



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 820 OF 2007

IN THE MATTER OF THE ESTATE OF SIPELLAH KHASATSILI (DECEASED)

RULING

1. I am tasked with determining a preliminary issue on jurisdiction. There is no formal notice of the objection, but it arises from a summons dated 26th November 2015, where Edward Lazarus Were, the applicant in that application, sought to be added or joined to the cause as a party, and to have S/Kabras/Shamberere/924 expunged from the list of the property of the deceased. The prayer for joinder was allowed on 14th June 2021, but the prayer on the expunging of S/Kabras/Shamberere/924 was to be canvassed by way of written summons as a preliminary issue around the jurisdiction of this court, as it turns on ownership of the said parcel of land.

2. The parties have complied, by filing their respective written submissions.

3. Before I advert to the written submissions, let me first of recite the pleadings relating to S/Kabras/Shamberere/924 as set out in the summons dated 26th November 2015. The applicant asserts to be the registered owner of S/Kabras/Shamberere/924, and says that the same cannot, in the circumstances, form part of the estate of the deceased herein. He avers that distribution of S/Kabras/Shamberere/924 would be illegal and would violate Article 40 of the Constitution, by going against his right to own property. He has attached a copy of the consent on distribution, which proposes distribution of S/Kabras/Shamberere/924 to eleven individuals. There is also copy of a certificate of official search, dated 16th November 2015, which shows the applicant to be the registered proprietor of that property since 8th February 1978, with a caution registered in favour of the deceased herein on 2nd March 1995, claiming a licensee's interest.

4. There is a response to that application by Philip Mukoya Limuli, by his affidavit, sworn on 30th May 2016. He asserts that the applicant got registered by fraud as proprietor of S/Kabras/Shamberere/924. He refers to proceedings of the Malava Land Disputes Tribunal, which ordered cancellation of the title, and registration of the said property in the name of the deceased. He avers that appeal against the decision of the Tribunal was not successful. He further avers that the deceased had the decision of the Tribunal adopted as an order of the court in Kakamega CMCC Miscellaneous No. 12 of 2003. He asserts that the applicant holds no title to the land. He has attached the proceedings of the Tribunal, which show that S/Kabras/Shamberere/924 was awarded to the deceased and others in the proceedings of 23rd September 2002, and the registration of the applicant was ordered cancelled. The proceedings at the Appeals Tribunal, conducted on 10th June 2003, show that the appeal by the applicant was dismissed.

5. In a rejoinder, in an affidavit sworn on 16th June 2016, the applicant avers that a suit had been initiated against him by the original administrator in Kakamega HCCC No. 27 of 2009, where the issue of fraud was raised, but the suit was dismissed by Lenaola J on 17th March 2011, for being time-barred, and, therefore, according to him, the issue of fraud was adjudicated upon. He further avers that the Tribunal had no jurisdiction to make the orders it made, which he pleads were a nullity for want of jurisdiction. He further avers that the deceased was not the registered owner of the property as at the date of his death. He further asserts that S/Kabras/Shamberere/924 was not available for distribution.

6. The applicant subsequently died, and was substituted by his widow, Beverly Nyaleso Were, who I shall continue to refer to as the applicant.

7. In her written submissions dated 7th May 2021, the applicant cites Article 162(2) of the Constitution, to argue that the High Court has no jurisdiction to deal with a matter that revolves around title to land. She submits that that jurisdiction lies with the Environment and Land Court. She asserts that the property was not registered in the name of the deceased, and, therefore, it should not be available for distribution. In her supplementary submissions, dated 14th June 2021, she raises issues of *res judicata*, limitation of actions and lack of jurisdiction on account of Article 165(5) of the Constitution.

8. The administrators, on their part, in summons, dated 27th September 2021, argue that the issue of ownership was determined by the Land Disputes Tribunal. They assert that the registration of the applicant as proprietor of S/Kabras/Shamberere/924 had been cancelled by the Tribunal.

9. What emerges from all these filings, that is to say the affidavits, the written summons, *et al*, is that the issue as to the ownership of S/Kabras/Shamberere/924 is far from settled. I have seen the decision of Lenaola J in *Rodah Injete Shiloya (Suing as the Administrator of the Estate of Sipellah Khasatsili vs. Edward Lazarus Were* [2011] eKLR. The good Judge addressed the issues that arise herein, and that decision ought to have settled the matter. Am alive to the fact that the Constitution is very clear, in Article 165(5), that the High Court has no jurisdiction whatsoever, on issues around ownership of land. Once the Constitution has pronounced that on jurisdiction, I cannot venture to make any determination on the issue at all. The little that I can do is just to point at the issues that the parties need to ponder about as they attempt to find a way forward. In doing so I shall just be repeating *Rodah Injete Shiloya (Suing as the Administrator of the estate of Sipellah Khasatsili vs. Edward Lazarus Were* [2011] eKLR (Lenaola, J).

10. Number one, the applicant is still the registered proprietor of S/Kabras/Shamberere/924, going by the certificate of official search on record dated 16th November 2015. As at 16th November 2015 the record at the lands office still reflected Edward Lazarus Were as proprietor of S/Kabras/Shamberere/924. Technically, therefore, the property belongs to his estate, and not the estate herein, and this court should not venture to distribute the property, unless and until the registration particulars are changed in favour of the estate herein.

11. Secondly, the registration of the late Edward Lazarus Were happened on 8th February 1978. It would appear that no one challenged that registration, until 2002 when the deceased herein brought the proceedings at the Land Disputes Tribunal, under the Land Disputes Tribunals Act, Cap 303A, No 18 of 1990, Law of Kenya, repealed by sectioned 31 of the Environment and Law Act, No. 19 of 2011. The said challenge was brought twenty-five years after the registration of the late Edward Lazarus Were as proprietor in 1978. The court in *Rodah Injete Shiloya (Suing as the Administrator of the estate of Sipellah Khasatsili vs. Edward Lazarus Were* [2011] eKLR (Lenaola, J), adverted to that issue, and said that the proceedings before the Land Disputes Tribunal offended section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya, under which a suit, to claim or recover land, may not be brought after the end of twelve years from the date on which the right first accrued. That should have settled the matter. It was a way of saying that the proceedings before the Land Disputes Tribunal and the Appeals Committee were nullities, for the two Tribunals entertained a stale claim. Whatever decisions they made could not sanitize the fact that the challenge was being mounted thirteen years after it had become statute-barred.

12. Thirdly, the Land Disputes Tribunals Act, was a piece of legislation that was, with respect, ill-conceived, for it granted jurisdiction to lay persons, over land that was governed by legislation, and they ended up making all manner of blunders, and orders that were way outside their jurisdiction. The instant case is just one of them, as pointed out in *Rodah Injete Shiloya (Suing as the Administrator of the estate of Sipellah Khasatsili vs. Edward Lazarus Were* [2011] eKLR (Lenaola, J). They entertained a statute-barred claim. Under that statute, the panels had no jurisdiction to determine matters that related to ownership of registered land, and they had no jurisdiction to order cancellation of titles to registered land. That is precisely what they purported to do in this case. They purported to determine ownership of S/Kabras/Shamberere/924, by deciding who was entitled to it, and went ahead to order cancellation of the registration of the late Edward Lazarus Were as proprietor. Under the said Act, they had no powers to do either of those things. Hence, the submission that they had no jurisdiction makes sense.

13. Fourthly, in view of *Rodah Injete Shiloya (Suing as the Administrator of the estate of Sipellah Khasatsili vs. Edward Lazarus Were* [2011] eKLR (Lenaola, J), the matter of ownership of S/Kabras/Shamberere/924 and the validity of the proceedings that were conducted under the Land Disputes Tribunals Act are *res judicata*. The administrators are flogging a dead horse.

14. I could go on and on and on. The bottom-line is that S/Kabras/Shamberere/924 is not a property registered in the name of the deceased, but of the late Edward Lazarus Were, despite the deceptively favourable decisions of the Tribunals. It should, therefore, not be available for distribution. If the administrators feel strongly that the decisions by the Tribunals are still valid, despite *Rodah Injete Shiloya (Suing as the Administrator of the estate of Sipellah Khasatsili vs. Edward Lazarus Were* [2011] eKLR (Lenaola, J), then they should approach the Environment and Land Court for interpretation of that decision, as against the decisions by the Tribunals on S/Kabras/Shamberere/924.

15. The final order is that S/Kabras/Shamberere/924 shall be removed from the schedule of the assets that are proposed for distribution in the estate of the deceased herein. Any party aggrieved by this order has a leave of twenty-eight days to challenge the same at the Court of Appeal. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF JANUARY, 2022

W MUSYOKA

JUDGE

In the presence of:-

Mr. Erick Zalo Court Assisant

Ms. Rauto instructed by Rauto & Co. Advocates, for the administrators

Ms. Luvai instructed by Amasakha & Co. Advocates for the applicant