



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 676 OF 2010

IN THE MATTER OF THE ESTATE OF LATE SETH MAHIVA SWAHILI DECEASED

AND

SYLVIA KHABWENJESI MAHIVA.....APPLICANT

LENOY LUDANYO AMALEMBA.....PETITIONER

DONALD MASANGANJILA MAHIVA....APPLICANT/INTERESTED PARTY

R U L I N G

The Application

1. The application coming up for determination is the Notice of Motion dated 15th December, 2016 by which the applicant Donald Masanganjila Mahiva, seeks orders that the orders issued by this Honourable Court (differently constituted) on 28th November, 2016 be vacated and the body of SILVERIUS LIYAYI AMBEYI be released to the respondent for burial on the portion of land belonging to DONALD MASANGANJILA MAHIVA on land Parcel IDAKHO.IGUHU/2259. The applicant also prays that costs of this application be in the cause.

2. The application is premised on grounds that the parcel of land in issue is owned by among others, the applicant herein who has a distinct portion and is not averse for the remains of SILVERIUS LIYAYI AMBEYI to be buried on that portion; that the applicant who obtained the orders is not the absolute proprietor of land parcel IDAKHO/IGUHU/2259 and finally that the applicant was not candid (??). The application is also supported by the applicant's affidavit sworn on 14th December, 2016. The deponent states that SILVERIUS AMBEYI LIYAYI (Now deceased) is a brother to the deponent's mother PAMELA LUSANJI, while he himself is the grandson to the deceased, Seth Mahiva Swahili. The deponent says that he is a joint registered proprietor of land parcel IDAKHO/IGUHU/2259 being joint owner with SYLVIA KHABWENJESI MAHIVA a sister to his (deponent's) mother and RHODAH MWENI MAHIVA, widow. (also now deceased). The deponent finally states that he has no objection to having the body of the objector being interred on his (deponents) portion of the jointly owned suit property.

3. The Replying Affidavit to the application is also sworn by Donald Masanganjila Mahiva dated 14th December, 2016 in which he says that he has no objection to his uncle the objector being buried on his portion of the jointly owned parcel of land.

Background

4. The deceased herein Seth Mahiva Swahili died on 20th March, 2008 aged 73 years. According to the papers filed herein on 5th October, 2010, the deceased was survived by:-

- Rhoda Mweni Mahiva – (widow)
- Ronald Mahiva (son)
- Sylvia Khabwenjesi Mahiva (Daughter)
- Pamela Mahiva (daughter) and
- Agripina Injete Mahiva (daughter)

5. According to form P&A5, the deceased's property comprised of land parcel No IDAKHO/IGUHU/2259 measuring 2.5 hectares (Two

point five four hectares). From the record also, the grant of letters of Administration was granted to Rhoda Mweni Mahiba on 22nd June, 2011. The same was confirmed on 28th July, 2011, distributing the deceased's estate as follows:-

- Rhoda Mweni Mahiba – remaining portion
- Ronald Mahiba – 1 acre
- Sylvia Khabwenjesi Mahiba – 2 acres

6. A fresh title deed was issued on 20th November, 2014 showing the above named beneficiaries as joint proprietors.

7. On the 11th May, 2015, Sylverius Liyayi Ambeyi filed summons for revocation and annulment of Grant for reasons appearing on the face thereof. One of those reasons was that because of her character, the petitioner, Rhoda Mweni Mahiba was not a proper and fit person to administer the deceased's estate. As of now, both Rhoda Mweni Mahiba and Sylverius Liyayi Ambeyi are deceased, and there is no indication on the file that their respective estates are being administered by anybody. The summons of revocation and annulment of grant remains undetermined to date.

8. Then on 23rd November, 2016, Sylvia Khabwenjesi Mahiba, through the firm of Momanyi, Manyoni & Co. Advocates filed a notice for injunctive orders against Lennox Ludenyo Amalemba to bar him from burying the remains of Sylverius Liyayi Ambeyi on the suit land. The grounds in support of the application were, inter alia, that during the lifetime of the deceased, Seth Mahiba Swahili, Sylverius Liyayi Ambeyi never turned up to claim paternity from the deceased and that as such Lennox Ludenyo Amalemba had no right to inter the remains of the said Sylverius Liyayi Ambeyi on the suit land.

9. On 28th November, 2016 my brother Chacha Mwita J granted an interim order of injunction restraining the respondent Lennox Ludenyo Amalemba from burying the remains of Sylverius Liyayi Ambeyi on parcel no. Idakho/Iguhu/2259 until the determination of the application dated 23rd November, 2016. Neither party has pursued that application to its logical conclusion. On the 21st December, 2016, this court ordered that the application dated 15th December, 2016 be heard together with the application dated 23rd November, 2016. For reasons attributable to counsel for the respondent, Lennox Ludenyo Amalemba, and without any resistance from M/S Momanyi, Manyoni & CO. Advocates, it is only the application dated 15th December, 2016 that is the subject of the submissions filed before me and therefore the subject of this ruling.

The Submission

10. The submissions by M/S Kiveu & Co. Advocates were filed on 15th May, 2018 after the court requested them to do so because they did not have any submissions on the file in spite of having told the court earlier that their submissions were on the file. It was submitted that the share of Donald Masanganjila Mahiba in the subject property is well demarcated on the ground and that as such, he should be allowed to bury the remains of Sylverius Liyayi Ambeyi thereon.

11. In response, the respondents contend that since the suit land is not yet sub divided amongst the three beneficiaries, it is not possible at the present time to know where the respective portion of Donald Masanganjila Mahiba is located on the ground. It is also contended that since one of the joint owners Rhoda Mweni Mahiba is deceased, the orders sought by the applicant cannot be granted in this succession cause. The respondents are of the view that the applicant should file a new cause against the registered owners of the suit property after obtaining letters of administration Ad litem to enable him represent the estate of the late Sylverius Liyayi Ambeyi.

Analysis and Determination

12. I have now given careful thought to the history and the various applications that are on this file. I have also considered the law. The issue that arises for determination is whether the applicant's has made out a case for the orders sought in the application dated 15th December, 2016

13. From an analysis of the facts in this case, the issue before me has nothing to do with the distribution of the deceased's estate. That was done and the beneficiaries agreed to be joint owners of the suit property. One of the joint owners has since died and from the record, the respective shares of the joint owner are not yet established on the ground.

14. In my considered view, this issue is now outside the jurisdiction of this honourable court and the same should be canvassed before the Environment and Land Court which has both the Constitutional and Statutory mandate to determine all matters related to land.

15. Secondly, and even if this court had the jurisdiction to deal with the matter, Rhoda Mweni Mahiba one of the three joint owners as well as Sylverius Liyayi Ambeyi are both deceased. No evidence has been placed before me by Lennox Ludenyo Amalemba that he has the power and authority to act on behalf of either one or both of the parties. He has not produced Grant of Letters of Administration Ad litem giving him such power and authority.

16. According to the provisions of the law of succession Act, the management of the estate of any deceased person is carried out by executors and administrators or as they are more commonly known, personal representatives. If the applicant in this case had taken out the appropriate grant he would have had the authority to step into the shoes of either Sylverius Liyayi Ambeyi or Rhoda Mweni Mahiba and proceeded to ask the court to grant to him the orders sought although with caution that an administrator appointed under the law of succession Act does not automatically, by virtue of such appointment become a beneficiary of the estate of the deceased. For this proposition, see **"In the matter of the estate of Fatuma Binti Mwanzi Umri (Deceased) Nairobi High Court Probate and Administration Number 21 of 1994.**

17. What message am I conveying to the applicant? That he must first correct the anomaly in the administration of the estates of both Sylverius Liyayi Ambeyi and Rhoda Mweni Mahiva before he can move the court for any orders touching on the estates of the two.

18. Finally, I must point out that what is before me is not a burial dispute. There is no contest as to who should bury Sylverius Liyayi Ambeyi. The dispute is about where he should be interred. The actual spot on the ground where Sylverius Liyayi Ambeyi should be buried is joined hip and shoulder with the ownership and title to the suit land. Again, and as stated earlier that dispute is for the Environment and Land Court.

Conclusion

19. For all the foregoing reasons, I find and hold that the applicant of the application dated 15th December, 2016 is not entitled to the orders sought. He should move to do first things first and then pursue the summons for Revocation of Grant dated 8th May, 2015 and filed in Court on 11th May, 2015. He is also at liberty to pursue the matter before the Environment and Land Court. How he proceeds to do that will be up to him.

20. I make no order as to costs of the application

Orders accordingly

Ruling delivered, dated and signed in open court this 28th day of May, 2018

RUTH N. SITATI

JUDGE

In the presence of:-

Miss Akinyi (present).....for Lennox Ludenyo Amalemba

Mr. Osango (Presen.....for Sylvia Khabwenjesi Mahiva

Miss Akinyi (present).....For Donald Masanganjira Mahiva

Polycap Mukabwa.....Court Assistant