



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 628 OF 2009

IN THE MATTER OF THE ESTATE OF DISMUS OKUNGU AKECH – DECEASED

ALFRED KISAKA MANDILA.....APPLICANT

VERSUS

FREDRICK OOKO AKETCH.....RESPONDENT

JUDGMENT

1. The applicant filed the application dated 28th May 2010 seeking to have the certificate of confirmation issued to the respondent on 9th February 2010 revoked on the grounds that:-
 - a. the property known as LR No. 62/272 otherwise known as House No. 296 situated in Nairobi's Ayany Estate does not form part of the deceased's estate;
 - b. the confirmation of grant was secured fraudulently by the concealment of material information from the court;
 - c. the proceedings leading to the grant were defective in the circumstances; and
 - d. the property in question is the subject of the dispute in High Court ELC No. 259 of 2009 between the applicant and the respondent and another and therefore it is fair and just that the matter awaits the outcome of the dispute.
2. The application was based on the affidavit sworn by the applicant in which he stated that on 10th July 1990 he bought the suit property from the deceased and MARGARET AKECH and paid the full purchase price. However, both the deceased and MARGARET AKECH died before they had transferred the property to him. When the respondent became the administrator of the estate the applicant sued him for the specific performance of the sale agreement. By the time of that agreement the applicant was a tenant in the suit premises. The respondent instructed auctioneers to demand the rent of Kshs.1.5 million and to levy distress. That led to the breaking into the premises carrying away the applicant's goods and evicting him from the premises. It was at that point that the suit was filed in which a temporary mandatory injunction was issued directing the respondent to deliver up vacant possession of the suit premises to the applicant. There was also an order or temporary injunction restraining the respondent, and all these working under him, from dealing with the suit property or interfering with the applicant's peaceful enjoyment of the suit

property pending the hearing and determination of the suit. The suit is still pending before the High Court in **ELC No. 259 of 2009** at Nairobi. It is this suit and the orders therein that the applicant claims were not brought to the attention of this court when it confirmed the grant to the respondent. His case was that the suit property was not the free property of the deceased and therefore should not have been the subject of the confirmation.

3. The respondent swore a replying affidavit denying the averments of the applicant. He stated that the existence of the case was brought to the attention of the court. He referred to the affidavit he swore in support of the application for confirmation in which he deponed as follows:-

“4. THAT the deceased left behind house LR No. 62/273 Ayany Estate which is capable of distribution.

5. THAT the tenant who was residing in the premises aforementioned has never paid rent to me although the same has been demanded severally.

6. THAT I initiated distress for rent action and the same was opposed necessitating to the Civil Case ELC NO. 259 of 2009 whereby the tenant claimed that he had bought the suit property from the deceased.

7. THAT the matter is still pending in the ELC division awaiting determination.

8. THAT it is also apparent that no transfer to the plaintiff in ELC No. 259 of 2009 was even made in his favour.

9. THAT the plaintiff in the ELC No. 259 of 2009 vacated the suit premises upon distress action levied against him but has since obtained order on ELC No. 259 of 2009 to have him reinstated in the suit premises.”

4. The respondent’s case was that the institution of this Cause had been gazetted, thereby giving any person (including the applicant) claiming any interest in the estate to come forward. No such claim was shown. Consequently, he had no obligation to inform the applicant of the application, or the confirmation of the grant. It is also clear from the respondent that, following the confirmation, he sold the suit property to a third party.
5. The applicant was represented by PAUL MUNGLA & COMPANY ADVOCATES and the respondent by M/S KANGETHE, WAITERE AND COMPANY ADVOCATES. These are the same advocates representing the parties in **ELC NO. 256 of 2009**. Counsel filed written submissions in the application. MR MUNGLA addressed the court on his submissions.
6. The first question for determination is whether the suit property formed part of the deceased’s estate. In other words, was the suit property the ‘free property’ of the deceased person? The second question is whether the confirmation was fraudulently obtained.
7. Under **section 3(1) of the Law of Succession Act (Cap 160)**, ‘the free property of a deceased person’ is defined as:-

‘the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.’

There is no dispute that the deceased was up to the time of his death on 21st August 1991 the registered proprietor of the suit property. But the applicant’s case is that the registration was only technical as he had bought the property from the deceased, and taken possession of the same; that the deceased had, however, died before transferring the property to him. This is his case in **ELC 259 of 2009** in which he provided the agreement of sale. The suit is against the respondent as the administrator of the estate of the deceased. At the time when the grant was being confirmed to the

respondent in this Cause, it was known that the applicant was laying a claim to the property. The respondent had evicted the applicant from the suit property on the basis that he was a tenant, but the situation had been overturned by the court by way of an interlocutory mandatory injunction. Further, the court had restrained the respondent from any further dealing in or interfering with the suit property. It is evident that in the affidavit sworn to support the application for confirmation it was not disclosed that the respondent's further dealing in or interfering with the suit property had been restrained pending the hearing and disposal of the suit. This means that by the time the application for confirmation was filed on **20th November 2009**, the High Court in **ELC 259 of 2009** had on 18th September 2009 granted the restraining orders. It was contemptuous for the respondent to file and prosecute the application in the face of the orders.

8. In **ELC 259 of 2009** there was a legitimate claim against the estate of the deceased over the suit property. Both the respondent and his counsel were aware of the claim. It was fraudulent on the part of the respondent not to serve the applicant with the application for confirmation. It was fraudulent for the respondent to transfer the suit property to another party when the suit was pending; a suit in which restraining orders had issued against such dealing. In **CONSOLIDATED BANK OF KENYA v. USAFI SERVICES LTD, Civil Appeal Case of 2006 (Unreported)**, the Court of Appeal was dealing with the principle of '*lis pendens*' when it observed as follows:

“The doctrine of *lis-pendens* is necessary for the final adjudication of the matter before the court and in the general interest of public policy and good and effective administration of justice. It therefore overrides Section 23 of the Registration of Titles Act and prohibits a party from giving to the other, pending the litigation, rights to the property in dispute so as to prejudice the other.”

9. The third party will have his day in court to protect whatever interest he had acquired in the suit property. He will probably seek to rely on **section 93(2)** of the **Law of Succession Act**. The dispute will be decided on its merits, but for now it was fraudulent, and prejudicial to the applicant, for the respondent to deal with the property the way he did. The respondent transferred the suit property with full knowledge of the pending case in which injunctive orders had been given.
10. On the question whether the suit property was the free property of the deceased, I hope I have said enough to show that the alleged sale to the applicant presented an attack on the deceased's proprietorship of the property. The title was encumbered, and therefore not free.
11. These are the reasons why I allow with costs the application dated 28th May 2010 by the applicant. The grant issued on 9th February 2010 to the respondent in respect of the deceased **DISMUS OKUNGU AKECH** who died intestate on 21st August 1991 is hereby revoked.

DATED and DELIVERED at NAIROBI this 27th November 2014.

A.O. MUCHELULE

JUDGE

