REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 325 OF 1998

IN THE MATTER OF THE ESTATE OF PHILIP ISWEKHA AMULABU (DECEASED)

JUDGMENT

1. The application that I am tasked with determining is a summons for substitution, dated 26th May 2017. It seeks that a dead administratrix, Benettta M. Iswekha, be substituted with Francis Lumadede Lunyenye, who claims to be a beneficiary of the estate. The application is brought at the behest of the said Francis Lumadede, who I shall refer hereto as the applicant. He claims to be a buyer, and says that the deceased was not survived by a son or daughter. His application is premised minoron section 44(1) of the Law of Succession Act, Cap 160, Laws of Kenya.

2. When the matter was placed before me on 13th November 2019, the applicant appeared in court together with Nicholas Amulabu. He informed the court that the deceased had children, but he did not know their number. I directed him to file a further affidavit, listing the children of the deceased, and to also obtain the consents of all the said children to pave way for his appointment as administrator.

3. When the matter came up again on 19th February 2020, the applicant indicated that he had not complied with my order of 13th November 2019, which had directed him to file a further affidavit, listing the children of the deceased. He informed the court that what he did was to obtain a letter from the Chief. He indicated that the deceased had only one son, and did not have daughters. He was accompanied by Nicholas Amulabu, who informed the court that the deceased was his father. He said that his mother had obtained representation to the estate, and had died. He said that he was not aware that the applicant wanted to be appointed administrator in her place. He asserted that the estate was that of his father, and he did not know the applicant. The applicant responded by saying that he had agreed with the mother of Nicholas Amulabu that he would get the land. That was in 1990. He said that his agreement was with the mother of Nicholas Amulabu, and not with the deceased.

4. I see on record four documents that were lodged at the registry after the filing of the application on 25th June 2019. The documents in question are a certificate of official search in respect of Idakho/Lukose/174, dated 6th March 2019, a letter from the Chief of Shikumu Location, copy of national identity card for Nicholas Iswekha Amulabu and another letter from the Chief of Shikumu Location, dated 22nd November 2019.

5. All these documents were lodged in court without leave of court. They were also lodged at the registry without being introduced by way of an affidavit. The practice of just filing sheets of paper at the registry without leave of court, and without the said documents being introduced through a sworn affidavit, is something to be deprecated. The Deputy Registrar should discourage the filing of documents at the registry unprocedurally and without authority. The court process is controlled by the court, guided by the relevant laws and rules of procedure. Parties are not at liberty to file any document of their choice in the cause. They must only file such documents as are provided for by the relevant procedure, and where such documents are not provided for then leave of court must be obtained. It should never be a free for all, where parties file all manner of papers, whether they are relevant or not. The Deputy Registrar must see to it that she has control of the registry, in terms of monitoring what the staff at the registry are allowing parties to file, for parties should only file such documents and papers in court as allowed under the rules. The registry must be an orderly place where things are done in an orderly manner.

6. Secondly, I note that I had directed the applicant, on 13th November 2019, to file an affidavit with a view to place certain information before the court. The matter for me to determine was placed on record through an application. In the civil process, the court handles matters through applications, which are supported by affidavits. Any information that a party wishes to have the court consider must be placed on record vide an affidavit. The applicant ignored the directions that I gave on 13th November 2019. Instead of doing what I had directed him to do, he merely did his own things. He went to the Chief, got a letter from him, and then merely lodged the letter at the registry. The letter from the Chief is not the affidavit that I had directed him to file. If it was intended to convey the information that I had directed him to place before the court, then he ought to have sworn an affidavit to introduce that information. Court orders and directions are not propositions or suggestions, they are commands that ought to be obeyed and complied with. The court directs these proceedings, and it must be seen that everything that the court directs is respected by the parties and followed. This is a court of law, and not a kangaroo court, where the parties just do pretty much what they please.

7. Thirdly, the application before me seeks substitution of an administratrix. The law does not provide for substitution of administrators. Grants of representation are personal. They are issued to a particular individual, and only the individual granted representation can hold that grant. Being an administrator is not about being a party to a suit, who can be substituted. The grant made to the administratix has become useless and inoperative following her death, for no other person can use it. It has to be revoked and another administrator appointed, not substituted. A revocation application has to be brought under section 76 (e) of the Law of Succession Act. Technically, the application before me is misconceived. Ideally, it should be struck out. I am mindful of the fact that the parties are laymen, and I shall consider it on its merits, its weak technical foundation notwithstanding.

8. Section 76 of the Law of Succession Act. The said provision states as follows:

> *"76. Revocation or annulment of grant*
>
> *A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—*
>
> *(a) that the proceedings to obtain the grant were defective in substance;*
>
> *(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
>
> *(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*
>
> *(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*
>
> *(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or*
>
> *(ii) to proceed diligently with the administration of the estate; or*
>
> *(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*
>
> *(e) that the grant has become useless and inoperative through subsequent circumstances."*

9. Under section 76(e), a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. In the first place, it would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation were not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate or *vice versa*. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator thereafter got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, unqualified to hold any office of trust.

10. In this case, revocation should be on the basis of section 76(e), that the grant has become useless and inoperative, following the death of the administratrix. The grant was personal to her. Her death means that the grant is now useless. It cannot vest the assets of the estate on anybody else, and no other person can purport to exercise power under it. It is now a useless piece of paper, and it has to be revoked to enable the court appoint fresh administrators. Curiously, although I am told that the administratrix died, no evidence has been provided. She appears to have died recently, after the government started to issue certificates of death. I cannot purport to revoke the grant made to the administratrix before proof has been provided that she died. That proof can only be through a certificate of her death.

11. The applicant is not a child of the deceased. He claims to have bought the property from the dead administratrix. He has not disclosed when he did so, but then that is not the most critical issue. The deceased was survived by children. Yet when he filed his application dated 25th June 2019, he swore an affidavit where he averred that the deceased had no children, neither sons nor daughters. When he appeared in court on 13th November 2019, he told the court that the deceased did in fact have children. That would mean that he told a lie in his affidavit of 25th June 2019. An affidavit is a document on oath. He told a lie on oath. Lying on oath is a criminal offence, that of lying to the court, since the affidavit is a document that is meant to be used in court. I person who lies on oath cannot be suitable for appointment as administrator.

12. Secondly, although the applicant claims to have had bought a portion of the land of the deceased he has provided no evidence that he did indeed buy the land. According to the Law of Contract Act, Cap 3, Laws of Kenya, at section 3, any contract disposing of land must be supported by a memorandum in writing. For the court to treat him seriously, as a buyer of land, he must provide proof in writing that he did enter into such an agreement. Then again, he says he did not transact with the deceased himself, but with the deceased's wife. He has not

disclosed the stage at which he allegedly contracted with her, was it before she obtained representation or was it after? A person can only be a creditor of the estate if he transacted with the deceased prior to his death, or with the administrator after representation has been granted or obtained. A person who deals with a spouse of the deceased or a child of the deceased before such person obtains representation to the estate of an intestate, like the deceased herein, does not become a creditor of the estate, as such person would have no authority to handle the property, and would be an intermeddler. Again, immovable property, such as land, cannot be sold before a grant has been confirmed. That is the effect of sections 45, 79 and 82 of the Law of Succession Act. It is critical that the applicant herein discloses the stage at which he dealt with the administratrix.

13. The said provisions 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 …"*

14. A purported creditor and a son of the deceased are tussling over the administration of the estate. Section 66 of the Law of Succession Act provides for who may be appointed as an administrator of the intestate estate of a deceased person. Priority is given to surviving spouses, children and other relatives of the deceased. Creditors and the Public Trustee rank at the bottom in terms of entitlement to appointment as administrators.

15. Section 66 provides as follows:

> *"66. Preference to be given to certain persons to administer where deceased died intestate*
>
> *When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—*
>
> *(a) surviving spouse or spouses, with or without association of other beneficiaries;*
>
> *(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*
>
> *(c) the Public Trustee; and*
>
> *(d) creditors …"*
>
> and
>
> *"7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by*

virtue of that section has –

(a) renounced his right generally to apply for grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him to renounce such right or to apply for a grant. "

16. Then there is Rule 26 of the Probate and Administration Rules, which states as follows:

> *"26(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.*
>
> *(2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in* Form 38 or 39, by all persons so entitled in equally or *priority, be supported by an affidavit of the applicant and such other evidence as the court may require."*

17. Rule 26(1) (2) applies where representation is sought by a person with equal or lesser right to others who have not petitioned like him. In such case, the petitioner is expected to notify such persons with superior or equal entitlement with notice. The individuals with superior or equal entitlement who have not applied for representation would signify that they had been notified of the petition by either executing their renunciation of their right to administration or by signing consents in Forms 38 or 39, depending on whether the deceased died testate or intestate. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly addressing these issues, that is by indicating that notice was given to all the other persons equally entitled and with prior right, and perhaps demonstrating that such persons had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

18. The applicant in the instant cause, is a purported creditor of the estate, his purported right or entitlement to administration, is inferior to that of the surviving children of the deceased, going by section 66 of the Law of Succession Act. A reading of section 66 and Rules 7(7) and 26 of the Probate and Administration Rules would mean that the purported creditor has to comply with the requirements of Rules 7(7) and 26, since these provisions apply to persons who seek representation while they have a lesser right to administration. He, therefore, should have obtained the consents of the surviving children of the deceased before he applied for representation to the estate of the deceased herein. The directions that I gave to him, on 13th November 2019, to obtain the consents of all the surviving children of the deceased to his being appointed administrator, were meant to bring him to compliance with section 66 of the Law of Succession Act, and Rules 7(7) and 26 of the Probate and Administration Rules, but he chose to ignore my directions. There is no way he can be appointed an administrator before he complies with those provisions.

19. The applicant is not a child of the deceased, and, therefore, he is not an automatic heir of the estate. He claims as a creditor. A creditor needs to prove his debt unless the same is admitted by the family. In his case, his claim his challenged by the son of the deceased. The applicant has not proved his claim to the estate before any court of law. He holds no valid decree of a competent court awarding him any portion of Idakho/Lukose/174. He cannot prove that before this court, seized as it is of a probate matter, as the mandate of the court, in such a matter as this, is distribution of the estate amongst heirs and others who are beneficially entitled. A creditor who has not proved his debt cannot be said to be beneficially entitled to a share in the estate of another. Even then, where the claim is over land, the High Court has no jurisdiction to venture to determine whether he had validly acquired a stake in the estate. The applicant should not seek to prove his claim to a portion of Idakho/Lukose/174 in this cause before this court since this is not a land matter, and this court has no jurisdiction to determine questions relating to land ownership, occupation and use.

20. The primary source of the jurisdiction of the courts is the Constitution. With respect to matters touching on title and, and occupation of land, the relevant provisions are in Article 162(2) and 165(5). 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, 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."*

21. 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)."*

22. 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."*

23. The applicant herein lays claim to Idakho/Lukose/174, not as an inheritor from the estate of the deceased herein, but by alleging that a portion of that property was sold to him. The sale is contested. That would mean the court has to decide a question as to ownership of the said property as between the estate and the applicant. Sale of property is about conveyance of title from the seller to the buyer. The dispute, therefore, is at the heart of title and ownership. Ownership or proprietorship of a property revolves about title, and that clearly places the matter squarely under Article 162(2) of the Constitution.

24. The property in question is registered land. Registration of property and transfers are governed by land legislation, to be specific the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The two pieces of land legislation have elaborate provisions of sale of registered land, and transfer and registration thereof. A determination of the question as to whether there was a valid sale of the registered land in accordance with the relevant land legislation is an issue that is well outside the jurisdiction of the High Court. Both statutes carry provisions which state the jurisdiction of the court with regard to the application and interpretation of the two statutes. These provisions are to be found in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.

25. 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."*

26. 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."*

27. 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 sale, registration and transfer of land, fall within the jurisdiction of the Environment and Land Court. The

Land Registration Act and the Land Act, therefore, confer jurisdiction in the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, any reference in the two statutes to 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 two statutes. All this adds emphasis to the fact that I have no jurisdiction whatsoever to address the matter of acquisition of a stake in Idakho/Lukose/174 by the applicant.

28. Jurisdiction is at the core of exercise of power by a court. Where there is no jurisdiction the court cannot exercise power without violating the principles of rule of law and legality. It was in that context that the Court of Appeal in 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."*

29. I note from the record before me that there is no evidence that letters of administration were ever made to Bennetta M. Iswekha, and a grant issued to her. There is also no evidence, if a grant was ever made to her, that the same was confirmed. Nevertheless, I see that the cause was published in the *Kenya Gazette* issue of 7th August 1998, and she was entitled to letters of administration intestate being made to her in respect of the estate of the deceased.

30. In the end I shall not make any final orders until the parties place on record a certificate to evidence the death of Benetta M. Iswekha. The matter shall be mentioned after 30 days for that purpose.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF MAY, 2020

W. MUSYOKA

JUDGE