



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.300'B' OF 2005

IN THE MATTER OF THE ESTATE OF THE LATE DAVID KALASIA LWANGU

AND

MARY MUSANGA DAVID PETITIONER/RESPONDENT

VERSUS

CHRISTINA WIRUNDA OBJECTOR/APPLICANT

CONSOLIDATED WITH

SUCCESSION CAUSE NO.471 OF 2000

IN THE MATTER OF THE ESTTE OF CHILADO ANDAYI ONGOTSO – (DECEASED)

RULING

1. **Christine Wirunda, (the objector)**, is the administratrix of the estate of the late Chilado Andayi Ongotso, while **Mary Musango David (the petitioner)** is the administratrix of the estate of **David Kalasia Lwangu**. The objector filed **Succession Cause Number 471 of 2000** seeking a grant of representation intestate for the estate of the late **Chilado Andayi Ingotso** and on 7th September, 2001 a grant was made to her and issued on 3rd October, 2001. The objector had listed Parcel No. **Kakamega/Shikulu/1807** as constituting the estate of the deceased in **Cause No.471 of 2000**. On the other hand the petitioner initiated succession proceedings in this cause (No.300'B' of 2005) and sought a grant of representation **intestate** for the estate of **David Kalasia Lwangu** and a grant was made to her on 8th November, 2006 and issued on 7th December, 2006. The petitioner had listed among other properties Parcel Number Kakamega/Shikulu/1807 as forming part the deceased's estate. This grant was on 21st January 2009 confirmed and Parcel no. **Kakamega/Shikulu/1807** shared out between the petitioner and one John Paul Kalasia taking 1.5 acres and 0.5 acres respectively.

2. The objector then filed summons for revocation of Grant dated 19th July 2012 and filed in court on even date, seeking among other orders, revocation of the Grant of representation made to the petitioner and confirmed on 21st January 2009. The summons were by consent of counsel for both parties allowed, **Succession Cause No.471 of 2000** consolidated with this cause and a fresh grant was issued in the joint names of the petitioner and the objector on 6th December, 2012. The objector was to file summons for confirmation of Grant which was done on 15th January 2013, and were ordered to be disposed of by way of oral evidence. The petitioner did not file a replying affidavit to the summons for confirmation of Grant although she was duly represented throughout the hearing of this cause.

3. PW1, Christina Wirunda (the objector) testified that she is daughter to Chilado Andayi Ongotso (deceased) and that her other sister Mukholera is also deceased. She told the court that her deceased father left behind a parcel of land comprising two acres being **Kakamega/Shikulu/1807**. She produced both certificate of death and a copy of the register (Green Card) as PEx 1 and 2 respectively. She told the court that she had filed succession proceedings in respect of her late father's estate and produced the Grant issued to her as PEx 3. The witness told the court that her late father did not sell land to **David Kalasia** but that David Kalasia had only leased the said land. According to the witness, her father died on 8th July 1986 and she should therefore inherit her late father's land as the only beneficiary now surviving her late father.

4. PW2, **Silvanus Ang'awa**, told the court that he is cousin to the objector, that is the objector's father was his uncle. He testified that Chilado Andayi Ingotso had a parcel of land known as **Kakamega/Shikulu/1807** measuring approximately 2 acres and which is near where he lives. He testified that the land has never been sold and according to him, David Kalasia used to lease that land. He also told the court that the petitioner, **widow** to David Kalasia, used to lease the same land too. According to him, the objector should inherit Parcel No. **Kakamega/Shikulu/1807** being the only child to the deceased proprietor of that land.

5. After the close of the objector's case, the petitioner was given a chance to call and tender evidence but on 7th October, 2014 Mr Vadanga, counsel for the petitioner elected not to call evidence and closed the petitioner's case. Parties were then directed to file and exchange written submissions and on 12th November, 2014 both counsel were present when Mr Akwala informed the court that they had filed written submissions. The court ordered that proceedings be typed and when the matter came up for mention on 18th February 2016, counsel for both parties were again present and they requested that I write the judgment although proceedings had been taken and concluded before Chitembwe, J.

6. I have perused the record herein but could only trace submissions on behalf of the objector. I have not been able to trace written submissions made on behalf of the petitioner. I also note that the petitioner did not file a replying affidavit to the summons for confirmation of Grant neither did she tender evidence in this matter on the issue of confirmation of Grant or concerns raised by the objector.

7. The objector is daughter to Chilado Andayi Ingotso who died on 8th July 1986 as can be seen from the certificate of death PEx 1. At the time of his demise, the deceased, **Chilkado Andayi Ingotso**, was the registered proprietor of Parcel No. **Kakamega/Shikulu/1807**, having been so registered on 19th May 1975. That parcel of land seems to have been transferred and registered in the name of **David Lwangu Kalasia** on 17th February 1992 and a title deed issued to him, some six (6) years after Ingotso's demise.

8. The objector is opposed to this transfer and has testified in her evidence in chief that her late father did not sell the land to David Lwangu Kalasia. She wants the land given to her since she is the administratrix of the estate of her late father and the only beneficiary to her father's estate.

9. Although the petitioner was duly represented throughout these proceedings, she did not respond to the application for confirmation of Grant and more so the suggestion by the objector that she is entitled to inherit Parcel No. **Kakamega/Shikulu/1807**. I also note that she never tendered any evidence and her counsel never filed written submissions as ordered and as it is, the objector's evidence that the land was not sold, has not been controverted.

10. From the record and exhibits produced by the objector, Parcel No. **Kakamega/Shikulu/1807** was registered in the name of **Andayi Ingotso** in 1975. The proprietor died on 8th July 1986 but the land was transferred into the name of **David Lwangu Kalasia** on 17th February 1992 at a consideration of kshs.2,500/- when the person who could have executed instruments of transfer was already dead and buried.

11. There has not been any explanation how the land belonging to a deceased moved from a dead person to another without going through succession proceedings given that succession proceedings for that estate

were initiated in 2000. This is in violation of clear provisions of the law. **Section 45** of the law of Succession Act abhors intermeddling with properties of a deceased person. It provides:-

S.45 “(1) **Except so far as expressly authorised by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**

(2) **Any person who contravenes the provisions of this section shall**

(a) **be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment, and**

(b) **be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”**

12. Intermeddling with the estate of a deceased person is a criminal offence and can also lead to a civil claim against the inter-meddler. Disposition of an interest in land belonging to a deceased person cannot be sanctioned without authority of the court and only by an executor or administratrix. The late Andayi Ingotso’s parcel of land was transferred to David Lwangu Kalasia in unexplained circumstances and even though the administratrix to the estate of the late Lwangu was given an opportunity to explain how that was possible, she did not tender evidence or reply to the affidavit in support of summons for confirmation. This left the court to draw inferences that there was no plausible explanation and that the said disposition of land was, to say the least, unlawful.

13. The parcel of land the subject of these objection proceedings, was included as forming part of the estate of the late **David Kalasia Lwangu** and upon Grant of representation of that estate being confirmed, was shared out between the petitioner herein **Mary Musanga David** and **John Paul Kalasia**, beneficiaries of the estate of the late **David Kalasia Lwangu**. From the facts presented in the objection proceedings and the applicable law, it is clear that the objector has demonstrated on a balance of probability that she has made out a case for taking **Parcel Number Kakamega/Shikulu/1807**.

14. The Grant of Representation in respect of the estate of the late **David Kalasia Lwangu** having been revoked, and a new Grant issued in the joint names of the petitioner and the objector herein, I allow the summons for confirmation of Grant dated 8/1/2013. And pursuant to powers conferred to this court by **rule 73** of the Probate and Administration Rules, I hereby rectify the certificate of confirmation of Grant issued herein on 28th May 2008, to the effect that the whole of **Parcel Number Kakamega/Shikulu/1807** shall be transmitted to **Christina Wirunda**. A rectified certificate of confirmation of Grant shall issue incorporating this change. The other properties and distribution thereof shall remain as before.

15. Costs to the objector.

Dated and delivered at Kakamega this 16th day of March, 2016.

E.C. MWITA

JUDGE