



REPUBLIC OF KENYA
IN THE HIGH COURT
AT KAKAMEGA
Succession Cause 270 of 2004

IN THE MATTER OF THE ESTATE OF ELIAD LIDUNDU MOSOLINI ----DECEASED

B E T W E E N

1.

GLADYS ALIMILA ANDREA

2. JANEKH KHALIBWA LUKHALU PETITIONER

A N D

NATHAN CHITUI WIJENJE APPLICANT

R U L I N G

The petitioner filed this petition in the year 2004 and a confirmed grant was issued on the 23rd May 2005. The applicant filed his application for the annulment of the grant in September 2011 claiming that he purchased some portion of land from the deceased. Before that application was heard, the petitioners filed a preliminary objection based on three grounds namely:-

1. That the application is bad in law.
2. The application is incompetent, misconceived and misplaced.
3. That the applicant has got no locus standi.

Mr. Mukabwa, counsel for the petitioner submitted that the application is brought under the wrong provisions of the law. **Rule 53** of the Probate and Administration Rules does not deal with revocation of Grants but deals with engrossment of wills and that **Rule 76** does not exist. Counsel further contends that no document in form of Sale Agreement or consent from the Land Control Board has been exhibited as proof of the alleged purchase. The application is brought seven years after the grant was confirmed and the land in question disposed off. Counsel submitted that the application offends the provisions of **Section 2(3)** of the Law Reform Act, Cap 26 Laws of Kenya.

Mrs. Muleshe, counsel for the applicant submitted that the fact that the Rules of Probate and

Administration cited on the application did not relate to revocation of a grant is a typing error and should not lead to punishing the applicant. Counsel submitted that the applicant purchased some land from the deceased and a purchaser's interest is recognized by the law.

On the issue of locus standi, I do note that the applicant is claiming a purchaser's interest. The petitioners in their replying affidavit filed on 16th December 2011 state that the deceased did not inform anyone that he had sold part of his land to the applicant. Since the applicant's claim is recognized in law, I do find that he has locus standi to make the application for consideration of his claim.

As regards the provisions of the Probate and Administration Rules, that issue is curable. The fact that the application is brought under the wrong statutory provisions can be cured by an amendment which can be done orally. The intent and purpose of **Article 159(2)(d) Constitution** is to accommodate such procedural technicalities and determine cases on their own merit. I do find that that legal point will not determine the matter once and for all as the applicant can file another application based on the correct legal provisions.

Section 2(3)(b) of the Law Reform Act, Chapter 26 Laws of Kenya provide as follows:-

2(3) – “No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either -

(a)

(b) Proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation.”

From the provisions of the above section, it is evident that it deals with actions based on 'tort'. The current action is based on contract and therefore the limitation period provided for under the above section does not apply to the applicant's claim.

The applicant did not annex any document to prove his claim. However, since such applications are at times heard by way of oral evidence, and since directions have not been taken, I do find that the applicant still has an opportunity to prove his claim if indeed he purchased a section of the deceased's land.

In the end, I do find that the preliminary objection will not settle all the issues relating to the applicant's claim. The preliminary objection is hereby dismissed with no orders as to costs.

Delivered, dated and signed at Kakamega this 10th day of May 2012.

SAID J. CHITEMBWE
J U D G E