

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 649 OF 2009

IN THE MATTER OF THE ESTATE OF WILLINGTON NYANGULE MULAMA (DECEASED)

RULING

1. The application for determination is the summons in chambers, dated 24th June 2019, principally seeking review of orders that were made on 24th October 2013, arising from an application dated 19th August 2013. The application is brought at the instance of Benson Miller Sakwa Akhule, who I shall refer to hereafter as the applicant. He seeks review and setting aside of the said orders, which cancelled the subdivision of Marama/Shinamwenyuli/1225 into Marama/Shinamwenyuli/2144 and 2145.

2. The applicant argues that the application dated 19th October 2013 was never served on him. He asserts that he was the registered proprietor of Marama/Shinamwenyuli/2144 and 2145, being subdivisions from Marama/Shinamwenyuli/1225, which he had purchased from the deceased during his lifetime. He avers that Marama/Shinamwenyuli/2144 and 2145 do not form part of the estate of the deceased. He accuses the administratrix, Wilkester Shiundu Malilo, of concealing from the court the fact of that sale. He avers that he took possession of the land. He mentions that he has come to discover that there was suit in Kakamega HCCC No. 95 of 2005, where he is named as defendant. He has attached copies of the two sale agreements and the title deeds in respect of Marama/Shinamwenyuli/2144 and 2145.

3. The administratrix responded to the application vide an affidavit she swore on 4th November 2019. She avers that the applicant had been properly served with the application dated 19th August 2013, which culminated in the orders of 24th October 2013. She makes reference to an affidavit of service that was placed on record by a process server, known as Geoffrey Odera Nyambaka. She asserts that the applicant never bought any land from the deceased, but acquired the titles on record through forgery, and she basis her assertion on the fact that her father, the deceased, was an educated person who could not have thumb-printed the document instead of executing the same by way of his known written signature.

4. The reply elicited a response from the applicant, vide an affidavit sworn on 19th February 2020. He avers that the affidavit of the process server relied on by the administratrix was comprised of falsehoods, for he was out of the country at the time of the alleged service. He has attached documents to support that.

5. The background is that the court had, on 7th February 2013, delivered a ruling, where it revoked a grant made to a brother of the deceased, and appointed the administratrix, a daughter of the deceased in his place. The grant of 7th February 2013 was confirmed the same day, and Marama/Shinamwenyuli/1225 was devolved upon the administratrix. The court urged her to pursue a pending suit, which was not identified in the ruling, to its final conclusion. Thereafter, the administratrix filed the summons dated 19th September 2013, seeking cancellation of the two subtitles created from Marama/Shinamwenyuli/1225, that is to say Marama/Shinamwenyuli/2144 and 2145, and restoration of the property to the original title in the name of the deceased, and a permanent injunction to restrain the applicant from claiming any portion of Marama/Shinamwenyuli/1225. The administratrix was arguing that the court had devolved Marama/Shinamwenyuli/1225 to her, but she was unable to have it registered, as she had discovered that the applicant had fraudulently caused subdivision of that property into Marama/Shinamwenyuli/2144 and 2145. That application was placed before the Judge on 24th October 2013, and was allowed.

6. Then another application was lodged at the registry, on 6th March 2015, of even date. It was at the instance of Sarah Nyangala Mukolwe. She wanted the grant made to the administratrix revoked. Her complaint was not about the grant itself, but that the orders made on 24th October 2013 had been implemented in a manner that affected two titles that belonged to her, being Marama/Shinamwenyuli/2154 and 2473, which were subtitles from Marama/Shinamwenyuli/1225. Her case is that as at 24th October 2013, when the orders cancelling Marama/Shinamwenyuli/2144 and 2145 were made, the two titles did not exist, and that the titles cancelled instead, by the land registrar, were Marama/Shinamwenyuli/2154 and 2473. She explained that she had, in 1996, bought 3 acres out of Marama/Shinamwenyuli/1225, and the deceased caused Marama/Shinamwenyuli/1225 to be subdivided in 2001 into Marama/Shinamwenyuli/2144 and 2145. Marama/Shinamwenyuli/2144 was then subdivided, during the lifetime of the deceased, to create Marama/Shinamwenyuli/2153 and 2154, out which Marama/Shinamwenyuli/2154 was then transferred to her name. She subsequently subdivided Marama/Shinamwenyuli/2154 into Marama/Shinamwenyuli/2473, 2474 and 2475. She sold Marama/Shinamwenyuli/2474 and 2475, retaining Marama/Shinamwenyuli/2473. She averred that in 2006, as the deceased was dying, she had no dispute with him. She complained that she was not party to the application that led to the orders of 24th October 2013, which cancelled her titles.

7. Directions were made on 20th July 2015, on the application dated 6th March 2015, for its disposal on the aspect of the confirmation of Marama/Shinamwenyuli/1225, to the effect that that application be canvassed by way of oral evidence. The oral hearing commenced on 28th September 2015. Sarah Nyangala Mukolwe testified. The other witness testified on 13th November 2018, Martha Shitawa Mukolwe. Musa Wakhu Nekolo, Asuman Alambe Kweyu and Julius Sawenja Khabilo followed, before Sarah Nyangala Mukolwe closed her case. The matter was then reserved for defence hearing.

8. As it is, the issues raised in the application by the applicant and that by Sarah Nyangala Mukolwe are similar. They revolve around the

subdivision of Marama/Shinamwenyuli/1225, by the deceased, after which he sold a portion of the land to both the applicant and Sarah Nyangala Mukolwe. What is even more critical is that both the applicant and Sarah Nyangala Mukolwe claim the same property Marama/Shinamwenyuli/2144. The question is, who between the two actually bought that asset, if at all, from the deceased. I have also seen on record pleadings that had been filed in Kakamega HCCC No. 95 of 2005, pitting the deceased and the applicant, with the deceased accusing the applicant of using fraud to procure transfer of Marama/Shinamwenyuli/2145 to himself. As it is, there are issues here. One, although the applicant claims both Marama/Shinamwenyuli/2144 and 2145, Sarah Nyangala Mukolwe claims Marama/Shinamwenyuli/2144 also. Two, there is a suit between the estate and applicant, which pre-dates this succession cause, over the ownership of Marama/Shinamwenyuli/2145, between the deceased and the applicant. I believe it is that suit that the Judge, in the ruling of 7th February 2013, advised the administratrix to pursue to finality.

9. As it is, the issues that arise in the instant application are the subject to the application by Sarah Nyangala Mukolwe and in the suit in Kakamega HCCC No. 95 of 2005. The application by Sarah Nyangala Mukolwe is part-heard, while the status of Kakamega HCCC No. 95 of 2005 is unknown. I believe that I cannot determine the instant application without compromising or causing prejudice to Sarah Nyangala Mukolwe, given that the applicant herein claims a property that she is also claiming. The best way forward would be for the applicant to join the application by Sarah Nyangala Mukolwe, so that they can battle it out over the ownership of Marama/Shinamwenyuli/2144. Of course, I doubt whether I have jurisdiction to venture into that area, but since the matter is part-heard it ought to go onto its conclusion. Regarding Marama/Shinamwenyuli/2145, the same ought not be canvassed in this cause, since it is the subject of Kakamega HCCC No. 95 of 2005, a case the deceased had commenced before his death. The applicant will be better of pursuing his claim in that separate suit, before a court competent, jurisdiction-wise, to determine the question of ownership.

10. The final orders that I make herein are that the instant application is hereby be consolidated with the application by Sarah Nyangala Mukolwe, for the reasons given in paragraph 9 here above. However, only one aspect of the application is to be canvassed within that of Sarah Nyangala Mukolwe, and that is the one relating to Marama/Shinamwenyuli/2144. The issue relating to Marama/Shinamwenyuli/2145 shall not be canvassed within that application but in Kakamega HCCC No. 95 of 2005. The application dated 24th June 2019 is disposed of in those terms. Each party shall bear their own costs. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6TH DAY OF AUGUST, 2021

W. MUSYOKA

JUDGE