



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 164 OF 1988**

**IN THE MATTER OF THE ESTATE OF DAVID MUKHUYI SHIVIKA DECEASED**

**RULING**

1. The summons for determination is dated 14<sup>th</sup> August 2013. It seeks revocation of the grant made herein on 19<sup>th</sup> March 1992 and confirmed on 28<sup>th</sup> September 1993.
2. It is brought an instance of Protus Mmboyi Imonje, who I shall refer hereto hereafter as the applicant, on grounds that his late father, Peter Imonje Musunga, had, on 3<sup>rd</sup> May 1978, bought 1¼ acres of Idakho/Shisiro/578, from the deceased, David Shivika Makhuyi. He took possession of the land and utilized till his death in 1994, leaving the applicant in occupation. His complaint is that he has not been involved in the succession proceedings. He avers that Idakho/Shisiro/578 has been subdivided into Idakho/Shisiro/1747, 1748, 1749 and 1750, and Idakho/Shisiro/1750 had been allocated to Gabriel Irungu, yet that parcel of land was what the applicant was entitled to, together in Idakho/Shisiro/1747.
3. Attached to supporting affidavit, is a document dated 3<sup>rd</sup> May 1978, in Kiluhya, translated into English, showing that Petero Imonje Musunga bought land from Daudi Makhonyi Shibika. A certificate of death, dated 17<sup>th</sup> October 2011 shows that Peter Imonje Musunga died in 1994. A grant *ad litem* was made to the applicant on 2<sup>nd</sup> November 2012.
4. Regina Shilesi replied. Her affidavit was sworn on 27<sup>th</sup> March 2014. She is a beneficiary of Idakho/Shisiro/1759. She avers that in the course of the succession proceedings, the applicant was heard and his objection was dismissed. It was a revocation application, dated 15<sup>th</sup> February 2011, and was dismissed on 27<sup>th</sup> July 2013. She asserts that there is no pending application of revocation of grant. She avers that original land, Idakho/Shisiro/578, had been subdivided, and distributed and transferred to various individuals, and the claim did not lie in succession but in a substantive land suit. It is asserted that, therefore, the application herein can only be presented in a substantive suit.
5. Directions were given on 21<sup>st</sup> January 2014, for disposal of that application by oral evidence. The oral hearing happened on 5<sup>th</sup> October 2015. The applicant and his witnesses testified. No other witness testified thereafter.
6. In the interim, the respondents, filed a notice of preliminary objection to the application dated 15<sup>th</sup> February 2011. The preliminary objection is dated 4<sup>th</sup> November 2020. It raises the issue of jurisdiction, on the ground that the application is rooted on land ownership, and the court with jurisdiction is Environment and Land Court. It is averred that the suit is incompetent, for the court lacks *locus standi* to adjudicate over the matter. Articles 162(2), 165(5) of Constitution, sections 47,79 and 82 of Law of Succession Act, Rules 41(3) and 73 of the Probate and Administration Rules, section 13(1)(2) of Environment and Land Court Act, No. 19 of 2011, sections 1 and 101 of the Land Registration Act, No. 3 of 2012 and sections 2 and 150 of the Land Act, No. 6 of 2012 are cited.
7. Directions were taken, for disposing the preliminary objection by way of written submissions. Parties herein have filed their written submissions. I have perused through them, and noted the arguments made.
8. It is common ground that the applicant herein is not a survivor of the deceased. He claims, not as such, but as a son of the person who had acquired, allegedly, a portion of Idakho/Shisiro/578, from the deceased in 1978. He is not a creditor of the estate either, for he has no valid decree from a competent court, entitling him to a portion of the estate. What he wants the court to do is to make a determination that he is entitled to a portion of Idakho/Shisiro/578, as a prerequisite to his being allocated a portion out of the state. It is this claim that has provoked the preliminary objection. Does the High Court have jurisdiction to determine that question?
9. The Constitution, 2010, created courts with the status of the High Court, and vested one of them with jurisdiction to determine disputes over title, occupation and use of land. That is at Article 162(2). Then in Article 165(5), the Constitution declares that the High Court has no jurisdiction whatsoever over matters that fall within the jurisdiction of the courts envisaged under Article 162(2). The relevant provisions in Articles 162 and 165 state:

“162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) ...

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2) ...

165 (5) The High Court shall not have jurisdiction in respect of matters—

(a) ...

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

10. Parliament passed the Environment and Land Court Act, pursuant to Article 162 of the Constitution, to exercise the jurisdiction conferred by that Article. Land issues, around title, occupation and use, are governed by the Land Registration Act and Land Act, both of which provide that the Environment and Land Court is the court for the purpose of any disputes that arise with respect to matters, disputes, and actions governed or regulated by the two statutes. The relevant provisions are at sections 2 and 101 of Land Registration Act and sections 2 and 150 of Land Act.

11. The provisions in the Land Registration Act state as follows:

*“Interpretation.*

*2. In this Act, unless the context otherwise requires—*

*“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011:*  
...

*Jurisdiction of court.*

*101. The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”*

12. The Land Act carries similar provisions; which state as follows:

*“2. Interpretation*

*In this Act, unless the context otherwise requires—*

*“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011);*  
...

*150. Jurisdiction of the Environment and Land Court*

*The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”*

13. Whether there was a valid sale transaction, between the deceased herein and the late father of the applicant, are matters that fell for determination under Land Registration Act and the Land Act, and other land legislation, such as Land Control Act, Cap 302, Laws of Kenya. Sale of agricultural land is subject to consent of the Land Control Board, and failure to obtain the relevant consent could lead to invalidation of a sale of land. These are issues that ought to be ventilated before the court properly vested with jurisdiction.

14. In addition, there are issues around limitation of actions, under the Limitation of Actions Act, Cap 22, Laws of Kenya. Claims to recover land and to assert title to land, on basis of adverse possession, would fall under this, and both are subject to timelines. Again, these are not issues for the High Court to venture into.

15. Moreover, under Rule 41(3) of Probate and Administration Rules, where questions arise, in the context of succession proceedings, relating to determination of questions on title to or ownership of assets placed before a court for distribution, such questions ought to be determined in separate proceedings. Of course, Rule 41(3) does not apply here, for it relates to confirmation proceedings, but it should be a pointer to what the process should be, and a statement of a general principle where disputes arise in succession proceedings relating to title to property contested as between an estate and other persons.

16. Overall, I believe that I have said enough to demonstrate that the High Court has no jurisdiction to entertain claims that turn on issues relating to title to and ownership of land. Similarly, sitting as a probate court, the High Court ought not wade it disputes that touch on ownership of assets, and the proper approach should be to place those questions before other courts in separate proceedings.

17. The application before me is for revocation of grant. Revoking the grant and getting distribution, through confirmation, done afresh will serve no purpose. The applicant can achieve what he seeks by moving the appropriate court in appropriate proceedings.

18. Consequently, I do hereby uphold the preliminary objection. The summons for revocation, dated 14<sup>th</sup> August 2013, is a disguised land case. The High Court has no jurisdiction to get into the issues it raises, and I hereby strike the same out with costs. I will grant the applicant twenty-eight days to challenge the order herein at the Court of Appeal. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS .....18<sup>th</sup> .....  
DAY OF .....FEBRUARY....., 2022**

**W MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Mr. Mutoka, instructed by Messrs. Shivachi Mutoka & Co. Advocates, for the applicant.**

**Mr. Mukavale, Advocate, for the respondent.**