



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 312 OF 2015

IN THE MATTER OF THE ESTATE OF ZABLON SHIGALI ALIAS ZABLON MASHETI ITAMBO (DECEASED)

RULING

1. The deceased herein died on 9th June 2008. Representation to his estate was sought vide a petition that was lodged herein on 20th March 2015. The cause is yet to be gazetted, and, therefore, representation is yet to be made to the petitioner.

2. The petitioner lodged an application herein on 10th June 2015, of even date, seeking an injunctive order to restrain Andrew Kasanga Anyika, who is not an heir to the estate of the deceased, from intermeddling with the estate. I shall refer to the petitioner as the applicant, and Andrew Kasanga Anyika as the respondent. The respondent is accused of encroaching on the estate's asset, being Kakamega/Iguhu/786, where he cleared a bush and ploughed the land.

3. The respondent has responded to the application through an affidavit that he swore on 3rd August 2015. He concedes that he is not an heir to the estate of the deceased, and asserts that he has no interest in the estate asset known as Kakamega/Iguhu/786. He explains that he is the proprietor of an adjoining parcel of land, described as Kakamega/Iguhu/789. He accuses the children of the deceased of having encroached on Kakamega/Iguhu/789, where they have erected a house. Whereupon, he sought intervention of the land registrar, with a view to have survey work done so as to ascertain the correct boundary between the two parcels of land. The survey work was allegedly done, but in the absence of the children of the deceased. He has attached several documents to support his contentions.

4. A variety of court orders were made to prevent intermeddling, and for survey work to be done on the subject property

5. The matter was placed before me on 21st January 2020. I was informed that the purpose of the mention was to confirm the filing of a report by the Deputy Registrar of this court, following a visit that she had made to the disputed land. I was informed that the report had been filed, and the parties went on to address me at length on the said report. At the end of it, I reserved the matter for mention for directions on 24th April 2020, to enable me peruse the record.

6. Let me start by stating that I doubt whether there is any jurisdiction on my part to handle the dispute.

7. In the first place, the dispute has nothing to do with succession. It has nothing to do with distribution of the assets of the estate, which is the primary mandate of a probate court. It is a dispute about a boundary. Each of the rival sides claim that the other side has encroached on their side of the land. It is, therefore, plainly a land dispute, in respect of which I cannot possibly have any jurisdiction.

8. The primary source of the jurisdiction of the courts is the Constitution. With respect to matters touching on use and occupation of and title to land, the relevant provisions are in Article 162(2) and 165(5) of the Constitution. Article 162 of the Constitution essentially establishes the superior courts in Kenya. It identifies them as the Supreme Court, the Court of Appeal and the High Court and the courts established under Article 162(2). Article 162(2) envisages the establishment of courts to be of equal status with the High Court, to exercise jurisdiction over, among others, use and occupation of and title to land. The relevant provisions say:

“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.”

9. Article 165 of the Constitution sets out the jurisdiction of the High Court. Article 165(5) is emphatic that that jurisdiction does not cover the matters that have been isolated for the courts envisaged in 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).”

10. Parliament has complied with Article 162(2)(3) of the Constitution, by passing the Environment and Land Court Act, No. 19 of 2011, 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.”

11. Both sides in the dispute claim that the other party has encroached on their land and done acts inconsistent with their titles. Both sides have sought to have the land registrar intervene by way of getting the two parcels of land surveyed in order to establish the facts as to who was on the wrong. That would mean the court having to decide a question of ownership of the said property as between the two assets in question. The dispute, no doubt, revolves around the boundary between the two parcels of land, and raises questions that touch on use and occupation. The quarrel is that either party has occupied the portion belonging to the other. Occupation of a property clearly places the matter squarely under Article 162(2) of the Constitution.

12. Boundaries to land form part of the registration process, and are governed by land legislation, to be specific the Land Registration Act, No. 3 of 2012. Land registration is dealt with in Part II of the Land Registration Act, in sections 15 to 23. A dispute relating to boundaries between two registered parcels of land can only be resolved under the provisions of the legislation which governs the fixing of boundaries of registered land, which is the Land Registration Act, as read with the Survey Act, Cap 299, Laws of Kenya.

13. Since the law governing the processes of registration and management of boundaries to land are all located in the Land Registration Act, questions arise as to which court has jurisdiction to address issues or questions or disputes that may arise with respect to boundaries to land. The answer lies in the Land Registration Act, which carries provisions which state the jurisdiction of the court with regard to the application and interpretation of the statute. These provisions are in sections 2 and 101 of the Land Registration Act.

14. 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.”

15. My understanding of these provisions, in the context of the matter before me, is that any disputes or questions or issues that require court intervention which revolve around boundaries to registered land, fall within the jurisdiction of the Environment and Land Court. The Land Registration Act, therefore, confers jurisdiction on the Environment and Land Court, with regard to all the processes that are subject to the said statute, and, therefore, any reference, in the Land Registration Act, to “the court” is meant to refer to the Environment and Land Court,

and any subordinate court that has been conferred with jurisdiction over the processes the subject of the said statute. All that means that I have no jurisdiction whatsoever to address the matter that the parties have placed before me.

16. Jurisdiction is at the heart of any exercise of power by a court of law. A court only exercises such power as has been conferred to it by the Constitution and the law. Its decisions would be illegal or unlawful, if they are made in absence of jurisdiction, they would be unconstitutional and against the tenets of the principle of the rule of law. It was with that background in mind that the Court of Appeal in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, stated:

“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.”

17. More recently the Court of Appeal stated, in *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* (2019) eKLR:

“... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If the suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction upon itself ...”

18. A dispute that turns purely on use and occupation of land, and boundaries to that land is outside my jurisdiction as discussed above. Without such jurisdiction I need to down my tools. I cannot proceed any further. The parties ought to place the dispute where it belongs, the Environment and Land Court, or such subordinate court as has been conferred with jurisdiction. I have no jurisdiction to give any directions relating to occupation of land, use of land and boundaries to such land.

19. The second issue has something to do with fact that the court is yet to appoint administrators in this cause. The applicant, in the application dated 10th June 2015, is not the administrator of the estate of the deceased. By virtue of section 79 of the Law of Succession Act, Cap 160, Laws of Kenya, the assets of the estate do not vest in him. He cannot, therefore, assert the powers of an administrator or the rights of an owner that are set out in section 82 of the Law of Succession Act; that is to enforce by suit or otherwise causes of action on behalf of the estate. A petitioner to whom representation is yet to be granted, is not in the same footing with an administrator or personal representative, by virtue of the above provisions. The petitioner in this cause, therefore, had no *locus standi* to assert the powers that could only be asserted by an owner of land or an administrator to whom the land had been vested. To the extent that representation is yet to be granted to him, there is no standing on his part to seek any sort of remedy with respect to boundaries between the two parcels of land or even occupation thereof.

20. The provisions that I have referred to above state as follows:

“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) ...
- (c) ...
- (d) ...”

21. I stated above that a petitioner, who is yet to be granted representation, is not in the same footing with an administrator. He cannot, therefore, purport, before his appointment as administrator, to exercise or assert powers that can only be exercised by a properly appointed administrator. According to section 82(2) of the Law of Succession Act, the office of administrator is established from the date of the grant. It is only from that date onwards that an administrator can claim that the estate vests in him, enabling him to exercise the powers conferred on administrators by virtue section 82 of the Act. Before then, the petitioner would be a busybody, and filing applications, such as that dated 10th June 2015, before representation is granted, would amount to an act of intermeddling with the estate of a dead person without authority, going by the decision in *John Kasyoki Kieti vs. Tabitha Nzivulu Kieti & Annah Ndileve Kieti* (2001) eKLR.

22. Section 80 states:

“80. When grant takes effect

(1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.

(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant.”

23. The position of a petitioner for a grant of letters of administration, whether intestate or with will annexed, is different from that of a petitioner for grant of probate. Grant of probate would be sought by the executor named in the will. The office of executor is established from the date of death, for the will becomes effective upon death, and the appointment of the executor is by the will, and once the will becomes effective the office of the executor also becomes automatically effective. The executor can exercise all the powers of a personal representative before a grant of probate is made. The grant of probate does not appoint the executor as personal representative. It merely confirms his authority, and it is issued to evidence is appointment and authority. All the intermediate acts of the executor, done between the date of death and the making of the grant of probate, are authenticated by the grant of probate. See section 80(1), in paragraph 21 above. The grant of probate is said to relate back to the date of death. That principle does not apply to a grant of letters of administration, and, therefore, any acts done by a petitioner before the grant of letters of administration is made are not validated or authenticated by the making of the grant. See *Ingall vs. Moran* [1944] KB 160, *Kothari vs. Qureshi and Another* [1967] EA 564, *Lalitaben Kantilal Shah vs. Southern Credit Banking Corporation Ltd* HCCC No. 543 of 2005, *Otieno vs. Ougo and another (number 4)* [1987] KLR 407, *Troustik Union International and another vs. Mrs. Jane Mbeyu and another* CACA No. 145 of 1991, *Martin Odera Okumu vs. Edwin Otieno Ombajo* HCSC N9479 of 1996, *Coast Bus Services Limited vs. Samuel Mbuvi Lai* CACA No. 8 of 1996, among others

24. Clearly, therefore, the Motion dated 10th June 215 cannot be a competent application, for the reasons given above, and it cannot support the sort of remedies that the parties hereto seek.

25. In view of everything that I have stated so far, it should be clear that there is no jurisdiction for me to continue handling the matter. I hereby down my tools. Let the parties move the dispute to the appropriate forum. I note that the petitioner has wasted a lot of time pursuing a dead cause, let him now turn his attention to having his cause gazetted, so as to pave way for making of a grant of representation. It is so ordered.

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

W. MUSYOKA

JUDGE