**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 571 OF 2008**

**IN THE MATTER OF THE ESTATE OF JOHN MURUSA (DECEASED)**

**RULING**

1. The deceased herein died on 15th December 1975. Two succession causes were initiated with respect to the estate. The first cause was initiated in Vihiga SRMCSC No. 143 of 2007 and the second in Kakamega HCSC No. 571 of 2008.

2. The cause in Vihiga SRMCSC No. 143 of 2007 was initiated by way of a citation issued at the instance of Francis Mbalanya, in his capacity as a creditor, directed at Patrick Zuberi Juma, a grandson of the deceased, with respect to succession to Kakamega/Logovo/588. A petition was lodged in that cause by Francis Mbalanya on 28th May 2009. He listed the survivors of the deceased as the two dead wives of the deceased and three dead sons of the deceased. He listed Kakamega/Logovo/588 as the property that the deceased died possessed of. A grant was subsequently made on 30th September 2009 to the petitioner. The grant in that cause was not confirmed.

3. The making of the grant in Vihiga SRMCSC No. 143 of 2007 provoked the filing of a summons for its revocation in Kakamega HC Misc. Application No. 153 of 2010, by Gastone Inungi Mulusa, alleging that the grant had been obtained fraudulently with the aim of disinheriting the rightful claimants of the estate.

4. The cause in Kakamega HCSC No. 571 of 2008 was commenced though a petition lodged in that cause by Gastone Inungi Mulusa, in his capacity as grandson of the deceased. He listed himself as survivor of the deceased together with the late sons and daughters of the deceased, the same individuals listed in Vihiga SRMCSC No. 143 of 2007. He also listed the asset listed in Vihiga SRMCSC No. 143 of 2007 as the property that the deceased died possessed of. Letters of administration intestate were made to him on 10th July 2009, and a grant duly issued, dated 13th August 2009. The grant in that cause is yet to be confirmed.

5. A summons for revocation of grant was filed in that cause on 22nd March 2010, by the administrator in Vihiga SRMCSC No. 143 of 2007, on grounds that the same had been made without disclosure that the estate had liabilities, arising from sale of the estate property by the deceased.

6. Directions were given on 21st March 2012. All three causes were consolidated, and it was directed that the summonses for revocation of grant were to be disposed of by way of oral evidence. The parties were given liberty to file further affidavits. Further directions were given, on 2nd June 2015, that the parties file witness statements. On 17th September 2018, further directions were given that written submissions be filed based on the witness statements.

7. I have seen on record several witness statements. They are not filed in any organized manner. I shall, too, deal with them in a similar eclectic manner.

8. The first statement is by James Kabaka. He was an assistant Chief, who wrote a letter on behalf of Francis Mbalanya for the purpose of initiating the succession proceedings. The statement by Francis Mbalanya says that he bought the estate asset on 15th December 1992, from Juma Inungi Mulusa, who was a son of the deceased, the registered proprietor of that property. Nathan Amagoye Mahonga was a village elder, who was party to proceedings that were being conducted in 2001, to reconcile Francis Mbalanya and the family of the person who had sold the land to him. The next statements are by Gastone Inungi Mulusa and Salimu Otiende Lihanda, grandsons of the deceased, who aver that the deceased never sold his land.

9. I have also seen the written submissions lodged in the matter by the parties. I have read though them and noted the arguments made in them.

10. My understanding of the dispute between Francis Mbalanya on one hand, and Gastone Inungi Mulusa on the other is over the estate asset, Kakamega/Logovo/588. Gastone Inungi Mulusa claims to be a grandchild of the deceased and asserts entitlement to that property through succession. Francis Mbalanya claims to be a creditor, who bought the alleged asset from a son of the deceased. He relies on a written

agreement of sale that he has placed on record. I note that he has not produced a decree of a court of law declaring him to be entitled to the property. The sale is contested by the grandchildren of the deceased.

11. The issue for me to determine revolves around the entitlement of Francis Mbalanya to be treated as a creditor of the estate, as well as his entitlement to administration of the estate of the deceased.

12. I will start with the first issue, whether Francis Mbalanya is a creditor of the estate of the deceased. A disposal of that issue would also indirectly answer the other question. The estate herein is that of John Murusa. A certificate of official search on Kakamega/Logovo/588, dated 17th October 2008, indicates that the same was registered in the name of the deceased on 14th December 1973. Francis Mbalanya did not buy the property from the deceased, during his lifetime. He purportedly bought it after the deceased died, from a son of the deceased. The deceased died in 1975, while the alleged sale happened in 1992. At the time of the alleged sale, the seller had not obtained representation to the estate, since representation to the estate was not obtained until 2009, when the two grants were made to the two rivals before me in Vihiga SRMCSC No. 143 of 2007 and Kakamega HCSC No. 571 of 2008.

13. The deceased person herein died before the Law of Succession Act, Cap 160, Laws of Kenya, came into force on 1st July 1981. By virtue of section 2(2) of the Law of Succession Act, the estate of a person who died before the Act came into for is to be governed by the law and customs that applied to such an estate before 1st July 1981, so far as distribution was concerned. However, with respect to administration, Part VII of the Law of Succession Act applies to such the estate.

14. According to section 79 of the Law of Succession Act, the assets of the estate of a deceased person vest in the personal representative of the deceased, whether he be an executor or an administrator in intestacy. The vesting of the assets in the administrator or grant-holder, constitutes the grant-holder the legal owner of the assets, to the extent that he exercises such powers and rights over the property as an owner would. The powers of personal representatives are set out in section 82 of the Law of Succession Act. They include the power to sue and be sued over the assets, to enter into contracts with respect to estate assets and the power to sell estate assets, so long as land is not sold before confirmation of the grant. Section 45 of the Law of Succession Act outlaws the handling or dealing with assets of the estate without authority in law. According to that provision, the authority to handle estate property emanates from a grant of representation. Handling estate assets without a grant of representation amounts to intermeddling with it. It is a criminal offence in respect of which the intermeddler can be fined or jailed or both.

15. In this case, the deceased died intestate, as no will was placed before me by either of the two parties. That being the case, the property is available for administration in intestacy. When the sale of 1992 was happening, the Law of Succession Act had come into operation. The said transaction was subject to the Law of Succession Act, to the extent that it related to the property of a dead person. The person who was purporting to sell it was required to be vested with authority to sell it. Such authority could only come from a grant of letters of administration intestate. He did not have a grant in respect of the estate of the deceased. The estate of the deceased did not vest in him, and, therefore, he could not exercise the powers over the property given by section 82 of the Law of Succession Act. By purporting to sell the property the seller was contravening section 45 of the Law of Succession Act. He was intermeddling with the estate. Since the property did not vest in him, he had not title to pass to Francis Mbalanya, and, therefore, the transaction between them was a nullity. It was as dead as a dodo. It conferred no rights or interests in Francis Mbalanya, which he could assert or enforce before a court of law. Since Francis Mbalanya did not transact with the deceased, he was not a creditor of the estate. He was, therefore, not justified to apply for representation in the estate of the deceased.

16. The said provisions in the Law of Succession Act that I have cited say 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
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> 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:

Provided that—

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant …"

17. The other issue, of course, relates to jurisdiction of the High Court to determine the validity of the sale of land transaction that happened between Francis Mbalanya and the seller, a son of the deceased who has since died. Sitting as a High Court Judge, I can make pronouncements on the sale to the extent that the Law of Succession Act applied. I have just done that in the preceding paragraphs of this ruling. However, whether there was a valid sale of land in accordance with the relevant land legislation, is something that is outside my jurisdiction.

18. I am called upon to make a determination on that question after the promulgation of the current Constitution in 2010. Articles 162(2) and 165(5) of that Constitution confer jurisdiction on a court other than the High Court over such matters. Indeed, Article 165(5) is quite emphatic, the High Court has no jurisdiction on matters that touch on title to land. Sale of land has everything to do with title. It is something that is way outside the jurisdiction of the High Court. Those provisions of the Constitution are buttressed by provisions in the Environment and Land Court Act, No. 19 of 2011, the Land Registration Act, No. 3 of 2012, the Land Act, No. 6 of 2012. Francis Mbalanya's sale agreement is contested by the grandchildren of the deceased. In that case then, he has to formally prove his entitlement to that property in a suit properly instituted at the appropriate court, the Environment and Land Court, or any subordinate court that has been vested with the requisite jurisdiction.

19. The constitutional provisions in Articles 162 and 165 state as follows:

"162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) 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.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)…

165 (5) 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)."

20. Overall, I am persuaded that Francis Mbalanya is not entitled to a share in the estate of the deceased until he proves his case at the Environment and Land Court, and that being the case, he is not entitled to be appointed administrator of the estate of the deceased, since he holds no decree of a competent court declaring that he is entitled to the property in question. His application for revocation of grant is, therefore, not merited. The converse is true with respect to the application by Gastone Inungi Mulusa.

21. In the end, the final orders that I shall make in this matter are as follows:

**a. That I hereby dismiss the summons for revocation of grant dated 14th March 2010 and filed in Kakamega HCSC No. 571 of 2008;**

**b. That I hereby allow the summons for revocation of grant dated 26th February 2010, filed in Kakamega HC Misc. Application No. 153 of 2010;**

**c. That as a consequence of the orders made in (a) and (b), above, I hereby revoke the grant of letters of administration intestate made in Vihiga SRMCSC No. 143 of 2007, to Francis Mbalanya, and direct that that cause is hereby closed, and the file relating to it shall be removed to the archives;**

**d. That Gastone Inungi Mulusa, the administrator appointed in Kakamega HCSC No. 571 of 2008 is hereby confirmed as such, and directed to move forward and apply for confirmation of the grant that was made to him in that cause on 10th July 2009;**

**e. That each party shall bear their own costs; and**

**f. That any party aggrieved by the orders that I have made herein has the liberty, within twenty-eight (28) days, to move the Court of Appeal appropriately.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020**

**W. MUSYOKA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**W. MUSYOKA**

**JUDGE**