



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 847 OF 2013

IN THE MATTER OF THE ESTATE OF REUBEN MUGESANI BULIMU (DECEASED)

RULING

1. The application that I am called upon to determine is dated 14th November 2019. It seeks a variety of orders, the principal ones being stay of proceedings in the matter, a prohibition order with respect to subdivisions resultant from South Maragoli/Buyonga/936, setting aside of order made on 24th September 2019 and leave to the applicant to defend the application dated 28th November 2018. It was initiated by Ruth Iminza Mugesani, who I shall hereafter refer to as the applicant.

2. The applicant is one of the beneficiaries of the estate of the deceased. She acknowledged that she was served with the application dated 20th November 2018, but due to ignorance she did not know that she was required to respond to it in writing. She avers that she did attend court on 24th September 2019, but informed court that she was not aware that she was supposed to respond to the application. She avers that the orders that the court made on 24th September 2019 were not fair, in view of what has been happening in the matter. She has attached to her affidavit her proposed reply to the applications dated 20th November 2018 and 25th September 2018, vide an affidavit that she swore on 14th November 2019. She has also attached a ruling that Sitati J. delivered in the matter on 19th July 2016, where the grant was confirmed, and it was directed that the estate be shared equally. There are also copies of the certificate of confirmation of grant generated from the orders made on 19th July 2016, a mutation form, among other documents.

3. The person named in the application as the respondent, and who is also the administratrix of the estate, Jane M'mbone Mugesani, has responded to the application. I shall hereafter refer to her as the administratrix. Her affidavit was sworn on 13th January 2020. She avers that the applicant had always been against the partitioning of the estate, and blames her and other beneficiaries of throwing obstacles on her way in her effort to have the estate distributed. She avers that the applicant had had enough time to file her response to the application. She avers that the orders made on 24th September 2019 were not detrimental to the applicant, and that the applicant had not disputed the resurvey of the property in question. She has attached to her affidavit an application for partition of South Maragoli/Buyonga/936.

4. The application was argued orally on 20th January 2020. Mr. Arwanda stated that the prayer on stay of proceedings had been spent, and so he argued the rest of them. He stated that the application dated 20th November 2018 had sought that the Deputy Registrar signs the relevant documents to facilitate transmission in terms of the certificate of confirmation of grant on record, which application was allowed as it was unopposed. On the prohibition order, he stated that the subdivision sought was contrary to the certificate of confirmation of the grant. He did not give details. He stated that the applicant sought the setting aside of the orders that allowed the unopposed application. He did not give reasons why the same should be set aside. The administratrix was in court, but she could only speak in Maragoli, and the court was unable to get an interpreter, so her case was stated by her son, Thomas Lukose Mugesani, who relied entirely on her replying affidavit.

5. The background to the application goes back to the ruling that Sitati J. delivered on 19th July 2016, on a summons for confirmation of grant dated 4th November 2015. The pertinent parts of that ruling, for the purpose of this ruling, are paragraphs 12, 13 and 14, where the Judge said:

“12. In determining the distribution of the deceased’s estate this court is guided by the provisions of the Law of Succession Act Cap 160 Laws of Kenya and especially Part V thereof. Section 35 (1) of the said Act is the appropriate provision to apply in this case since the deceased left one surviving spouse the petitioner herein. Since the deceased left land parcel No. S/Maragoli/Buyonga/936, the petitioner has a life interest in the whole residue of the net estate. She is therefore entitled to hold the land in trust for all the beneficiaries.

13. However, in view of the fact that most of the beneficiaries need to settle down on their own portions the said parcel of land will be divided equally among the beneficiaries who have an interest in the same, and shall exclude those who have renounced their interest. These beneficiaries entitled to get a share of the deceased’s estate are:

1. Jane M'mbone Mugesani

2. Ronald Odali Mugesani

3. *Fanuel Kihu Mugesani*

4. *Thomas Lukase Mugesani*

5. *Ruth Iminza*

6. *Brenda Mbone Bulimu.*

14. To expedite the completion of these proceedings the petitioner is directed to file a fresh Summons for Confirmation of grant within thirty (30) days from today...

6. In compliance with the direction by Sitati J, the administratrix did file the summons for confirmation of grant dated 12th August 2016, in which she proposed that Jane M’mbone Mugesani, Ronald Odali Mugesani, Fanuel Kihu Mugesani, Thomas Lukase Mugesani, Ruth Iminza and Brenda Mbone Bulimu share Maragoli/Buyonga/936 equally, as stated in the ruling of 19th July 2016, with each proposed to take 0.29 HA. That application was placed before Njagi J on 21st November 2016, and was allowed, with the direction that the estate be distributed as proposed. A certificate of confirmation of grant was generated from those orders, and was issued, dated 15th March 2017.

7. After a grant is confirmed, and a certificate of confirmation of grant issued, the process that follows is known as transmission, of the property from the name of the deceased to that of the beneficiaries named in the certificate of confirmation of grant. That would involve, where the property has to be shared amongst many persons, the subdivision of the property, before the resultant subtitles are registered in the names of the beneficiaries. Transmission is not provided for under the Law of Succession Act, nor under the Probate and Administration Rules. It has nothing to do with the probate court, and it is carried out at the lands registry. It is, therefore, a process under land legislation. The principal legislation is the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The Land Registration Act and the Land Act carry complementary provisions on transmission of property upon the death of an owner after the grant has been confirmed.

8. The provisions in the Land Registration Act are in sections 60 to 63, and state as follows:

“Transmission on death of joint proprietor.

60. If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate.

Transmission on death of a sole proprietor or proprietor in common.

61. (1) If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative’s name of the words “as executor of the will of [deceased]” or “as administrator of the estate of [deceased]”, as the case may be.

(2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission—

(a) any transfer by the personal representative; and

(b) any surrender of a lease or discharge of a charge by the personal representative.

(3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.

Effect of transmission on death.

62. (1) Subject to any restriction on a person’s power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but enforceable and subject to which the deceased proprietor held the land, lease or charge, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor of the land lease or charge with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.

(2) The registration of a person as provided in section 61, shall relate back to and take effect from the date of the death of the proprietor.”

9. On the other hand, the relevant transmission provisions in the Land Act are carried in sections 49 to 51, and they state as follows:

“49. Transmission on death of joint proprietor

If one of two or more joint proprietors of any land, lease or charge dies, the Registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate.

50. Transmission on death of a sole proprietor or proprietor in common

(1) If a sole proprietor or a proprietor in common dies, the proprietor's personal representative shall, on application to the Registrar in the prescribed form and on production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative's name of the words "as executor of the will of () [deceased]" or "as administrator of the estate of () [deceased]", as the case may be. (2) Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission—

(a) any transfer by the personal representative; and

(b) any surrender of a lease or discharge of a charge by the personal representative.

(3) In this section, "grant" means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.

51. Effect of transmission on death

(1) Subject to any restriction on a person's power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor thereof with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.

(2) The registration of any person as aforesaid shall relate back to and take effect from the date of the death of the proprietor."

10. It would appear, as the record is silent on what the administratrix might have done, in an effort to effect transmission, that the matter moved to that stage, and the administratrix ran into some difficulties with the process, ostensibly caused by beneficiaries who did not cooperate with her. She came back to court vide a Motion dated 25th September 2019, to ask the court to direct the Deputy Registrar of the court to sign necessary forms to facilitate transmission as Ronald Odali Mugesani, Brenda M'mbone Bulimu and Ruth Iminza, who were said to have failed to cooperate by signing the documents. The Motion came up first on 8th May 2019, but I put it off as there was no evidence that the same had been served on the three individuals. It came up again on 24th September 2019. The applicant, Ruth Iminza was in attendance, she confirmed that she had been served, and said that she had not refused to sign the relevant papers. I granted the application.

11. The application I am tasked with determining largely seeks the setting aside of the order that I made allowing the Deputy Registrar to sign the papers that would facilitate transmission. It is common ground that the applicant was served with the application by the administratrix. She attended court at the hearing. She informed the court that she had not refused to sign the papers, but she did not explain why she had not signed the papers in the first place. Secondly, she did not ask the court to give her time to respond to the application by way of an affidavit, if she was so minded. The confirmation orders were made in 2016 by Sitati and Njagi JJ, yet more than two years down the line the administratrix was not able to complete administration because the beneficiaries were not cooperating with her, yet she had a duty, under section 83(g) of the Law of Succession Act, to complete administration within six months from the date of confirmation of grant. Litigation must come to an end, and administration should not last forever.

12. I have perused through the affidavit that she proposes to place on record in response to the administratrix's application, should I be minded to allow the instant application. She argues that she and her two other siblings did not sign the papers to allow subdivision, because the proposed subdivision did not fully conform to the directions made in the ruling of 19th July 2016. That may well be so, but the answer to such a challenge is not to refuse to sign the documents and then just sit back. The process must be moved forward. As said elsewhere, it is a process of transmission, which is governed by the land legislation. The parties should have escalated their dispute to the offices and organs provided for under the relevant land legislation to address those matters.

13. I have had occasion elsewhere in this ruling to state that the challenges raised in the application before me relate to transmission of the property, which, I beg to repeat, is a process which happens outside of the provisions of the Law of Succession Act. Consequently, the remedy available should be sought not under the Law of Succession Act, but under the legislation that provides for transmission, that is to say the Land Registration Act and the Land Act. Indeed, under the Land Registration Act and the Land Act the court with jurisdiction with respect to matters that fall under those statutes is Environment and Land Court. That is spelt out in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land 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. The Land Act carries similar provisions , which state as follows:

“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.”

16. It is should, therefore, be clear that since transmission is a process governed by land legislation, which same land legislation provides that the court for the purposes of the said legislation is the Environment and Land Court, it follows that the dispute over transmission of Maragoli/Buyonga/936, should be placed before the Environment and Land Court, or otherwise dealt with within the mechanisms provided for under the relevant land legislation. It is a matter that is now outside the purview of the High Court, it is clearly off the hands of the High Court. The High Court has no answers to the challenges that the parties are having with the process of transmission, the answers are with the relevant land registrar and the relevant courts under the land legislation that I have identified above.

17. Jurisdiction is at the heart and soul of any court. A court only exercises authority where the same has been conferred upon it by the relevant law. With respect to transmissions, the High Court has not been conferred with authority to make intervention, any intervention must be done in accordance with the governing land legislation, by the entities given that authority by the said legislation. Jurisdiction is everything, and, without it, the court should not move any further, and should stop in its tracks, as was stated in *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, in the following terms:

“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.”

18. In the end, I hold that I have no jurisdiction to deal with the issue of transmission as raised in the applications dated 25th September 2019 and 14th November 2019. Consequently, the application dated 14th November 2019 is hereby dismissed, while the orders that were made herein on 24th September 2019 are hereby vacated. Each party shall bear their own costs.

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