REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 337 OF 1994

IN THE MATTER OF THE ESTATE OF MALAYA KOMBO TSUMA, DECEASED

RULING

1. The application for determination is dated 17th April 2014. It seeks nullification of a grant made on 6th January 1995, review of orders made on 20th March 1996 confirming the grant, redistribution of the estate after considering the interests of the applicant, and cancellation of the sub-parcels curved out of Butsotso/Shikoti/1310.

2. It is brought at the instance of Doris Noah Shisumu. She avers that her family had bought a portion of Butsotso/Shikoti/1310, and had lived on the land for over twenty years. She avers that she had put up modern permanent houses on the land. She states that her family was not considered during the distribution of the property, and that she had discovered that her husband, Nuhu Shisumu Alucho, had sold the said portion of land to Livingstone Ambale Rufus, who has since obtained a title to the portion. She says that it was Johnstone Kulundu Mukai who was selling her family land. It is on that basis that she seeks redistribution of the estate.

3. I have carefully perused the record before me, I have been unable to find a reply to the facts set out in the supporting affidavit by way of an affidavit by the persons named as the respondents.

4. Directions were given on 17th July 2017 for its disposal by way of written submissions. There has been compliance with the directions by both sides.

5. In her submissions, the applicant states that she bought the property from the registered owner thereof and therefore she was a liability to the estate. She asserts her claim as a creditor within the meaning of section 86 of the Law of Succession Act, Cap 160, Laws of Kenya. She argues that her application is not opposed. The respondents submit that the estate having been distributed, and the properties vested in the beneficiaries named in the confirmation process, the matter was *res judicata*. They challenge the applicant's capacity to bring the application, and further argue that her relief lies with the Environment and Land Court.

6. The applicant claims that her family had bought a portion of the estate of the deceased. She has not averred in her affidavit in support as to who might have sold the property to her family. It is also not averred as to when that interest was acquired. That is critical given that the family would only have a valid claim if it had bought the property from the deceased himself, for it was he who would have had capacity to dispose of his own property. If the interest was acquired after his death, the transaction would be valid only if it was sold by the administrator of the estate as the assets of the estate vest in administrators by virtue of section 79 of the Law of Succession Act. Even then, the sale can only be valid, by virtue of section 82(ii) of the Law of Succession Act, if it was conducted after confirmation of the grant, or with leave of the court.

7. Secondly, I note that the applicant has not identified the person who allegedly transacted with the estate. She does not state the person within her family who dealt with the deceased or the administrator or whosever sold the property. She does not assert to have had bought the property herself. This is important for it raises the issue as to whether she has capacity or the status to assert a right to the property. From her affidavit it would appear that her husband is still alive. It is the person who transacted with the estate or the deceased who would have the standing in law to assert the rights that she is now asserting. I note too that she has not provided any sort of documented proof of the alleged sale.

8. I am told that the application is *res judicata*, in terms of raising issues that have already been disposed of by the court. Put differently, I am being invited to consider an application which raises issues similar to those that were raised previously in a similar application. I have carefully perused through the file of papers before me. I do not see in the record any application similar to the instant one, and I have not seen any ruling on record where the court considered similar issues. I do not therefore find that the issues raised herein are *res judicata*.

9. It is correct and true that the grant herein was confirmed and that assets distributed. It is possible that transmission might have happened. However, the office of an administrator of an estate is for life. Any person with an interest in the estate can move the court appropriately for a revisiting of action that the administrator might have had taken affecting his interests. In this case I note that the applicant claims that her family had acquired an interest in estate property. She goes on to say that that interest was not taken into account at distribution. If indeed it is true that, then the same can be revisited. The fact of distribution does not *per se* mean that a valid interest of any person would be defeated merely because the estate was distributed. If the court is convinced that a claimant had a valid claim, which was not considered at distribution, and that the confirmation process proceeded without notice to them, then it can intervene and reverse the confirmation process and all what might have transpired thereafter. It cannot therefore be said that the court has no jurisdiction in the matter after a grant has been confirmed.

10. It would appear that the family of the deceased does not acknowledge the sale claimed by the applicant. I note too that the applicant has not provided any sort of documentary evidence of the alleged purchase. That being the case, she has to prove the sale to her, or her family, of the subject land before the court can make any orders in her favour. The issue being raised turns on title to or ownership of land, that is as to whether the applicant acquired an interest in the estate property which could be transferred to her or her family. Article 162(2), as read with Article 165(5), both of the Constitution, have taken away jurisdiction to determine such questions from the High Court. What the applicant ought to do is to move the Environment and Land Court, prove her right to the property in that court, and upon obtaining a favourable decree

have the estate transfer the interest to her.

11. In view of what I have stated above, it is my conclusion that the application dated 17th April 2014 is devoid of merit. It is hereby dismissed with no orders as to costs.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 10th DAY OF April, 2019

W. MUSYOKA

JUDGE