



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO.17 OF 2016

IN THE MATTER OF THE ESTATE OF CHARO KAZUNGU MASHA (DECEASED)

KADZO CHARO KAZUNGU

TABU MKOKA.....PETITIONERS

VERSUS

FAIZA SAID ALI BAJABER

SAMUEL KWAME MUTEMI.....INTERESTED PARTIES

RULING

1. A grant of representation to the estate of the late Charo Kazungu Masha who died intestate on 19th April, 1990 issued to Kadzo Charo Kazungu and Tabu Mkoka on 9th June 2016. The same was confirmed on the 19th June, 2017 and the only property comprising the estate LR No. Kilifi/Vipingo/231 distributed equally amongst the petitioners (widows) and the daughters namely; Mwende Kadenge, Jumwa Charo and Kanido Charo.
2. Upon presentation of the grant at the lands office at Kilifi, the petitioners discovered that the title deed in respect of the subject property had been collected by one Mohamed Breik. Consequently, the petitioners filed a summons dated 1st March 2018 and amended on 26th November 2018 seeking to summon one Faiza Ali Bajaber to surrender the said title deed.
3. Before the said application could be heard, Faiza Said Ali Bajaber claiming to be the rightful registered owner of the property in issue filed a summons for Revocation dated 12th March 2019 as an interested party seeking revocation of the grant and stay of execution of the same on grounds that the property in question did not form part of the estate as he had bought the same from Kanidu Charo Kazungu and Mwenda Kadenge Chanzera as vendors using a grant of representation issued by Kilifi court in succession case number 51 of 2011 on 18th January 2013.
4. However, parties entered into an agreement vide a consent dated 4th December 2019. In the said consent, parties agreed to withdraw their respective applications that is to say, amended application of 26th November 2018 and 12th March 2019. They further consented that Faiza Ali had lawfully bought the land in question hence the property was not part of the estate and that the title deed deposited in court to be released to Faiza. A similar consent was again recorded on 22nd August 2019.
5. Subsequently, one Samuel Kwame Mutemi claiming to be a son to Titus Musembi Mutemi and administrator of his late father's estate filed an application dated 10th December 2019 and filed on 17th December 2019 as the second interested party seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That this honourable court do issue an order staying the adoption of the consent dated 4/12/2019 between the petitioners and the interested party pending hearing and determination of this application.
 - d. That the grant of letters of administration issued on 9th June, 2016 and the certificate of confirmation of grant issued on 19th June, 2017 be revoked and annulled.

e. That this honourable court do take oral evidence to determine the rightful person between the applicant herein and the interested party to be awarded the land.

f. That this honourable court do order for the cancellation of the entries made in the land registry file relating to Plot No.231/Vipingo /Kilifi and the title deed issued in the name of the interested party and revert the same to the name of the deceased.

g. That costs for this application be provided for.

6. The application by Samuel is anchored on grounds that the subject property was purchased by his late father on 14th June 1992 from the petitioners (widows of the deceased) with their daughters as witnesses. In his affidavit in support, he contended that it was a term of the agreement that the vendors were to receive the remaining amount of the purchase price upon processing a grant of letters of representation a process undertaken in 2016 long after his father had died on 26th May 2001 before completing the process.

7. He averred that LR No 231/Mavueni Takaungu did not form part of the estate as it had been sold to his father. That after his father died, they included that property as part of his father's estate in succession case number 233 of 2003 Nairobi high court. That the sale of the said land to the 1st interested party without their knowledge was illegal.

8. In reply, the petitioners filed a replying affidavit sworn on 27th January 2020 admitting selling the property but denied the allegation of payment of any purchase price to the deceased and that the inclusion of the deceased's property in the estate of Titus Mutemi Musembi was without their consent as no transfer had been executed in Titus' name hence irregular acquisition of the deceased's property.

9. The second interested party filed a replying affidavit sworn on 27th January 2020 opposing the application on grounds that he is the bonafide purchaser for value having bought the land in question from duly appointed administrators of the estate of the deceased.

10. Consequently, the petitioners filed a preliminary objection dated 19 may 2021 seeking the summons dated 17/12/2019 to be struck out. The preliminary objection is based on the grounds that;

a. The 2nd interested party's claim (if any) is time barred under Section 4(1) (a) of the Limitations of Actions Act (CAP 22) laws of Kenya. The 2nd interested party obtained grant of letters of administration on 12/5/2004 more than 17 years ago. That the claim is time barred under Section 9(2) of the Limitations of Act CAP 22 laws of Kenya as the sale agreement was executed on 4/6/1992 more than 29 years ago.

b. This court has no jurisdiction over the same as the summons seek to determine the rightful person to be awarded the subject land and cancellation of entries and title deed thereof which is the exclusive jurisdiction of the Environment and Land Court as established under Section 4 of the Environment and Land Act (CAP 12A) laws of Kenya.

11. The preliminary objection was canvassed by way of written submissions.

12. The petitioners through their advocate Mr.Mutisya filed written submissions dated 12th July, 2021.Counsel submitted that it is not in dispute that this matter involves land i.e. Plot No.231/Vipingo /Kilifi and the main prayers i.e. prayer 5 and 6 of the summons dated 17/12/2019 seek to determine ownership and cancellation of entries relating to land. That from grounds 1 and 2 of the summons and paragraphs 2 and 3 of the supporting affidavit, it is clear that the land was allegedly bought by his late father in 1992 and he (2nd interested party) got letters of administration in respect of his late father's estate confirmed in 2005.

13. Counsel submitted that the cause of action to claim the land is over 12 years hence his claim is time barred under section 9(2) of the Limitations of Actions Act (CAP 22) Laws of Kenya.

14. On jurisdiction, counsel submitted that the ELC court has the exclusive original jurisdiction on land &environment matters and not the probate court.

15. In support of his submissions, counsel relied on the following authority: **Joseph Ojwang' Oundo v National Environment Management Authority & 8 Others [2015] e KLR** where the court held as follows;

"...it is apparent that the ELC has exclusive jurisdiction of the environment and land matters viz a viz other superior courts created by the constitution..."

16. In conclusion, counsel urged the court to uphold the objections.

17. The 2nd interested party through his advocate Mr. Mwakisha filed written submissions dated 23rd September, 2021.Counsel submitted that the fact of having obtained letters of administration 17 years ago is in the entirety of the circumstances, immaterial, the sole issue being whether there is still a claim maintainable against the estate herein relative to the suit property. That the transfer was executed on 4th July, 2017, the grant having been confirmed on 19th June, 2017 and the administrators therefore had full capacity to execute the transfer. That the effect of the transfer is to revive the 2nd interested party's right of claim or cause of action over the property to the benefit of his father's estate to which he is administrator.

18. That time should run only from the date of execution of the transfer which constitutes a written acknowledgment of the claim of his father's estate as contemplated by the Limitation of Actions Act, Section 23 thereof. That the element of proceedings is one that cannot be determined on a preliminary objection, but must be agitated at a substantive hearing.

19. On the court's jurisdiction, counsel submitted that the jurisdiction of this court is not ipso facto, necessarily ousted as the core of the dispute here is the administration of the estate of the deceased Masha Charo Kazungu. That central to the proceedings is what assets are available for distribution as part of the deceased's estate.

20. It was further submitted that the 1st interested party exhibited the documents by which a transfer was made to him. That the documents clearly bespeak a case of irregularity as should amount to intermeddling with the estate as the grant of letters administration was only made to the petitioners/administrators herein on 9th June, 2016, and confirmed on 19th June, 2017. That these issues clearly fall within the province of this court, and it is for it to unravel and determine the propriety of the circumstances under which the property has been transmitted to the 1st interested party through the act of persons other than the administrators named in the grant. That the objection is intended to short circuit this inquiry, and urged the court to dismiss it with costs.

21. The 2nd interested party filed a response to the submissions by the 1st interested party. Counsel submitted that subsequent to obtaining the grant herein in 2016 the petitioners/administrators had engaged the 2nd interested party in writing, and indeed executed a transfer in his favour as administrator of the estate of his late father who had previously dealt with the petitioners well prior to their being constituted administrators under the grant, thereby acknowledging his interest, which acts would amount to such acknowledgement as is contemplated by Section 23 of the Limitation of Actions Act as sufficing to revive the 2nd interested party's claim. That the facts and circumstances surrounding that engagement, evident from the material on record, are such as cannot be determined on a preliminary objection.

22. That the validity of the claim with regard to time limitation cannot be reckoned merely or solely from the date of the contract giving rise to the claim, but the subsequent conduct of the parties would be material as well. That these elements, with respect, have to abide a further inquiry.

23. On jurisdiction, counsel submitted that this court is clothed with jurisdiction to address itself to the question as to whether the property in question is the sole asset the subject of administration and, is being dealt with in accordance with the law. That before the grant was issued to the petitioners, the property had purportedly been transferred to the 1st interested party by persons other than those administrators, and in circumstances that are contrary to the terms of the confirmed grant.

24. That this is a matter that properly falls for this court to interrogate. Counsel opined that the consent in question is meant to sanitise the irregular dealing by way of the consent sought to be recorded between the petitioners and the 1st interested party. That the court ought to address the mischief being perpetrated over the property, now with the apparent connivance of the administrators, the grant and the legal provisions/caveats attendant thereto notwithstanding. That the validity of the contract itself may then be dealt with before the environment and land court. *Reliance was placed on the case of In re estate of Julius Ndubi Javan (2018) eKLR*

25. The petitioners through their advocate filed a response to the 2nd interested party's submissions dated 13th October, 2021. Counsel submitted that the 2nd interested party's capacity to file any claim for and on behalf of his late father's estate accrued upon obtaining the letters administration on 12/5/2004 more than 17 years ago. That the 2nd interested party's claim is based on the alleged sale agreement dated 4/6/1992 (more than 29 years ago) when the cause of action accrued. That the 2nd interested party in acknowledging the limitation, submits that the claim was revived by the transfer in favour of the 2nd interested party but this transfer was not registered and is totally denied by petitioners.

26. Counsel submitted that the 2nd interested party's claim is not for himself but the estate of his late father, hence reference should be made to documents concerning the deceased.

27. On jurisdiction, counsel submitted that the 2nd interested party's prayer 5 in the summons application dated 17/12/2019 is seeking substantive orders under the exclusive jurisdiction of the land and environment court. That the 2nd interested party's submissions are only meant to mislead the court.

Determination

28. I have considered the preliminary objection and the submissions by both counsel. Issues that emerge for determination are:

a. Whether this court has jurisdiction.

b. Whether the claim is time barred.

29. On the question of jurisdiction, the applicant submitted that it is the ELC that has the exclusive original jurisdiction on land & environment matters.

30. On the other hand, the 2nd interested party submitted that the jurisdiction of this court is not ipso facto, necessarily ousted as the core of the dispute here is the administration of the estate of the deceased Masha Charo Kazungu. That central to the proceedings is what assets are available for distribution as part of the deceased's estate. That it is not in dispute that this matter involves land.

31. It is trite law that jurisdiction flows from the constitution or statute. It is not a creature of any individual to arrogate himself authority to hear and or adjudicate over a dispute. See **Samuel Kamau Macharia and another v Kenya Commercial Bank and 2 others S.C. Civil appeal No.2 of 2011**

32. It has been held time and again that jurisdiction is everything and without it a court should not move any further step. This position was clearly stated in the celebrated case of **Owners of Motor vessel "S" V Caltex oil (K) LTD(1989)KLR1 where the court held that:**

“Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

33. Ultimately, a probate court has a distinct mandate separate from that of the ELC. In the case of **In re Estate of Julius Ndubi Javan (Deceased) (supra)** the court had this to say;

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which *prima facie* valid should be determined before confirmation.”

34. In the instant case, the 2nd interested party in his application has sought several orders. However, prayers 5 and 6 stand out in the sense that they relate to ownership on land. From the above cited case of **In re Estate of Julius Ndubi Javan (Deceased) (supra)**, it's clear that any dispute with regard to ownership of land must be resolved first.

35. There is no doubt that ordinarily, disputes regarding land ownership are constitutionally reserved for the ELC. However, there are instances when overlapping jurisdiction may arise. For instance, a probate court dealing with intermeddling with the estate cannot avoid cancelling a title acquired through a criminal activity like intermeddling. To that extent, the court must ask itself as to whether the second interested party has a lawful claim against the petitioners to enable this court assume jurisdiction, interrogate it and make a determination.

36. It is clear from the pleadings and indeed the 2nd interested party's pleadings that his late father bought land belonging to the deceased from the petitioners in 1992 long after the deceased had died in 1990. It is also clear that the alleged sale was done by the petitioners before petitioning for a grant of representation in respect of the deceased's estate.

37. From this admission, it is obvious that the petitioners had no capacity to sell land before obtaining a grant of letters of administration hence a criminal act of intermeddling with the estate. **See Gitau and two others v Wandai and five others (1989) KLR 231** where the court held that an act done concerning the estate of the deceased by a person who has not obtained representation amounts to intermeddling with the estate.

38. Therefore, it is not tenable for the 2nd applicant to seek this court to assume jurisdiction, preside over and perpetuate an illegality. **See Macfoy Limited vs United Africa Co.LTD(1961)3All E.R 1169** where it was held that ;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside...You cannot put something on nothing and expect it to stay there”

39. In the case of **In re Estate of Njagi Njeru (Deceased) [2018] eKLR** the court emphasized on the mandate of ELC as follows;

“This resolution of that question will in addition involve application of the law on title to land, and the applicant's summons therefore goes beyond being merely a claim of succession to the deceased property. It is notable in this regard that disputes primarily concerning ownership of land title to land fall within the jurisdiction of the Environment and Land Court as provided by Article 162 (2)(b) of the Constitution, and Section 13(1) and (2) of the Environmental and Land Court Act.”

40. The only remedy the second interested party has in my opinion is to seek a refund of his father's money as the deceased did not transfer any property to him nor obtain requisite consent from the land control board. Alternatively, he can institute a claim on adverse possession before the ELC if he strongly believes he has a good case. In the premises, this court has no jurisdiction to deal with claims bordering on adverse possession.

41. In view of the above finding, I am in agreement with the petitioners that this court has no jurisdiction and that only ELC can resolve land ownership dispute and issue relevant orders. If the ELC finds in favour of the interested party, it will be a ground to interfere with the grant by seeking to redistribute the estate afresh.

42. Regarding the question of limitation of time, the law of succession is not governed by the Limitation of Actions Act hence suits touching on probate issues have no time limitation unless specified in the Act or the court in exercise of its discretion finds the delay purely unreasonable subject to the circumstances and merits of each individual case. See **in the estate of Josephine Magdalene (deceased) (2016) eKLR** where the court stated:

“My reading of this is that an application founded in Section 76 of the Law of Succession Act can be made at any time. There is no limitation set to the provision for the making of the application. The provision is open ended. Of course there is need for bringing in the test of reasonableness to play. That, however consent does not introduce time limitation. It merely

requires the court to bring in to bear reasonableness in its exercise of discretion as whether or not to revoke a grant.”

43. The court in the case of **In re Estate of Josephine Magdalena Motion (Deceased) [supra]** stated;

“I am conscious that the Limitation of Actions Act does in some provisions provide for actions in respect of property of a deceased person. However, what these provisions envisage are ordinary suits, often referred to as administration suits, filed by administrators or beneficiaries in respect of estate property seeking a variety of reliefs. The Act sets time limitations for the bringing of such administration suits. Those provisions have nothing to do with reliefs that are created by the Law of Succession Act, and that are brought within the framework of the Law of Succession Act.”

44. The upshot of the above holding is that, the preliminary objection dated 19th May 2021 by the petitioners is upheld and the 2nd interested party’s application filed on 17th December 2019 struck out with no order as to costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF MARCH, 2022

J.N. ONYIEGO

JUDGE