



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 235 OF 2011

IN THE MATTER OF THE ESTATE OF JOSEPH LISANZA LUKALE (DECEASED)

RULING

1. On 10th April 2019 I delivered a judgment herein, where I directed that George Wendo Jeki accounts for cattle that he had sold and thereafter, if account will be unsatisfactory, reimburse the estate of the sale proceeds. Similarly, I ordered that Abraham Lukoye accounts for the trees that he had cut down and sold, and thereafter reimburse to the estate the amount equivalent to the sale proceeds, should his account be unsatisfactory. He was also to handover any unsold timber, still in his possession, to the administrator.

2. The matter was mentioned several times thereafter to confirm compliance. In the course of those mentions, an issue was raised concerning cane that Abraham Lukoye had planted on and harvested from estate land without authority from the administrator, and which he had not accounted for. I directed that the administrator files a formal application on the matter of the cane, and that the issue of the cane be handled simultaneously with the accounts with respect to timber and cattle.

3. In purported compliance with the orders of 10th April 2019, George Wendo Jeki, swore an affidavit on 29th July 2019, which he filed in court on even date. He conceded in that affidavit that he had indeed sold seven head of cattle belonging to the deceased. He explained that he did so with the authority of the deceased, and that after the sale he handed over the sale proceeds to the deceased. He stated that he did not know how the deceased applied the money. He further said that he drew no personal benefit from the proceeds of sale of the said cattle. He mentioned that the persons who bought the cattle were arrested after reports were made at the Kakamega Police Station by the administrator and Abraham Lukohe, but were released after the deceased confirmed that he had authorized the sales.

4. Abraham Lukoye Lisanza swore an affidavit on 26th March 2020, filed herein on 30th March 2020, to account for the trees felled and sold as timber. He explained that he had planted blue gum trees within the portion of Kakamega/Ileho/311 that he occupied. He said that he did so during the lifetime of the deceased. He stated that he nurtured them to maturity. He asserted that the deceased during his lifetime knew that the trees belonged to him. He stated that sometime in August 2018, he harvested 13 blue gum trees and 28 cypress trees, which he split into timber. He averred that he sold the timber and raised Kshs. 119, 991.00, which he applied to settle splitting charges, legal fees and on medical expenses for his ailing wife. He added that the deceased had, in 2008, sold his trees to a John Musonye Museti, he had tried to persuade him to allow him to sell his trees, but he, Abraham Lukoye had refused.

5. To the account by Abraham Lukoye, the administrator swore an affidavit on 26th June 2020, filed herein on 29th June 2020. He averred that Abraham Lukoye had sworn affidavits on 15th May 2013 and 14th August 2013, where he had stated that the blue gum trees belonged to the family, which he, Abraham Lukoye, had suggested ought to be sold and the proceeds applied to settle fees for survey works on estate land. He mentioned orders made on 1st August 2013, 29th January 2014, 11th October 2018 and 15th October 2018, which he said had all restrained the cutting of trees, which orders he said Abraham Lukoye refused to comply with. He also pointed at affidavits sworn on 13th August, 2013, by Gilbert Khamasi, Beatrice Lisanza and Dickson Amalemba, who had averred that the said blue gum trees belonged to the estate.

6. The administrator filed the application on the cane on 19th February 2020, of even date, seeking a variety of orders – that West Kenya Sugar Company Limited, (the company), be joined to the suit as an intermeddler, that the dealings with the company be declared unlawful, that the permit given to Abraham Lukoye to harvest cane on Kakamega/Ileho/311 be declared illegal, that the moneys paid by the company from deliveries of cane to it be deposited in court, that the company be restrained from cultivating on Kakamega/Ileho/311 pending distribution of the estate, that Abraham Lukoye be cited for contempt of court of the orders made on 3rd March 2014 and be arrested, and that the officer commanding the Mukhonje/Ileho Police Post ensure compliance with the any order requiring the arrest of Abraham Lukoye. In his supporting affidavit, he averred that Abraham Lukoye had contracted with the company over Kakamega/Ileho/311, in which he permitted the company to cultivate 5.8 acres of the estate land. He averred that should Abraham Lukoye go ahead and benefit from that contract he would have an undue advantage over other family members. He urged that Abraham Lukoye be found to be in contempt of court orders made on 3rd March 2014. He mentioned that the advocate for Abraham Lukoye had addressed the court on 18th February 2020 and informed it that Abraham Lukoye had cultivated cane on his own portion of Kakamega/Ileho/311.

7. Abraham Lukoye Lisanza replied to the application dated 19th February 2020, through the affidavit that he swore on 8th May 2020. He averred that when the deceased died on 25th June 2010 he had not cultivated any crops on Kakamega/Ileho/311, but he had allowed him to

utilize his portion out of Kakamega/Ileho/311, where he had planted maize and beans for consumption by his family. He decided towards the end of 2018 to plant sugarcane on the said portion, which he did, with the assistance of his children, and when the cane matured, he harvested the same in February 2010 and had it delivered to the company. He averred that the company ought not be brought into the matter as an intermeddler as it never leased, planted nor utilized any portion of Kakamega/Ileho/311. He avers that the cane he planted and harvested together with the proceeds of sale did not belong to the estate. He averred that he had only been utilizing the portion that the deceased had allocated to him during lifetime to support his family. He asserted that he had continued to utilize that portion as directed by the court on 3rd March 2014 and 31st May 2018. He argued that the application is overtaken by events as he had already received the proceeds of sale from the company. He asserted that no one should claim the proceeds of sale of the cane as they were not the ones who had planted it.

8. The administrator reacted to the affidavit by Abraham Lukoye sworn on 8th May 2020, by swearing and filing an affidavit herein on 12th June 2020. He averred that the harvesting and payment for the cane was done after the application was served, and, therefore, during the pendency of the application.

9. There is a reply to the application by William Kangwana Kulova, an official of the company, sworn on 25th September 2020. He averred that Abraham Lukoye had approached the company on 1st November 2018 for loan facilities to enable him cultivate cane on family property known as Kakamega/Ileho/311. He averred that he was informed by field assistants that the family had no objection, whereupon Abraham Lukoye was advanced various amounts, of money I suppose, from proceeds of the sugarcane harvested from the land. He averred that at no time did family members object to land preparation and other farm processes such as weeding and fertilizer application throughout the term of the sugarcane production. In the course of 2019, the administrator served the company with letters directing the company to cancel the contract with Abraham Lukoye on grounds that the company was intermeddling with the estate. Whereupon, the company advised the administrator that he should serve the company with a court order to stop it from harvesting the cane and paying Abraham Lukoye the proceeds. He averred that no such court order was served, and the company had no reason to stop harvesting the cane or paying Abraham Lukoye the proceeds. He averred that the company did not have any interest in the property apart from recovering the moneys it had advanced to Abraham Lukoye. He stated that the company was an innocent third party who was unaware of any intermeddling. He averred that the company had not intermeddled with the estate as it had paid all the proceeds of the sugarcane harvested to Abraham Lukoye.

10. Directions were given on 28th September 2020, for disposal of the three issues by way of written submissions. All the parties to the dispute have filed written submissions, which I have perused through, and noted the arguments made therein.

11. I will start by considering the issue of the sale of the cattle by George Jeki Wendo. I addressed this in my judgment of 10th April 2020. It is not disputed that George Jeki Wendo sold them before the deceased died. His accounts shed little light. He says that the persons who bought the cattle were arrested at the instance of the administrator and Abraham Lukoye, but they were subsequently released after the deceased confirmed that the sales were on his instructions. No concrete evidence was availed, say production of copy of some police record, showing that the police released the buyers on the basis of that confirmation. I do not think that much will come of this matter. As it relates to a period before the deceased died, I would hesitate to go beyond the account. There is no material before me which suggests that the sale proceeds were pocketed by George Jeki Wendo, or that he had not handed over the money to the deceased as at the date of his death therefore making the proceeds part of the estate. The account is inadequate, but it would be prudent to close the matter at that. In any case, if the administrator feels strongly about it, he should file a civil suit against George Jeki Wendo.

12. The issue of the trees that were cut by Abraham Lukoye is a little more substantial. Like in the case of the cattle, it is not disputed that Abraham Lukoye cut the trees, split them into timber and sold the same. In his account, he explained that he had planted the trees on the portion of land that the deceased had assigned to him during lifetime, and that the trees belonged to him, and he was entitled to cut them and sell them off as timber.

13. The question that I have had to grapple with is whether the trees belonged to Abraham Lukoye or to the estate. The fact that they grew on Kakamega/Ileho/311, which is estate property suggests that the said trees were estate property. Abraham Lukoye says that he was permitted to grow the trees by the deceased before the latter died. If that was so then he would be entitled to harvest the trees, and the timber would not be estate property. However, the issue is not that simple. I say so because what Abraham Lukoye says in his account that contradicts what he had averred previously with respect to the trees. In the affidavit that he swore on 15th May 2013, at paragraph 9, he referred to the said trees as "family commercial trees," which he identified as blue gum trees. He proposed that the said trees be sold to meet the cost of surveying and subdividing the land, with the remainder being shared equally amongst all the beneficiaries. So, in 2013, according to Abraham Lukoye, the trees belonged to the estate and he was proposing that the same be harvested to raise money for administration, with the balance being shared out equally amongst all the survivors of the deceased. He did not then claim that they were his, on account of his having planted them. He appears to me, in the two affidavits, to be speaking from both sides of his mouth. It is what perjury, or lying to court, is about. And it is a criminal offence.

14. What is more is that there was proposal at confirmation that the said same trees be given to the daughters of the deceased in lieu of them getting a share of the land from the estate. That was averred in the affidavit of George Wendo Jeki, sworn on 3rd April 2013, at paragraph 10, where he said that Kakamega/Ileho/311 had huge trees, which the deceased had allocated to the daughters to harvest, but he had not allocated the land to them. Benjamin Lisanza testified to that effect when he took the witness stand on 3rd April 2014. There are also affidavits on record, sworn on 13th August 2013 by Gilbert Khamasi Lisanza, Beatrice Khenyeni Lisanza and Dickson Amalemba, all averring that the said blue gum trees, which they identified as family commercial trees, belonged to the estate, and proposing that the same be sold and the proceeds utilized in estate administration, with the balance being shared out amongst the survivors. There appears to be consensus that the said trees in fact belonged to the estate.

15. There was intense litigation in 2013/2014, in this cause over the said trees, through a chamber summons filed by the administrator on 1st August 2013, of even date, which targeted George Wendo Jeki, Abraham Lukoye and Dickson Amalemba, who were sued as intermeddlers. They were accused of embarking on an exercise of cutting trees on Kakamega/Ileho/311, shortly after the deceased died, which they converted into charcoal, firewood and timber for sale. In his reply, Abraham Lukoye, in the affidavit sworn on 14th August 2013, he did not deny cutting trees, neither did he aver that the trees he cut had been planted by him. George Wendo Jeki denied cutting trees. There is an

affidavit by Janet Munayi Lisanza, sworn on 19th August 2013, where she accused George Wendo Jeki, Dickson Amalemba and Abraham Lisanza of harvesting all the trees on Kakamega/Ileho/311, and converting them into charcoal, firewood and timber and disposing the same, and spending the money on their own personal needs. She prayed that punitive action be taken against them, and that they be made to reimburse the estate their equivalent in monetary form. Eventually, the court made orders on 21st October 2013, on the application dated 1st August 2013, restraining George Wendo Jeki, Dickson Amalemba and Abraham Lukeyo from cutting “any trees” on Kakamega/Ileho/311, effective from that date. The order was not time-bound, and I have not come across any other order reversing it. Indeed, a further order was made on 14th November 2018 reinforcing the earlier order, to the effect that none of the parties was to harvest any of the trees on Kakamega/Ileho/311, pending distribution of the estate or further orders of the court.

16. From the narrative above, it is clear that the trees the subject of the account belonged to the estate. Further, there are clear orders dating to 2013 which restrained Abraham Lukoye, among others, from felling or cutting or harvesting trees. There is no evidence that the orders of 2013 were time-bound, and lapsed at any time. They were open-ended, and intended to last till distribution of the estate, which is yet to happen. Abraham Lukoye did not deny then nor does he do so now deny cutting trees, instead he asserts that what he cut belonged to him. The report by the Deputy Registrar records that the trees cut appeared to be mature. In any event the orders on record, talk about the cutting of “any trees,” regardless of whoever had planted. With such an order in place, any person desiring to cut trees, for whatever reason, could only do so with the leave of court. There is no evidence that Abraham Lukoye ever approached the court for permission, because of the orders in force, to harvest the trees he alleged he had planted. The act of cutting the trees, despite the orders, amounted to non-compliance, defiance and disobedience of a clear court order. It is what contempt of court is about.

17. The third matter for consideration is the application dated 19th February 2020, which is about Abraham Lukoye entering into a contract with the company for harvesting of sugarcane from estate land. He asserted that the he had planted the cane, it belonged to him and, therefore, it did not belong to the estate, and there could not have been any intermeddling with the estate.

18. I have perused the court record, and noted that orders were made on 3rd March 2014, restraining any person entitled to a share in the estate from further intermeddling until confirmation of the grant and distribution of the estate. There was an additional order that should Abraham Lukoye and Dickson Amalemba disobey the said orders, by cultivating the land or allowed it to be grazed upon, they should be arrested and brought to court. There is also an order that that the parties should confine themselves to the portions that they had previously been cultivating. Another order was made on 16th December 2014, on a summons dated 16th September 2014, to the effect that each party to the application, that is to say the administrator, on one hand, and George Jeki Wendo, Abraham Lukoye and Dickson Amalemba, on the other, were to confine themselves to occupying and working on the portions that they had occupied and worked before the deceased died.

19. I understand Abraham Lukoye to be saying that, that is what he had done, planted cane on the portion that the deceased had left him occupying and working on as at the date of his death. His case is that the cane he was harvesting had not been planted by the deceased before he died, but, rather Abraham Lukoye grew the same for the upkeep of his family, but on the portion that the deceased had let him occupy and use before he died. I have perused through the affidavit, that the administrator swore in support of the application dated 19th February 2020, and I have not come across any averment that the cane in question was grown outside the portion that Abraham Lukoye occupied before the deceased died. I say so because the orders of 3rd March 2013 and 16th December 2014 were clear that the parties to the applications, the subject of those orders, who included Abraham Lukoye, were entitled to confine their agricultural activities to the portion of Kakamega/Ileho/311, and they were to fall afoul of the orders if their activities exceeded those confines or bounds. The administrator was bound to demonstrate that the activities of Abraham Lukoye of growing cane on Kakamega/Ileho/311 were outside the portion of the land that the said Abraham Lukoye had occupied and worked on before the deceased died. No effort was made to demonstrate that. Instead, the administrator contented himself with proving that Abraham Lukoye was cultivating cane on estate property and had contracted the company to harvest the same, yet that was not the most critical thing. What should have been demonstrated was that Abraham Lukoye had exceeded the bounds of the orders made on 3rd March 2013 and 16th December 2014. That has not been demonstrated, and, therefore, it has not been established that Abraham Lukoye and the company acted in contravention of court orders. Furthermore, the cane in question was not shown to have had been planted by the deceased. The evidence on record, inclusive of the report by the Deputy Registrar, point to the same having been planted by Abraham Lukoye. Whether he planted it on the portion he occupied or worked prior to the deceased’s death or beyond the confines thereof is what is critical, and is what the administrator has failed to demonstrate.

20. Overall, it is my finding and holding that regarding the cattle, the matter should be left to rest for the reasons given above. Alternatively, the administrator is at liberty to file a civil suit against George Jeki Wendo. On the trees, the record points to the fact that Abraham Lukoye acted contrary to court orders, and his account does not at all clear the air. On the application dated 19th February 2020, I find that there is no merit in it, and I hereby dismiss it. Each party shall bear their own costs. The matter is disposed of in those terms.

21. Having found that the conduct of Abraham Lukoye, with regard to the trees, bordered on contempt of court, I must state that I cannot cite him for contempt of court. The law on contempt of court committed away from the face of the court, or *ex facie* requires that contempt proceedings be mounted in the usual way, and that it is only after that process is completed, that a court can pronounce whether Abraham Lukoye was guilty of contempt of court or not. Contempt proceedings are quasi-criminal in nature, for the consequences are that the contemnor may end up serving term in civil jail or paying a hefty fine. However, before the said sanctions are imposed, the contemnor must be taken through due process, being contempt proceedings that are mounted in accordance with the law as laid down. The administrator, if he is minded to, ought to initiate such proceedings against Abraham Lukoye.

22. Any party aggrieved is hereby granted leave to appeal to the Court of Appeal, within twenty-eight (28) days. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22nd DAY OF JANUARY 2021

W. MUSYOKA

JUDGE