



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**PROBATE AND ADMINISTRATION CAUSE NO.257 OF 2004**

**IN THE MATTER OF THE ESTATE OF OМУKENYA SHIRO TSA (DECEASED)**

**JOHN OGOLA**

**MUKENYA.....PETITIONER**

**AND**

**ERNEST MANGALA**

**AYUGA .....PROTESTOR**

**JUDGMENT**

**John Ogola Mukenya** petitioned for a grant of representation intestate for the estate of his late father one **Omukenya Shirotsa** who died on 7<sup>th</sup> June, 1985 and a Grant of representation was duly made to him on 22<sup>nd</sup> March 2005. By summons dated 23<sup>rd</sup> August 2010, **Julius Omondi Ogola** applied for an order of substitution of his late father John Ogola Mukenya who had himself passed on and summons were allowed and Julius Omondi Ogola appointed the administrator of the estate of the late Omukenya Shirotsa and an amended grant of representation made to him on 8<sup>th</sup> December 2010.

The administrator then filed summons for confirmation of Grant dated 11<sup>th</sup> April 2011. Thereafter **Ernest Mangala Ayugi (The Protestor)** filed an affidavit of protest sworn on 26<sup>th</sup> September, 2011 and filed in Court on the same day protesting on the mode of distribution proposed by the administrator. The protest was to the effect that he (**the protestor**) had purchased land **Parcel Number Butso/Ingotse/154** from the deceased herein in 1975 and was occupying the land, the subject of this cause and for that reason he was the one who was entitled to that parcel of land.

Directions were given to the effect that the protest be disposed of by way of oral evidence and both parties called witnesses.

**PW1, Ernest Mangala Anyuga**, testified that the deceased offered to sell 2 acres of land to him in 1975 and there was a written agreement which he produced as exhibit 1. He told the court that he purchased the land for Kshs.1,900/- which he paid in instalments. He told the court that during the transaction, there were witnesses some of whom are dead. The witness testified that after buying the land, he moved in and occupied the land and continues to work on it.

**PW2 Simon Opati Barasa** testified on behalf of the protestor and told the court that the protestor

purchased the parcel of land from the deceased herein in 1975. He told the court that he is the one who drafted the agreement and that the purchase price was Kshs.1,700/-. According to the witness the land purchased was **Parcel Number Butsotso/Ingotse/154**, and that it was the whole land that was purchased. He also testified that the purchase price was paid. When the deceased died, the witness told the court, he was buried on the same land.

**PW3 Christopher Ashiemi Luvuha** told the court that he is a neighbour to the protestor since birth and that the protestor has lived on the land since 1975 and has been using the land growing both maize and sugar cane. He however told the court in cross examination, that he did not know anything about the purchase of the land but only took the protestor as the owner of the land.

**PW4 Andrew Owino Mangala** son to the protestor told the court that he was born in 1976 and that the land belongs to his father. He said that is what he was told and that he also saw the sale agreement. In cross-examination, he told the court that the relationship between them and the petitioner herein is in respect of purchase of land only. He told the court that he has lived on the parcel of land for long after his father allowed him to build a house thereon.

**DW1, Julius Omondi Ogola**, the petitioner herein on his part testified that the estate involves his late grandfather's estate. He denied that his grandfather, the deceased herein sold land to the protestor. He told the court that the agreement relied on by the protestor and produced as PExI did not show that the deceased sold land to the protestor. He told the court that the protestor lodged a caution against the title since there was a dispute between the deceased and the protestor. He also challenged the agreement saying that, witnesses never appended their signatures on the agreement, that the agreement is silent on the acreage sold, that the agreement does not state where the land is situate and that the parcel number does not appear on the sale agreement. He also attacked the testimony of the protestor saying that whereas the affidavit says that the protestor purchased a portion of land, his oral testimony refers to the whole land. The witness denied that the land was sold saying the legal process was not followed in that consent was not obtained.

**DW2 Maria Akinyi**, daughter to the deceased, told the court that the land the subject of this cause belonged to her father. She told the court that she is not aware of the land having been sold to the protestor. All she knows is that the protestor is their neighbour.

The issue herein is about who is entitled to the estate of the late **Omukenya Shiroti** namely **Parcel Number Mutsotso/Ingotse/154**. The disputes pits **Julius Omondi Ogola** the petitioner and administrator of the estate of the deceased on the one hand, representing I believe, the other beneficiaries, and **Ernest Mangala Ayugi**, the protestor herein, on the other hand. The protestor's claim according to the evidence on record, arises by virtue of a purchase of the land the subject of these proceedings and therefore is a creditor to the estate. He has relied on what he says, is a sale agreement and the fact that he has been occupying the land since 1975.

The petitioner denies the protestor's assertion that he purchased the parcel of land from the deceased and has raised a number of questions regarding the sale agreement the protestor relies on. He has held a firm position that the land was not sold and has raised both legal and factual issues to discredit the protestor's evidence that he bought the land. His witness has also held the same position saying that the protestor is only a neighbour. The petitioner has prayed that the protest be dismissed and that the court do confirm the grant and distribute the estate namely Parcel number **Butsotso/Ingotse/154** as proposed in his further affidavit sworn on 2<sup>nd</sup> February 2016 and filed in court on the same day.

The protestor herein is not by a family member of the deceased who is entitled to the deceased's estate as a beneficiary by virtue of family relations with the deceased, but by a purchaser who claims purchaser's interest based on a sale agreement and prolonged occupation by virtue of the said purchase. The evidence by the protestor and his witnesses seems to support the position that the protestor is a purchaser.

The purchase is not acknowledged by the petitioner, and both the petitioner and his witness have held a strong view that there was no sale or purchase of the land. The petitioner has also questioned the validity

of the sale agreement and the size of the land sold if there was such purchase or sale.

From the positions held by parties herein, it is my respectful view that the issue has metamorphosed from a succession issue into a claim for land based on an agreement for sale coupled with prolonged occupation. To my mind that is not a pure succession issue that this court is mandated to deal with under the law of Succession Act. This is a matter that falls under the jurisdiction of another court which has to determine the validity of the sale agreement and any other rights that might have accrued therefrom.

My understanding of the issue herein is that they fall within the jurisdiction of the Environment and Land Court, whose jurisdiction includes determining claims for land, occupation and so forth. The jurisdiction of that court is defined under **Article 162(2)** of the Constitution and expounded under **section 13(2)** of the Environment and Land Court Act (2011), to hear and determine disputes relating to Environment and Land severally but also those relating to Public, Private and Community land and **contracts, choses in action or other instruments granting any enforceable interests in land** among other disputes.

The dispute herein as I view it, relates to a contract which is said to have given rise to an enforceable interest in land, and for that matter, it is a dispute that lies within the jurisdiction of that court. The Environment and Land Court as established under **Article 162(2)** of the Constitution of Kenya, 2010, is of equal status to this court. This Court is therefore not superior to that court and should allow that court to exercise its jurisdiction without encroachment. That court according to **Article 162(2)(b)** deals with issues of environment, and those of occupation of and title to land.

Moreover, this court no longer has the latitude to adjudicate on disputes as it wishes. Its jurisdiction is clearly defined under Article 165 of the Constitution and it is not allowed to encroach on the jurisdiction of the other courts of equal status. **Article 165(5)** of the Constitution provides as follows:-

*“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)”*

Issues touching on environment, the use, occupation and title to land are now exclusively reserved for the Environment and Land Court.

As already said, the issue herein relates to a contract over land leading to occupation which both under the Constitution and statute, are matters reserved for another court. In the words of the Supreme Court in the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 others** [2012] eKLR;

*“A court’s jurisdictions 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 jurisdiction of a court of law, the court must operate within the constitutional limit. It cannot expand its jurisdiction through judicial craft or innovation”*

This Supreme Court must have been echoing the words of **Nyarangi, JA** in the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd** [1989] KLR I where the learned Judge of Appeal said at page 14:

*“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is*

*constituted, and may be extended or restricted by the like means ... A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics ... where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given." (emphasis)*

Taking the advise of the Supreme Court and Nyarangi, JA. into account and what both the Constitution and statute say about jurisdiction of this court and courts of equal status as shown in the analysis above, I come to the conclusion that this Court is not properly seized of the issues raised for determination in this protest, and cannot expand its jurisdiction which is limited by the Constitution. That being my view of this matter, I decline jurisdiction to pronounce myself on the issue raised in the protest and down my tools.

In the circumstances above, I strike out the protest with costs. The best I can do is hold confirmation of the grant herein in abeyance for a short time to give the protestor time to reflect and decide what to do next. I therefore direct as follows:-

- 1.) That the protestor do move the appropriate court for whatever relief he deems fit within NINETY (90) DAYS from the date hereof and serve the petitioner with pleadings as he will have decided.*
- 2.) In default of (1) above, this court shall move to conclude the aspect of confirmation of Grant in this cause..*
- 3.) This cause be mentioned on 25<sup>th</sup> May, 2016 for further orders and/or directions.*

**Dated at Kakamega this 25<sup>th</sup> day of February, 2016.**

**E. C. MWITA**

**JUDGE**