



REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 126A OF 2007

JOHN M. LUKA..... DECEASED

VRS

ERNEST M. SHILOYA RESPONDENT

RULING

The applicant has invoked several provisions of the law, in making the application. He has cited **section 63 (c) and (e) of the Civil Procedure Act; Order 1 rule 10 (2) of the Civil Procedure Rules; Order 39 rules 1 and 3 of the Civil Procedure Rules; Section 143 (1) of the Registered Land Act; and Rule 73 of the Probate and Administration Rules.**

Through those provisions, the applicant seeks three substantive reliefs. First, he seeks an order of inhibition or a prohibitory order to be placed on parcels number 4010 and 4011, so as to preserve the said titles.

Secondly, the applicant seeks an interlocutory injunction to restrain the respondent from alienating, trespassing, moving onto, laying claim to, utilizing, developing, carrying out any works on, constructing or in any other manner dealing or intermeddling with the two parcels of land. The said injunction, if granted, should remain in force until this succession cause is determined.

Thirdly, the applicant asks that the registration of the two parcels, number 4010 and 4011, be revoked or cancelled so that the property can revert to its original title, which was in the name of the deceased.

Before delving into the substance of the application, I feel that it is prudent to set out herein the full titles of the properties.

It is common ground that the deceased, **JOHN MUSHILA LUKE**, was the registered proprietor of **L.R No. BUTSOTSO / INDANGALASA / 3238**, which shall hereinafter be cited as “**the original title**” or simply “**parcel No.3238.**”

The said original title was closed on 8th February, 2007. By the time of the said closure of the title, the deceased had passed away, almost three years before;

Upon the closure of the original title, the property was sub-divided into two, being;

(a) L.R No. BUTSOTSO/INDANGALASIA/4010

(b) L.R No. BUTSOTSO/INDANGALASIA/4011

Those two titles shall hereinafter be cited as “**parcel No. 4010**” and “**parcel No. 4011**”, respectively.

Parcel No. 4010 is now registered in the names of the deceased, **JOHN MUSHILA LUKE**, whilst parcel No. 4011 is registered in the names of the respondent, **TAPHROZA MDECHA OMBAJO**.

It is the applicant’s case that the respondent fraudulently caused the closure of the original title, and also caused the sub-division of the property into two. The alleged fraud is founded upon the fact that **JOHN MUSHILA LUKE** died on 22nd April, 2004, and that he could not therefore have facilitated the sub-division of the original title, nor the transfer of parcel No. 4011 to the respondent.

In any event, following the demise of **JOHN MUSHILA LUKE**, the applicant submits that any transfer of any property constituting a part of his estate, could only be lawful if the same was done on the strength of a confirmed grant.

Although the respondent asserts that he bought land from the deceased, **JOHN MUSHILA LUKE**, the applicant argues that all the documents exhibited by the respondent were forgeries. The applicant’s reasons for so saying are, firstly, that the figures in the Agreement of Sale dated 22nd November, 2002 were altered. Secondly, the said figures do not make any sense at all, because there is no way that when the consideration in a contract was Kshs.35, 000/-, the balance could be Kshs.115,000/- after the buyer had paid Kshs. 35,000/-.

The applicant also pointed out that there was no way that the deceased could have executed the Transfer document dated 6th March, 2007, because he had died on 22nd April, 2004.

In answer to the application, the respondent first submitted that the said application was improperly before the court, because the provisions of **Order 39 of the Civil Procedure Rules** were inapplicable to succession proceedings.

As far as the respondent was concerned, it mattered not that the applicant had also invoked the provisions of **Rule 73 of the Probate and Administration Rules**. The respondent submitted that the court cannot be asked to separate the Law of Succession Act from the Civil Procedure Rules, because they had been cited at the headnote of the application.

In that respect, I find myself unable to agree with the respondent. I say so because once the appropriate provisions governing an application have been cited by the applicant, anything else that he cites is simply surplusage. The same can be ignored, without any undue implications to the application.

The respondent did not cite any authority to back her proposition that just because an application is said to be founded on several statutory provisions, the application would be fatally defective if any one of those provisions were found to be inapplicable to the application. On my part, I too failed to get any authority to support that proposition. But in my considered opinion, there is no plausible reason that would bar the court from ignoring the inapplicable provisions, and to proceed thereafter only on the basis of such provisions as are applicable.

Secondly, as the original title no longer exists following the creation of parcel No. 4010 and parcel No. 4011, the respondent says that this court cannot invoke its discretionary power in respect to parcel No. 4011, which is now registered in her name.

If I did understand the respondent correctly, her view is that discretionary remedies are not applicable to succession proceedings. Regrettably, however, the respondent did not explain herself further. She did not tell this court why discretionary remedies were inapplicable to succession proceedings.

In my considered opinion, and by virtue of the **Provisions of Section 47 of the Law of Succession Act**;

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient ...”

The “**Chambers Concise Dictionary**” defines the word “**expedient**” as;

“**suitable or appropriate**”

Surely then, for the court to be in a position to properly exercise its jurisdiction in making orders which are suitable or appropriate, the court must be able to exercise its discretion. I cannot see anything in the Law of Succession Act which purports to fetter the discretion of the court. If anything, **Rule 73 of the Probate and Administration Rules** appears to fortify my belief that the court’s discretion remains applicable. That rule reads as follows;

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court.”

In the event, if this court holds the view that an interlocutory injunction was necessary so as to meet the ends of Justice, or to prevent the abuse of the process of the court, it shall have power to grant the said reliefs. The next question is whether or not the court ought to grant the reliefs sought.

In my considered opinion, the single most important consideration in succession proceedings is the preservation of the estate of the deceased person until the stage at which the grant is confirmed. In particular, the capital assets should be preserved, so as to be available for distribution to the beneficiaries, after the liabilities, if any, of the deceased have been paid off. The applicant did not just seek injunctive reliefs herein. He also sought an order of inhibition or a prohibitory order. He also asked that the titles to parcel No. 4010 and parcel No. 4011 be cancelled or revoked, so that the property can revert to its original title.

In answering to the application, the respondent dwelt only on the prayer for an injunction. However, she did not address the court on the issues of inhibition or the prohibitory order.

For now, the most important document in this application is the Transfer instrument date 6th March, 2007. In that document it is indicated that **JOHN MUSHILA LUKE** appeared before Mr. A.M Momanyi Birundu, Advocate and Commissioner for Oaths, on 6th March, 2007. It is on that date that the deceased, **JOHN MUSHILA LUKE** acknowledged the signature on the Transfer instrument as his.

In my understanding, it is that Transfer instrument which transmitted to the respondent parcel No.4011. Without that instrument, the respondent would not have got parcel No. 4011 registered in her name.

Because **JOHN MUSHILA LUKE** had died about three years before he appeared before the Commissioner for Oaths (On 6th March, 2007), I find that the authenticity of the Transfer instrument is seriously in doubt. It may not, therefore, have conferred a legitimate title to the respondent. In the circumstances, justice demands that an inhibition should issue in respect of parcel No. 4011. Justice further demands that parcel No.4010 and parcel No. 4011 be cancelled forthwith. I therefore so order.

The two parcels of land shall revert to the original title, **L.R No. BUTSOTSO/INDANGALASIA/3238**, which shall be registered in the names of the deceased **JOHN MUSHILA LUKE**.

In arriving at this decision I have not made any decision as regards the question whether or not the respondent has a legitimate claim to any portion of the estate of the deceased. If she is able to prove to the court herein that she has a legitimate claim, then, at the stage of confirmation of the grant, the court will give to her, her lawful share.

For now, the titles to parcel No. 4010 and parcel No. 4011 are to be surrendered to the District Land Registrar, within the next 14 days, for cancellation.

After cancellation of those two titles, and also after the Land Registrar restores the original title, which shall be in the names of **JOHN MUSHILA LUKE**, an inhibition shall issue in respect to the said original title, so as to preserve it until the succession cause herein is determined. I have made this final order so as

to protect the property in every respect, pending confirmation of the grant.

The costs of the application are awarded to the petitioner/applicant.

Dated, signed and delivered at Kakamega this 30th day of April, 2009.

FRED A. OCHIENG'

JUDGE