



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VIHIGA

SUCCESSION APPEAL NO. 90 OF 2021

(from the decision of Hon. B. Ireri, Principal Magistrate (PM) delivered on 5th February 2014 in Vihiga PMCSC No. 85 of 2009)

BENJAMIN KASI.....APPELLANT

VERSUS

MACDONLD MUGESANI.....RESPONDENT

JUDGMENT

1. These proceedings relate to the estate of Peter Mudonyi, who died on 15th May 1996. A petition was lodged, in Vihiga PMCSC No. 85 of 2009, on 5th October 2009, by Benjamin Kasi, seeking representation to the intestate estate of the deceased. He listed, in the petition, individuals that he said were the sons of the deceased, who had survived the deceased, that is to say Joseph Amukoye Mudonyi, Benjamin Kasi, Peter Simani, Alfred Mahano, Yakubu Enyangala and Kereb Ngayira. He expressed the deceased to have had died possessed of a property known as Tiriki/Chepkoyai/1054. A grant of letters of administration intestate was made to the petitioner, Benjamin Kasi, on 8th July 2010, and a grant was duly issued, dated 15th July 2010.
2. On 16th March 2011, the administrator mounted a summons for confirmation of his grant, dated, 14th March 2011. He proposed that Tiriki /Chepkoyai/1054 be shared equally between the six sons of the deceased, Joseph Amukoye Mudonyi, Benjamin Kasi, Peter Simani, Alfred Mahano, Yakubu Enyangala and Kereb Ngayira.
3. The confirmation application attracted a protest by Macdonald Mugesani, through an affidavit that he swore on 14th May 2011. He averred that he had bought a portion of Tiriki/Chepkoyai/1054 from Yusuf Amukoye Mudonyi, one of the sons of the deceased, whereupon he went on to develop the land he had bought. The document placed on record indicates that the sale happened in 2006. A trial was conducted, and a judgment was delivered in favour of the protestor. The trial court found that there was evidence of the sale transaction. The court took the view that the fact that the land was still in the name of deceased did not defeat the transaction, as the seller had sold the portion that was due to him from the estate. It was directed that the protestor be treated as one of the beneficiaries of the estate.
4. The appeal herein arose from the said judgment. It was initiated by way of a memorandum of appeal, filed herein on 14th February 2014, dated 10th February 2014. It was initiated by the administrator, Benjamin Kasi, who I shall refer hereto as the appellant, against the protestor, Macdonald Mugesani, who I shall refer to hereafter as the respondent. The appellant in his memorandum argues that the court erred in treating the respondent as one of the dependants of the deceased, failed to consider that the respondent did not buy any land from the deceased, failed to consider that the seller Joseph Amukoye was not an administrator of the estate, it was not considered that the purported vendor had no capacity to sell the property of a dead person, and the court failed to consider the Law of Succession Act, Cap 160, Laws of Kenya.
5. The appeal was canvassed by way of written submissions. Both sides have filed written submissions, which I have perused through and noted the arguments made.
6. The matter is fairly straightforward. The contest is that the trial court decreed that the respondent, who had allegedly bought a portion of the estate from a son of the deceased, after the demise of the deceased, be treated as a beneficiary.
7. It is common ground that the deceased in 1996, and the contested sale happened in 2006. The deceased was not party to the sale for he was long dead. Representation to the estate was obtained in 2010, by the appellant herein. The sale happened before then, and that meant that, as at 2006, the estate of the deceased had not been committed to an administrator.
8. According to section 45 of the Law of Succession Act, the handling of the estate of a dead person by a person who has no letters of administration amounts to intermeddling, which is a criminal offence. The grant of letters of administration intestate enables the

administrator to lawfully deal with the property of a dead person. Without such a grant any handling of the property would amount to intermeddling. In 2006, the seller, Joseph Amukoye, had not obtained letters to administer the estate of the deceased, and, therefore, by handling the estate, he was committing intermeddling. He was engaging in criminal activity by purporting to sell the land. He had no authority to sell the property, and he could bind no one. A transaction tainted by criminality cannot possibly confer any legal rights to anyone.

9. The material before me indicates that the deceased died intestate. There is no allegation that the deceased had made any written will. Under section 81(2) of the Law of Succession Act, a grant of letters of administration intestate becomes effective from the date the grant is made. The grant herein was made in 2010, that is when administration of the estate commenced. Before then, including 2006, no one had letters of administration, and no one could lawfully administer the estate, and any dealing with the property before 2010 by anyone was unlawful. That meant that any sales carried out by anyone before the grant was made in 2010 were unlawful, and of no effect. A grant of letters of administration intestate has no retroactive effect. The principle of relation back does not apply to it, so as to authenticate any intermediate acts between the date of death and the date of the making of the grant.

10. The other critical provision is section 79 of the Law of Succession Act. It provides that the estate of a dead person vests in his personal representatives, being the executors of his will, where he died testate, and an administrator in intestacy where he died intestate. That would mean the property does not just vest in any one, but the persons to whom a grant of representation has been made. That vesting constitutes them legal owners of the estate property, in terms of them being able to step into the shoes of the dead owner, and being able to do things, with respect to the estate, that the deceased would have done, such as entering into contracts, suing and being sued, etc. It is only the grant holder who can deal with the assets as if they belonged to him. In 2006, Joseph Amukoye, was not the administrator. He did not hold a grant, and the estate of the deceased did not vest in him, by virtue by section 79. He could bind no one, and whatever he did amounted to intermeddling, according to section 45 of the Law of Succession Act. The only person who could bind the estate was the appellant, upon grant being made to him in 2010, but he was not party to the 2006 events, and in any event, the said events happened before grant was made, and even if he were to be involved it would have been of no effect.

11. The transaction the subject of the proceedings was land, and section 82 of the Law of Succession Act is equally critical. It requires that no immovable asset of the estate is to be disposed before the grant had been confirmed. The transaction of 2006 disposed of an immovable asset of the estate. In 2006, representation had not been granted, and, therefore, the issue of the grant being confirmed did not arise. The said sale happened before the grant had been confirmed, and, therefore, the transaction got caught up in section 82(ii) of the Law of Succession Act, and was unlawful. The trial court had no legal basis for sanctioning a transaction that was unlawful through and through. It was as dead as a dodo, and the seal of the court could not possibly sanitize or legitimize it.

12. The trial court fell in error, in treating the respondent as a beneficiary of the estate. He was not. He was no kin of the deceased. He did not acquire any stake in the estate through a transaction between him and the deceased. He had no claim against the estate, to warrant his being made a beneficiary of the estate.

13. The transaction that the respondent is hanging on, to lay stake to the estate, was between him and an intermeddler. Such a transaction could not give him any legal status in the estate, for the intermeddler had no good title in the property to pass to the respondent. The transaction was unlawful on account of sections 79 and 81 of the law of Succession Act, as stated in the preceding paragraphs of this judgment. He had no authority to sell the land. He passed no title, and the respondent acquired no interest whatsoever in the assets, for the reasons given above. The respondent has no claim against the estate, he can only look up to the person that he transacted with, or his estate, to get his share of the property, after the grant has been confirmed.

14. I hereby find merit in the appeal herein, and I hereby allow the same. The order of the trial court, that the respondent be treated as a beneficiary of the estate, is hereby vacated. The property, Tiriki/Chepkoyai/1054, shall be shared equally between the six sons of the deceased, being Joseph Amukoye Mudonyi, Benjamin Kasi, Peter Simani, Alfred Mahano, Yakobu Enyangala and Kereb Ngayira. The respondent shall pursue his claim thereafter from Joseph Amukoye Mudonyi or his successors. The grant shall be confirmed in those terms. The certificate of confirmation of grant shall issue out of Vihiga PMCS No. 85 of 2009. The appellant shall have the costs. The instant file shall be closed, while the file in Vihiga PMCS No. 85 of 2009 shall be returned to the relevant registry, for issuance of the certificate of confirmation of grant, and other processes. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF OCTOBER, 2021

W. MUSYOKA

JUDGE