



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 30 OF 2014

IN THE MATTER OF THE ESTATE OF:

SHADRACK OICHOE OISEBE..... DECEASED

AND

IN THE MATTER OF:

AN APPLICATION FOR GRANT OF LETTERS OF ADMINISTRATION

BETWEEN

JOEL OICHOE OISEBE PETITIONER

AND

BILIA BOSIBORI OISEBE.....RESPONDENT

RULING

1. There are two applications before this honourable court, both having been filed under Certificate of Urgency on difference dates. The first application is the summons dated 15th January 2014 and filed in court at Nairobi on 16th January 2014. The application was transferred to this court by an order made by Hon. Mr. Justice W. Musyoka on the 16th January 2014. The second application is the Notice of Motion dated 25th February 2014 and filed before this court on 26th February 2014.
2. In the summons dated 15th January 2014, the applicant/petitioner therein, Joel Oichoe Oisebe, the holder of the Grant of Letters of Administration intestate to the estate of SHADRACK OICHOE OISEBE seeks orders in terms of prayers 2, 3, 4, 5 and 6 thereof, and more specifically for ORDERS:-
 1. *That pending the hearing and determination of this application the following persons and/or their agents and/or assigns and/or anybody claiming through or under them namely:*
 - a. *JAMES OISEBE (SON OF LATE SWENEY MANASSEH OISEBE);*
 - b. *JOASH MANASSEH OKIRIGITI (SON OF LATE SWENEY MANASSEH OISEBE'S LATE SISTER);*
 - c. *BILIA BOSIBORI OISEBE (WIFE TO LATE SWENEY MANASSEH OISEBE);*
 - d. *ANY CHILDREN OF THE LATE SWENEY MANASSEH OISEBE. be restrained by an order of this honourable court from tilling land known as LR. GESIMA SETTLEMENT SCHEME/243 outside the portion occupied by the late SWENEY MANASSEH OISEBE which portion measured*

less than four acres, evicting or attempting to evict the applicant and/or any of the brothers and sisters of the applicant MR. JOEL OICHOE OISEBE or trespassing onto the area occupied by the applicant and his siblings.

2. *That it be declared that LR NO.GESIMA SETTLEMENT SCHEME/234 is part and parcel of the estate of the late SHADRACK OICHOE OISEBE and that the entries noted on the green card as entry No.3 and 4 be declared a nullity and the District Land Registrar, Nyamira be ordered to rectify the register accordingly by cancelling the said entries.*
 3. *That pending the hearing and disposal of the entire petition herein, all rents collectable from the rental houses being on LR KISII MUNICIPALITY BLOCK III/36 be deposited into court and that the rents collected so far be accounted for by the family of the late SWENEY MANASSEH OISEBE.*
 4. *That any orders made herein to be enforced by the Director of C.I.D. and/or his officers on the ground.*
 5. *That the costs of this application be specifically provided for and paid by whoever the court shall find to have occasioned the changes in the green card.*
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3. For purposes of this ruling, the applicant in the summons dated 15th January 2014 shall be referred to as the Petitioner while the applicant in the Notice of Motion dated 25th February 2014 shall be referred to as the respondent.
 4. The application which is brought under **Sections 45, and 82 of the Law of Succession Act and Rules 59 and 73 of the Probate and Administration Rules, Part III of the Land Control Act Cap 302** and any other enabling powers conferred by law is premised on the Grounds on the face of the application being:-
 - a. **L.R. NO. GESIMA SETTLEMENT SCHEME/234 was in the names of the Settlement Fund Trustees until 20th April, 2006 when it was transferred to the names of the late SHADRACK OICHOE OISEBE and that the provisions of cap 302 could not apply until after 20th April, 2006.**
 - b. **The late SWENEY MANASSEH OISEBE the step-brother of the applicant died on 25th March, 2004 while the deceased herein died in 1992.**
 - c. **The late SWENEY MANNASSEH OISEBE allegedly swore an affidavit on 4th April, 2003 which successfully moved the Land Control Board and subsequently was acted upon at Nyamira Lands Office on 20th April, 2006 resulting into what amounted to a transfer under Cap 300. This was legally not possible in the circumstances.**
 - d. **On 2nd June, 2005 the late SWENEY MANASSEH OISEBE applied for a consent to correct names when he was over one year dead which application was considered on 3rd June, 2003. The names to be corrected were (i) From SHADRACK OICHOE OISEBE (the father of applicant); to SWENEY MANASSEH OISEBE (the step-brother of the applicant and son to the person named in (i) herein). These were two different people.**
 - e. **That apparently the above transaction took place after the death of the persons named in (d) herein and was clearly untenable in law.**
 - f. **The transaction in issue being a name correction BUT which effectively change the proprietorship of the parcel of land in issue was not a transaction envisaged in Cap 302 part III thereof. The Land Control Board consent was legally inconsequential and the resulting changes null and void.**
 - g. **The transaction in issue being in respect of property in the full and correct names of a deceased person, and in the absence of court orders pursuant to the clear provisions of cap 160 was absolutely void.**
 - h. **That the holder of the national identity card number 1592155 did participate and/or perpetuate this fraud. However this person is SWENEY MANASSEH OISEBE who was dead before then and whose identity card ought to have been with the registrar of births and death.**

The application is supported by the sworn affidavit of the applicant JOEL OICHOE OISEBE dated 15th day of January, 2014.

5. The second application dated 25th February, 2014 has been filed by BILIA BOSIBORI OISEBE, the widow lawfully constituted

administratrix of the estate of SWENEY MANASSEH OISEBE. The application seeks orders that:-

1. **Pending the hearing and determination of the instant application, the honourable court be pleased to grant an Order of Stay, staying the implementation and/or enforcement of the Ex-parte Orders of Injunction granted by this honourable court on the 16th day of January 2014, restraining the Respondent herein, JAMES OISEBE, (son of SWENEY MANASSEH OISEBE), JOASH MANASE OKIRIGITI (Son of late SWENEY MANASSEH OISEBE's late sister) and any children of late SWENEY MANASSEH OISEBE, from taking possession, entering upon, dealing with and/or evicting the petitioner herein and the petitioner's sisters and brothers from LR NO. GESIMA SETTLEMENT SCHEME/234, (hereinafter referred to as the suit property).**
2. **Pending the hearing and determination of the instant Application, the honourable court be pleased to discharge, vary, Vacate and/or set aside the Ex-parte Orders of injunction granted by this honourable court on the 16th day of January 2014, restraining the Respondent herein, JAMES OISEBE (son of SWENEY MANASSEH OISEBE), JOASH MANASE OKIRIGITI (son of late SWENEY MANASSEH OISEBE's late sister) and any children of late SWENEY MANASSEH OISEBE, from taking possession, entering upon, dealing with and/or evicting the petitioner herein and the petitioner's sisters and brothers from LR NO. GESIMA SETTLEMENT SCHEME/234, (hereinafter referred to as the suit property).**
3. **The honourable court be pleased to Discharge, Vary, Vacate and/or set aside the Ex-parte Orders of Injunction issued herein on the 16th day of January 2014, directed against the respondent/applicant herein and her children, servants and/or agents, from dealing with LR NO. GESIMA SETTLEMENT SCHEME/234.**
4. **In the alternative and without prejudice to the foregoing, the honourable court be pleased to recall the summons application dated 15th January 2014 from the scheduled hearing date now fixed for the 10th day of June 2014 and same be heard and disposed of on priority basis, to abate and/or mitigate the prejudice and/or loss suffered by the respondent/applicant herein.**
5. **Costs of the application e borne by the petitioner.**
6. **Such further and/or other orders be made as the court may deem fit and expedient.**
6. The notice of motion is brought pursuant to **Order 40 Rule 4(3) (4) and (7) of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 and Rules 63, 67 and 73 of the Probate and Administration Rules, Article 159(2) (d) of the Constitution 2010** and all enabling provisions of the law.
7. The application is premised on the grounds on the face of the said application being that the petition touches on the estate of one SHADRACK OICHOE OISEBE now deceased and the petitioner herein factored and included L.R.NO. GESIMA SETTLEMENT SCHEME/234 in the inventory vide form P&A 80 which parcel of land belongs to and is registered in the names of SWENEY MANASSEH OISEBE now deceased. That in the premises L.R.NO. GESIMA SETTLEMENT SCHEME/234 is and does not form part of the free property of the deceased and it cannot be the subject of the instant succession proceedings.
8. Further that the interim ex-parte orders of injunction granted on the 16th January, 2014 were procured vide fraud misrepresentation and concealment of material facts and they have the effect of restricting the rights and interests of the respondent, her children servants and agents. Further that the said orders amount to intermeddling in the estate of SWENEY MANASSEH OISEBE and they are contrary to and violate **Section 45 of the Law of Succession Act Cap 160 laws of**

- Kenya.** That the said ex parte orders of injunction are bound to condemn the respondents to denial, deprivation and poverty, and are grossly prejudicial which constitutes violation of the respondents' fundamental rights.
9. That on the other hand the petitioner herein has commenced to interfere with the rights of the respondent on the suit property and has since uprooted and evicted the respondents; that the petitioner has also threatened to evict the servants and/or agents of the Respondent from the suit property vide orders issued without giving the respondent a hearing. It is also the respondent's contention that the ex-parte orders are bound to be misused or abused by the petitioner and his (petitioner's) claims to the suit property herein are misconceived and otherwise legally untenable, the orders having been granted without the requisite conditions being complied with, as the petitioner did not make any undertaking as to damages. The respondent, Bilia Bosibori Oisebe contends that the entire proceedings herein amount to abuse of the due process of court and that it is in the interest of justice that the application herein be allowed *ex debito justitiae*.
 10. The application is supported by the affidavit of BILIA BOSIBORI OISEBE sworn on the 25th February, 2014. On the 3rd March, 2014 when the court heard both counsel for the petitioner and respondent on whether or not the application dated 25th February, 2014 should proceed to hearing the court noted that the Respondents to the said application had not had adequate notice and that both applications were inextricably joined together through prayer 5 of the application dated 25th February, 2014 and that it would be prudent for the two applications to be argued on the same day. The parties were ordered to file their respective replies and the matter was then fixed for hearing on the 10th March, 2014 where Mr. Siagi was present for the petitioner and Mr. Oguttu Mboya was present for the respondent.
 11. It is on record that both parties filed and served replying papers in response to the two applications. Mr. Siagi for the petitioner submitted that the petitioner seeks orders in terms of prayers 3 and 4 of the summons dated 15th January, 2014; that is to say a declaration that L.R. NO. GESIMA SETTLEMENT SCHEME/234 forms part of the estate of the deceased in this cause SHADRACK OICHOE OISEBE. In prayer 4, they seek for orders that rent accruing from L.R. KISII MUNICIPALITY/BLOCK 11/36 henceforth be deposited in court and the rent so far collected be accounted for.
 12. Counsel relies on the grounds on the face of the application and the averments of the affidavit of JOEL OICHOE OISEBE. He has referred the court to page 21 of their application which shows a charge document dated 10th December, 1964 which clearly shows that the land in question was the property of the Settlement Fund Trustees but given to the deceased on terms.
 13. He also submits that it is a matter of judicial notice that all properties charged by the SETTLEMENT FUND TRUSTEES upon opening respective registries in respective districts had the titles of such parcels registered in the name of SETTLEMENT FUND TRUSTEES. He refers the court to page 20 of their application which shows a copy of green card in respect of L.R. GESIMA SETTLEMENT SCHEME/234 which was opened on 12th November, 1985 and he draws courts attention to part B thereof entry No.1, confirming registration of the suit property in the name of the Settlement Fund Trustees.
 14. He submits further that the first registered owner of the suit land on opening of the register was Settlement Fund Trustees and that the proper procedure for change of ownership from the Settlement Fund Trustees was that upon full repayment of the loan, the title would be discharged and thereafter registered in the name of the chargor.
 15. He has also referred the court to page 13 of their application being the letter dated 17th August, 2004 addressed to Manasseh Oisebe c/o the subject land and which letter refers to discharge of charge and transfer and submits that the 2 documents were not ready for collection. At page 14 of the application is a letter addressed to the District land Registrar Kisii North dated 20th March, 2006 requesting for Certificate of Official Search in respect of the suit property.
 16. On the issue of discharge of charge and transfer Mr. Siagi refers this court again to page 20 of the application at entry No.2 on the ownership section where property changes from SETTLEMENT FUND TRUSTEE to SHADRACK OICHOE OISEBE on 20th April, 2006 and he submits that on the same date 20th April, 2006 the discharge is noted so that registration of property into SHADRACK'S name is effected.

17. He further submits that as at 20th April, 2006 the person whose estate is subject of these proceedings became registered owner of the suit property after SETTLEMENT FUND TRUSTEES. That the said SHADRACK OICHOE OISEBE died in 1992 and so by 20th April, 2006 Shadrack had been dead for 14 years, and could therefore not have undertaken the process of transfer.
18. Counsel also drew the courts attention to page 16 of his application the affidavit of MANASSEH OISEBE who alleges that the suit property was sold to him by SETTLEMENT FUND TRUSTEES after payment of full purchase price and that the deceased had no interest in the same. He adds that at page 15 there is the letter of consent from Land Control Board addressed to SWENEY MANASSEH referring to an application made on 2nd June, 2005 at a sitting of the board on 3rd June, 2003. He submits that SWENEY died in 2004. He also submits that the letter at page 15 is used on the same day SHADRACK became owner for transfer to SWENEY MANASSEH and that this is fraud as the transfer is made to SWENEY MANASSEH 2 years after his death.
19. Mr. Siagi adds that under the above circumstances the provisions of the now repealed **Chapter 300** of the **Laws of Kenya** could not apply, the letter of consent having been obtained on 3rd June, 2006 when the suit property herein still belonged to SETTLEMENT FUND TRUSTEE. That there is no way Land Control Board could sit and give consent for a property owned by Government. Counsel prays that the court do cancel the entries numbers 3 and 4 so that the property reverts to SHADRACK OICHOE OISEBE for its proper administration.
20. Mr. Siagi further submits that it is on the basis of these fraudulent entries that the court is being introduced to the application dated 25th February, 2014 alleging property belongs to SWENEY and to have the children of SHADRACK evicted therefrom. Further that the other issues raised in the application of 25th February 2014 are side shows which this honourable court should not entertain. He contends that the respondent's counsel have not understood the order issued by the Nairobi court. He submits that the application dated 25th February, 2014 is misconceived and ought to be dismissed.
21. Mr. Oguttu for the respondent opposes the summons dated 15th January, 2014 vide a replying affidavit dated 10th February, 2014 but filed on 17th February, 2014 and submits that the contents of the said affidavit explicitly puts this whole matter into perspective.
22. He submits on the following issues:-
- i. *Whether L.R.NO. GESIMA SETTLEMENT SCHEME/234 (suit property) belongs to the estate of SHADRACK OICHOE OISEBE.*
 - ii. *He invites the court to take note of the term "free property" which is in terms of S.2 of Cap 160, connoting that the property be registered in the name of the deceased. He submits that at the time of filing the instant proceedings it is acknowledged that the suit property was registered in the name of SWENEY MANASSEH OISEBE (Pg. 20 of the summons) entry no 3 and that whether the transfers were procured by fraud misrepresentation or commission of any criminal activity the suit property did not form part of the estate of the deceased.*
 - iii. *Whether it should be declared that suit property belongs to estate of deceased Mr. Oguttu submits that what is before court is an interlocutory summons mounted in the succession proceedings yet the declaration sought if granted would amount to a final order. He submits that this court is not seized of jurisdiction to grant such an order especially at the interlocutory stage.*
 - iv. *Prayer to expunge entries Nos. 3 and 4 from the green card. As concerns the above which he submits can only be done under rectification of register, Mr. Oguttu submits that this court sitting as a P&A court has no jurisdiction to decree rectification which falls under **Section 8** of the **Land Registration Act No. 3 of 2012** whose mandate is donated to the **Environment and Land Court** under **Sections 13 and 19** of the **Environmental and Land Court Act**. That even assuming that this court had jurisdiction to order rectification he submits that the court cannot initiate such a process on the basis of an application.*
 - v. *Proof of fraud- Mr. Oguttu submits that in this case the court was referred to pages 21 and 15 of the summons that SWENEY MANASSEH OISEBE on the face of it appears to be issued with a valid letter of consent whose efficacy and propriety cannot be addressed without calling the alleged author. That transfer of suit property to SWENEY OISEBE was undertaken by a*

government office, the land registrar. That no proceedings to impeach what the officer did can proceed without enjoining that officer. He submits that in any event fraud is a criminal act and in this case proof thereof cannot be done on the basis of affidavit evidence as is sought to be done in this case.

- vi. Prayer 4 of the summons for an account of all collectable rents. He submits that the said prayer relates to a particular property in Kisii Municipality. He submits that no evidence is adduced to show that this property forms part of deceased's estate and that even if there was such evidence, the prayer as couched is omnibus because it does not give details of rent involved so that any order issued would be an order in vain. Further that the prayer is directed to the family of SWENEY MANASSEH without being specific as to who of the family members should be served. He further submits that **Article 50(1)** applies in this case and he urges this court to find that if the court were to grant prayer 4 of the summons there would be a breach of the said Article. The question is whose houses are these and when were constructions done? He submits that to prove this point viva voce evidence must be placed before the court.

23. In summary Mr. Oguttu submits that the issues raised in the summons are not for this court and that all those arguments he has made support the notice of motion dated 25th February, 2014 the main ground being ground 1 which shows that the suit property belongs to the estate of SWENEY MANASSEH OISEBE until that position is impeached by the Land Court.

24. Mr. Siagi in a short rejoinder on the issue of jurisdiction submitted that the argument that this court has no jurisdiction is wrong because what happened in this case was not a transfer but a name correction which means it is the same person but an error in the name. He submits Land court does not come into this matter.

25. I have had opportunity to carefully read and go through both applications herein. I have looked at the replies herein and considered in depth the submissions made by counsel for both the petitioner and respondent. Several issues arise in this matter. The first issue relates to the competence of the summons dated 15th January, 2014 and the second issue which is critical concerns the jurisdiction of this honourable court; namely whether this court can:-

- i. **Issue an injunction in a probate and administration matter and**
- ii. **Make rectification of entries Nos. 3 and 4 from the green card.**

26. The summons dated 15th January, 2014 is brought under **Sections 45 and 82** of the **Law of Succession Act** and **Rules 59 and 73** of the **Probate and Administration Rules**. **Section 45** of the **Law of Succession Act** falls in the division of the Law of succession dealing with the protection of the estate of a deceased person. It specifically provides against intermeddling and it outlaws intermeddling with an estate by a person who has no authority to handle estate property. There is nothing in the provision which gives this probate court power to make orders of injunctions in probate matters but the provision merely defines intermeddling and criminalizes it. **Under Section 45 (2) any person who contravenes Subsection (1) shall (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and (b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.**

27. **Section 82** on the other hand deals with powers of personal representative. In light of the above provisions, this court is of the considered view that the applicant is not deserving of the orders sought in the summons dated 15th January 2014. The punishment for intermeddlers is well defined under **Section 45 (2)**. In any event, the court finds that the prayer for accounts is not supported by any specific pleading nor is it indicated in whose name the rentable property situate within Kisii Municipality is registered for purposes of implementing any orders that may be granted by this court.

28. On the second issue of jurisdiction the Judges of Appeal (Nyarangi, Masime and Kwach) (as they were then) held in the case of **“Owners of the Motor Vessels “Lillians” vs. Caltex Oil (K) Ltd Civil Appeal No. 540 of 1989 “that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue straight away on the material before it; Jurisdiction is everything. Without it a court has no power**

to make one more step. Where the court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law lays down tools in respect of the matter before its moment, the moment it holds that it is without jurisdiction”

29.The court went ahead to observe that:-

“It is for that reason, that a question of jurisdiction once raised by a party or by a court on its own motion, must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.

Rule 73 is on the inherent powers of the court, and it reads:-

“Nothing in these rules shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

30.The inherent powers of the court are resorted to where there are no clear provisions. The point was made by Khamoni J. In **the matter of the Estate of Erastus Njoroge Gitau (deceased) Nairobi High Court Succession Cause No. 1930 of 1997** to the effect that **Rule 73** is to be used only in deserving cases where no specific provisions exist to deal with the situation in question. It is not an omnibus provision which allows the court to entertain all manner of applications. **Rule 73** only relates to gaps in the Law of succession Act and the Probate and Administration Rules.

31.In **Re Estate of Kilungu (Deceased) (2002) 2 KLR 136** Khamoni J observed that Rule 73 cannot be used to do what the Law of Succession Act does not allow the court to do. The Law of Succession Act does not grant any power to the court to grant injunctions. An injunction is a drastic order that should not be granted under the inherent power. It should only be sought in a proper suit.

32.Rule 63 of the Probate and Administration Rules imports several provisions of the civil procedure rule. The provisions imported do not include those that provide for injunctions. The fact that **ORDER 40** has not been imported into the probate practice means that there was no intent at all to empower the court to entertain injunctions in probate and succession matters. The prayer for injunction is therefore declined.

33.Finally this court as a Probate and Succession Court has no jurisdiction to order rectification of register which falls under section 8 of the **Land Registration Act No. 3 of 2012** whose mandate is now with the Environment and Land Court. In any event the prayer for rectification cannot be initiated by way of an application.

34.For the foregoing reasons the ex-parte interim orders of injunction granted by this Honourable court on the 16th day of January, 2014 are hereby set aside, and the whole of the said application is dismissed with costs to the Respondent. Effectively therefore, the respondent’s application is allowed as prayed. The Petitioner is however at liberty to move the appropriate court for orders touching on the matters set out in the summons dated 15/01/2014.

Dated and delivered at Kisii this 14th day of May, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Anyona for Siagi for the Petitioner

Mr. Ochwangi for the Respondent

Mr. Bibu - Court Clerk.