



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 351 OF 2008

IN THE MATTER OF THE ESTATE OF TIMOTEO LUSENAKA SHIRO (DECEASED)

RULING

1. The application that I am tasked with determining is dated 10th April 2019. It seeks orders to restrain the Land Registrar responsible for Kakamega County from implementing the orders that the court made at the confirmation of the grant on 28th December 2009. In the affidavit in support of the application, sworn on 10th April 2019 by Joseph Juma Lusenaka, Peter Mwombe Lusenaka, Beatrice Khatete Murukwa, Jackton Lusenaka, Shitanda Lusenaka, Loice Lusenaka and Christopher Lusenaka, it is alleged that the land registrar was subdividing the property the subject of the confirmation orders, Kakamega/Malava/1101 and 11097, in a manner that was contrary to the confirmation orders. It is alleged that they have since sued the land registrar in Kakamega CMCCC No. 23 of 2016 (OS).

2. It must be stated from the outset that the land registrar is not a party to these succession proceedings, as the land registrar is neither an heir nor survivor nor dependant nor beneficiary nor creditor of the estate or the deceased. It would be improper in the circumstances to drag the public office into these probate proceedings. The proper course of action should be to commence civil proceedings against the land registrar as the applicants have done in Kakamega CMCCC No. 23 of 2016 (OS). Proceedings cannot, therefore, be properly maintained against the land registrar within these probate proceedings but in Kakamega CMCCC No. 23 of 2016 (OS).

3. Secondly, the applicants have already initiated a proper civil suit against the land registrar in Kakamega CMCCC No. 23 of 2016 (OS). The issues raised in the application dated 10th April 2019, should have been raised in that suit. In short, the said application ought to have been filed within Kakamega CMCC as 23 of 2016. There is no point of having multiple suits over the same issues. It amounts to abuse of court process.

4. Thirdly, the grant herein was confirmed on 11th November 2009. The dispute does not go to the merits of the confirmation orders; neither is it a challenge to those orders. That being the case, there are no pending proceedings under the provisions of the Law of Succession Act, Cap 160, Laws of Kenya, with respect to the estate. Once a grant has been confirmed, the process moves away from the probate proceedings under the Law of Succession Act to processes under the relevant land legislation, for the implementation of the confirmation orders as encapsulated in the certificate of confirmation of grant.

5. The property in question, from the documents on record, was registered under the Registered Land Act, Cap 300, Laws of Kenya. As at 2009, when the grant herein was being confirmed, the said Registered Land Act was still the applicable law. Sections 118, 119 and 122 of the said law provided for transmission of property upon the death of the proprietor. The provision relevant for the purpose of what is before me is section 119, which states as follows:

“119. (1) If a sole proprietor or a proprietor in common dies, his personal representative, on application to the Registrar in the prescribed form and on production to him of the grant, shall be entitled to be registered by transmission as proprietor in the place of the deceased ...

(2) Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission –

(a) any transfer by the personal representative;

(b) ...

(3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee ...”

6. As framed, the provisions above refer to the making of a grant. Under those provisions, the land registrar may register a property in the

name of a personal representative, upon production of a grant of representation, provided that it is reflected in the register that the registration is upon transmission. The same provision would also apply to transmission or registration after confirmation of grant. The point that should come out of this is that that is a process that is not subject to the Law of Succession Act, but the Registered Land Act. Any disputes that arise from the said process are for dealing in accordance with the procedures set out in the Registered Land Act and not the Law of Succession Act.

7. The procedures for dealing with disputes arising from processes before the Registrar are set out in Part XI of the Registered Land Act. Section 149 provides that whenever a question arises regarding exercise of power or performance of any duty by the Registrar imposed upon him by the Registered Land Act, he may state his case for opinion by the High Court. Statement of such a case for opinion of the High Court cannot be through the processes under the Law of Succession Act, but the Civil Procedure Act, Cap 21, Laws of Kenya. Section 150 provides for appeals to the Chief Registrar of Land from decisions of a land registrar with regard to registrations.

8. The Registered Land Act has since been repealed by the Land Registration Act, No. 3 of 2012. The provisions on transmission of property upon death in Part VII of the Registered Land Act have been reproduced in Part VI of the Land Registration Act. The equivalent of section 119 of the Registered Land Act is section 61 of the Land Registration Act, which states as follows:

“Transmission on death of a sole proprietor or proprietor in common. 61. (1) If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased ...

(2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission—

(a) any transfer by the personal representative; and

(b) ...

(3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.”

9. As can be seen, the provision in section 61 of the Land Registration Act is virtually a reproduction of the provision in section 119 of the Registered Land Act. The only difference is that 61(2) refers not to the grant but the certificate of confirmation of grant. Under the subsection upon production of a certificate of confirmation of grant the Registrar should proceed to effect the relevant transfers. The Land Act, No. 6 of 2012, carries provisions at section 50 which are similar to section 61 of the Land Registration Act and section 119 of the repealed Registered Land Act.

10. Under the Land Registration Act, any disputes that may arise from the processes envisaged in the Act should be placed before the Environment and Land Court. The relevant provision is section 101; which states as follows:

“Jurisdiction of court.

101. The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

11. It would be clear from that provision that transmission upon death, as provided for in section 61 of the Land Registration Act, is an action or proceeding under that Act and any dispute relating to that process would be a dispute within the meaning of section 101 of the said Act. It would mean that any such dispute should be placed before the Environment and Land Court in a separate suit, and not the High Court in probate proceedings. Section 150 of the Land Act is in similar terms.

12. The matter placed before me relates to a dispute on transmission upon death. As indicated above, the application does not challenge the confirmation orders. Rather, it is about implementation of the confirmation orders by the land registrar. The implementation of the confirmation orders is not a process that is governed by the provisions of the Law of Succession Act, but the Land Act and the Land Registration Act. The transmission process is an action or proceeding under the said legislation, and any disputes relating to those processes ought to be placed before the Environment and Land Court, but not before the High Court in the instant probate proceedings.

13. Furthermore, the High Court has no jurisdiction over matters that the Environment and Land Court has jurisdiction over, by virtue of Articles 162(2) as read together with Article 165(5) of the Constitution, which state as follows:

“162. (1) ...

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) ...

(b) the environment and the use and occupation of, and title to, land.”

163 ...

164 ...

165. (1) ...

(2) ...

(3) ...

(4) ...

(5) *The High Court shall not have jurisdiction in respect of matters—*

(a) ...

(b) *falling within the jurisdiction of the courts contemplated in Article 162 (2)."*

14. In compliance with 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 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."

15. 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) 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."

16. The plain effect of these provisions is that the High Court has no jurisdiction to address itself to matters that fall under the jurisdiction of the Environment and Land Court. The dispute that has been placed before me relates to transmission of land upon death. Such a process is governed by the Land Act and the Land Registration Act, and any dispute arising from the same ought to be a matter for resolution by the Environment and Land Court as envisaged by the Land Act and the Land Registration Act.

17. I believe that I have said enough on the application dated 10th April 2019. The same is misconceived and an abuse of the process of the court for the reasons that I have stated above. I shall accordingly strike the same out. The applicants, should they be aggrieved by the order above, are at liberty to move the Court of Appeal appropriately within the next twenty-eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 27th DAY OF September 2019

W. MUSYOKA

JUDGE