



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 398 OF 2011**

**IN THE MATTER OF THE ESTATE OF MIKOLAMATI ATEYA ALIAS NIKOLA MATI ATEYWA (DECEASED)**

**RULING**

1. This matter relates to the estate of Mikola Mati Ateya alias Nikola Mati Ateywa, who died on 23<sup>rd</sup> July 1995. According to the letter from the Assistant Chief of Kochwa Sub-Location, dated 14<sup>th</sup> November 2009, the deceased was survived by a widow, Jane Namalwa Mati, a son, Andrew Wawire Mati, and a daughter-in-law, Everlyne Nekesa Wafula. He was said to have owned a property known as Sidikho/Bunyala/1253.

2. Representation to his estate was sought vide a petition lodged herein on 26<sup>th</sup> August 2011, by Jane Namalwa, in her capacity as widow of the deceased. She expressed the deceased to have had died possessed of Sidikho/Bunyala/1253 and to have been survived by the individuals mentioned in the Assistant Chief's letter that I have mentioned above. Letters of administration intestate were made to him on 20<sup>th</sup> November 2012, a grant was duly issued, dated, 23<sup>rd</sup> November 2012. I shall consequently refer to her as the administratrix. The said grant is yet to be confirmed.

3. What I am called upon to determine is a summons dated 8<sup>th</sup> May 2013, and which was lodged herein on 13<sup>th</sup> May 2013, by Abraham Mango Mateteh and Saleh Sifuna Mango, to be hereinafter referred to as the applicants. The grounds upon which the application was premised are set out on the face of the application, while the factual background is given in the joint affidavit in support of the application, sworn by the applicants on 8<sup>th</sup> May 2013. They seek that dealings in Sidikho/Bunyala/1253 be prohibited and inhibited, and the administratrix restrained from dealing with the said property in any manner pending disposal of the application. It is also sought that the said property be removed from the schedule of the assets of the estate and that the name of the administratrix be removed from the proprietorship of the said property.

4. The applicants aver that they were the registered proprietors of Sidikho/Bunyala/1253 having bought the property in 1998 from a person they named as Leo Wafula, after which they caused it to be registered in their names and they took possession of it. They state that Leo Wafula had acquired the property by way of gift from the deceased, who was his father and the father of the administratrix. The said Leo Wafula is said to be deceased. They aver that when the cause herein was initiated Sidikho/Bunyala/1253 was still registered in their respective names. For that reason, they argue that the said property does not form part of the estate of the deceased, and as they were still alive, the property could not be subjected to succession proceedings. They state that sometime in 2013 the administratrix trespassed upon Sidikho/Bunyala/1253 and harvested the cane on the land. When they carried out a search at the land registry, they established that the administratrix, after she had obtained representation to the estate of the deceased, had caused their names to be struck off the register of ownership of Sidikho/Bunyala/1253 and had herself inserted as the new registered owner. They accuse her of having taken possession of the property and of doing wanton destruction on it. They reveal that there was litigation before the Navakholo Land Disputes Tribunal in Tribunal Case No. 1 of 2005, which was determined in favour of the administratrix, but that determination by the Tribunal was set aside upon review in Kakamega HCMisc Applica. No. 19 of 2006. They also refer to another suit over the same land, being Kakamega CMCCC No. 632 of 2009, which has since been dismissed. They would like to have this cause struck out or the name of the administratrix struck off the register in Sidikho/Bunyala/1253.

5. They have attached to their affidavit several documents to support their case. There is a green card for Sidikho/Bunyala/1253, showing that the same was registered in the name of the deceased on 19<sup>th</sup> October 1992. Then it was transferred to the name of the late Leo Wafula on 19<sup>th</sup> December 1997. It was subsequently transferred to the names of the applicants on 19<sup>th</sup> January 1998. The final entry is that the administratrix herein was registered as proprietor on 5<sup>th</sup> February 2013 after she obtained representation to the estate of the deceased herein. There is a certificate of official search dated 26<sup>th</sup> August 1996, which indicates that the deceased was proprietor of the property as from 19<sup>th</sup> October 1992. There are also copies of the proceedings of the case before the Tribunal, which was decided in favour of the administratrix. .

6. The administratrix responded to the application by way of an affidavit she swore on 23<sup>rd</sup> November 2014. She denies that Sidikho/Bunyala/1253 was ever sold to the applicants. She avers that the applicants had only leased the said property from Leo Wafula in 1998. She states that the deceased died in 1995, and that by 1996 the property was still registered in his name according to a green card she has attached to her affidavit. Therefore, according to her, there was no way that he would have transferred it to Leo Wafula in 1997. She also

avers that Leo Wafula died on 11<sup>th</sup> October 2004 and, therefore, there was no way he would have been party to a sale agreement on 16<sup>th</sup> November 2004. She asserts that the cause before the Tribunal was initiated procedurally, but argues that Kakamega HCMisc Applica. No. 19 of 2006 has not been finalized and is still pending. She states that Kakamega CMCCC No. 632 of 2009 was dismissed for lack of standing, and she initiated the instant cause upon being so counselled by the court. She has attached several documents to her affidavit to support her case.

7. The summons was placed before the Judge on 21<sup>st</sup> May 2013, and interim orders were made to prohibit and inhibit dealings in Sidikho/Bunyala/1253. When it came up for hearing before me on 4<sup>th</sup> November 2019, the advocates appearing for both sides invited me to determine the application based on the application itself, the rival affidavits and the annexures.

8. It is common ground that the applicants are not claiming a share in the estate of the deceased. They do not claim to be heirs or survivors or dependants of the deceased or beneficiaries of the estate. Indeed, it would appear they are not claiming to be related to the deceased. Their case is that they acquired the property listed as the asset of the estate, and agree that it did not form part of the estate of the deceased as it had been sold to them. For that reason they would like the court to discontinue this cause or, otherwise, remove the property, Sidikho/Bunyala/1253, from the schedule of the assets of the estate. The only issue for determination in this cause is whether Sidikho/Bunyala/1253 belonged to the estate of the deceased or to the applicants. Put differently, whether the applicants had validly bought Sidikho/Bunyala/1253.

9. A succession cause is initiated for the sole purpose of distributing the assets that a person leaves behind upon their death, to those persons who are found to be legally entitled to such property. Distribution is done amongst the survivors or heirs or dependants of the deceased. It is these categories of persons beneficially entitled to estate property who are provided for in the Law of Succession Act, Cap 160 Laws of Kenya. That distribution is of the net estate, that is after debts and liabilities have been ascertained and paid. The Act does not say much about other claimants such as creditors and purchasers. They are not entitled to the net estate, for distribution should only be done after the purchasers and creditors have been settled. Any disputes with such purchasers and creditors ought to be resolved in separate proceedings.

10. The dispute presented by the application dated 8<sup>th</sup> May 2013 calls upon me to determine a question as to ownership of Sidikho/Bunyala/1253 as between the estate of the deceased herein and the applicants in that application.

11. It must be stated from the outset that I, sitting as a Judge of the High Court have no jurisdiction to make any determinations with respect to ownership of land. Article 162(2) of the Constitution vests such jurisdiction on a court of equal status with the High Court, while 165(5) of the Constitution states that the High Court shall not touch any dispute which falls under Article 162(2) of the Constitution, which is now the exclusive domain of the court contemplated in that Article.

12. Article 162(2) states as follows: –

*‘Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –*

*(a) ...*

*(b) the environment and the use and occupation of, and title to, land.’*

13. While Article 165(5) of the Constitution states:

*‘The High Court shall not have jurisdiction in respect of matters-*

*(a) ...*

*(b) falling within the jurisdiction of the courts contemplated in Article 162(2).’*

14. In obedience to Article 162(2) of the Constitution, Parliament did, through the Environment and Land Court Act, No. 19 of 2011, establish such a court, known as the Environment and Land Court. The jurisdiction of the Environment and Land Court is set out in section 13 of the Environment and Land Court Act. The said court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution, relating to environment and land.

15. The scope and jurisdiction of the Environment and Land Court is set out in section 13 of the Environment and Land Court Act, which states as follows:

*“13. Jurisdiction of the Court*

*(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.*

*(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –*

*(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

*(b) relating to compulsory acquisition of land;*

*(c) relating to land administration and management;*

*(d) relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

*(e) any other dispute relating to environment and land.”*

16. Section 13(d) of the Environment and Land Court Act covers disputes relating to private land and contracts relating to such land, while section 13(e) is an omnibus provision which covers any other dispute relating to land and environment.

17. The land in question, that is to say Sidikho/Bunyala/1253, is registered land, which is subject to the Land Registration Act, No. 3 of 2012. The Land Act, No. 6 of 2012, carries provisions on land, whatever its tenure, and that would include registered land, such as Sidikho/Bunyala/1253. According to section 2 of the Land Act and the Land Registration Act, the reference to court in both statutes is to be taken to be referring to the Environment and Land Court, and not the High Court. Section 101 of the Land Registration Act and section 150 the Land Act specifically state that all disputes that arise with respect to land, including disputes relating to ownership should be placed before the Environment and Land Court. In view of the above, the High Court no longer has jurisdiction over matters revolving around title, occupation and use of land. That jurisdiction lies with the Environment and Land Court.

18. The applicants invited me to dismiss the instant succession cause as it relates to property that does not belong to the estate. I shall do no such thing. Let the parties move the Environment and Land Court appropriately so that the said court can determine the question of ownership as between the estate and the applicants. If it is established that the property herein, Sidikho/Bunyala/1253, is still estate property, then the administratrix shall proceed to file for confirmation of her grant to pave way for distribution. Should it turn out that the property, Sidikho/Bunyala/1253, belongs to the applicants, then at that point there would be nothing to be distributed in this cause.

19. In the meantime, I shall not remove the said property from the schedule of the assets of the estate. Instead, I shall order that the property, Sidikho/Bunyala/1253, shall not be distributed before the Environment and Land Court makes a final determination on the ownership of the property as stated above. The interim orders made on 21<sup>st</sup> May 2013 shall remain in force, until other or further orders are made by this court.

20. For avoidance of doubt, the final orders are:

**(a) That I hereby declare that I, as Judge of the High Court, do not have jurisdiction to determine ownership of Sidikho/Bunyala/1253 as between the estate herein and the applicants in the application dated 8<sup>th</sup> May 2013;**

**(b) That as consequence I hereby direct the administratrix and the applicants to place the dispute on ownership of Sidikho/Bunyala/1253 before the Environment and Land Court for determination;**

**(c) That in the meantime, Sidikho/Bunyala/1253 shall not be distributed unless and until the determination of the status of its ownership is resolved in terms of (b) above or until further orders of this court;**

**(d) That this cause shall be mentioned after 366 days to confirm compliance with (b) above and for further directions in terms of (c) above;**

**(e) That the temporary orders made on 21<sup>st</sup> May 2013 shall remain in force pending compliance with (b) above or until further orders in terms of (c) above; and**

**(f) That any of the parties who is aggrieved by the orders made herein shall have twenty-eight days to file an appeal at the Court of Appeal.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF JANUARY, 2020**

**W. MUSYOKA**

**JUDGE**