



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 31 OF 1997

**IN THE MATTER OF THE ESTATE OF BENJAMIN ALBERT MULAMA OSUNDWA
DECEASED**

AND

IN THE MATTER OF:

GEORGE CHITECHI OSUNDWA 1ST PETITIONER/RESPONDENT

DICKSON RAPANDO OSUNDWA 2ND PETITIONER/RESPONDENT

GILBERT MUMIA OSUNDWA 3RD PETITIONER/RESPONDENT

BEATRICE ADUDA OSUNDWA 4TH PETITIONER/RESPONDENT

AND

VINCENT MUMIA OSUNDWA BENEFICIARY/RESPONDENT

AND

MARGARET ANYANGA OSUNDWA 1ST BENEFICIARY APPLICANT

LUCY ANGULU OSUNDWA 2ND/BENEFICIARY/APPLICANT

CATHERINE SHITANDI NDEGWA 3RD BENEFICIARY APPLICANT

R U L I N G

The application dated 16.12.2013 seeks an order restraining the respondents from organizing, planning, participating in or otherwise, presiding over, facilitating and/or holding, the Memorial Service of or in any manner performing any cultural, traditional or religious rights to the late Albert Mulama Osundwa (deceased) either in or within the parcel of land known as **KAKAMEGA/LUMAKANDA/510** or in any other place in the said estate or from otherwise intermeddling in and or interfering with the affairs of the estate of the late Albert Mulama Osundwa (deceased) at all.

The application is supported by the affidavit of Margaret Anyanga Osundwa, the 1st applicant. Mr. Muga, counsel for the applicants submitted that this Honourable court issued an order restraining the respondents from dealing with plot number KAKAMEGA/LUMAKANDA/510. The orders were granted

in respect of an application seeking to revoke the grant and the main application is listed for hearing in April 2014. The respondents have organized a memorial service and this is part of the affairs of the estate that were stopped by the court. The deceased's family is in dispute and there is likelihood of breach of peace if the memorial is allowed to continue. One of the beneficiaries, Margaret, has been in peaceful occupation of the deceased's homestead and the memorial service is meant to alienate the daughters from the estate. The holding of the service will be a disobedience of the court order. The 1st applicant was threatened and she made a report at the Turbo police station.

Mrs. Imwene, counsel for Vincent Osundwa opposed the application and submitted that the beneficiaries want to have a memorial service at the grave of their father. The applicants would like to put up a permanent house before the memorial is conducted. There are 33 beneficiaries and only the applicants are opposed to the memorial being conducted. The applicants would like to have the memorial conducted in December 2014 so as to enable them put up a permanent house. Those who will attend the memorial will only go to the grave for prayers and not to the home occupied by the applicants. Mr. Odongo, counsel for the other respondents opposed the application and relied on the replying affidavits Beatrice Osundwa, Patrick Mulama, George Chitechi and Mary Osundwa. Counsel contends that the deceased died in 1997 and the applicants are free to conduct their own memorial next year. This is a customary rite and does not involve the administration of the estate.

From the application and the responses, it is clear that there are misunderstandings between the applicants and the respondents. Both parties are the children of the deceased. According to the applicants this order stopped the conduct of any affairs in relation to the deceased's estate. The respondents are disobeying that order and intent to conduct a memorial service. On the other side the respondents do wish to conduct the service in memory of their late father. The succession law relates to the administration of the deceased persons. Section 2 of the said Act defines estate to mean the free property of a deceased person. The same section defines what constitutes free property. The respondents herein would like to conduct a memorial service and the main issue for determination is whether the conduct of such service would be in breach of the court order that restrains the administrators from intermeddling with the deceased's estate. The order issued by this court on the 25.6.2013, order number 2 thereof states as follows:-

“Pending interparties hearing of this application a temporary injunction be and is hereby issued restraining the respondents either by themselves, their servants, employees or agents or any other person of group of persons whosoever from subdividing, selling, distributing, disposing or transferring all that parcel of land known as KAKAMEGA/LUMAKANDA/510 and/or destroying crops, trees, fences and any other fixtures or developments erected thereon or evicting the applicants herein from the said parcel or in any manner interfering with dealing in and/or otherwise intermeddling in the said property and the affairs of the estate of the late Albert Mulama Osundwa (deceased) or at all.”

It is the position of the respondents that the family met in 2012 and agreed to have the memorial conducted in December 2013. I have seen the minutes of that meeting of 25.2.2012 whereby the year 2013 was proposed as there were elections in 2012. From the pleadings herein I do find that the conduct of a memorial service is in fulfillment of parties' cultural rites and does not form part and parcel of the administration of the estate. There is no evidence that the memorial service is sponsored by proceeds from the estate. Article 11 of the Constitution recognizes culture as the foundation of the Nation as well as being the cumulative civilization of the Kenyan people and Nation. My understanding of a memorial service is that parties will pray for the deceased. It also brings together the children and relatives of the deceased in remembrance of their departed loved ones. The conduct of a memorial service cannot be held to be intermeddling with the deceased's estate. Indeed there is nothing in form of an estate in the conduct of a memorial service. This is a simple cultural event meant to honour the deceased. For the court to interfere with such arrangement good reasons have to be advanced. The applicants would like to have the memorial conducted next year while the respondents are in favour of this year. The issue of a memorial service was discussed over one year ago. From the pleadings herein, it is evident that some of the beneficiaries reside outside the country and it might be expensive to cancel the arrangement at the last

moment.

From the pleading herein I do find that the applicants are only apprehensive that the respondents might use the occasion to evict them applicants from the deceased's homestead. I do find that apprehension to be farfetched and the same can be taken care of by the court. I do hold that the application dated 16.12.2013 lacks merit and the same is dismissed. The respondents to carry out their memorial service but should not evict any of the applicants from plot number **KAKAMEGA/LUMAKANDA/510**. I do further order that the OCS turbo police station provide security during the date of the memorial should it be required. Each party to meet his/her own costs.

Delivered, dated and signed at Kakamega this 23rd day of December 2013

SAID J. CHITEMBWE

J U D G E