



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 160 OF 2006

IN THE MATTER OF THE ESTATE OF IBRAHIM BETTY SALWA (DECEASED)

RULING

1. I am tasked with determining a Motion dated 27th November 2018, which seeks orders to restrain the carrying out of developments on Butsotso/Shiveye/1609, by Anacletus Luyali Lubembe and Winfred Jesicah Atsulu, to be referred hereafter as the respondents. The application is at the instance of Christine Omwanda Salwa, to be referred to as the applicant.

2. The applicant is a daughter-in-law of the deceased herein, being a widow of a son of the deceased, the late Meshack Salwa Beti. Her case is that the respondents had leased the said parcel of land from her late husband, who was at some point administrator of the estate herein, but, at the expiry of the lease, the respondents failed or refused to hand over vacant possession of the land. It is averred that the two are not survivors of the deceased, and, therefore, they are not beneficially entitled to shares in the estate. She has attached a copy of the lease agreement that was allegedly signed between the respondents and her late husband.

3. The two respondents swore a joint affidavit in reply. They conceded that they had leased a portion of Butsotso/Shiveye/1609 from the applicant's late husband, who was at the time the administrator of the estate. Subsequent to his death, administration was given to the current administrator, Jeremiah Shibuswa Salwa, who is named in the application as a respondent, but I shall refer to him, for the purpose of this ruling, as the administrator. They averred that upon his appointment, the new administrator extended the lease. They stated that they would vacate the land once the lease expired. They asserted that they dealt with the administrator and that the applicant had no locus to challenge them. They stated that they have not interfered with the affairs of the estate. They further said that the children of the applicant had forcibly harvested their cane, they reported the matter to the police and there was a pending criminal matter against them.

4. The administrator swore his own affidavit in reply to the application. He conceded that the applicant was a widow of a son of the deceased and who was also an administrator, who had unfortunately passed on. He conceded that the land in question had been leased to the respondents, with the proceeds of the lease being utilized in the administration of the estate. He averred that the respondents were in possession courtesy of consents given by beneficiaries in the lease agreement.

5. Directions were never given on the manner of the disposal of the application, but the parties were in concurrence that the application could be disposed of by way of written submissions, and have filed written submissions in that behalf. I have carefully presumed through the said submissions and noted the arguments that the parties have advanced in those submissions.

6. It is common ground that the respondents herein are not survivors of the deceased, and, therefore, they have no claim to the estate by virtue of being survivors. Their claim is founded in contract, the administrator had leased to them a portion of the estate property. The respondents are, strictly speaking, outsiders so far as the cause herein is concerned. On the other hand, it is common ground that the applicant is a daughter-in-law of the deceased. Her claim to the estate arises from her marriage to a son of the deceased, and she is beneficially interested in the estate, to the extent of accessing the share due to her husband from the estate. She is, however, not an administratrix of the estate.

7. Ideally, claims by and against third parties or outsiders, in the sense of persons who are neither survivors of the deceased nor beneficiaries, are not for handling within the succession cause. Such claims or disputes usually have nothing to do with distribution of the estate, which is the primary goal of the cause. Contests between the estate and outsiders should be placed before the relevant court in separate proceedings. Where there are tenants in occupation of estate property, who default in paying rent, or need to be removed, or who have grievances against the estate, the same ought not be a subject to be placed before the probate court in the succession cause. In the first place, tenants are not survivors of the deceased. They claim no right to a share in the property of the estate. Their interest is contractual, and where issues arise, then the same ought to be dealt with in separate proceedings.

8. In any case, there would be specific legislation to govern such matters. If the tenant occupies residential premises, the Rent Restriction Act, Cap 296, Laws of Kenya, would be relevant, if the rent payable is below Kshs. 2, 500.00. Should the rent be above that, then the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012, would apply. If the premises are commercial, then Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya, would apply, and where it would not, then the Land Registration

Act and the Land Act would apply. Where the lease or contract is over agricultural land, then the relevant law would be Land Registration Act and the Land Act. The courts or tribunals to which any disputes arising from such legislation are to be placed are clearly stated in the relevant legislation. The Land Registration Act and the Land Act carry very elaborate provisions on leases. The law to apply to disputes that arise over the leases should be the Land Registration Act and the Land Act, and any other derivative legislation, such as the Rent Restriction Act and Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, but not the Law of Succession Act, Cap 160, Laws of Kenya. The mere fact that the property leased was still registered in the name of the dead person does not, of itself, confer jurisdiction on the probate court, to handle a dispute over the lease in the succession cause.

9. The second consideration is that the dispute herein is with regard to a lease. Leases are contracts over land, where the property owner permits another to occupy and use the land, at a consideration. *Black's Law Dictionary*, Tenth Edition, Thomson Reuters, 2004, defines "to lease" as the granting of "the possession and use of ... land, buildings ... rooms ... to another in return for rent or other consideration ...". In the Land Act, lease is defined in section 2 as follows:

““lease" means the grant, with or without consideration, by the proprietor of land of the right to the exclusive possession of his or her land, and includes the right so granted and the instrument granting it, and also includes a sublease but does not include an agreement for lease...”

10. The key word used in both definitions of lease is "possession," which denotes having hold on to or controlling something. In legal terms, possession is distinct from ownership. Possession of property goes together with occupation. A person acquires possession of property through first occupying the property. Being in possession of property is often used interchangeably with being in occupation of the property. I dwell on this because of the provisions in Articles 162(2) and 165 of the Constitution, which use the word occupation of land as opposed to possession thereof.

11. The reference to Articles 162(2) and 165(5) of the Constitution brings me to the issue of jurisdiction. According to the Court of Appeal in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR :

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

12. The primary source of the jurisdiction of the courts is the Constitution. With respect to matters touching on title and occupation of land, the relevant provisions are in Articles 162(2) and 165(5). Article 162(2) envisages the establishment of courts to be of equal status with the High Court, to exercise jurisdiction over, among others, occupation of and title to land. The provision says:

“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. Article 165 of the Constitution sets out the jurisdiction of the High Court, and its sub-Article (5) is emphatic that the jurisdiction of the High Court does not cover the matters that have been isolated for the courts established under Article 162(2). Article 165(5) states as follows:

“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. It will be seen, therefore, from the said Articles of the Constitution that the High Court no longer has jurisdiction to deal with disputes that relate to occupation and use of land. A lease grants the lessee a right to occupy and use land. That would squarely place the dispute between the applicant and the respondents, herein, within Article 162(2) of the Constitution. The dispute is about the right to use and occupy land. I can have no jurisdiction, by dint of Article 165(5), to deal with that. Jurisdiction over that lies with the courts contemplated under Article 162(2) of the Constitution.

15. Parliament has passed the Environment and Land Court Act, No. 19 of 2011, in compliance with Articles 162(2)(3) of the Constitution, to establish the Environment and Land Court, the jurisdiction of which is set out in section 13 of the Act. The 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. Section 13 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. Leases are currently governed by the Land Registration Act and the Land Act. The Land Registration Act provides for, among other things, registration of land and registration of leases created over properties registered under the Act. The provisions on registration of leases are set out in Part IV of the Land Registration Act, sections 54 and 55. The Land Act carries elaborate provisions on leases at Part VI, running from section 55 to 77, both inclusive. The provisions cover such matters as the power to lease land, the various types of leases, termination of leases, possession under the lease, covenants and conditions, transfer and assignments of leases, remedies and relief. It would appear from the above that the leases created over property registered under Land Registration Act, such as Butsotso/Shiveye/1609, are registrable under the Land Registration Act. By virtue of the provisions in Part VI of the Land Act, Butsotso/Shiveye/1609, being private land is subject to the Land Act, inclusive of Part VI thereof, relating to leases.

17. The Land Registration Act and the Land Act carry provisions which state the jurisdiction of the courts with regard to the administration, operationalization, application and interpretation of the two statutes. These provisions are in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act, and they reinforce Article 162(2) of the Constitution and the provisions of the Environment and Land Court Act.

18. The provisions in the Land Registration Act state as follows:

“Interpretation.

2. In this Act, unless the context otherwise requires—

“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011: ...”

“Jurisdiction of court.

101. The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

19. Those in the Land Act say:

“2. Interpretation

In this Act, unless the context otherwise requires—

“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011); ...”

“150. Jurisdiction of the Environment and Land Court

The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

20. I have already noted above, that the applicant was not one of the administrators of the estate of the deceased. The assets of the estate did not, therefore, vest in her by virtue of section 79 of the Law of Succession Act. The fact that the assets did not vest in her meant that she did not have the powers set out in section 82 of the Law of Succession Act, which include the power to sue on behalf of the estate. Only a personal representative can sue and be sued on behalf of the estate, because the assets of the estate vest in the personal representative and because he has been vested with power to sue or be sued on behalf the estate by section 82. Consequently, she cannot maintain a suit or action against any one purportedly on behalf of the estate. Section 45 of the Law of Succession Act outlaws intermeddling with an estate, which is defined as the handling of estate property by a person who has no grant of representation to the subject estate. Intermeddling has been interpreted to include commencing action on behalf of the estate when one has no authority to do so for lack of representation. See *John Kasyoki Kieti vs. Tabitha Nzivulu Kieti & Annah Ndileve Kieti* (2001) eKLR.

21. For avoidance of doubt the provisions that I have referred to above state as follows:

“45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

“79. Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

“82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best ...”

22. The applicant herein is not the administratrix of the estate of the deceased. Butsotso/Shiveye/1609 does not vest in her. She has no mandate, therefore, to exercise the powers, rights and duties of an administrator with respect to Butsotso/Shiveye/1609. Since Butsotso/Shiveye/1609 does not vest in her, she has no locus to bring any proceedings against any person with respect to the said asset. The only action she can maintain in these proceedings would be against the administratrix, but limited to calling for an account with respect to monies collected as rent from the leasing of Butsotso/Shiveye/1609.

23. I conclude, in view of everything that I have said so far, that the Motion, dated 27th November 2018, is wholly without foundation. I hereby dismiss the same. Each party shall bear their own costs. Any party aggrieved by the order has a right to challenge the dismissal of the application at the Court of Appeal, within the time allowed. As there is a pending application for confirmation of grant, dated 15th June 2017, I shall, right away, allocate a date for directions on the disposal of the said application, as the distribution of the estate ought to be fast-tracked.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF MARCH, 2020

W. MUSYOKA

JUDGE