYAMAIYA/1519, by arresting or taking any legal action against the same.

5. Costs of this application be provided for.

9. The application is premised on the grounds on the face of the summons and on the affidavit of JOSHUA NYAKANGI OMASIRE, the 2nd objector in which he states that the respondents/petitioners have intermeddled with the estate of the deceased and have caused the land forming the deceased’s estate to be sold, sub-divided and registered in the names of third parties before the succession case is heard and determined and despite the issuance of a court order of 10th April 2014 for the maintenance of the status quo.

10. The 2nd objector further states that in a ruling delivered on 17th December 2014, the respondents/petitioners were restrained by themselves, their agents, servants, employees or any person acting through them from in any way whatsoever alienating, transferring, disposing and/or appropriating any part of the property belonging to the deceased and in particular **LR W/M/NYAMAIYA/1519**.

11. The 2nd objector adds that the said restraining orders were duly served on the petitioners/respondents but they have remained defiant and instead increased their illegal activities on the suit land.

12. The 2nd objector contends that they had lodged contempt of court proceedings against the petitioners who survived punishment owing to the high standard of proof required in contempt of court proceedings.

13. The 2nd objector accuses the petitioners of forging title documents, destroying trees, threatening to demolish their houses and other acts of gross impunity in total disregard for the law and the dignity of the

court.

14. The 2nd objector depones that they have been subjected to hardship and great loss due to the unlawful acts of the respondents/petitioners and prays that the orders sought in the application be granted.

15. The 2nd objector attached the following documents to his said supporting affidavit – among other documents:

a) Copy of the court order dated 10th April 2014 as exhibit “JNO5”.

b) Copy of the ruling dated 17th December 2014 as exhibit “JNO6”

c) Copies of photos taken between 10th April 2014 and 8th February 2016 as Exhibit JNO7”

16. The 2nd interested party, EVANS ONGERA OMOTE, opposed the said application dated 8th February 2016 in which he depones that the application is brewed in fabrication as the applicant’s claim to the suit land is anchored in falsehoods. The 2nd interested party states that the objector’s purported purchase of land is in respect to a different property that has no relationship with the deceased’s parcel of land.

17. The interested party has given an elaborate explanation to show that the suit land is distinct and separate from the parcel of land which the objectors claim that they had purchased.

18. The 2nd interested party accuses the objectors of failing to prosecute the objections to grant that they had filed way back in the year 2006 and 2013 respectively and state that by keeping the objection proceedings pending the objectors are holding the petitioners and the interested parties at ransom notwithstanding the objector’s claim of legal entitlement to the estate of the deceased.

19. The 2nd interested party states that the objectors are imposters and masqueraders devoid of entitlement to the estate of the deceased.

20. He also depones that he has not breached the terms of the court order issued on 17th December 2014 as alleged by the objectors and that he has diligently adhered to the said order.

21. It is the 2nd interested party’s case that the objectors have never had crops or houses on the suit land and therefore the instant application is a flagrant abuse of the court process besides being an epitome of misrepresentation of facts pertinent to the suit property.

22. The 2nd interested party also contends that the objectors’ rights, if any, in the suit property has not crystallized since their objection has not been heard or determined and therefore the calibre of the orders sought in the application will have the effect of conferring rights to the deceased’s property before the objectors can establish their legal capacity.

23. When the application dated 8th February 2016 came up for hearing before me on 20th April 2016, parties agreed to canvass it by way of written submissions after which the case was fixed for mention on 20th April 2016 for purposes of confirming the filing of the said submissions.

24. At the time when the 1st application was pending the filing of submissions and the delivery of the ruling, the petitioners and the interested parties filed two separate but identical applications dated 19th April 2016 and 2nd June 2016.

25. Application dated 19th April 2016 (hereinafter "the 2nd application"), is brought by the 2nd interested party under Section 47, and 68 of the Law of Succession Act and Rule 73 of the Probate and

Administration Rules in which the following prayers are sought:

1. Spent

2. That this honourable court be pleased to allocate earliest hearing date and or give directions facilitative of disposal of the objection proceedings filed by the 1st and 2nd objectors in the year 2006 and on 5th February, 2013 respectively.

3. That the hearing and or disposal of the objection proceedings referred to herein above do precede the hearing of any application pending before court.

4. That costs of this application be borne by the respondents.

26. The application is supported by the 2nd interested party's affidavit dated 19th April, 2016 in which he states that the 1st and 2nd objector filed objection proceedings in the year 2006 and 2013 respectively and since the time of the filing of the objections, the same have not been heard or directions taken. The 2nd interested party further states that the pendency of the objection proceedings goes contrary to the expeditious dispensation of justice and are denying the beneficiaries the opportunity to crystallize their interests in the estate of the deceased comprised of **Land Parcel No. West Mugirango/Nyamaiya/1519**.

27. It is the 2nd interested parties case that the determination of the objection proceedings will define the real issues including the locus *standi* of the objectors in regard to their claim/interest in the estate.

28. It is the 2nd interested parties argument that the objectors have imposed themselves on the estate of the deceased without any legal justification.

29. Application dated 2nd June 2016 (hereinafter "the 3rd application"), is brought by the 1st petitioner under **Section 47 and 68 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules**. The orders sought in the said application are as follows:

1. Spent.

2. That this honourable court be pleased to allocate earliest date and/or give directions facilitative of disposal of the objection proceedings filed by the 1st and 2nd objectors in the year 2006 and on 5th February, 2013 respectively.

3. That the Honourable Court be pleased to consolidate the instant application with the Interested Parties' Application dated 19th April 2016.

4. That the hearing and or disposal of the objection proceedings referred to herein above do precede the hearing of any application pending before court.

5. Costs of this Application be borne by the Objectors/Respondents.

30. The application is supported by the affidavit of JOHN ONDIEKI ONDIGO, the petitioner/applicant dated 2nd June 2016 in which he states that the 1st objector filed objection proceedings in 2006 objecting to the grant of letters of administration in respect to the estate of the deceased and that the 2nd objector belatedly and without leave of the court mounted another objection on 5th February 2013.

31. The applicant contends that 10 years have lapsed since the first objection was filed and therefore it is necessary for the court to give directions so as to define the capacity, legality and propriety of the objections.

32. It is the applicant's position that the disposal of the objection proceedings would clarify the salient

matters/applications pending before the court and should therefore take precedence over the other pending applications.

33. According to the applicant, the objections should take priority over all the other matters especially the application dated 8th February considering that this is a succession case.

34. The applicant states that the objectors are imposters and busy bodies in this succession cause as they have no valid claim to the estate of the deceased. It is the applicant's position that **Rule 73 of the Probate and Administration Rules** empowers this court to list objection proceedings for hearing on priority basis.

35. **JOSHUA ONKANGI OMSIRE**, the 2nd objector herein, opposed the application dated 2nd June 2016 through his replying affidavit sworn on 15th August 2016 in which he depones that the said application is an abuse of the court process because the issues raised therein are the same issues raised by the petitioners in the replying affidavit to the application dated 8th February 2016, sworn by **Evans Ongera Omote** on 25th February, 2016 and **John Ondieki Ondigo's** affidavit of 29th February 2016.

36. The 2nd objector states that the said application dated 8th February 2016 is still pending hearing and determination and that directions were by consent taken on 20th April, 2016. The 2nd objector contends that the application dated 2nd June 2016 is therefore an afterthought, and a belated attempt by the interested parties to curtail, short-circuit and defeat the course of justice by suffocating the issues raised in the application dated 8th February 2016, which seeks to address the serious issues of impunity, fraud, and forgery that have been perpetrated by interested parties and the petitioners.

37. The 2nd objector seeks the dismissal of the application dated 2nd June 2016 as he states that the same has been filed by the petitioners as a way of evading the hearing of the earlier application dated 8th February 2016.

38. On 17th August 2016, the court gave direction that the applications dated 19th April 2016 and 2nd June 2016 be consolidated and further, that a ruling on the consolidated applications and the application dated 8th February 2016 be delivered at the same time.

39. The court also gave further directions that all the applications be canvassed concurrently by way of written submissions.

Analysis and determination

40. I have considered the applications dated 8th February 2016, and the consolidated applications dated 19th April 2016 and 2nd June 2016 together with the parties' respective written submissions on each of the applications.

41. In the application dated 8th February 2016, the objectors are seeking orders of injunction on exactly the same format and for the same reasons that they sought orders of injunction in an earlier application dated 2nd April 2014 for which a ruling was delivered on 17th December 2014 allowing the said application. Indeed, the objectors concede that upon obtaining and serving the said orders of injunction on the petitioners, and the interested parties, the petitioners disobeyed the orders thereby prompting the objectors to institute contempt of court proceedings which were not successful.

42. With this background in mind, it is my finding that the application dated 8th February 2016 is *res judicata* because a similar application had already been filed, adjudicated upon and final orders issued. It is therefore not open for the objectors to institute the same application 2 years later and hope to get a different outcome. The fact still remains that the restraining orders issued in this case are still in force to date. To my mind, claims that the petitioners and/or interested parties have committed acts of destruction

to property, trespass and forgery of title documents are claims of complaints which are criminal in nature should be presented to the police for proper investigations and prosecution.

43. Section 7 of the Civil Procedure Act stipulates as follows:

“7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating

under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

***Explanation.* —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.**

***Explanation.* —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

***Explanation.* —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

***Explanation.* —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

***Explanation.* —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.**

***Explanation.* —(6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”**

44. If the objectors complaint is that the petitioners have continued to interfere with and intermeddle with the estate of the deceased, despite the orders of the court issued on 17/12/2014, then my humble opinion is that they can approach the court through fresh contempt of court proceedings in view of the fact that Justice Wakiaga, in his ruling dismissing the earlier application for contempt proceedings delivered on 29th September 2015, gave the objectors a window of opportunity to institute such fresh contempt of court if a need arose proceedings when he in his closing remarks observed as follows:

“However, for avoidance of doubt, the applicants are at liberty to adduce further evidence of the allegations of breach of the court order herein...”

45. Having found that the application dated 8th February 2016 is *res judicata*, the order that commends itself to me is the order to dismiss the said application. Each party shall bear his own costs of the said application.

46. Turning to the consolidated applications dated 19th April 2016 and 2nd June 2016, I note that the twin applications basically seek directions over 2 objection applications filed by the 2 objectors at different times, the first one in the year 2006 and the 2nd one on 5th February 2013.

47. I note that the submissions of the parties on the consolidated applications went into the main substance of the objections and whether the objectors were justified to file them or if they have the *locus*

standi to claim interest in the state of the deceased.

48. My view is that the wordings of the consolidated applications are simply to seek early hearing dates and directions to facilitate the disposal of the two objections. The validity and merits of the objections can only be determined after the said objections are heard and not at this stage.

49. In an ideal situation in succession case, once a party files or initiates objection proceedings, after the issuance of grant, what follows is that the parties seek the directions of the court on how to proceed which directions are normally taken by consent of the parties when they inform the court on their preferred mode of prosecuting the case, either by way of oral viva voce evidence, by way of affidavit evidence or through written submissions.

50. In the instant case however, grant of letters of administration had not been issued and so the issue of directions on the objections does not arise. It would appear that upon filing their separate objections to grant, the objectors went to sleep and did not pursue them, they have instead been embroiled in unending applications for injunction, one after the other. The applicable law and procedure in objections to grant can be found in Section 68 of the Law of Succession Act which provides as follows:-

“68(1) Notice of any objection to an application for a grant of representation shall be lodged with the court in such form as may be prescribed within the period specified by the notice, or such longer period as the court may allow.

(2) Where notice of objection has been lodged under sub-section (1) the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.”

51. Section 69(1) of the Act provides as follows:-

“69(1) where a notice of objection has been lodged under sub-section (1) of section 68 but no answer or no cross-petition has been filed as required under sub-section (2) of that section, a grant may be made in accordance with the original application.”

52. The facts herein are not in dispute. Though the intending objectors filed the notice of objection no cross-application or answer to petition was filed by the objectors. The provisions of section 68(1) are clear. If either the answer or cross-petition is not filed by the objector then the court is under an obligation to make the grant in accordance with the original application. No sufficient cause has been shown by the objectors as to why the answer to the petition was never filed. It has also not been shown by the objectors why no steps were taken to file an application under Rule 17(2) of the P&A Rules for extension of time within which to file the answer to the petition. It would seem to me that the objectors have been indolent in dealing with this matter.

53. In the circumstances of this case therefore, the court cannot be expected to come to the aid of an indolent litigant. This litigation must come to an end and in line with the provisions of Article 159 of the Constitution that justice be dispensed to the parties without undue regard to procedural technicalities, I proceed to direct that grant letters of administration be issued to the petitioners who should then apply for the confirmation of the grant, in which case, the objectors' case will not be prejudiced in any manner as they are still be at liberty to apply to revoke the said grant or lodge their claim to the estate of the deceased, if any, during the confirmation of the grant. Each party shall bear his own costs of the consolidated applications.

54. It is so ordered.

Dated, signed and delivered in open court this 6th day of December, 2016

HON. W. A OKWANY

JUDGE

In the presence of:

- Shilwatso for Petitioner
- Otieno for the Objectors
- Mr. Mogire for the interested parties
- Omwoyo: court clerk