



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 124 OF 2007

IN THE MATTER OF THE ESTATE OF LABAN MOGIRE MAGOGO (DECEASED)

AND

IN THE MATTER OF: CONFIRMATION OF LETTERS OF ADMINISTRATION

AND

IN THE MATTER OF: SECTION 71 OF THE LAW OF SUCCESSION ACT, CAP 160

PETER MANONO MOGIRE.....1ST PETITIONER/APPLICANT

AND

BATHSEBA KWAMBOKA OMAR.....2ND PETITIONER/RESPONDENT

MESHACK OGECHI MOGIRE.....3RD PETITIONER/RESPONDENT

AND

MARY MOGAKA.....INTERESTED PARTY

RULING

1. The applicant as filed a summons for execution of mutation and transfer instrument. The application is brought under Rules 59,63,71 & 73 of the Probate & Administration Rules, section 1A,1B,3A, & 98 of the Civil Procedure Act, Section 31 of the Land Registration Act, No. 3 of 2012 and Articles 22 (2), 27, 47, 48,50(1). 159 (2) (d) & 165 of the Constitution, 2010. The applicant seeks the following orders;

i. Spent

ii. That the Honourable Court be pleased to order and/ direct the Honourable Deputy Registrar herein to execute the Mutation, Application for consent of land control board, together with the transfer of instrument(s) over and in respect of L.R. No. Nyaribari Chache/B/B Boburia/516 respectively, to facilitate the sub-division, transfer and registration of the resultant parcels to and/or in favour the beneficiaries in terms of the certificate of confirmation of grant issued on the 29th day of October 2018.

iii. That the honourable court be pleased to grant such further and/or orders, as may be just ad/or expedient to enable the lawful heirs and/or beneficiaries of the estate of the deceased, to partake and/or benefit from the orders of the honourable court and the resultant certificate of confirmation of grant issued on the 29th day of October 2018.

iv. Costs of the application be provided for.

2. The application is supported by the affidavit of Peter Manono Mogire the 1st petitioner applicant. He deposes that following the confirmation of grant of letters of administration the administrators were obliged to proceed and distribute the estate of the deceased in accordance with the schedule. That the rest of the administrator and him were unable to implement and/or execute the distribution owing to mistrust in the appointment of a designated surveyor to carry out the intended sub-division. That he facilitated the sub-division and distribution of L.R.No. Nyaribari Chache/B/B/Boburia/516 and engaged a surveyor who proceeded to *inter-alia* prepare the Application for Consent to Land Control Board in readiness for execution by the rest of the Administrators and him. That the 2nd and 3rd petitioners herein have failed and/or refused to execute the same. That it is imperative that the Deputy Registrar executes the relevant documents to facilitate

implementation and/or enforcement of the judgment and decree of the court and that unless the orders are granted the designated beneficiaries shall suffer irreparable damages.

3. The respondents did not respond to the application nor the interested party. The applicant and interested party filed written submissions. I have read the said submissions and the sections of the law that are cited in this matter. I have also read the cases relied on by the applicant.

4. The applicant in his submissions has relied on Section 47 and Rule 73 of the LSA to persuade this court that the court is clothed with the jurisdiction to entertain the application and that the court cannot allow a party who is out to frustrate the execution of a statutory duty and that the court is seized with the jurisdiction and or mandate to intervene and ensure that the judgment of the court is actualised and or implemented. It was further argued that the jurisdiction of the court relates or concerns all dispute that touch or affect the beneficiaries of the estate of the deceased and that when a dispute arises it is the succession court which is vested and or seized with jurisdiction. To support this argument, the applicant relied on the case of *Munyasya Mulili & 3 Others vs Sammy Muteti Mulili [2017]* and the case of *In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR*. In my view the said cases did not deal with the issue at hand.

5. It was further submitted that the dispute between the administrators is a dispute that can only be resolved within the framework of the LSA and Rules made there under

6. . That the dispute does not pertain to a claim to title to warrant reference to the Environment and Land Court in terms of Article 162 (2) of the Constitution, 2010. Further that the issue before the Court concerns execution and implementation of the decree of this court in terms of the certificate of confirmation of the grant and that such execution cannot be the basis of another suit before another court. Counsel distinguished my decision in the case of *Paskaroa Mogire Ontita vs Joseph Mose Akuma Succession Cause No. 209 of 2000*.

7. The applicant has urged this court not to allow that 2nd and 3rd petitioners to choose when and when not to play ball by choosing not to sign the transfer documents. That the court has to ensure that justice is done as provided by Article 159 (2) (b) and (d) of the Constitution.

8. The issue that is the subject of this ruling is whether this court can grant the orders being sought. As was held in the case of *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd 1989 KLR 1* jurisdiction is everything and without it a court has no power to take one more step. The Law of Succession Act (LSA) Cap 160 gives an administrator the power to execute a transfer instrument and transmit the estate of the deceased to each beneficiary as per the confirmed certificate of grant (see section 82 of the LSK). What then happens when an administrator fails to execute a transfer of instrument? My finding in the case of *Paskaria Moige Ontita vs Joseph Mose Akuma (supra)* was that that the Deputy Registrar cannot usurp the powers of an administrator and that the court lacks jurisdiction to grant the orders sought. Judge Musyoka held as follows in *Succession Cause No. 847 of 2013 In the Estate of Reuben Mugesani Bulimu (Deceased)*.

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... [Emphasis added]

13..... 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.

9. The applicant seeks to have the Deputy Registrar execute the Mutation Form, Application for Consent of the Land Control Board together with the Transfer Instrument. These are documents to be used in the transmission process. I associate myself with the finding of Justice Musyoka that transmission is not provided for under the LSA nor the Probate and Administration Rules. Judge Musyoka ruling is so clear on the issue and I need not elaborate further. The applicant’s only remedy is to move to the appropriate court. This court lacks the jurisdiction to grant the orders being sought. Each party to bear its own costs.

Dated, signed and delivered at Kisii this 30th day of July 2020.

R.E.OUGO

JUDGE

In the presence of:

Mr. Adawo For the Applicant

Absent For the Respondent

Ms. Rael Court Assistant