



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE AND ADMINISTRATION CAUSE NO. 22 OF 2003

RE ESTATE OF CHRISTOPHER SHABUNGULULA MAKARE

JOHN KAROLI SHOGA.....APPLICANT

VERSUS

ADAN ALIO ADAN.....1ST RESPONDENT

FLORENCE OKARI OMWENO.....2ND RESPONDENT

RULING

1. The applicant prays that the *consent order* filed on 26th October 2009 be *set aside*. In particular, the applicant seeks to remove the two respondents from the list of beneficiaries of the property known as Uasin Gishu/ Kimumu/ 808 (hereafter *the Kimumu land*); and, that the property reverts to the estate of the deceased. In essence, the court is being invited to redistribute the property.

2. The summons for review is dated 18th June 2012. It is supported by two depositions sworn by the applicant on 18th June 2012; and, 18th March 2013. Clauses 4 and 5 of the impugned consent required the respondents to transfer parcels numbers Kakamega/ Lugari/ 1555 and 1369 (hereafter *the Kakamega or Lugari land*) to the beneficiaries simultaneously with transmission of shares to the two respondents in the Kimumu land. The applicant contends that the respondents have failed to transfer the two parcels. He also alleges that the two parcels constitute Government or forest land. He has annexed excerpts from the *Ndungu Report* showing that the parcels were *irregularly* acquired.

3. The motion is contested. There are two near identical affidavits sworn by the respondents on 2nd November 2012. The 1st respondent avers that the deceased took his parcel of land known as Kakamega/ Lugari/ 1555 measuring 0.8 hectares; and, that it has been registered in the name of the applicant's family as per the records kept by the Land Adjudication & Settlement Office. He states that the applicant's family has settled on the Lugari land. He avers further that the land belongs to the Settlement Fund Trustees and not the Kenya Forest Service. He contends that the burden of processing the title falls upon the applicant. Lastly, he avers that he is entitled to the Kimumu land in terms of the consent.

4. The 2nd respondent regurgitates the averments by the 1st respondent. She adds that she has not transferred her parcel Kakamega/ Lugari/ 1369 because she has not obtained the title from the lands office at Kakamega. She reiterates that the property was allocated to her by the Land Adjudication & Settlement Office.

5. On 6th March 2017, I heard learned counsel for both parties. I have considered the rival submissions.

6. It remains a serious indictment on the parties that the present summons has not been prosecuted for nearly *five years*. It has been adjourned on a number of occasions by both parties. At one point the parties indicated they were negotiating a further settlement. It never came to pass.

7. A consent order can only be set aside “*on circumstances as would afford a good ground for varying or rescinding a contract between parties*”. See *Brooke Bond Liebig Ltd v Mallya* [1975] E.A 266 at 269. See also *Hirani v Kassam* (1952)19 EACA 131, *Board of Trustees NSSF v Michael Mwalo*, Nairobi, Court of Appeal, Civil Appeal 293 of 2014 [2015] eKLR.

8. Applying those precedents, I find as follows. In *consideration* of the respondents getting a share of the Kimumu land, they were to *transfer* to the beneficiaries the two parcels of land in Lugari, Kakamega. Those conditions have *not been achieved*. The 2nd respondent concedes that she has *not* obtained her title from the lands office at Kakamega. The 1st respondent asserts that the obligation to get the title falls on the shoulders of the applicant or her family. That is self-serving. The obligation to obtain *titles* for the Kakamega land; and, to effect the *transfer* to the beneficiaries rests squarely upon the *respondents*. It is in black and white at clauses 4 and 5 of the consent. The respondents are the ones who claim to have been *allocated* the land by the Land Adjudication & Settlement Office. The conduct of the respondents has *militated* against *implementation* of the *consent*.

9. There is then the allegation that the two parcels of land in Kakamega were *unlawfully* allocated to the two respondents. I *cannot* make a *conclusive* finding at this stage. But suffice to state that the applicant has annexed extracts from the *Ndungu Report* showing that the parcels *may* have been irregularly acquired. The extracts are *not* without dispute. Learned counsel for the respondents submitted that the report refers to *Mautuma Scheme*. The row here is over parcels numbers *Kakamega/ Lugari/ 1555 and 1369*. I cannot say for certain whether the two refer to the *same* pieces of land: That will be the true province of the trial court. But allegations of illegality remain *grave*. If they turn out to be true, they would make the consent fraudulent. I say that very carefully at this stage.

10. In the end, it is apparent that the consent was not entered into in *good faith*; and, that the respondents *misrepresented* the true *status* of their *ownership* of parcels numbers *Kakamega/ Lugari/ 1555 and 1369*. Doubt is removed completely by their *inability* to transfer valid *title* to the beneficiaries of the estate of the deceased. That in turn destroys the *substratum* of the consent between the two parties.

11. I remain alive that some beneficiaries of the estate have taken possession of parcels numbers *Kakamega/ Lugari/ 1555 and 1369*. It would then be *unjust*, as urged by the applicant, for the court to shut its eyes and *redistribute* the Kimumu land without any reference to the respondents. Justice of the case demands that the *entire* consent be impeached.

12. The upshot is that the *consent* dated 27th July 2009; and, filed in court on 26th October 2009 is hereby *set aside*. The cause shall be fixed for mention for *directions* on *distribution* of the net intestate estate of the deceased. Considering that this is a succession matter or family dispute, I shall make no order on costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 21st day of March 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the applicant.

No appearance by counsel for the respondents.

Mr. J. Kemboi, Court Clerk.