



No.3015
REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION
NUMBER.276 OF 2006

REPUBLIC APPLICANT

AGAINST

MAKUENI DISTRICT DISPUTES TRIBUNAL 1ST RESPONDENT

RESIDENT MAGISTRATE’S COURT AT MAKUENI..... 2ND RESPONDENT

GILBERT K. MUTULU 1ST INTERESTED PARTY

PAUL MUNYALO NGUNDO 2ND INTERESTED PARTY

***EX-PARTE:*JONES MUTETI WAEMA**

RULING

This matter had been previously heard by **Waweru J.** up to the stage of crafting a ruling before he left the station on transfer. He left the station though with the file for that purpose. However, on 17th November, 2011, **Waweru J.** returned the file indicating that he was not in a position to craft the ruling due to his busy schedule in his division at the High Court of Kenya, Nairobi.

On 30th November, 2011, the matter was placed before me for mention with a view to charting the way forward. Though all the parties involved were served with mention Notices for that purpose, only the applicant appeared. **Mr. Kituku**, counsel for the applicant opined that since all the parties had filed and exchanged written submissions, he was not averse to this court taking over the case from where **Waweru J.** had left, act on the written submissions on record, craft and deliver the ruling. Accordingly, I made an order in those terms.

The application under consideration is the one dated 21st February, 2008. In the Notice of Motion, **Jones Muteti Waema**, hereinafter “**the applicant**” seeks orders of this court in terms:

“ **1.....**

2. THAT order of certiorari directed at the 1st Respondent/Tribunal do issue to quash its decision in

land dispute case No.35 of 2006 and the ensuing judgment by the 2nd respondent in LDTC No.154 of 2006 concerning the title to the applicant's land parcel NZAUI/KAWALA/533 (herein after called the suit premises).

3. THAT order of prohibition directed at the 2nd Respondent/Resident magistrate do issue to prohibit him from entertaining and/or continuing to entertain or making any decision in Resident magistrate Civil case No.154 of 2006 or any other proceedings concerning the ownership of land NZAUI/KAWALA/533.

4. That the leave granted to file these proceedings do act as stay to stop all the respondents' proceedings in Resident Magistrate Civil suit No.154 of 2006 aforesaid until the final determination of the intended main motion."

The facts and grounds relied on are that the interested parties colluded and commenced phony proceedings between them before the 1st respondent resulting in an award which wrongly granted land parcel **Nzau/Kawala/533** hereinafter "**the suit premises**" to the 3rd respondent although the suit premises formed and still form part of the estate of the applicant's father **Ngundo Kimale** alias **Ngundo Waema** who died on 28th September, 1991. By their action, the interested parties intermeddled with the estate of the deceased. The applicant has an interest in the suit premises as an inheritance from his father. The deceased was survived by five children, the 4th interested party and the applicant being among them. To date no full grant of letters of administration had been obtained and no formal distribution of the estate of the deceased had been done. Hence these judicial review proceedings.

Leave to commence the same having been obtained from **Lenaola J.** on 20th February, 2008, the substantive motion was filed the following day. It was served on all the respondents. However, only the 1st, 2nd respondents and 3rd interested party reacted to the application. The Attorney General on behalf of the 1st and 2nd respondents filed grounds of opposition alleging that the application was misconceived, bad in law and an abuse of the process of court, that the application was incompetent, incurably defective and offended the provisions of order LIII rules 1, 2 and 3 of the Civil Procedure rules.

On his part, the 3rd interested party filed a replying affidavit and deponed where pertinent that the application lacked merit and was an abuse of the court's process. The applicant was dishonest, lacked candidness and withheld material facts relevant to the case. Otherwise the 1st respondent heard the dispute fairly and in accordance with the laid down procedure and arrived at a decision that was fair. He never colluded with anybody in the prosecution of the proceedings before the 1st respondent.

It appears that the 4th interested party did not file any papers in opposition to the application. On 16th June, 2009 **Lenaola J.** directed the parties to file written submissions. However, by the time **Waweru J** took over the file on 23rd February, 2010, following the departure of **Lenaola J.** on transfer, written submissions had not been filed. It was not until 8th April, and 2nd December, 2010 respectively that the said submissions were filed and exchanged. But those submissions were by the applicant and 3rd respondent only. I have carefully read and considered them alongside cited authorities.

In my view the issue for determination is whether the 1st and 2nd respondents had jurisdiction to entertain the proceedings considering that they related to the estate of the deceased. It is common ground that the suit premises are still registered in the name of the deceased if the certificate of official search annexed to the affidavit annexing exhibits by the applicant dated 15th December, 2006 is anything to go by. In the certificate it is clearly indicated that as at 1st November, 2006, the name of the proprietor of the suit premises was **Ngundo Kimalu**. I have not seen the 3rd interested party dispute that fact. In the same affidavit there is a death certificate of **Ngundo Waema Kimale** showing that he infact died on 28th September, 1991. Again I have not heard the 3rd interested party dispute the fact. The proceedings before the 1st Respondent were commenced and concluded on 22nd June, 2006. They related to the suit

premises. Since the suit premises formed part of the estate of the deceased, the 1st and 2nd respondent lacked jurisdiction to entertain such proceedings. Under section 47 of the Law of Succession Act, it is the high court and in some instances, the magistrates court that are clothed with jurisdiction to deal with matters relating to the estate of deceased persons. In the premises the two respondents lacked the requisite jurisdiction to deliberate on the suit premises forming part of the estate of the deceased.

The jurisdiction of the 1st respondent is derived from section 3 of the Land Disputes Tribunals Act. Under the said section; the 1st respondent has the jurisdiction to entertain all cases civil involving a dispute as to:

- ***The division of, or the determination of boundaries to land, including land held in common.***
- ***A claim to occupy or work land or***
- ***Trespass to land.***

As can be seen from the foregoing, entertaining proceedings relating to succession matters is outside the jurisdiction of the 1st Respondent.

The proceedings before the 1st respondent were commenced by the 4th interested party. His claim was against the 3rd interested party was that he sold him 1.5 acres out of the suit premises. This was on 10th January, 2006. Though he paid him, the purchase price, the 3rd interested party failed to give the portion of land so purchased. Obviously this was a breach of a contract for the sale of land and not necessarily a claim based on trespass to land as urged by the 3rd interested party. That being the case, it cannot be said that the 1st respondent had jurisdiction to entertain such proceedings. The suit premises formed part of the free property of the estate of the deceased as defined in section 3(1) of the Law of Succession Act. The 3rd interested party having not obtained a grant of letters of Administration intestate he had no capacity to enter into a sale agreement in respect of a portion of the suit premises which was still registered in the name of his late father. Indeed the property of the deceased as already stated was protected by section 45 (1) of the Law of Succession Act which is to the effect that:

“45(1) Except so far as expressly authorized 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.”

It matters not that following the passing on of the deceased, the clan sat and shared out his estate among the siblings. In the absence of a confirmed grant the clan's decision was merely a proposal with no force of law. Until the estate was distributed by court, the decision of the clan notwithstanding, the suit premises still remained the property of the estate. Again section 40 of the Law of Succession Act operates against transactions of this nature. Since an intestate estate has in the first instance to be gathered before distribution amongst the dependants, even if the 3rd interested party had been an Administrator of the estate, he could not have entered such transaction. As it were he was purporting to sell that which he did not have. It is trite law that a person who has no proprietary title to a property cannot transfer any interest to that property to another person.

Since the proceedings before the 1st respondent related to the estate of the deceased, it behoved the 1st respondent to establish whether the disputants had the capacity or *locus standi* to mount such proceedings before it. For instance, it ought to have found out whether any of them had a grant of Letters of Administration Intestate to the estate of the deceased.

These are judicial review proceedings strictly governed by the provisions of the Law Reform Act and order LIII. It is a special jurisdiction that is neither criminal nor civil. The applicant may have acted in bad faith, may have come to court with unclean hands and or may be guilty of material non-disclosure. However, those are doctrines only applicable in civil proceedings.

From all the foregoing, coupled with the fact that the 1st and 2nd respondents and 4th interested party did not really oppose the application, the best order that commends to me is to find in favour of the applicant with regard to his Notice of Motion dated and filed on 21st February, 2008. The application is allowed in terms of prayers 2 and 3. I make no order though, as to the costs of the application.

Dated and delivered at Machakos, this 16th day of January, 2012.

ASIKE-MAKHANDIA
JUDGE