



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.139'B' OF 1992

IN THE MATTER OF THE ESTATE OF SAMUEL IKOBWA ISIGO – (DECEASED)

JULIANA LUTENYO ONYANGO)

JOTHAN KALLEP).....PETITIONERS

VERSUS

SUSAN VIHENDA.....BENEFICIARY

PERESLA ASHALI MATEYA.....DECEASED

ARTHUR NGAIRA MUDOGO..... INTERESTED PARTY

RULING

1. **Julia Luteny**o and **George Burundi**, petitioned for Grant of representation herein, and on the 28th October, 1993, letters of administration intestate for the estate of late **Samuel Ikobwa Isigi** were made to them as joint administrators. That grant was subsequently amended on 7th March, 2005, removing the name of the 2nd petitioner, **George Burudi**, so that Julia Luteny, the 1st petitioner remained the only Administratrix. The amended grant was issued on 22nd March, 2005. The grant of representation was thereafter confirmed on 9th May, 2007 and the estate of the deceased, namely **Parcel No. Kakamega/Shamberere/152**, shared equally between the petitioner, **Julia Luteny** and one **Jotham Kallep**. A certificate of confirmation was issued on 7th August, 2007 in that regard.

2. On 5th December 2007, summons for rectification of Grant were taken out and filed seeking to correct the name of the petitioner from **JULIA LUTENYO** to **JULIA LUTENYO ONYANGO** and that of **JOTHAM KALLEP** replacing it with that of **JOTHAM WAMUGADA MWAMBE**. That application came up for hearing before **Ochieng, .J** on 9th December 2008, but the Judge ordered that one **Ilario Khamati** and **Mutsachi Musoka** attend court on 4th March 2009. Those people did not attend court as ordered, and the court stood over the application generally until the orders of 9th December, 2008 requiring those people's attendance were complied with.

3. The cause came up for hearing again on 9th December, 2009, this time before **Chitembwe, J.** who directed the District Surveyor, Kakamega to visit the land forming the deceased's estate, **Kakamega/Shamberere/152** and establish the portion occupied and file his report in court. He set the matter for mention on 28th April 2010, to confirm the filing of the surveyor's report.

Nothing of significance happened until 25th September, 2012 when the court granted an order in an

application dated 6th July 2012, enjoining one **Arthur Ngaira Mudogo** as an interested party, and set the matter for mention on 6th December, 2012 to allow service to be effected on the other parties. Prayer 2 of that application sought an order directing that a portion previously occupied buy one **Peresila Ashiali Mateya** (deceased), be allocated to the interested party on account of being a purchaser.

4. On 18th March, 2013, at the request of parties in the cause, the court gave directions that the matter be heard by way of oral evidence. Buyers were to be plaintiffs while the petitioners were to be defendants. Parties were also directed to exchange documents and fixed the cause for hearing on 21st and 22nd October, 2013. Nothing of substance happened.

5. Finally, this matter took off on 15th July 2014, when **Arthur Ngira Mudogo**, the interested party, took the witness stand as PW1. He told the court that he purchased land from the late **Peresila Ashiela Mateya**, in April 2011. According to this witness, the husband to **Peresila Ashiela**, one **Zacharia Mateya**, also deceased, had purchased the land from **Raso**, wife to the deceased herein in 1978, and produced a 1978 sale agreement as PEx1. He told the court that he had obtained a limited grant of administration which he produced as PEx2, and his own sale agreement dated 24th April 2011 which he produced as PEx3. He told the court that he was claiming the portion belonging to Peresila measuring 0.94 HA. which was marked portion B in the surveyors' report dated 24th November, 2010, which was produced as PEx4. He also told the court that he was in occupation and was cultivating the land in question.

6. PW2, **Susan Vihenda**, told the court that she knew **Samuel Ikobwa** the deceased herein, that her husband **Samuel Munyale** and **Samuel Ikobwa** jointly bought land at a price of Kshs.2,350/-. She produced an agreement for sale dated 20th June, 1967 as PEx5(a) and its English translation PEx 5(b). The said Samuel Munyade left the witness occupying the land which was about 3 acres. She therefore asked the court to order that she gets title to the land and be allowed to use the same.

7. DW1, **Juliana Lutenyo**, on her part, testified that she is daughter to the deceased herein who died leaving behind 5 surviving children. According to the witness, one **Samuel Munyade** husband to PW2, purchased land from her late father but due to some disagreements, the purchase price was refunded to **Samuel** through an advocate. Later **Susan Vihenda** came with her son and demanded one acre from the land. The witness told the court that she entitled to get 2 acres while Susan should get 1 acre. She however, denied knowing **Arthur Ngaira**. She also told the court that **Perisila** bought land from her mother, that was sold to **Ngaira** but she did not know who witnessed the sale. **Jonathan Kallep** is her sister's son but that he sold the land and moved out. According to her, **Jonathan** should wait until the issue of succession is concluded before she decides what to give him.

8. DW2 **Fatuma Naliaka**, sister to DW1 testified that Parcel No. Kakamega/Shamberere/152 belonged to their father, the deceased herein. She told the court that the deceased had initially sold land to **Samuel Munyade**, but later the purchase price was refunded bringing the transaction to an end. According to this witness, **Susan** daughter to Samuel later came to DW1 who gave her one acre which Susan sold and left. She told the court that in her view, **Susan** should not get land because she had already been given land. She also told the court that **Peresila** sold land to other people she did not know and also that in her view, it is **Jonathan's mother** who should get land and not **Jonathan** himself.

9. DW3, **Jonathan Wamugoda Mwambe, (Johnathan Kullep)**, on his part told the court that he purchased land from Julia Lutenyo Onyango, the petitioner, **Rael** and **Dorcas Malesi**, in 1992. However, **Julian** later turned against him saying that he did not purchase land from her. He produced an agreement for sale as PEx6.

10. DW4, **Sista Malesi** on the other hand testified that she is mother to **Jonathan**, (DW3) who bought land at Kshs.10,000/- from her sisters and paid the purchase price. The land belonged to her late father, and after the purchase, she left the land and went her own way.

With that evidence and written submissions filed by counsel for the parties herein, I have been asked to

make a decision in this matter.

11. I have carefully considered this matter, submissions by counsel and perused the record. I must state from the outset that this matter seems to have confused parties herein. A grant of representation was made to the petitioners Julia Lutenyo and George Burudi. The name George Burudi was later removed leaving Julia Lutenyo as the only petitioner and administratrix of the deceased's estate. The beneficiaries to the deceased's estate had been named as the two petitioners and one **Jonathan Kallep**, who was described as nephew.

12. That grant of administration was confirmed on 9th May, 2007 and the estate shared out equally between **Julia Lutenyo** and Jonathan Kallep, and that remains the position to date.

13. I have perused the record but have not come across any summons for revocation of that grant or cancellation of the certificate of confirmation of grant. When the administratrix made an application for correction of names, the court, (**Ochieng, J**), made an order requiring that the people who had been named as **liabilities** to the deceased's estate namely **Ilario Khamati** and **Alusachi Musoka**, attend court and when that did not happen, the court stood over the cause generally until his orders of 9th December, 2008 were complied with. That order remains in force and the application for rectification is live to-date.

14. Parties herein appear to have side-stepped the orders of 9th December, 2009 and proceeded as though those orders did not exist. They have sought determination of this cause without complying with the said court orders. That is something a court of law should not allow. Court orders must be obeyed, complied with, or set aside upon offering satisfactory reasons.

15. From the record, the cause was concluded when the grant of representation was confirmed and the estate shared out. The interested party was enjoined into a cause that did not exist, the estate having been shared out, and whatever prayers he seeks cannot be the basis of a decision in a non-existent cause. This court cannot also be called upon to order that a portion of land that was allegedly occupied by someone now deceased, be allocated to another when there is no estate. That claim also seems to be based on a purchase or sale of land and occupation thereof which are not issues for this court and which should be pursued against the estate of that deceased person.

16. Parties should have identified their claims and against whom they relate and move the court appropriately.

17. Having carefully considered the evidence and perused the record, I find that the application dated 6th July, 2012 is untenable in the circumstances. It is hereby dismissed with costs.

Dated and delivered at Kakamega this 21st day of July, 2016.

E.C. MWITA

JUDGE