



REPUBLIC OF KENYA



In re Estate of Teresina Etambo Lukhumwa (Deceased) (Succession Cause 914 of 2011) [2022] KEHC 16899 (KLR) (23 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16899 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 914 OF 2011
WM MUSYOKA, J
DECEMBER 23, 2022**

IN THE MATTER OF THE ESTATE OF TERESINA ETAMBO LUKHUMWA (DECEASED)

RULING

1. The application for determination in the summons dated January 31, 2022, for revocation of grant. The same was placed before me on 1st February 2022. I directed that the same be served, and directions be given on February 23, 2022. I granted temporary orders in terms of prayer 3 of the application. I also directed that a translation be provided of the annexure RL1 in English.
2. When the matter came up on February 23, 2022, Richard Lokeni Shapaya, the applicant, and Timothy Misango Lukhumwa, the respondent, were in attendance. Timothy Misango Lukhumwa informed the court that he had been served the previous day, that is February 22, 2022. He asked for time to reply. I gave him 14 days to reply. I fixed the matter for hearing on May 26, 2022.
3. On May 26, 2022 both Timothy Misango Lukhumwa and Richard Lokeni Shapaya were in attendance. Timothy Misango Lukhumwa informed me that he had an Advocate, who had not come to court, and he asked for another date. Richard Lokeni Shapaya informed me that Timothy Misango Lukhumwa kept adjourning the matter, yet he, Richard Lokeni Shapaya was sickly, and needed to have the matter concluded. I declined to allow the adjournment on grounds that there was no evidence that Timothy Misango Lukhumwa had instructed an Advocate, and indicated that I would hear the matter.
4. When it came to the hearing, Richard Lokeni Shapaya said that he had filed an affidavit, and that everything was in that affidavit. On his part, Timothy Misango Lukhumwa said that he he was alive in 1998, when Richard Lokeni Shapaya alleged he had bought the land from the deceased, yet he, Timothy Misango Lukhumwa, did not sign the sale agreement. He asserted that his mother was illiterate, and could not have signed the agreement. He said that the land was given to him by his parents, he had done succession, the matter was gazetted, the grant was confirmed and transmission had been done. After those statements were made, I reserved the matter for ruling on November 4, 2022.
5. Before November 4, 2022, Timothy Misango Lukhumwa filed a certificate of urgency, supported by an affidavit. Seeking to have the ruling suspended, on grounds that he was unaware of the suit, and that he be given time to respond, and that a caution on the land be lifted. In the supporting affidavit,



he avers that he was a total orphan, and administrator of the estate of his mother, the deceased herein. He attached documents to that affidavit to assist the court determine the matter. He argues that the matter has been finalized. He would like the application dismissed.

6. Timothy Misango Lukhumwa cannot possibly be sincere in asserting that he was not aware of the application dated January 31, 2022, for he attended court on February 23, 2022, and confirmed that he had been served with the application, and asked for time to reply. When the matter was mentioned next on May 26, 2022, 3 months later, he had not filed a reply, and wanted more time, alleging that he had instructed an advocate. When his plea was denied, he addressed the court and made an oral reply to the issues raised in that application. He cannot now plead ignorance of those issues. In any case, he has filed an affidavit responding to that application, sworn on November 3, 2022. It is belated, and was filed without leave, but I shall consider it on its merits.
7. The application dated January 31, 2022 attaches a document, said to be a sale agreement signed by the deceased in 1998, selling the land to Richard Lokeni Shapaya. If that be the case, then Richard Lokeni Shapaya had acquired a stake in the estate prior to the demise of the deceased, which ought to have been reckoned at confirmation. That would make him an interested party, who would have a right, under section 76 of the *Law of Succession Act*, cap 160, laws of Kenya, to file for revocation of the grant. Issues would arise as to whether Timothy Misango Lukhumwa, at confirmation, properly ascertained the persons beneficially entitled to a share in the estate, and ascertained their shares.
8. Of course, the sale to Richard Lokeni Shapaya is contested by Timothy Misango Lukhumwa. Where such claims arise, the estate ought not be distributed, instead the dispute on whether or not the deceased sold the portion to Richard Lokeni Shapaya ought to be determined first. Unfortunately, the High Court has no jurisdiction to determine that dispute in these succession proceedings, in view of articles 162(2) and 165(5) of the *Constitution*, and the proper court, for that purpose, ought to be the Environment and Land Court or empowered subordinate courts.
9. I shall not hear the revocation application, for it is a disguised land case, which Richard Lokeni Shapaya should have filed in the court with jurisdiction. I shall, therefore, not revoke the grant. I shall, instead, direct Richard Lokeni Shapaya to file his claim at the appropriate court, against Timothy Misango Lukhumwa, and have it determined within one year. In the meantime, I shall direct that the confirmation orders on record ought not be carried out to await the outcome of the suit to be filed by Richard Lokeni Shapaya. If transmission has been done, then Richard Lokeni Shapaya shall have to obtain the relevant orders from the Environment and Land Court or the empowered subordinate court, for once transmission is done, the probate court would have no powers whatsoever over the property the subject of the transmission. The matter shall be mentioned after one year for monitoring and further orders. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 23RD DAY OF DECEMBER, 2022.

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Richard Lokeni Shapaya, the applicant.

Timothy Misango Lukhumwa.

