



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.372 OF 1996

IN THE MATTER OF THE ESTATE OF

DISMAS KAMIRU CHITACHI DECEASED

ALICE MAKOKHA SAKWA OBJECTOR

VERSUS

BERDORD MUSUNGU DISMAS PETITIONER

JUDGMENT

By summons dated 15th October, 2012, brought under *section 76* of the Law of Succession Act and *rule 59* of the Probate and Administration Rules, Alice Makokha Sakwa (the objector) moved this court and sought several Orders as follows:-

- 1.) THAT KAKAMEGA SUCCESSION CAUSE NO.291 of 2000 and KAKAMEGA SUCCESSION CAUSE NO.372 of 1996 be consolidated.
- 2.) THAT Grant of Letters of Administration issued to FRANCIS SAKWA CHITECHI in Kakamega Succession Cause NBo.372 of 1996 and Grant of Letters of Administration issue to the petitioner in Kakamega High Court Succession Cause No.291 of 2000 be annulled or revoked.
- 3.) THAT ALICE MAKOKHA the applicant herein be substituted in place of the deceased petitioner FRANCIS SAKWA CHITECHI.
- 4.) THAT a fresh Grant be issued in joint names of the applicant Alice Makokha Sakwa and PAUSTINE KUTSUSHI KAMILO the mother of the respondent.
- 5.) THAT title in respect of LAND PARCEL NO. EAST WANGA/ISONGO.174 be registered in the names of the respondent BENFORD MUSUNGU DISMAS be cancelled (sic).
- 6.) THAT the costs of this application be provided for.

The application is supported by an affidavit by the objector sworn on the same day 25th October, 2012. The objector who is widow to Francis Sakwa Chitechi who was petitioner in the Succession Cause No.291 of 2000. According to the affidavit, the petitioner in that cause (291 of 2000) obtained a grant of letters of administration for the estate of the late Dismas Kamiro Chitechi and had it confirmed but passed on before distributing the estate namely Parcel No. East Wanga/Isongo/174. The objector complains that the petitioner in Cause No.372 of 1996 distributed the estate Parcel No. East Wanga/Isongo/174 unfairly

by giving the objector's late husband only 2 acres. She says that she is not satisfied with that mode of distribution and therefore has moved the court to have that corrected since the land, the subject of this cause, is a family land hence they are entitled to a fair share. She further states that during land adjudication, her late husband was working in Nairobi and the deceased herein, Dismas Kamito got registered as proprietors of the subject land but was to hold the same in trust for himself and her late husband Francis Sakwa Chitechi. The objector says that they have been utilizing half of the land hence they should be given that portion.

The summons are opposed and the petitioner has filed a replying affidavit sworn on 2nd December, 2012 and filed in court on 3rd December, 2012. The petitioner says that he is the administrator of his late father's estate having petitioned for and obtained a grant of letters of administration which was subsequently confirmed. The petitioner says that the objector is widow to his uncle, the late Francis Sakwa Chitechi who was a brother to the petitioner's father. The petitioner's father and the objector's late husband were sons of one Chitechi Lukungu also deceased.

The petitioner further says that his grand-father had three sons namely Dismas Kamiri Chitechi, Francis Sakwa Chitechi and Meriko Indakwa Chitechi all now deceased. He said that the three were given parcels of land. Dismas got parcel No. East Wanga/Isongo/173 (ten acres) and Francis was given 14 acres but did not pursue registration hence his parcel was taken by someone else. The petitioner further states that the family later met and agreed to give the late Francis one acre where he was later buried. He says that Francis was also given two acres from their portion (Parcel No.174). He therefore opposes any move to have more land given to the objector's family and says that the succession cause filed by the late Francis was untenable since there was already this succession cause filed in 1996 pending in court.

On 3rd October, 2013 the court ordered this cause and Succession Cause No.291 of 2000 consolidated and Benford Musungu Dismas (the petitioner) was to remain the sole administrator in the consolidated succession cause. The matter then proceeded by way of oral evidence.

The objector who testified as PW1 told the court that she lives on Parcel no. East Wanga/Isongo/174 where she grows sugar cane. Her late husband who died in 2007 was a brother to the petitioner's father. The land in question was registered in the petitioner's father's name Dismas who was the eldest son and when her husband was in Nairobi. She further testified that her husband had two wives, Frida and herself and each had four children, and they all live on the Parcel No.174. She said that land Parcel No.174 was sub-divided by elders and a portion given to them. She now wants the court to assist her get the land surveyed and given the portion she lives and cultivates on. She denied knowledge of any other parcel of land that was given to her husband by his late father.

The next witness to take the stand was *Joseph Chiteli* who testified as PW2. He told the court that the objector is her sister in law. According to this witness village elders subdivided the land because Dismas was holding it waiting for Francis, the objector's husband. This was done in the presence of the District Officer and Chief. Dismas got eleven (11) acres while Francis got seven (7) acres. He denied knowledge of the fact that the family agreed that Dismas gives Francis two acres.

PW3, *Jackson Ambani*, on his part, told the court that he is a brother to the late Dismas and before his father died he showed him the land and said that Dismas should share that land with Francis where Dismas was to get 11 acres and Francis 7. The elders divided the land and gave 11 and 7 acres to Dismas and Francis respectively.

At the close of the objector's case, the petitioner took the witness stand as DW1 and testified that his father died in 1972 and left behind land Parcel No. East Wanga/Isongo/174 measuring about 20 acres.

He obtained a grant of letters of administration and had the same confirmed. He distributed the land and gave 2 acres to the late Francis, the objector's late husband. According to him, his late grant father divided land to his sons where by Dismas got 20 acres, Aneriko 10 acres and Francis 14 acres whereas Dismas and Aneroko had the parcels registered into their names, Francis did not and his portion was taken by a neighbour. Francis came back in 1978 long after his father and Dismas had passed on. He told

the court that a family meeting was held and it was agreed that Aneriko was to give Francis one acre while Dismas' family was to give Francis 2 acres out of sympathy.

DW2, *Jerida Namwendwa Indakwa* testified and told the court that she is widow to Aneriko Indakwa who was a brother to Francis and Dismas. At the time she was married, Francis was staying in Nairobi. Her husband had Parcel No.173 while Dismas had PRCEL No.174. Francis had land at Mungakha village but it was taken by other people. She further told the court that when Francis returned from Nairobi he stayed on their land Parcel No.173. The family sat and agreed that Aneriko gives him one acre and Dismas two acres and when Francis died he was buried on Parcel No.173. He built a house on Parcel No.173 and cultivates on Parcel 174. The witness said she is still ready and willing to give Francis' family the one acre that was given by her husband.

PW3, *Gerald Welemba*, testified and adopted his statement dated 2nd October, 2013 and filed in court on 3rd October, 2012. He said in his statement that the late Francis was given land but he never got registered as the owner, while Aneriko Indakwa Chitechi and Dismas Kamiro Chitechi were registered as proprietors of Parcel No. East Wanga/Isongo/173 and 174 respectively. Francis came back home in 1978 and was given 2 acres by the late Dismas and one acre by the late Aneriko – making a total of three acres. He told the court that the land given to Francis – the objector's husband, was not near that of Dismas and were not bordering each other. He said that during adjudication process, the father to Dismas and Francis was dead. The land given to Francis was later taken by another person known as Gershon Musakwa Likungu.

At the close of their respective cases, counsel for the parties filed written submissions which are on record. Counsel for the objector has submitted that the objector has a beneficial interest on Parcel No. East Wanga/Isongo/174. Counsel submitted that *Chitechi Lichungu* died leaving behind three sons namely Dismas Kamiro Chitechi, Francis Sakwa Chitechi and Anerikko Indakwa Chitechi. Counsel further submitted that the said Chitechi Lichungu left behind two Parcel of land namely East Wanga/Isongo/173 measuring 10 acres and East Wanga/Isongo/174 measuring 20 acres. According to counsel, parcel 174 was given to Dismas and he hold half of the land in trust for Francis, husband to the objector. That is to share that land equally between them. At the time of adjudication, Dismas registered himself as the owner of the whole parcel of land in exclusion of Francis, which has prompted the objector to come to court. Counsel submitted that land Parcel No.174 should be shared equally between the objector and the petitioner so that each party gets 10 acres.

Counsel for the petitioner on his part, submitted that Francis Sakwa Chitechi had no first priority to file *Succession Cause No.291 of 2000* when the deceased left behind a family. He contended that since the petitioner son to the deceased (Dismas) had already petitioned for grant of letters of administration, the second petition by Francis was an abuse of the court process. Counsel has also submitted that Dismas Sakwa was registered as proprietor of Parcel No.174 on a first registration and that no trust was recorded in the register which means the objector's claim is untenable.

Regarding the objector's claim for a portion on Parcel No.174, counsel submitted that the objector's late husband (Francis) was given his own land but failed to have it registered in his name but was given two acres by the deceased herein on a humanitarian ground. He is not entitled to 10 acres or half of Parcel 174 as they seek. Counsel further submitted that the objector's family has been using two acres of Parcel 174 while their home is built on one acre of Parcel 173 which should be maintained and that the certificate of confirmation of Grant in which Francis was given 2 acres be affirmed and the objection dismissed.

The substance of the summons before court and proceedings pursuant to that summons is for the annulment and revocation of the grant of letters of administrator issued on 14th February, 1997, and confirmed on 16th September, 2003. The objector also sought to have the grant issued in *Succession Cause No.291 of 2000*, similarly annulled and revoked so that a fresh grant is issued in the joint names of the petitioner and the objector. The petitioner's father and the objector's husband were brothers both of whom are now deceased. The petition and the objection relate to Parcel No. East Wanga/Isongo/174 which is registered in the name of Dismas Kaniro Chitechi and which forms the estate in this cause.

Revocation and annulment of grants is governed by *section 76* of the Law of Succession Act, (Cap 160), Laws of Kenya which provides where relevant as follows:-

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides either on application by an interested party or of its own motion –

- a) that the proceedings to obtain the grant were defective in substance;*
- b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case,*
- c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently ...”*

The above section is clear on the circumstances under which a grant may be revoked or annulled. In the present cause, the objector claims a beneficial interest to the estate saying that the land the subject matter in this cause was a family land and for that reason she and her family are entitled to a portion of the land and that is why she has applied to have the grant revoked. On the same strength, her late husband had petitioned for grant of letters of administration for the deceased’s estate and had it confirmed but was unable to distribute the estate for reason of his demise.

First and foremost, the property the subject of this cause, that is Parcel No. 174, is registered in the name of the deceased *Dismas Kamiro Chitechi*. The deceased left behind a family and that is why the petitioner, as son to the said deceased, petitioned for and obtained a grant of letters of administration for his father’s estate. Under the Law of Succession Act, the petitioner is first in priority to take out succession proceedings and the objector and her husband could not, in law, take out such proceedings. For that reason *Succession Cause No.291 of 2000* having been filed by a person who was not first in priority and at a time when there was a succession cause filed by those entitled to file such a cause, is without merit and is unsustainable. Had the deceased left no surviving spouse or children, then under *section 40* of the Law of Succession Act, the objector or her husband could petition for such a grant, not otherwise.

This cause is about the estate of the late *Dismas Kamiro Chitechi*. Section 3 of the law of Succession Act defines the word “estate” to mean “*the free property of a deceased person* and the word “*free Property*” is defined as “*the property of a deceased person, which that person was legally competent freely to dispose of during his lifetime and in respect of which his interest has not been terminated by his death.*” Parcel No. East Wanga/Isongo/174 forms the estate of the deceased as his free property. It is registered in his name and no one else. In terms of the law of Succession Act, it is to be administered by the petitioner as the administrator and distributed as agreed by the beneficiaries with the approval of the court.

The objector’s claim is that this is a family land and should be shared out to them. She says that the land belonged to her late father-in-law and was registered in the name of the deceased for himself and in trust for her late husband, *Francis Sakwa Chitechi*. Much of the evidence adduced by the objector and her witnesses was also to that effect which also raises the issue of jurisdiction. The jurisdiction of this court is to deal with intestate and testamentary succession and the administration of the estates of deceased persons and distribution of those estates. And as the law stands now, this court cannot pronounce itself on the issues raised by the objector without encroaching on the jurisdiction of another court whose jurisdiction is to deal with issues such as the one raised by the objector, that is whether or not the subject land was held by the deceased in trust the objector’s late husband.

As the law stands now and as I understand it, this court has been divested of jurisdiction to deal with issues that call for determination of claims for land. The objector’s claim the way I see it, is that of land and not succession. The land the subject of these proceedings is registered in the name of the deceased herein and him alone. The interest of the objector’s husband was not noted on the register and that is a claim that can be properly determined by another court. Whether this land was a family land and whether it was held in trust are no longer issues for this court. Indeed *Article 165(5)(b)* of the Constitution bars

this court from entertaining matters falling within the jurisdiction of the courts contemplated in *Article 162(2)* of the Constitution. The view I take is that the issues raised by the objector lie within the jurisdiction of Environment and Land Court. As the Supreme Court held in the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 others* [2012] eKLR:-

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law ... The issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality. It goes to the very heart of the matter. For without jurisdiction, the court cannot entertain any proceedings ... Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation ...”

I am persuaded that the objector’s claim is a claim for land by way of trust and occupation which falls within the jurisdiction of the Environment and Land Court. This court cannot interpret it to be a claim based on succession under the law of Succession Act. I see no reason to interfere with the proceedings herein and the distribution of the estate of the deceased as proposed by the petitioner and accepted by the court.

The final orders of the court are that *Succession Cause No.291 of 2000* was improperly filed and is hereby struck out. The summons for revocation of grant dated 15th October, 2012 is hereby dismissed. Each party do bear their own costs.

Dated and delivered at Kakamega this 26th day of January 2016.

E.C. MWITA

JUDGE