REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 503 OF 2011

IN THE MATTER OF THE ESTATE OF FRANCIS IMONJE MUKOTO (DECEASED)

JUDGMENT

1. This cause relates to the estate of Francis Imonje Mukoto, who died on 7th July 2003. A letter from the Chief of Shisele Location, dated 14th April 2010, indicates that the persons, who, in the opinion of the Chief, were entitled to a share in his estate included his widow – Juliana Busolo Imonje, his brother Charles Mukoto Shikami, and Shimanyiro Secondary School. There are other individuals whose names are listed but it is not indicated how they were related to the deceased, that is Benard Lumiti Omonje, Rose Imonje, Kevin Imonje, Stanslaus Makani, Stephen Imonje, Cleophas Imonje and Irni Machafu.

2. Representation to the estate was sought by Benard Lumiti Imonje, in his purported capacity as son of the deceased, through a petition lodged herein on 20th July 2011. He expressed the deceased to have had been survived by two widows, being Juliana Busolo Imonje and Rose Imonje. His surviving sons were listed as Benard Lumiti Imonje, Kevin Imonje, Stanslaus Makani, Stephen Imonje and Cleophas Imonje. He was also said to have been survived by his brother, Charles Mukoto Shikami, and his grandson, Irni Machafu. He was said to have had died possessed of three parcels of land, being Idakho/Shiseso/1835, 1836 and 1837. Letters of administration intestate were made to Bernard Lumiti Omonje on 10th January 2012 and a grant duly issued dated 24th January 2012. The said grant was confirmed on 8th April 2015 on an application dated 7th August 2014, and a certificate of confirmation of grant was duly issued dated 29th July 2015. Idakho/Shiseso/1835 devolved in equal shares upon Juliana Busolo Imonje, Rose Imonje, Benard Lumiti Imonje, Kevin Imonje, James Lumiti Mayekula, Agapitus Lunalo Mayekula, Stanslaus Makani and Stephen Imonje. Idakho/Shiseso/1836 devolved wholly upon Charles Mukoto Shikami, while Idakho/Shiseso/1837 devolved upon Blasio Kubai Shikami.

3. On 8th August 2016, St. Bonaventure Shimanyiro Secondary School, hereinafter referred to as the school, through Simon Shikanga, the Chairman of its Board of Management, hereinafter to be referred to as the applicant, lodged a summons dated 17th February 2016, seeking orders relating to the orders made on 8th April 2015 confirming the grant on record and seeking a redistribution of the estate. The complaint by the applicant is that the grant was obtained through a defective and fraudulent process as he was not involved in the proceedings. He stated that he had bought part of Idakho/Shiseso/712 from the deceased on 31st January 2000 and therefore he was entitled to the whole of Idakho/Shiseso/1837, which arose from the subdivision of Idakho/Shiseso/712. He avers that he had bought the parcel of land on behalf of the Shimanyiro Secondary School, where he was the Chairman of the Board of Governors. The school took possession of the land and developed it, but the deceased died before he could transfer the same to the institution. He has attached to his affidavit a handwritten memorandum of the said sale transaction.

4. The reply to the application is by Benerd Lumiti Imonje, vide an affidavit that he swore on 4th October 2016 and filed herein 5th October 2016. He denies that the deceased sold any land to the school, saying that if there was any sale the same was not with the deceased but one Shikami Mukoto, who did not own the land in question. He also avers that the family refunded to the school any money that might have been received on behalf of Shikami Mukoto. He asserts that the school was neither a beneficiary of the estate nor a liability, and therefore there was no obligation to have it involved in the proceedings. He further argues that the subject land was agricultural land and consent of the land control board was necessary as required by the Land Control Act, Cap 302, Laws of Kenya. He has attached several documents to his affidavit to support his case.

5. Directions were given on 16th November 2016 for disposal of the application by way of *viva voce* evidence.

6. The oral hearing commenced on 27th November 2018, with Simon Shikanga on the witness stand. He testified on how the school bought a portion of the subject land from Charles Shikami Mukoto, who he conceded was not the registered proprietor of the property. He stated that the sale was approved by the land control board and subdivision was allowed. The land was subdivided into three portions, being Idakho/Shiseso/1835, 1836 and 1837. Idakho/Shiseso/1835 was registered in the name of the deceased, Idakho/Shiseso/1836 was for Shikami, while the school was to get Idakho/Shiseso/1837. The three parcels were registered in the name of the deceased and were not transferred to the other two proprietors as at the date of his death. He explained that before transfers be effected restrictions were placed on the land by Bernard Imonje. The matter was escalated to the Divisional Land Tribunal in 2006, which awarded the land to the school, which award was adopted by the court. Bernard Imonje was not satisfied and he moved to the High Court on appeal in ELC No. 15 of 2014 but his

appeal was dismissed. He stated that the school was still using the land.

7. During cross-examination, he conceded that he had bought the land from Shikami Mukoto and not from the deceased, he also stated that the school did not obtain consent of the land control board to transfer the land, and that they did not obtain consent to transfer within the six-month period allowed in law. He stated that there were restrictions placed on the land by the sons of the deceased. He also conceded that there was nothing that prevented the deceased from transferring the property to the school between the date of the transaction and the date of his death. He referred to correspondence between him and Shikami Mukoto during which the said transaction was allegedly revoked, but he said that they did not collect the sale money which had been deposited with Shikami's advocates.

8. The case for the administrators opened on 11th March 2019, with Bernard Lumiti Imonje on the witness stand. He testified that the distribution proposed in the confirmation application had not been opposed by any of the family members. He asserted that the deceased never sold any land to the school, adding that the school ought to pursue the person who sold the land to it. He said that the refund of the purchase money was by Blasio Shikami. He said that his uncle who sold land to the school had his own land which did not have a reference number. He said that parcel of land was now Idakho/Shiseso/1836 which he had inherited from his father. He stated that the school might have bought the land but he was away at the time.

9. There was also evidence from Raphael Kuyabi Shikundi, which turned, not on the dispute between the estate and the school, but on a matter of a road that he wanted the court to order to be reopened.

10. Although the application before me is headed summons for revocation, it is clear from the body of the application, and the contents of the affidavit in support, that the applicant does not seek revocation of the grant, but is unhappy with the orders on distribution of the estate.

11. Revocation of grants of representation is provided for in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. A grant may be revoked on three general grounds. The first is where the process of obtaining the grant was defective or was attended by fraud, misrepresentation and concealment of matter from the court. The second would be where the grant is obtained procedurally, but the administrator fails to apply for confirmation of his grant within the period required in law, or fails to proceed diligently with the administration of the estate, or fails to render accounts as and when required to. The third general ground would be where the grant has become useless or inoperative for some reason, such as where the sole grant-holder dies.

12. For avoidance of doubt the said provision states:

> "76. Revocation or annulment of grant
>
> A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
>
> (a) that the proceedings to obtain the grant were defective in substance;
>
> (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
>
> (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
>
> (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
>
> (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
>
> (ii) to proceed diligently with the administration of the estate; or
>
> (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
>
> (e) that the grant has become useless and inoperative through subsequent circumstances."

13. The applicant's case, as presented and conducted, did not dwell on the process of obtaining the grant to demonstrate whether or not the process was defective or fraudulent. Neither was it geared to demonstrating that the administrators had failed in the administration exercise, or that their grant had become useless or inoperative. Therefore, no case was made for revocation of the grant.

14. The revocation order sought, as framed, is not for revocation of the grant of representation, but rather of the certificate of confirmation of grant. It will be noted that section 76 does not provide for revocation of certificates of confirmation of grants, but of the grant itself. An application premised on section 76, which seeks revocation of a certificate of confirmation of a grant cannot, therefore, be proper. I doubt that the same can be sound basis for annulment of a certificate of confirmation of grant.

15. A certificate of confirmation of grant is a document processed from the orders that the court makes upon confirming the grant. It is clearly, therefore, not a grant in itself and, therefore, it is not available for revocation under section 76. It merely encapsulates the contents of

the orders that the court makes at confirmation of grant. It is a purport of the confirmation orders. Annulment or cancellation of the certificate of confirmation of grant does not in any way affect the confirmation orders themselves, since it is a mere extract of those orders. It is a mere piece of paper summarizing the orders that the court made at confirmation of grant. A party who is serious about having the confirmation orders set aside or vacated or varied, does not seek cancellation or annulment of the certificate, but targets the confirmation orders themselves. For once the said orders are vacated or varied or set aside, the certificate from which they are extracted automatically becomes a useless or worthless piece of paper. What I am, therefore, saying is that the application before me would be of little benefit to the applicant, if all what he seeks is the revocation of the certificate of confirmation of grant, as the revocation of the said certificate would leave the confirmation orders intact.

16. The other issue turns around the sale transaction alleged to have had happened between the school and the estate. The school says it bought land belonging to the deceased, and, therefore, the estate owes the school some land. The estate says that the deceased did not sell any land and, therefore, it does not owe the school any land. It transpires that the sale was between the school and another person, not the deceased proprietor of the subject land. Did the school acquire any proprietary rights to the property? I would rather not answer that question, as I do not, sitting as a Judge of the High Court, have jurisdiction to determine such matters. That jurisdiction was taken away from the High Court by the Constitution 2010.

17. The relevant constitutional provisions on this are Articles 162(2) and 165(5). The relevant provisions 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) employment and labour relations; and
>
> (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).
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> (4) …
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> 163 …
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> 164 …
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> 165. (1) There is established the High Court, which—
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> (a) …
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> (b) …
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> (2) ...
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> (3) Subject to clause (5), the High Court shall have—
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> (a) unlimited original jurisdiction in criminal and civil matters;
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> (b) …
>
> (c) …
>
> (d) …
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> (e) …
>
> (4) …
>
> (5) The High Court shall not have jurisdiction in respect of matters—
>
> (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
>
> (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
>
> (6) …

(7) …"

18. Parliament in obedience to Article 162(3) of the Constitution passed the Environment and Land Court Act, No. 19 of 2011, to establish the court envisaged in Article 162(2)(b) and to lineate the jurisdiction of the said court. The preamble to the Act states the objective of the Act to be: -

> "… 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."

19. The scope and jurisdiction of the said court is set out in section 13 of the 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) re*lating 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."

20. The legislation that governs land is the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The two land statutes cover such matters as contracts for sale land, transfers of land, among others, and provide for processes for determination of disputes that arise with regard to those matters. The court for the purpose of resolution of such disputes is the Environment and Land Court Act, for that is what "court" is defined to mean at section 2 of both Acts.

21. The overall effect of all these provisions is that the High Court has no jurisdiction whatsoever to handle or determine questions around ownership or title to property. That would include determination of disputes about contracts for sale, on whether the sales were valid or resulted in the valid or legitimate transfer of proprietary rights from the vendor to the purchaser. Consequently, there can be no jurisdiction for me to determine whether the school herein entered into a valid sale of land contract with the deceased or any other person, and whether the school acquired any proprietary rights over the land in question from the said transactions. Those questions can only be resolved by the Environment and Land Court.

22. Once the person who claims to have had acquired an interest in estate land by sale obtains a favourable decree from the Environment and Land Court, he should place it before the administrator who should be bound by it, and who should therefore give effect to it.

23. That would mean in the instant case, that should the school have a decree in their favour from a court of competent jurisdiction, the administrator would be obliged to give effect to it. It would mean that once such a decree is placed before the High Court the court ought to respect it, have regard to it and require the administrator to give effect to it by ceding the estate property the subject of the decree to the decree-holder. In the instant case, no such decree was placed before, either through being annexed to the affidavit in support of the revocation application or by being produced as an exhibit at the oral hearing. I can only, therefore, conclude that the school is yet to prove its right to the property and obtain an award or decree of a competent court in its favour.

24. There is a third party who wants the court to intervene regarding a road. The issues around where the road should pass through, and whether it should be opened or closed, are matters that relate to land, and, in respect of which, I have held already, fall outside the jurisdiction of this court.

25. From what I have said so far, it should be obvious that the applicant has not established their case for the orders sought in the application dated 17th February 2016. The said application has no merits, and it is hereby dismissed with costs. Any party aggrieved by the orders that I have made hereabove has the liberty, within twenty-eight (28) days, to move the Court of Appeal appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26thDAY OF JULY 2019

W. MUSYOKA

JUDGE