



IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 215 OF 2011

IN THE MATTER OF THE ESTATE OF MUSA OMURWA (DECEASED)

BETWEEN

IRENE KERUBO MUSA.....APPLICANT

AND

MARY KEMUNTO MUSA.....1ST RESPONDENT/PETITIONER

IBRAHIM ONKOBA MAKAYA.....2ND RESPONDENT

PAMELA ADHIAMBO OUKO..... 3RD RESPONDENT

FAMILY BANK LIMITED..... 4TH RESPONDENT

LAND REGISTRAR – KISII COUNTY..... 5TH RESPONDENT

ATTORNEY GENERAL.....6TH RESPONDENT

AND

KENNEDY BOSIRE GICHANA..... INTERESTED PARTY

RULING

Introduction

1. This cause relates to the estate of Musa Omurwa (“the deceased”) who died intestate on 28th September 2010. On 20th September 2011, the grant of letters of administration for his estate was issued to his first wife Mary Kemunto Musa (“Mary”) and son Felix Musa. Irene Kerubo Musa (“Irene”) filed summons for annulment and revocation of the grant on 3rd October 2011. By a ruling dated 23rd January 2015, Nagillah J., annulled the grant on the ground that Mary had concealed the statutory marriage between the deceased and Irene and that she had also failed to disclose the existence of the interested party, Kennedy Bosire Gichana who had allegedly purchased part of the deceased’s property. The learned judge proceeded to issue the grant to Irene.

2. In the course of these proceedings, Irene died and on 19th June 2019, I granted an order substituting her with her son, Erick Sydney Musa, who had been issued with a *grant ad litem* in *Kisii Chief Magistrate’s Court Succession Cause No. 251 of 2019* to enable him pursue this matter on her behalf.

The application

3. The summons for consideration is dated 12th August 2016 and was filed by Irene against the respondents seeking the following orders;

1. *That this Honorable court be pleased to declare the transactions and / or registration of entry numbers 8, 9, 10 and 11 in the register of land parcel No. Kisii Town / Block I/126 illegal, null and void;*

2. *That entry Numbers 8, 9, 10, and 11 of the register to land parcel no. Kisii Town /Block I / 126 be cancelled and the property be reverted back to the original owner the late Musa Omurwa for purposes of completing this succession cause.*

3. That land parcel no. Kisii Town / Block I/126 forms part of the free property of the deceased herein and the same should not be disposed of and/or transferred before confirmation of grant of letters of administration issued to the applicant herein.

4. That the estate of the deceased herein be compensated accordingly.

5. That [any] other suitable orders and/ or direction be made.

6. That the costs of and incidental to this application be provided for.

The evidence

4. Irene (PW 1) set out her case in her deposition in support of the summons sworn on 12th August 2016. She deponed that Mary had fraudulently caused Kisii Town/Block I/126 ("Plot 126") to be registered in her name and thereafter transferred it to the 2nd and 3rd respondents who then charged it to the 4th respondent ("the Bank") as a security for a loan of Kshs. 20,000,000/=. She claimed that these transactions were done in contravention of a court order placing a temporary injunction against any dealings on the land pending the hearing and determination of the summons for revocation of grant. Irene further claimed that the Land Registrar was either incompetent or had been improperly influenced to insert the entries in the register which culminated in the deceased's estate losing the property. She further deposed that the deceased had sold Plot 126 to the interested party and it would be proper to confirm the grant and transfer it to him upon payment of the outstanding balance of the purchase price.

5. In addition to her deposition, Irene's oral testimony mirrored what she had set out in her affidavit. She added that she married the deceased in 1995 and that they had 3 children during the subsistence of their marriage. She accused Mary of disposing of Plot 126 to the 2nd respondent with the knowledge that the interested party had purchased the land and that she sold it despite the existence of an injunction issued by the court restraining dealings with the land. She testified that the 2nd respondent demolished rental houses on the land before constructing a building on it. She urged the court to nullify the entries, rectify the register and reinstate the land in the name of the deceased.

6. Mary (RW 1) opposed the application through her affidavit sworn on 24th October 2016. She deponed that the lease for Plot 126 expired in December 1999. She thereafter proceeded to apply for extension of the lease after she was issued with the grant of letters of administration. She further deponed that Plot 126 have been given to her by the deceased for upkeep of her children after the deceased's neglected his parental responsibilities. She denied that the interested party had purchased Plot 126 as the deceased had refuted the claim that he had sold the property. She stated that the orders sought in the application could not be granted as the property had since been transferred to third parties.

7. In her testimony, Mary, recalled that in September 2007 she and the deceased had entered into a Parental Responsibility Agreement in which they agreed that Plot 126 be given to her as surety for the upkeep of their children. She testified that after the grant of letters of administration was issued to her on 20th September 2011, she started the process of extending the lease over Plot 126 on the strength of the grant. She testified that Kisii Municipal Council issued to her a letter of allotment which enabled her clear the outstanding land rates of Kshs. 272,268/=. The lease was then extended from 1st January 2000 and registered in her name. She thereafter she sold Plot 126 to her brother, the 2nd respondent, the land was registered in her name. She maintained that that she was not aware that Plot 126 had been sold to the interested party.

8. Ibrahim Onkoba Mokaya (RW 2) testified that he had purchased Plot 126 from his sister, Mary, in October 2014 at a price of Kshs. 2,000,000/=. Before he purchased the land, he appointed a lawyer who conducted a search and confirmed that the property was free from encumbrances. He received the title in October 2014 and began construction of a four storied block after demolishing a small structure on the land. He and his wife, the 3rd respondent, applied for and were granted a loan of Kshs. 20 million by the Bank secured by a charge on the property. He told the court that when he purchased the property he was not aware of the interested party's claim and did not know that the deceased had another family. He testified that all of Mary's children were adults and had consented to the purchase. He also testified that Mary had been given the land by her husband and at the time she was selling the land to get fees for one of her children.

9. A Senior Relationship Manager with the Bank, Valentine Jeptoo Yator (RW 4), confirmed that the 3rd respondent had applied for a loan of Kshs. 10,000,000/= and later on applied for a further loan of Kshs. 10,000,000/=. Both applications were approved. She testified that the Bank had acted in good faith and conducted due diligence before Plot 126 was charged in its favour.

10. The interested party, Kennedy Bosire Gichana (RW 6), a practicing Advocate, recalled that in 2009, the deceased had offered him land parcel KISII MUNICIPALITY/BLOCK 1/135. He conducted a search and noted that the land was still registered in the name of the deceased's father. He paid the deceased a deposit of Kshs. 250,000/= to facilitate the succession cause and paid him a further Kshs. 110,000/= when the deceased requested for more money. Later on, the deceased offered to sell him Plot 126 instead. They entered into an agreement on 24th May 2010 and it was agreed that the deceased would process the extension of the lease. Gichana paid Kshs. 560,000/= and the balance was to be paid as the lease was being processed. He further testified that at that time, Mary filed a suit against him and the deceased alleging that the land did not belong to the deceased. He recounted how Mary had once gone to his office complaining that the deceased was not paying fees. She showed him a Parental Responsibility Agreement which referred to Plot 126 as surety for upkeep. He took the position that the agreement was of no consequence as the children were all above 18 years. He further communicated with the deceased who told him not to interfere in his family issues. The interested party also testified that he gave the deceased a cheque of Kshs. 260,000/= to facilitate payment of his daughter's fees. Thereafter the deceased got sick and he died without completing the transaction. By then he had paid a total purchase price of Kshs. 920,000/=.

11. Gichana further explained that when the deceased gave him possession of the land, there were 3 tenants paying rent to him. When he discovered that Mary had filed a succession cause, he applied for an injunction when the structures on the land were demolished. He stated that Mary proceeded with the demolition despite being served with the court order. He was of the view that the estate should complete the

transaction notwithstanding the developments that had been made on the land.

12. In the course of the proceedings, I summoned the Land Registrar Kisii, Steve Mokaya to give evidence regarding Plot 126. He testified that the then County Council of Gusii had issued a lease of 33 years from 1st January 1967 to the first lessor who was Nyandika Mayioro. On 29th January, 1974, Nyandika Mayioro transferred the land to the deceased. A certificate of lease was issued to the deceased and later reissued on 12th April, 2006. In 2000 the lease expired and the property reverted back to the County Government. One Tom Mageka Omurua claiming a beneficiary interest, had caused a caution to be registered in his favour on 13th March 2009. Another caution was also registered in Mary 's favour as entry no. 6 on 23rd June 2010. These entries were withdrawn on 2nd July 2012 and Mary registered as administrator by **Kisii Succession Cause No. 215 of 2011**.

13. He testified that the registrar had no power to extend the lease and applications for renewal had to be made to the Ministry of Lands Headquarters in Nairobi. Mary made an application for extension of the lease on 3rd December 2013 which was granted and a lease was prepared in her name. The new lease was issued for a period of 66 years to run from 1st January 2000. The Land Registrar informed the court that on 22nd October 2014, the property was transferred to the 2nd and 3rd respondents for a sum of Kshs. 2 million and a certificate issued in their favour. The land was charged to Family Bank for Kshs. 10 million on 26th October 2015. A further charge was later on registered in favour of the Bank for Kshs. 10million. On cross examination, he testified that all entries from 13th March 2009 to 2nd July 2012 were invalid as they had been entered when the lease had expired.

Matters in issue

14. After the oral hearing, the parties' filed written submissions. I shall refer to the submissions where necessary in my determination. In the meantime, I have considered the same alongside the depositions and oral evidence and I find that the issues for determination are as follows:

1. Whether this court has jurisdiction to issue the orders sought;
2. Whether Plot 126 forms part of the deceased's estate; and
3. Whether the 2nd and 3rd respondents are innocent purchasers for value.

Whether the Court has jurisdiction

15. It is Irene's case that Plot 126 forms part of the deceased's estate. In the summons dated 12th August, 2016 Irene sought to have the land reverted back into the deceased's name through the cancellation of entries 8, 9, 10 and 11 in the register. The respondents argue that the determination of whether or not the entries were valid is a matter that lies within the jurisdiction of the Environment and Land Court as it is a matter of and concerning title to land. They urge that this court lacks jurisdiction to grant the orders sought.

16. The jurisdiction of the High Court under the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** court is set out in **section 47** as follows;

47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

17. The above provision confers wide powers upon this court to resolve any issues arising out of the administration of the estate of a deceased person. In **Bena Nafula Makana & 2 others v Nyaoro Akoth Muka Crescentia & 8 others KSM CA Civil Appeal No.70 of 2015 [2019] eKLR**, the Court of Appeal considered such an objection to the jurisdiction of the High Court to deal with land matters and held as follows:

[15] As section 47 of the LSA expressly provides, the High Court has jurisdiction to determine any dispute under the Act relating to intestate and testamentary succession to estates of deceased persons. It does not matter that the determination of a question of trust would make the proceedings litigious or contentious. Rule 58 of P&A Rules recognizes that a succession court would deal with litigious proceedings and Rule 63(1) of P & A Rules imports specific provisions of the Civil Procedure Rules to facilitate the resolution of such disputes. Those rules relate to litigious proceedings. The Civil Procedure Rules which apply to succession proceedings relate to interrogatories and discovery, summoning and attendance of witnesses to give evidence, cross-examination of deponents of affidavits, security for costs and review. Whether or not a court can deal with litigious proceedings is not a question of jurisdiction of the court. Rather, it is a question of whether or not the issue in dispute can be conveniently determined in succession proceedings or in another forum. This was a family dispute. The fact that the land originally belonged to Gaitano and the appellants were closely related to Gaitano and Jacob and have lived in and cultivated the disputed land for a long time coupled with the fact that there were previous proceedings entitled them to be heard in the succession proceedings relating to devolution of the disputed property on intestacy. It follows that, and we find that, the court erred in declining jurisdiction to entertain the application. Since the court had jurisdiction to entertain the claim in the succession proceedings, the application should not have been dismissed merely on a technicality of procedure.

18. I therefore find and hold that the determination whether Plot 126 formed a part of the deceased estate lies squarely within the mandate of this court dealing with matters of succession notwithstanding that it concerns land.

Whether the Plot 126 forms part of the deceased's estate

19. **Section 3** of the Act defines estate as "*the free property of a deceased person.*" "*Free property*", in relation to a deceased person, means

the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.

20. Irene argued that Plot 126 forms part of the deceased's estate and that Mary lacks capacity to deal with the property by causing the lease to be renewed in her name and selling the property. She contended that Mary did not have a good title to pass to the 2nd and 3rd respondents and that therefore the charge to the Bank was irregular. Her case is supported by the interested party who produced a copy of a sale agreement dated 24th May 2010 supporting his case that the deceased sold him Plot 126 at a price of Kshs. 1,500,000/= of which he paid Kshs. 920,000/= by the time the deceased passed away. He admitted that he was to pay the balance upon renewal of the lease, a process which had already been commenced by the deceased.

21. Apart from the fact the deceased had given her Plot 126 as part of Parental Responsibility Agreement, Mary contended that by the time the deceased passed away, the lease which had been issued for a period of 33 years had expired hence it was not part of the estate and she was entitled to make an application for extension in her own right which she did after paying all outstanding rates.

22. The evidence of the Land Registrar confirmed that the County Government of Kisii which owned Plot 126 had issued a lease for a period of 33 years from 1st January 1967. The lease was transferred to the deceased on 29th January 1974 and expired on 31st December 2000. The Land Registrar's opinion was that at that point the land reverted back to the County Government thus all the entries made when the lease had expired were invalid.

23. Whether the Plot 126 belongs to the deceased's estate turns on the status of the land by the time the deceased died and on this issue the evidence of the Land Registrar is decisive. The evidence as well as the copy of the register which has been availed to this court is that the lease issued by the County Government in respect of Plot 126 expired on 1st January 2000 hence the property had reverted back to the Government. As the registered proprietor, the deceased would have had pre-emptive rights to renewal of the lease. There is however no evidence that he had exercised these rights by the time of his demise.

24. The evidence before this court is that Mary made the application for renewal of the lease which was renewed in her name by the County Government on 3rd December 2013. By that time, she had been issued with a grant of letters of administration for the deceased's estate which included Plot 126 as one of the deceased's asset listed in Form P & A 5. In fact, in an affidavit sworn on 1st March 2012 in support the Notice of Motion dated 1st March 2012 seeking to confirm the grant, she proposed that Plot 126 be distributed to herself and her children; Felix Musa, Annah Kwamboka Musa, Elizabeth Musa and Dinley Musa. Ultimately the application was not heard and was interposed by the Irene's summons for annulment of the grant. I would also add Mary was one of the plaintiffs claiming an interest in Plot 126 in **Kisii High Court Civil Suit No. 252 of 2010** against the deceased and interested party, hence she knew the status of the property.

25. The fact that the lease had, in law expired, in my view, is does not absolve Mary of any liability. Nor does the fact that she held a Parental Responsibility Agreement with the deceased. I have read the agreement and it states that the property was only a surety for the maintenance and upkeep of the children. It was neither a gift nor transfer and that is why when Mary applied for the grant she listed it as an asset of the deceased. It is also worth recalling that at the time she applied for allocation of the land to herself, she had commenced the process by representing that she was an administrator of the estate of the deceased as she was holding the grant of letters of administration. In addition, Mary was applied to be registered as a proprietor by transmission through Form RL 19 dated 2nd July 2012 and was duly registered despite the fact that the grant had not been confirmed. Further, the grant had been issued to Mary and her son, Felix Musa yet she alone purported to apply to be the registered owner by transmission. Although the Land Registrar alluded to the fact the documents were recorded in the wrong register, Mary's intention and action were clear and they were that she intended to take what she knew was the estate's property for her own benefit.

26. By virtue of **section 79** of the **LSA**, the property of a dead person vests in his personal representatives as follows –

79. The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

27. The effect of the aforesaid provision is that the property of the estate is vested personal representative so that he or she exercises such power over the property as the deceased himself would have done. **Section 83** of the **LSA** sets out the duties of an administrator, inter alia, as follows:

83. Duties of personal representatives

Personal representatives shall have the following duties—

(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) -----

(f) -----

(g) -----

(h) -----

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

28. From the aforesaid provision is clear that the principal duty of the personal representative in that process is to collect, gather and get in the assets, identify the persons entitled to a share in the assets and eventually distribution of the estate. It was therefore Mary's duty to apply for renewal of the lease after it had expired. As an administrator, she owed a fiduciary duty to the estate to do what the deceased would have done had he been alive and more having received information about the lease from her position as an administrator. It was therefore improper for her to seek and obtain a letter of allocation of Plot 120 for her own benefit. I therefore find and hold that Mary violated her duties to the estate of the deceased as administrator by procuring the renewal of the lease in her own name and processing it as such. She is therefore liable to account for the proceeds of sale of Plot 120 to the estate of the deceased.

Position of 2nd, 3rd and 4th respondents

29. While I am equally skeptical of the assertion by 2nd and 3rd respondents that they knew nothing about the deceased's estate's interest in the property, the fact that a lease had been issued to Mary by the time they purchased the Plot 126 and there being no evidence that they were involved in the fraud perpetrated by Mary to the deceased's estate, I absolve them of liability as innocent purchasers under **section 93** of the **LSA**. Likewise, the Bank cannot be blamed for lending money to the 2nd and 3rd respondents.

Claim by interested party

30. Finally, and as regards the interested party, I hold that he must make his claim for refund of the purchase price for consideration as a liability to the estate since **Plot 126** is no longer available to the estate at the appropriate time.

Conclusions and reliefs

31. For the reasons set out above, I allow the summons dated 12th August 2016 on the following terms;

(a) **MARY KEMUNTO MUSA** shall refund to the estate of the deceased the sum of Kshs. 2,000,000/- which represents the price she sold **KISII MUNICIPALITY BLOCK 1/126** to the 2nd and 3rd respondents within the next **ninety (90) days**.

(b) The case against the 3rd, 4th and 5th respondents is dismissed with no order as to costs.

DATED and DELIVERED at KISII this 15th day of AUGUST 2019.

D.S. MAJANJA

JUDGE

Mr Aunga instructed by Momanyi Aunga and Company Advocates for the applicant.

Mr Ochoki instructed by Ochoko and Company Advocates for the 1st respondent.

Ms Gogi instructed by Moronge and Company for the 2nd and 3rd respondents.

Ms Kamunya instructed by Mbaluka and Company Advocates for the 4th respondent.

Mr Ombachi instructed by Ombachi and Company Advocates for the interested party.