



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 720 OF 2006

IN THE MATTER OF THE ESTATE OF WECHULI MWOMBE (DECEASED)

JUDGMENT

1. The matter herein commenced by way of a citation, to accept or refuse letters of administration intestate, issued at the instance of Danson Muhehe, the citor, directed at Nyongesa Wechuli Mwombe, the citee, on grounds that the citor was a purchaser and occupant of LR No. 13 Nzoia Settlement Scheme, allotted in the name of the deceased herein, Wechuli Mwombe, from the Settlement Fund Trustees, since 1968. He averred that his brother, Joshua Martin Muhehe, took possession of the land immediately after it was purchased. The deceased died on 10th October 1993, before the property was transferred to the purchaser, and the citee had refused to cooperate, with respect to obtaining representation to facilitate transfer of the property.
2. A citation in those terms issued, dated 7th November 2006. The citee was traced and served on 3rd May 2007. The citation was then fixed for mention on 29th May 2008, and a notice to that effect was served on the citee on 13th April 2008. Two affidavits of service were thereafter filed, as proof of service, of the citation and the notice for directions. Come 29th May 2008, the citee did not attend court, and the citor was granted leave to proceed to institute proceedings in the estate of the deceased herein.
3. The citor, using the name Saulo Danson Muhehe, filed a petition herein, on 24th June 2009, for representation to the intestate estate of the deceased, in his capacity as citor. He listed himself as the survivor of the deceased. The property that made up the estate of the deceased was said to be LR No. 13 Nzoia Settlement Scheme. Letters of administration intestate were made to him on 4th September 2009, and a grant was duly issued, dated 14th September 2009. I shall refer to the citor hereafter as the administrator. The said grant was confirmed on 12th April 2011, on an application dated 22nd October 2009, and the estate was devolved wholly upon the administrator.
4. What I am called upon to determine is the summons for revocation of grant, dated 22nd August 2011, brought at the instance of Joshua Martin Anusu. He would like the grant to be annulled, or, alternatively, that he be made a co-administrator. He claims to have had bought the property from the deceased, and to have occupied the land since 1968. He says he executed sale agreements with the deceased in 1974 and 1975. He avers that the deceased moved out of the land after the sale. He says that the agreement was that he would take over the loan due to the Settlement Fund Trustees, which he did, and he cleared the loan. The deceased then signed the relevant documents that would have facilitated transfer of the property to his name. He avers that he attended before the Lugari Land Control Board sometime in 1981, but he was not able to have the property transferred to himself as the deceased did not attend before the land control board. He died in 1982, after which he approached the sons of the deceased to have them take out letters of administration intestate to facilitate transfer of the property to his name. He states that he had invited the administrator, who he describes as his brother, to the land to stay there with him, and allocated to him two acres to till. He asserts that the administrator was a mere licensee who did not participate in the purchase of the property. He expresses surprise that he sought and obtained representation to the estate and went on to have it wholly devolved to himself. He states that representation was obtained secretly. He says he occupies forty-eight acres, while the administrator still occupies the other two. He states that the land was still in the name of the Settlement Fund Trustees. I shall refer to Joshua Martin Anusu as the first applicant.
5. He has attached to that affidavit several documents. There is a letter dated 31st May 1974, written by the deceased, addressed to the Settlement Fund Trustees, informing the Fund that he had sold the property to the first applicant, and that the first applicant was to take over the loan. The letter dated 9th February 1975 is from the deceased, addressed to the first applicant acknowledging receipt of part of the sale price. The letter dated 27th November 1968 is from the Settlement Fund Trustees, informing the first applicant that he was in arrears with respect to settlement of his loan dues. The letter dated 15th February 1996 is from the Settlement Fund Trustees, addressed to the administrator, the deceased and the first applicant and inviting them for resolution of a dispute relating to transfer of the land. There is a letter dated 3rd April 1989, from the Settlement Fund Trustees asking the deceased to sign certain forms to facilitate transfer of the property to the first applicant. A certificate of official search, dated 20th July 2011, indicates that the property was registered on 22nd November 1980 in the name of the Settlement Fund Trustees. There is also a bundle of official receipts in respect of payments made to the Settlement Fund Trustees, by the first applicant and the deceased.
6. The administrator responded to that application, vide an affidavit that he swore on 19th September 2011. He asserts to be the *bona fide*

purchaser of that property from the deceased. He states that the first applicant was his younger brother, who he had taken under his wings, and bought him a *posho* mill, and settled him at Webuye. He gives a detailed account of how he raised money, which he then used to purchase the subject property. He agreed with the deceased on the purchase price, and then gave the money to the first applicant to deliver to him. He avers that he took over payment of the loan. After he completed payment, he wrote to the Ministry of Lands, asking that the property be transferred to his name. He was advised to conduct a succession to the estate of the deceased, hence these proceedings. He avers that he cited a son of the deceased, but he took no action. He asserts that the first applicant was not entitled to the land, and had nothing to prove ownership. He has attached receipts to his affidavit showing that he made certain payments to the Settlement Fund Trustees, some in his name, some in the name of the deceased and some in the name of the first applicant. There is a letter that he wrote to the Director of Land Adjudication and Settlement, dated 8th July 1996, in which he enquires about what had been decided on the ownership of the subject property. The Director of Land Adjudication and Settlement wrote, in response, the letter dated 11th September 1996, where he is noncommittal on who was entitled to it, but advising them to seek representation to the estate of the deceased to facilitate registration either way.

7. There is a second application for revocation of grant, by John Ekesa Mwombe, dated 17th February 2012. He is a purported son of the deceased, and asserts that the administrator was not an heir of the deceased, for he was not a child of the deceased. He expresses fear that the administrator may pursue other assets of the deceased using the grant he holds. He further asserts that the administrator never bought the property from the deceased. He states that he had been nominated by the family to seek representation to the estate, only to discover that a grant had been made and confirmed, without informing the family. He states that the deceased had eight children, who are all alive, but who he has not mentioned in his application. I shall refer to John Ekesa Mwombe as the second applicant.

8. To that application, the administrator has responded. He states that he has never claimed to be a child of the deceased, and that he had obtained representation on the basis of a citation. He asserts that he was a *bona fide* purchaser of the property in question, and that he limited his administration of the estate to the property that he was claiming. He avers that the family of the deceased had been unwilling, since his death in 1993, to take out representation to his estate, hence the citation, and the initiation of the cause in his estate. He asserts that he did not file his application in secrecy, pointing at the fact that the initiation of the cause was published in the *Kenya Gazette*. He accuses the second applicant of colluding with the first applicant to frustrate his efforts to get his land.

9. Directions were given on 23rd February 2012, for disposal of the revocation applications by way of *viva voce* evidence.

10. The oral hearing commenced on 24th October 2012. The first applicant was the first on the stand. He detailed how he allegedly bought the disputed land from the deceased. The second applicant followed. He said he was a nephew of the deceased, since the deceased was a brother to his father. He stated that the citee was his younger brother. He said that the deceased had sold the land to the first applicant. He stated that the deceased had his own children, eleven of them. Japheth Simiyu Mwombe was the son of the deceased. He said that his father had seven daughters and five sons. He described the citee as his blood brother. He said that his father had sold the land to the first applicant. He stated that the administrator lived on the land, although the loan was repaid by the first applicant. He said that his father had other lands, but they had not yet sought representation with respect to the other assets. The administrator said that he bought the property together with the first applicant. He then went into details about where he got the money that he used to buy the property. The administrator died before the hearings were concluded, and his son, John Mboge Muhehe, stepped in as a witness, whose evidence largely reiterated what his late father had previously told the court. The last witness was from the Settlement Fund Trustees. He stated that the person entitled to the land was the administrator, as he was the one who repaid the settlement and development loan in full. He added that the land was not transferred to him as there was a court order restraining the same. He said the deceased was the allottee and settler, and if he died, it was his relatives who were entitled to undergo succession.

11. At the end of the oral hearing, the parties were directed to file and serve written submissions. They have complied. I have read through the written submissions placed on record, and I have noted the arguments made in them.

12. The tussle herein is really not on representation or administration, for the family of the deceased does not appear to have much interest in the property in question. The main fight is between two individuals, who are not members of the family of the deceased, but who claim to have had bought the property from the deceased. It is a fight over ownership of that land as between the administrator and the first applicant, for both say that they bought it. The family appears to side with the first applicant, while the Settlement Fund Trustees appears to hold that the administrator was the person they considered to be rightfully entitled to the property.

13. As the principal dispute is over ownership of land, it may be well to state that I, sitting as High Court, have no jurisdiction to make a determination as to ownership of the land as between the administrator and the first applicant. I have no jurisdiction to venture to determine the validity of the sale transactions allegedly carried out by the administrator, the first applicant and the deceased. Disposal of interests in land pave way to ownership of such land, and its occupation and use. The High Court no longer has jurisdiction over such matters, by virtue of Article 165(5) of the Constitution, for Article 162(2) of the Constitution has vested jurisdiction over the same in the Environment and Land Court. Disposal of interests, use and occupation of land are governed by the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. Both statutes, at sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act, have defined court, for the purpose of disputes and actions relating to matters that are governed by those two statutes, to be the Environment and Land Court. The point, therefore, that I make is that the issue as to who is entitled to the disputed land, as between the administrator and the first applicant, is not for me to determine. The parties will have to initiate separate proceedings elsewhere for that purpose.

14. That then leaves me with the issue of revocation of the grant. It is plain that before the administrator initiated this cause for representation, he had cited a son of the deceased in this cause, with a view to getting him to obtain representation to the estate of his late father, so that the administrator could agitate his claim in that succession cause, to have the land transferred to his name. A citation was issued by the court, dated 7th November 2006. The said son was served, with a copy of the citation, and a hearing notice. On the date appointed for mention for directions, he did not attend court. The matter was before Ochieng J, on 29th May 2008. As the citee was not in court, and had not answered the citation, the court had no option but to allow the administrator to petition for representation. It cannot, therefore, be said that the administrator obtained administration or representation through a flawed process. The family of the deceased was prompted, but it ignored the prompting. The deceased died in 1993, the administrator did not come to court until 2006, some thirteen or so

years later. Where was the family all this while? Who had stopped it from seeking representation? I find no wrongdoing on the part of the administrator.

15. The way forward. As I am not able to determine ownership, on account of lack of jurisdiction, and as it is clear that the family does not claim the property, it would only be right that the interests of all is protected pending initiation of separate proceedings elsewhere, should the parties be minded to go that way. I note that there are restraining orders in force. The same should remain so until the issue is resolved in those other proceedings. I note too that the deceased was survived by children and had other property, and succession proceedings have not been initiated with respect to those other assets. It is not permissible that a separate succession cause be initiated for that purpose, and, therefore, those other assets have to be brought into this cause for distribution in this cause to the children. See *In re Estate of Margaret Nduta Maina (Deceased)* [2018] eKLR (Muigai J), *In re Estate of Kariuki Gachenga (Deceased)* [2018] eKLR (Musyoka J) and *Re Estate of Lyduska Hornik Plato (Deceased)* [2012] eKLR (GBM Kariuki J). An administrator will have to be appointed from within the family, to work together with the current administrator. As the issue of ownership will have to be determined by the court with jurisdiction on the ownership of Plot No. 13 Nzoia Settlement Scheme, it will be prudent, for preservation purposes, to set aside the confirmation orders made on 12th April 2011. I note that the initial administrator has died, his son substituted him as such administrator, vide orders that were made on 31st October 2019, on an application dated 14th November 2018.

16. In the end, these are the orders that I make:

(a) that I shall not revoke the grant herein, but I shall confirm John Mboge Muhehe as administrator, and appoint, in addition, Japheth Simiyu Mwombe as administrator;

(b) that a grant of letters of administration intestate shall issue to the two of them to complete administration of the estate herein;

(c) that I hereby set aside the orders that were made on 12th April 2011, in confirmation of the grant herein, to pave way for a fresh distribution where all the survivors of the deceased, and all those beneficially entitled to a share in the estate, are provided for and involved in the process in accordance with the law;

(d) that to facilitate a fresh distribution, I hereby cancel the certificate of confirmation of grant, that issued out of the orders of 12th April 2011, of even date, and annul all transactions that were or might have been carried out on the basis of the said cancelled certificate;

(e) that John Mboge Muhehe and the first applicant shall initiate separate proceedings, before the court with jurisdiction, for a determination of the question on entitlement to ownership of the subject property, and the grant made in (a) above shall only be confirmed after that issue has been resolved;

(f) that each party shall bear their own costs; and

(g) that any party, aggrieved by these orders, has leave of twenty-eight days, to challenge the same at the Court of Appeal.

17. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF DECEMBER 2021

W. MUSYOKA

JUDGE

In the presence of:-

Erick Zalo – Court Assistant

Mr. Mwebi for Ms. Rauto for the Petitioner