



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 192 OF 2015

IN THE MATTER OF THE ESTATE OF ADRIANO MBALILWA SHITEMBETE (DECEASED)

JUDGMENT

1. Adriano Mbalilwa Shitembete, the deceased person to whom these proceedings relate, died on 9th June 1990. According to a letter from the Chief of Khayega Location, dated 30th March 2015, he was survived by four children, being Zacharia Mbalilwa Adriano, Fanus Mukaisi Mbalilwa, Catherine Vunyinda Mbalilwa and Rosalia Khasiala Shivachi, and that he died possessed of two parcels of land, known as Isukha/Lukose/937 and 1435. Representation to the intestate estate of the deceased was sought by Adriano Mbalilwa Shitembete alias Mbalilwa Tembete. He expressed the deceased to have had been survived by the four individuals named in the Chief's letter, and to have died possessed of the two assets listed in that letter. Letters of administration intestate were made to him on 24th February 2016, and a grant was issued to him of even date. I shall hereafter refer to him as the administrator.

2. On 18th March 2016, a summons was lodged herein by the administrator, dated 18th March 2016, seeking confirmation of his grant. The application listed the four children of the deceased named in the Chief's letter as the persons who had been ascertained as having survived the deceased. It was proposed that the two assets in the Chief's letter be shared out jointly between the four survivors.

3. To the summons for confirmation of grant, Martin Khataka Adriano, Bernard Mbalilwa Juma and Celestine Injila Alogongo, to be hereafter referred to as the protestors, filed an affidavit of protest, sworn on 31st August 2016, by Martin Khataka Juma, and filed herein on 1st September 2016. He acknowledged that the deceased was the father of the four individuals named in the chief's letter, and the registered proprietor of the two assets named in that letter. He identified his own father as David Juma Asichi, also known as Daudi Juma Asigi, who he described as a nephew of the deceased and a cousin of the administrator. He identified the children of his father as himself (1st protestor), Bernard Mbalilwa Juma (2nd protestor), Protas Luchinga Asichi, Paul Likhayo and the late Patrick Kenyatta Lipesa, represented by his widow, Celestine Injila Alogongo (3rd protestor). He averred that although Isukha/Lukose/937 was registered in the name of the deceased, his father, the late David Juma Asichi, had been in occupation of it since the 1950s and had raised his family on the land. He further averred that the remains of the said David Juma Asichi and his late children, Bonface Shibuku Juma, Francis Witava Juma, Patrick Lipesa Juma and Stephen Ingoi Juma were all buried on the said parcel of land. He claimed that during land adjudication, the late David Juma Asichi was in Nairobi and for that reason the deceased was registered as proprietor of the subject property, although neither he nor his family were in occupation of the property. He asserted that the family of the deceased was not entitled to and had no interest in the subject property, and that they were instead entitled only to Isukha/Lukose/937.

4. The protest elicited a response from the administrator, vide an affidavit sworn on 6th October 2016 and filed herein on even date. He averred that he was unaware that he and the protestors were related by blood, and asserted that all he knew was that the Isukha/Lukose/937 belonged to the deceased and the family of the protestors had no claim to it whatsoever. He stated that the protestors were entitled to Isukha/Lukose/1435, a property in the name of the Daudi Juma Asigi, and he attached to the affidavit copy of a search certificate dated 1st September 2016, to support his case. He urged the protestors to move the court for succession to the estate of their father with respect to the said property.

5. Directions on the disposal of the application for confirmation of grant were given on 10th October 2016. The matter was to proceed by way of viva voce evidence. The parties were directed to file affidavits of the persons they proposed to call as witnesses. The administrator complied by filing affidavits sworn by his witnesses known as Benedict Litali Shakwila, Henry Shiasuvila Mbalilwa and Maurice Litali Juma. The three relatives of the deceased sought to confirm the administrator's position that the subject property belonged to the deceased, and that the family of the late David Juma Asichi was entitled to a property known as Isukha/Lukose/1434. The protestors did not file affidavits of their witnesses as directed by the court, they instead chose to file witness statements, of Fredrick Bukoba Mung'anyi, Felix Musebe Ikaalia and Anastanzia Shing'ole Busieka. There is also on record an affidavit by the administrator, sworn on 10th September 2018, in purported reply to the protest affidavit, which was filed without any leave having been sought and granted by the court.

6. The oral hearing commenced on 3rd July 2018, with the administrator on the witness stand. He identified the four children of the deceased as those spelt out in his petition, and the property similarly as that listed in the petition. He restated that he wished to have the property shared out equally between the children. He stated that none of the four lived on Isukha/Lukose/937, instead, he said, it was squatters who lived there, and he named them as the protestors in this case and their siblings. He said that he knew their father. He stated that their father and his wives were not buried on Isukha/Lukose/937. He said that they lived on government land, which was not part of Isukha/Lukose/937. He said that the protestors' houses were not on Isukha/Lukose/937 but on adjoining government land. He then added at cross-examination that the father of the protestors lived in Isukha/Lukose/937 with his children, while the rest of his children were on

7. The administrator called Maurice Litali Chuma as his witness. He identified the deceased as his grandfather. He described the protestors as his siblings, as their father was also his father. He stated that his father had said, before he died, that upon his death his remains should be interred at Isukha/Lukose/1434. After his father died, the witness went to see the administrator because he and the protestors were living on Isukha/Lukose/937, which did not belong to his father, and agreed that the remains of his father be interred behind a banana grove as the land was no his. He said that his brothers messed up by raising the issues the subject of the instant protest, and began to destroy the deceased's property. He disagreed with them and moved out and settled on his father's land, Isukha/Lukose/1434. He said that he had no claim at all to the estate of the deceased. At cross-examination, he stated that he was born and raised on Isukha/Lukose/937, and that his father and one of his brothers were buried on the said land. He confirmed that his siblings, the protestors, had houses on the said land. He stated that Isukha/Lukose/1434 bordered with Isukha/Lukose/1435 on which the administrator lived, and that Isukha/Lukose/937 was some twenty kilometers away from the two.

8. The third witness on the administrator's side was Henry Shiasubila Asirigwa. He said he was a clansman of the deceased, who was like an uncle to him. He said that the land occupied by the protestors belonged to the deceased and he described them as being on the land illegally. He said that it was their father who was to blame for the impasse for he failed to inform them prior to his death that the property did not belong to him. According to him, they learned of that fact after his death. After he died, his children approached the administrator, who allowed them to bury the remains on Isukha/Lukose/937. He referred to a family meeting that was held on 25th October 2014, where the agreement was hammered out. Another agreement was entered into the following day, 26th October 2014. He expressed surprise that the matter ended in court. He said the reason the protestor's father was not buried in front of his house, as is the custom, and was buried at the back of the compound, was because the land was not his. He asserted that the protestors had their own land, Isukha/Lukose/1434.

9. The administrator's last witness was Josephat Okechi Likuyani. He was the Assistant Chief for Lukose Sub-Location. He confirmed that on 25th October 2014 the administrator had called him to inform him that the protestors and the other children of Daudi Juma had gone to his home to agree on how the remains of their father were to be buried on the farm of Zakaria's farm. He said that he was informed that the two families had reached some agreement. On 27th October 2014 he was called by the two sides to a meeting where he was shown. Some documents that had been signed by them. Based on those agreements and documents, the body of Daudi Juma was removed from the mortuary and buried on Isukha/Lukose/937. He stated that they had agreed that the body be buried near the banana plants. The administrator then fenced off that portion with the grave of Daudi Juma. The barbed wire was later removed and the posts uprooted. During cross-examination, he stated that Daudi Juma always lived on Isukha/Lukose/937. He said that he was not aware of any land dispute during his lifetime, for no one came forward to ask him to leave.

10. The case for the protestors opened on 27th November 2018, with Martini Khataka Juma on the stand. He said that the deceased and his father were related. He said that his claim to Isukha/Lukose/937 was founded on the fact that he was born on the land, their father left them there, he was buried there and that they were living there. He confirmed that the land was registered in the name of the deceased. He said that during demarcation, his father was in Nairobi, and it was the deceased, who he described as the brother of his father, who was on the ground hence the land was registered in his name. He said that the family of the deceased never lived on the land. He said that he wanted the name of the deceased removed from the register for Isukha/Lukose/937. During cross-examination, he confirmed that the deceased was not his father, and that both Isukha/Lukose/937 and 1435 were registered in the name of the deceased. He said that he was not aware that his father had any other land elsewhere apart from Isukha/Lukose/937. He stated that there was no case filed at the Environment and Land Court.

11. The protestors called Felix Musebe Ikaalia as their witness. He was an in-law to the protestors. He stated that the father of the protestors and some of their relatives were buried on Isukha/Lukose/937. He confirmed that the protestors were not children of the deceased. He said that Isukha/Lukose/937 was registered in the name of the deceased, but he was not its owner.

12. At the close of the oral hearings, the parties filed written submissions. I have read through them and noted the arguments made therein. Regrettably none of the parties articulated the legal issues at the heart of the matter, and none of them pointed me to any relevant statutory provisions or case law.

13. This matter is fairly straight forward. The deceased herein died and was survived by the four children listed in the petition. That is not in dispute. He died leaving behind two assets registered in his name, being Isukha/Lukose/937 and 1435. That is again not in dispute. The dispute is that although Isukha/Lukose/937 is registered in the name of the deceased, it is alleged by the protestors that it did not belong to him, for it instead belonged, it is alleged, to the father of the protestors. The protestors have urged me to order that the name of the deceased be removed from the register for Isukha/Lukose/937.

14. What I have to grapple with is whether I have any jurisdiction to make that determination, because this is an invitation to me to decide on the ownership of the property as between the deceased and the father of the protestors. Jurisdiction is everything. That position was settled by the Court of Appeal in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR*, where Nyarangi JA famously said:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

15. The jurisdiction to determine questions around ownership of property was taken away from the High Court by the Constitution 2010. 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).

(4) ...

163 ...

164 ...

165. (1) There is established the High Court, which—

(a) ...

(b) ...

(2) ...

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) ...

(c) ...

(d) ...

(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) ...”

16. In obedience to Article 162(3) of the Constitution, Parliament passed the Environment and Land Court Act, No. 19 of 2011, to establish the court envisaged in Article 162(2)(b) and to delineate the jurisdiction of the said court. The preamble to the Environment and Land Court 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.”

17. Section 13 of the Environment and Land Court Act sets out the scope and jurisdiction of the said court, and it 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.”

18. The statutory framework that regulates land dealings in Kenya is the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The legislation provides for processes for determination of disputes that arise with regard to land matters. Section 2, in both statutes, defines the court for the purpose of resolution of such disputes as the Environment and Land Court.

19. The legal framework that I have set out above clearly points to the legal position that the High Court has no jurisdiction whatsoever to handle or determine questions around ownership of or title to property. That would, therefore, mean that I, sitting as a Judge of the High Court, have no jurisdiction to determine ownership of Isukha/Lukose/937 as between the deceased and the father of the protestors. Issues around that can only be resolved by the Environment and Land Court.

20. The correct position and practice should be that a person who claims to have an interest in land that is registered in the name of another should obtain a decree favourable to them from the Environment and Land Court, place it before the administrator who should be bound by it, and who should, therefore, give effect to it. Should the administrator ignore or disregard the decree of the Environment and Land Court, the claimant should move the probate court appropriately. That is the route that the protestors herein should have taken, instead of merely filing a protest to the confirmation application and expecting the High Court to make determinations on issues over which it has no jurisdiction.

21. It should be emphasized that in probate proceedings, the role of the probate court, ultimately, is to distribute the property of the deceased amongst the persons that are entitled to it. The duty of this court is, therefore, limited to that role. The survivors of the deceased herein have been identified and the two assets that the deceased died possessed of have also been identified. There are documents on record indicating that the said two assets are in the names of the deceased. A decree of the Environment and Land Court awarding Isukha/Lukose/937 to the family of the protestors has not been placed before me. There is, therefore, no basis upon which I should refrain from distributing the same as property in the estate of the deceased.

22. I understood the position taken by the protestors to be that the property in question was held by the deceased in trust for the family of the protestors. Unfortunately, that argument was not advanced before me. It was not articulated in the written submissions, and it should not be my duty to read the mind of the parties. In any case, there is little material on record establishing such a trust. Needless to say that the registration happened in 1973, the deceased died in 1990, the father of the protestors had more than adequate time to stake a claim to the property during the lifetime of the deceased, and to have the situation, if there was one, corrected. He never availed himself of the opportunity.

23. In the end the orders that I shall make in this matter are as follows:

(a) That the protest to the confirmation of the grant herein is hereby dismissed and the grant on record is hereby confirmed;

(b) That the estate of the deceased, that is to say Isukha/Lukose/937 and 1435, shall be distributed equally amongst the children of the deceased, that is to say Zacharia Mbalilwa Adriano, Fanus Mukaisi Mbalilwa, Catherine Vunyinda Mbalilwa and Rosalia Khasiala Shivachi;

(c) That a certificate of confirmation of grant shall issue accordingly in those terms;

(d) That any party aggrieved by the orders made in this judgement has twenty-eight (28) days to move the Court of Appeal appropriately; and

(e) That the administrator shall have the costs of the litigation.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 15th DAY OF August, 2019

W. MUSYOKA

JUDGE