



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

(Coram: A. C. Mrima, J.)

SUCCESSION CAUSE NO. 275 OF 2015

IN THE MATTER OF THE ESTATE OF NORERI CHACHA (DECEASED)

-between-

OMAR MARWA ADAN.....PETITIONER

-versus-

JACOB GITINGORI MWITA

BENEDICT MARWA MWITA

AUGUSTINE PETER MWITA.....OBJECTORS/PROTESTORS

JUDGMENT

1. On 08/03/2018 this Court delivered a ruling on an Objection to Making of a Grant. The objection was dated 30/08/2010.
2. The objection was allowed. A joint grant was issued to the Petitioner herein, *Omar Marwa Adan*, and the First Objector/Protestor herein, *Jacob Gitingori Mwita*. I will henceforth refer to the first Objector/Protestor as '**Jacob**'.
3. The Petitioner thereafter filed a Summons for Conformation of the Grant dated 14/03/2018 on 15/03/2018 (hereinafter referred to as '**the Summons**'). The Summons was supported by the Affidavit of the Petitioner sworn on 14/03/2018. The Petitioner proposed that the estate property known as *Bukira/Buhirimonono/341* (hereinafter referred to as '**the land**') do wholly devolve unto him.
4. The Summons was opposed by the Objectors/Protestors. Jacob swore and filed a Replying Affidavit to that end on 09/04/2018 and 10/04/2018 respectively.
5. Directions on the hearing of the Summons were taken to the effect that the Summons be heard by way of oral evidence. Parties filed their respective witness statements and documents.
6. The Petitioner testified. He also called two witnesses. They were an elderly woman one *Victoria Boke (PW1)* and *Zablon Mwita Manini (PW2)*.
7. Jacob testified as well. The third Objector/Protestor *Augustine Peter Mwita* also testified. *Thomas Robi Sigiria* testified as a witness. He was **OW1**. *Patrice Gugwa* testified as **OW2**.
8. As stated in the ruling rendered on 08/03/2018 the Petitioner's claim on the estate subject of these proceedings was twin-pronged. He had claimed entitlement to the land as a beneficiary on one hand and as a purchaser on the other hand.
9. At the hearing of the Summons the Petitioner abandoned his claim as a beneficiary to the estate of the deceased. He stated in cross-examination as follows: -

..... I am not here to inherit from the deceased as the land belongs to the lineage of my mother. I can only buy from them but I cannot inherit from that side.

According to Kuria customs one cannot inherit from his mother's lineage. My claim is that I bought land but I am not seeking to inherit....

10. On re-examination the Petitioner re-stated his position as under: -

I am in Court to claim for the refund of my money or I be given the land...

11. The basis of the Petitioner's alleged entitlement to the land was therefore that he had lawfully purchased the land. He produced minutes of a clan meeting held on 03/07/2005, a copy of an Agreement dated 03/02/1985, an Official Search Certificate for the land and some proceedings before the Land Dispute Tribunal as exhibits.

12. The Objectors/Protestors vigorously disagreed with the Petitioner. They contended that there was no sale of the land to the Petitioner at all. They denied the authenticity of the alleged minutes of the clan meeting and further testified that the proceedings before the Lands Disputes Tribunal were nullified by the High Court in Kisii in *Judicial Review Cause No. 46 of 2011*. According to the Objectors/Protestors the deceased never sold her land during her lifetime.

13. An Official Search Certificate for the land, the judgment in Kisii in *Judicial Review Cause No. 46 of 2011* and a decree in Kehancha Senior Resident Magistrates Court LTD No. 10 of 2010 were produced as defence exhibits.

14. At the close of the parties' cases each party filed written submissions in support of the rival positions.

15. I have carefully considered this matter in light of the record, the pleadings, the evidence, the exhibits and the submissions.

16. As the Petitioner renounced his contention that he was entitled to the land by way of inheritance, the only issue for determination is whether the Petitioner lawfully purchased the land.

17. The issue as to whether a purchaser of land forming part of the estate of the deceased has an entitlement to the estate of the deceased was well canvassed and settled by the Court of Appeal in **Kisumu Court of Appeal Civil Appeal No. 2 of 2014 Musa Nyaribari Gekone & 2 Others vs. Peter Miyianda & Another (2016) eKLR**. The Court in paragraph 19 stated as follows: -

The expression 'any interested party' as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate. We are not persuaded, as Mr. Oguttu urged, that the expression is limited by or should be construed against the provisions of section 66 and 39 of the Law of Succession Act. Section 66 provides a general guide to the court of the order of preference of the person(s) to whom a grant of letters of administration should be made where the deceased has died intestate. Section 39 provides for the order of priority of persons to whom the net intestate estate shall devolve where the deceased left no surviving spouse or children. Those provisions do not in our view have a bearing on the question of who may be an 'interested party' for purposes of an application for revocation or annulment of grant of letters of administration under section 76 of the Law of Succession Act. There is therefore no merit in the complaint that the learned judge paid undue premium or undue regard to section 76 of the law of Succession Act when he held that the 1st respondent has the locus standi to present the application for revocation of the grant. We agree with the learned Judge that the 1st respondent's interest as a purchaser of the property of the deceased qualifies him as an 'interested party' with standing to challenge the grant.

18. The Petitioner may hence, subject to proof, sustain a claim as a purchaser of the land in these succession proceedings.

19. What now comes to the fore is how the Petitioner's claim ought to be dealt with in these proceedings.

20. From the evidence the land was registered in the name of the deceased herein, *Noreri Chacha*. It is on record that the deceased was married to one *Chacha Magori*. The said Chacha Magori was a sibling to the Petitioner's mother and also to one *Augustine Mwita Magori* among others. Augustine Mwita Magori was the father of Jacob and the third Objector/Protestor in these proceedings.

21. The Petitioner testified that Chacha Magori became quite elderly and left the management of the land to his youngest brother Augustine Mwita Magori who was to also take care of the deceased herein. According to the Petitioner the Chacha Magori eventually passed on. The deceased then left her home. Augustine Mwita Magori then sold the land to one *Nchagwa Sabai* in order to raise money for dowry for his children.

22. Augustine Mwita Magori then informed the Petitioner of the sale of the land to Nchagwa Sabai. The Petitioner was disturbed since the land was the only asset left to the deceased. He wondered how and where the deceased will live in the event she returned to her home. In order to avoid a possible family crisis, the Petitioner allegedly bought the land from Nchagwa Sabai.

23. The Petitioner contended that after he purchased the land from Nchagwa Sabai he agreed with Augustine Mwita Magori on two issues. The first one was that in the event the deceased returned to her home the deceased would take possession and ownership of the land. The second issue was that in the event the deceased did not return to her home then the Petitioner was to take over the possession and ownership of the land.

24. It was the Petitioner's position that the deceased never returned to the land and as such the Petitioner remained entitled to the land. That was the basis upon which the Petitioner instituted the succession proceedings.

25. As stated above, the Petitioner's position is variously opposed by the Objectors/Protestors.

26. As a result of the rival positions, determinations on the validity of the alleged sale of the land by Augustine Mwita Magori to Nchagwa Sabai and the alleged purchase of the land by the Petitioner from Nchagwa Sabai must be made. In the event it is established that the purchase of the land by the Petitioner from Nchagwa Sabai was valid in law then this Court will be in a position to finally determine the Summons.

27. The determinations on the validity of the alleged sale of the land by Augustine Mwita Magori to Nchagwa Sabai and the alleged purchase of the land by the Petitioner from Nchagwa Sabai are not within the jurisdiction of the High Court as a succession Court.

28. I dealt with this issue at length in **Migori High Court Succession Cause No. 14 of 2018 In the Estate of Simion Robi Maroa (Deceased)**. Since I still hold that position I will reiterate what I stated therein. I had the following to say: -

9. There was the submission that the succession law in Kenya is circumscribed under the Act and that it is only a Succession Court that has the jurisdiction to deal with all matters relating to the property of a deceased. My response to that submission is that the submission is partly correct. I say so because the Act is a pre-2010 statute. At promulgation of the Constitution in August 2010 Article 262 and the Transitional and Consequential provisions under the Sixth Schedule of the Constitution became operational.

10. Section 7(1) of the Sixth Schedule of the Constitution provides as follows: -

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

11. The effect of the foregone is that the Act which existed before the effective date must be construed in a manner as to bring it into conformity with the Constitution. It therefore means the Act cannot be taken to be the sole and independent source of the succession law in Kenya. The Act must and remains subject to the Constitution.

12. It is the Constitution which created the High Court and the Courts of equal status in Article 165. Each of the three Courts was vested with specific jurisdiction (See the Supreme Court of Kenya in Petition No. 5 of 2015, Republic -vs- Karisa Chengo & 2 Others [2017] eKLR).

13. I have previously dealt with this contention. In Migori High Court Succession Cause No. 77 of 2015 In the Matter of the Estate of Martinus Okore, Randa Okore and Owino Okore (all deceased) (2019) eKLR I held as follows: -

11. On the other hand, the duty of a Succession Court is principally to protect estates of deceased persons which it has jurisdiction over and to oversee the transmission of those estates to the lawful beneficiaries. The High Court as a Succession Court is vested with requisite jurisdiction to discharge that mandate. However, if a dispute arises on the ownership of the land subject of the succession proceedings and/or the declaration of trusts over the land in issue, then such a dispute transcends the jurisdiction of a Succession Court courtesy of Article 165(5) of the Constitution, Section 13 of the Environment and Land Court Act, No. 19 of 2011 among other relevant legal provisions. It is a dispute which calls for evidence to establish ownership or the existence of such a trust upon which finding a party may be a beneficiary for purposes of the distribution of the estate property before a Succession Court or not. (See the Court of Appeal in Peter Moturi Ogotu vs. Elmelda Basweti Matonda & 3 others (2013) eKLR, Muthuita vs. Muthuita (1982-88) 1 KAR 42 and Chogera vs. Maria Wanjira Kimani & Others (2005) eKLR).

12. In reaching that position I am alive to the provisions of Section 2(1) of the Law of Succession Act, Cap. 160 of the Laws of Kenya, which provides as follows: -

Except as otherwise expressly provided in this Act or any other written law, the provisions of this act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estate of the deceased persons dying after the commencement of this Act and to the administration of estate of those persons

13. My response thereto is that the Law of Succession Act is a pre-2010 legislation and pursuant to Article 262 and the Sixth Schedule of the Constitution the Law of Succession Act must be brought into conformity with the Constitution and shall only remain in force and be construed with the necessary adaptations, alterations, qualifications and exceptions. It is the very Constitution that clearly demarcated the boundaries of the superior Courts with their respective jurisdictions. (See the Supreme Court decision in Petition No. 5 of 2015, Republic -vs- Karisa Chengo & 2 Others [2017] eKLR). I am further aware of the immense inconveniences, increased costs and unpredicted delay caused to parties who are forced to move from one Court to the other in dealing with disputes which could be easily dealt with by one Court but since jurisdiction is everything and a Court cannot legally act without it, the law must always prevail given that this country is firmly and constitutionally governed by the Rule of Law.

29. It therefore follows that it is the Environment and Land Court to determine the validity of the alleged sale of the land by Augustine Mwita Magori to Nchagwa Sabai and the alleged purchase of the land by the Petitioner from Nchagwa Sabai. The best this Court can now do is to stay any further proceedings on the summons pending the outcome of the foregone.

30. Resulting therefrom this Court now makes the following orders: -

(a) The Petitioner herein, Omar Marwa Adan, is not entitled to the parcel of land known as Bukira/Buhirimono/341 by way of inheritance;

(b) This Court has no jurisdiction to adjudicate upon the validity of the sale of the parcel of land known as Bukira/Buhirimonono/341 by Augustine Mwita Magori to Nchagwa Sabai and the validity of the purchase of the said Bukira/Buhirimonono/341 by Omar Marwa Adan, the Petitioner herein, from Nchagwa Sabai.

(c) There shall be a stay of any further proceedings in respect to the Summons for Confirmation dated 14/03/2018 pending the determination of the validity of the sale of the parcel of land known as Bukira/Buhirimonono/341 by Augustine Mwita Magori to Nchagwa Sabai and the validity of the purchase of the said Bukira/Buhirimonono/341 by Omar Marwa Adan, the Petitioner herein, from Nchagwa Sabai over Bukira/Buhirimonono/341 by the Environment and Land Court.

(d) Omar Marwa Adan, the Petitioner herein, shall institute and serve the Objectors/Protestors herein with the proceedings before the Environment and Land Court within 90 days'.

(e) In the event the Petitioner fails to take out the proceedings in (d) above the following shall follow: -

(i) The order on stay of proceedings herein shall automatically be discharged;

(ii) The joint Grant issued to the Petitioner and Jacob Gitingori Mwita on 08/03/2018 shall stand confirmed;

(iii) The parcel of land known as Bukira/Buhirimonono/341 shall wholly and jointly devolve to Jacob Gitingori Mwita, Benedict Marwa Mwita and Augustine Peter Mwita who shall hold the property in trust pending the determination and ascertainment of the shares of all those who are lawfully entitled to benefit from that land;

(f) The prevailing status quo shall be maintained pending further orders of this Court.

(g) Each party to bear its own costs.

(h) Parties be at liberty to apply.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 24th day of August, 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. cephasagure2015@gmail.com for Messrs. Agure Odera & Company Advocates for the Petitioner.
2. roabisai@yahoo.com for Messrs. Abisai & Company Advocates for the Objectors/Protestors.
3. Parties are at liberty to obtain hard copies of the judgment from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE