



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 182'A' OF 2015

IN THE MATTER OF THE ESTATE OF MOKAMI MURIMI (DECEASED)

BETWEEN

JOHN MIKWABE MURIMIPETITIONER

versus

GAUDENCIA ACHIENG MUKAMI.....RESPONDENT

RULING

1. This is yet another matter where this Court is called upon to deal with an Estate of a deceased person where third parties are claiming entitlement to the estate by virtue of a hotly contested sale agreement.

2. **John Mwikwabe Murimi** (hereinafter referred to as '**John**') filed Migori Senior Principal Magistrates Court Citation Cause No. 15 of 2012 (hereinafter referred to as '**the Citation**') against **Gaudentia Achieng Mukami** (hereinafter referred to as '**Gaudentia**') where John cited Gaudentia as the wife of the deceased herein, **Mokami Murimi**. John was out to enforce an alleged agreement on the purchase of part of the parcel of land known as **Bugumbe/Masaba/83** (hereinafter referred to as '**the land**') on behalf of his wife one **Tabitha Jamwi Mwikwabe** (hereinafter referred to as '**Tabitha**') who was by then dead.

3. Leave was granted in the Citation and John petitioned for the Grant in the Citation file which culminated with the issuance of a Grant of Letters of Administration for the Estate of the deceased on 15/05/2014. Thereafter, the Citation was transferred to this Court where it became the present Cause. On 04/05/2015 John applied for the confirmation of the grant vide a Summons for Confirmation of the Grant dated 26/04/2015. The Summons was opposed by Gaudentia who filed a Protest claiming that the deceased never sold any portion of the land to John's wife.

4. Directions were taken and the Summons for Confirmation was heard by way of oral evidence. John testified as the Plaintiff/Petitioner and closed his case. Gaudentia testified as the Protestor/Defendant and called her son one **John Mukiira Mokami** who testified as **DW1**.

5. Gaudentia and DW1 vehemently denied the alleged sale of part of the land of the deceased herein to the wife of John. They contend that the deceased never entered into the alleged sale during his lifetime and that the family of the deceased herein was never involved in the alleged sale. That, if any sale at all went on then it was between the father of the deceased herein and Tabitha and not the deceased. John contends that although he had no Grant of Letters of Administration on behalf of the Estate of Tabitha, he could still maintain a valid claim over the estate herein in his position as the spouse. Upon closure of their respective cases, parties filed written submissions and highlighted on the same.

6. The hearing revealed the backbone of the contest herein as the alleged sale of part of the land. Whereas John contends a valid sale, Gaudentia is of the contrary position. Gaudentia has denied ever willingly appending her thumb print on a sale agreement and insists that she had only been sent to collect money from John by her father-in-law at the office of John's lawyers where she was asked to acknowledge receipt of the money and did not attempt at any time to sell the land since she had no power to do so. Gaudentia was however aware that her father-in-law sold part of his land to John elsewhere. Gaudentia further questioned the legal capacity on which John was maintaining the proceedings on behalf of Tabitha despite not being the Administrator of the estate of Tabitha.

7. I have previously dealt with like disputes and have declined jurisdiction over them. Recently 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)** 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 Ogutu 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.

8. I still hold that position in this matter since I am so clear in my mind that the **Constitution** did not envisage concurrent jurisdiction on the High Court and the Environment and Land Court over matters on *inter alia* ownership of land.

9. It can therefore be only fair that John is accorded an opportunity before an appropriate forum to assert his wife's claim, if any, on the estate property. It is that resultant decision which will determine whether there was a valid sale between Tabitha and Gaudentia over the land and that will enable this Court determine the appropriate way forward.

10. Consequently, the following orders do hereby issue: -

(a) This Court has no jurisdiction to adjudicate upon the validity of the sale between Tabitha Jamwi Mwikwabe and Gaudentia Achieng Mukami over Bugumbe/Mabera/83.

(b) There shall be a stay of any further proceedings in respect to the Summons for Confirmation dated 26/04/2015 pending the determination of the validity of the sale between Tabitha Jamwi Mwikwabe and Gaudentia Achieng Mukami over Bugumbe/Mabera/83 by the Environment and Land Court.

(c) John Mwikwabe Murimi or any appropriate party shall file and serve the proceedings before the Environment and Land Court within 90 days' failure to which the stay of proceedings herein shall be automatically discharged and the Summons for Confirmation dated 26/04/2015 shall be fixed for judgment.

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

(e) Parties be at liberty to apply.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 26th day of July 2019.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of: -

Mr. Mudeyi, Counsel instructed by the firm of Messrs. Mudeyi Okumu & Company Advocates for the Plaintiff/Petitioner.

Mr. Abisai, Counsel instructed by the firm of Messrs. Abisai & Company Advocates for the Protestor/Defendant.

Evelyne Nyauke - Court Assistant