



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 1347 OF 2011

IN THE MATTER OF THE ESTATE OF SIBIANUS RAMBA ODERO (DECEASED)

RULING

1. The grant herein was confirmed on 27th April 2015, and two parcels of land, being West Bunyore/Ekwanda/1708 and 1710 were devolved upon Kennthe Kizili and Gabriel Muga Ramba.
2. Subsequent to that confirmation, a summons, dated 18th March 2019, was filed herein, on 24th April 2019, seeking that titles that had been created from West Bunyore/Ekwanda/1708, being West Bunyore/Ekwanda/2359 to 2366, be cancelled and the land registrar for Vihiga County be compelled to file restrictions on the registers for the resultant subdivisions. It also seeks that the West Bunyore/Ekwanda/1708 be partitioned as per the certificate of confirmation of grant dated 1st April 2016.
3. In the affidavit sworn in support of the application, the applicant, Kennthe Kizili, complains that West Bunyore/Ekwanda/1708, according to the certificate of confirmation of grant dated 1st April 2016, was to be shared between two individuals, namely himself and the administrator. The administrator did not have it subdivided into two portions as per that certificate, but to eight portions, which he went on to transfer to individuals who were not named in the certificate of confirmation of grant. He has attached to his affidavit copies of certificates of official searches to support his contention.
4. To that application, five individuals have been named as interested parties, being Duncan Elphas Abwavo, Michael Nyangaga Obuya, Jared Mimimo Abwavo, Joash Awiti A. Olwanda and Apollo Bwonya Orudho, being the non-beneficiaries benefiting from the subdivisions of West Bunyore/Ekwanda/1708. The 1st and 3rd interested parties appointed an advocate to come on record for them, and they have filed a replying affidavit. The same is sworn by Duncan Elphas Abwavo, who argues that the applicant had introduced strangers to the succession cause without leave of court, the power to place restrictions on land was provided for under the relevant law and the probate court had no jurisdiction over the matter, a claim for cancellation of title based on fraud could only be achieved through a substantive suit and not through interlocutory proceedings, issues relating to transmission of land through succession can only be addressed through the Environment and Land Court, and they are innocent purchasers of land without notice.
5. In addition, the interested parties filed a notice of preliminary objection, dated 29th November 2019, in which they raise diverse issues, such as there being no proper suit before the court, failure to obtain leave to join the interested parties as such, lack of jurisdiction on the part of the court to entertain the suit, lack of *locus standi* on the part of the applicant, and the suit being incompetent, defective and failing to disclose a reasonable cause of action.
7. Directions were given on 4th December 2019, for disposal of the preliminary objections by way of written submissions. By 5th October 2020, when I allocated the matter a date for ruling, only the interested parties had filed their respective written submissions.
8. In their written submissions, the interested parties have argued four grounds, namely that the High Court had no jurisdiction over the matter, the applicant ought to have had obtained leave to have the interested parties joined as such, the applicant had no *locus standi* to institute the suit herein and the application was fatally defective.
9. With respect to lack of jurisdiction on the part of the court, it is argued that the power to cancel titles lay with the Environment and Land Court and the High Court had no jurisdiction. They cite the provisions of Article 162(2)(b) of the Constitution, section 13 of the Environment and Land Court Act No. 19 of 2011 and section 101 of the Land Registration Act Cap 300 Laws of Kenya. On the centrality of jurisdiction to exercise of power by a court, the interested parties cited *Peter Gichuki King'ara vs. IEBC & 2 others* [2013] eKLR, *George G. Gichuru vs. Senior Private Kioko & another* [2013] eKLR, and *Owners of the Motor Vessel "Lillian SS" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR.
10. On the second issue, of the necessity of leave being obtained for joinder of interested parties, the interested parties cite Legal Notice No. 117 of 2013, to argue that it was a mandatory and a prerequisite condition that before a party is made an interested party to a matter, leave

ought to be given by the court. They also cite *Komen Ego & 3 others vs. District Surveyor, Uasin Gishu District & 2 others* [2007] eKLR, to argue that where no leave is granted to join interested parties, no orders can be made against them.

11. On the third issue, that the applicant lacked *locus standi* to institute the suit, it is argued that the applicant was not an administrator of the estate of the deceased, and, therefore, she could not mount a suit seeking cancellation of titles.

12. Finally, it is argued that the application was fatally defective, to the extent that the same sought cancellation of titles. Order 3 Rule 1(1) of the Civil Procedure Rules and *Gilbert Maina vs. Pursham Singh* [2007] eKLR are cited to make the proposition that a substantive order ought to be sought through a substantive suit. Other decisions cited are *Apex International & Anglo Leasing Finance Limited vs. Kenya Anti-Corruption Commission* [2012] eKLR and *Patrick Kiseki Mutisya (deceased) vs. KB Shangani & Sons Limited & others* [2012] eKLR.

13. As narrated here above, the grant herein was confirmed, and a certificate of confirmation of grant was issued. After a grant is confirmed the process of transmission is carried out in terms of the relevant land legislation. In other words, transmission of property in accordance with a confirmation of grant is not governed by the provisions of the Law of Succession Act nor the Probate and Administration Rules. Disputes around transmission of property, as per the certificate of confirmation of grant, therefore, do not lie to the probate court, but to the court with jurisdiction. Indeed, the Law of Succession Act and the Probate and Administration Rules do not carry any provisions on transmissions.

14. Upon confirmation orders being made by a probate court, the next step should be transmission of the same in terms of sections 61 and 62 of the Land Registration Act, No. 3 of 2012. Transmission of property upon death, after confirmation of the grant is a process which is governed by the Land Registration Act, and not the Law of Succession Act, as stated elsewhere. Upon transmission, the beneficiaries named in the certificate of confirmation of grant are issued with title deeds from the property the subject of the transmission.

15. Section 61 of the Land Registration Act provides as follows:

“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 ...

(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) ...

(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 change 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.”

16. The Land Act, No. 6 of 2012, also carries provisions, in sections 49 to 54, on transmission. The provisions relevant to the matter at hand are sections 49 to 51 of the Land Act, 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.”

17. Transfer of land after a succession process is what transmission is about. To facilitate transmission, any subdivisions of the land in question, done after the deceased died, and before the grant was confirmed, may have to be cancelled. Such subdivisions often lead to transfers of the resultant subdivisions to third parties. Cancellation of such transfers may require that such third parties be heard before any action is taken in that direction. I believe that is the context in which the interested parties have responded to the application dated 18th March 2019, that they be heard before the cancellation is ordered. Determinations as to validity of the transactions that led up to the subdivisions, which had not been ordered by the probate court, perhaps do not have to be heard by the probate court. That should raise an issue of jurisdiction. As stated elsewhere, the Law of Succession Act and the Probate and Administration Rules do not provide for transmission of property following confirmation of grant. Indeed, both are silent on what the administrators ought to do with the certificate of confirmation of grant once one is issued to them. What they ought to do with such a certificate is what I have discussed in paragraphs 13, 14 and 16 of this ruling. It follows, therefore, any disputes around transmission should be resolved, not through the Law of Succession Act and the Probate and Administration Rules, but under the relevant land legislation, which govern transmission.

18. Since the law governing the processes of transmission of interests in land is located in the Land Registration Act and the Land Act, the answer to the question, as to the court with jurisdiction to address or resolve disputes around transmission, is to be found within the Land Registration Act and the Land Act. Both statutes carry provisions which state the jurisdiction of the court with regard to the administration, operationalization, 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.

19. 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.”

20. 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.”

21. 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 and which revolve around transmission of property upon the death of the proprietor and after completion of succession proceedings, fall within the jurisdiction of the Environment and Land Court. The Land Registration Act and the Land Act, therefore, confers

jurisdiction on the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, any reference to court in the two statutes refers to the Environment and Land Court, and any subordinate that they have been conferred with jurisdiction over the processes the subject of the two statutes.

22. The question that follows then is whether the High Court can exercise jurisdiction over the processes the subject of these two statutes, or does the Environment and Land Court have exclusive jurisdiction over them? To answer that question, I have to advert to the Constitution, which establishes the judicial system of Kenya. Article 162 of the Constitution identifies the Supreme Court, the Court of Appeal and the High Court as the superior courts, and envisages establishment, through legislation, as per Article 162(2), of a court with status equal to the High Court, to hear and determine disputes relating to the environment and the use and occupation of and title to land. Article 162(3) provides that Parliament, while legislating that court into existence, shall determine its functions and jurisdiction. That of itself would suggest that the High Court would have no jurisdiction to handle disputes that centre on the environment and the use and occupation of and title to land. Article 165 of the Constitution specifically establishes the High Court and delineates its jurisdiction. At Article 165(5), the Constitution declares that the High Court has no jurisdiction over matters that fall within the jurisdiction of the court envisaged in Article 162(2) of the Constitution.

23. For avoidance of doubt, the relevant portions of Articles 162 and 165 state as follows:

“162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) 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.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2) ...

165 (5) 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).”

24. Parliament has complied with Article 162(2) (3) of the Constitution, by passing the Environment and Land Court Act, No. 19 of 2011, which brought into existence the Environment and Land Court. The object of the said Act is set out in its preamble, which states as follows:

“... to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land; and to make provision for its jurisdiction functions and powers and for connected purposes.”

25. The scope and jurisdiction of the Environment and Land Court is set out in section 13 of the Environment and Land Court Act, which 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.”

26. The plain effect of all these provisions, in my view, is that the High Court has no jurisdiction to handle matters that fall under the jurisdiction of the Environment and Land Court, and, it specifically has no jurisdiction or power to address itself to any of the disputes that arise around the processes provided for under the Land Registration Act and the Land Act, which are subject to the exclusive jurisdiction of

the Environment and Land Court. The dispute that has been placed before me relates to transmission of the property of a dead person in terms of a certificate of confirmed grant in the hands of the grant-holders, and cancelation of titles created from the estate property to facilitate the transmission. Transmission of property and cancelation of titles, which hinder such transmission, are processes governed by the Land Registration Act and the Land Act, and under that law, the court with jurisdiction, to deal with any disputes or issues that may arise over the processes is the Environment and Land Court. Transmission is a process which confers title on the beneficiaries named in a certificate of confirmation of grant. It is a process of transfer of title, and, therefore, any issue arising around it would be a dispute over title to which Articles 162(2) and 165(5) of the Constitution apply. Cancelation of titles also concern title. These processes are at the core of Articles 162(2) and 165(5) of the Constitution. The cancelation of titles is, no doubt, one of the functions that are envisaged in Article 162(3) of the Constitution.

27. This is a matter of jurisdiction as conferred by the Constitution and the relevant statutes. That jurisdiction has been conferred by express statutory provisions to another court, and the inherent powers of the High Courts cannot confer jurisdiction that the Constitution and statutes have taken away. Inherent powers spring from jurisdiction, and without jurisdiction there can exist no inherent powers to be exercised. The provisions in the land legislation serve a purpose and design. The objectives served by those provisions are best met when the processes are handled through the channels provided for under the relevant legislation, instead of relying on the inherent powers of the court, which are not properly founded on jurisdiction. Exercise of inherent power would only be justified, in such circumstances, where the subdivisions sought to be cancelled were ordered by the probate court itself, rather than where the subdivisions arose from processes independent of the succession cause, for in the former the probate court would be reviewing its own order rather than interfering with processes that are statutorily outside of its jurisdiction.

28. In the end, I find that the High Court lacks the requisite jurisdiction to entertain the application dated 18th March 2019, and I should down my tools and proceed no further. The matters raised in the said application would best be handled by the Environment and Land Court. Granting the orders sought would amount to assumption of jurisdiction that I do not have, and usurpation of jurisdiction that property belongs to another court. It would amount to acting against the Constitution of Kenya, which would be contrary to my oath of office.

29. In the upshot, the applicant has utterly failed to provide sufficient grounds to justify grant of the orders sought in the application, dated 18th March 2019, and the same is hereby dismissed. This being a family matter, there shall be no order on costs. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF December 2020

W MUSYOKA

JUDGE