



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC NO. 162 OF 2014**

**MICHAEL MAISHA MWITA**

**(Suing as the Administrator and personal representative of the Estate of**

**FRANCIS MWITA KECHERE).....PLAINTIFF**

**VERSUS**

**THOMAS BWIRE MWITA & 5 OTHERS.....DEFENDANTS**

**RULING**

(Application to strike out suit; subject matter being land which the plaintiff claims to belong to the estate of his late father and illegally sold by his siblings the 1<sup>st</sup> – 4<sup>th</sup> defendants to the 5<sup>th</sup> and 6<sup>th</sup> defendants; 1<sup>st</sup> – 4<sup>th</sup> defendants now filing application claiming that the suit is an abuse of the court process as the estate of the deceased has already been distributed; the suit property not having been listed among the properties distributed hence not subjected to the succession process; plaintiff as administrator rightfully in court to try and claim it on behalf of the estate of the deceased; such suit cannot be sustained within the succession cause and the plaintiff is thus properly before this court; arguable case as the applicants have not demonstrated how they sold the property without the permission of the court yet the property had not been distributed to them; application dismissed)

1. Through an application dated 3 July 2020, the 1<sup>st</sup> – 4<sup>th</sup> defendants seek orders that this suit be struck out with costs for being an abuse of the court process. The application is brought inter alia pursuant to Section 13 of the Environment and Land Court Act, No. 19 of 2011, and Order 2 Rule 15 (1) (a) and (d) of the Civil Procedure Rules. The applicants want the plaintiff's suit dismissed on the following grounds :-

a. That the plaintiff's claim is a succession dispute.

b. That the dispute is not one relating to the environment, use, occupation or title to land as contemplated by Section 13 of the Environment and Land Court Act since the same was already determined by the High Court in Succession Cause No. 46 of 1995.

c. That the issue of the succession to the Estate of the late Francis Mwita Kechere (deceased) was fully canvassed and determined by the Probate and Administration Court in Succession Case No. 46 of 1995.

2. The application is supported by the affidavit of Jane Matokore Mwita, the 4<sup>th</sup> defendant herein and the same is opposed by the plaintiff.

3. To put matters into context, the respondent commenced this suit through a plaint filed on 1 July 2014 on behalf of the Estate of Francis Mwita Kechere (hereinafter referred to as "the deceased"), his late father. He pleaded that the deceased was the legal and beneficial owner of the land parcel Mombasa/Block XV/207 having bought it from one Awadh Saleh. He averred that his late father died on 14 March 1992 before transferring the property into his name. He pleaded that on 25 October 2013, he discovered that the 1<sup>st</sup> to 4<sup>th</sup> defendants (who appear to be his siblings) had by a sale agreement dated 28 August 2013, purported to sell the suit property to the 5<sup>th</sup> defendant who thereafter acquired a title deed in his name and that of the 6<sup>th</sup> defendant. He contends that this sale is illegal as the 1<sup>st</sup> – 4<sup>th</sup> defendants had no capacity to sell. In the suit, he seeks a declaration to nullify the said sale and cancellation of the title of the 5<sup>th</sup> and 6<sup>th</sup> defendants.

4. In the defence filed by the 1<sup>st</sup> – 4<sup>th</sup> defendants, they contend that the sale of the suit property was legal for they had the capacity and legal right to sell as beneficiaries of the estate of the deceased. They pleaded that the sale was done with the prior knowledge of the plaintiff after confirmation of letters of administration on 3 March 2004 in the case Mombasa High Court Succession Cause No. 46 of 1995. They pleaded that this court lacks jurisdiction given the succession matter through which all the properties of the deceased were effectively dealt with.

5. It will be seen that in this application the applicants wish to have this suit struck out and have yet again cited Mombasa High Court Succession Cause No. 46 of 1995. In the supporting affidavit, the 4<sup>th</sup> defendant has deposed that the estate of the deceased, including the suit property, was distributed, and therefore the suit property is no longer available for further allocation. She has contended that any claim over the suit property should be canvassed in the succession cause. She has deposed that the suit property was bequeathed to them by the administratrix of the estate of the deceased, Anna Nyambiji Mwita.

6. Counsel relied fully on the material supplied in the application to urge their positions.

7. Order 2 Rule 15 does permit the striking out of a case where it discloses no reasonable cause of action and/or is an abuse of the Court process. The gist of this application is that this court has no jurisdiction because the matter was either fully dealt with in the succession matter, or if the plaintiff has issue, he ought to canvass the same within the succession suit. The applicants otherwise assert that all issues were dealt with in the succession cause and the estate of the deceased has already been distributed. I do not agree.

8. The plaintiff has filed this suit on behalf of the estate of the deceased after he was issued with a grant *ad litem* to do so. In this suit, he wishes to assert that the suit property is part of the estate of the deceased. The applicants claim that the estate of the deceased was distributed including the suit property. That is not true. I have gone through the confirmed grant and the suit property is not listed therein. It follows that the suit property was never disclosed within the succession matter to have been part of the estate of the deceased, yet I can see that the 1<sup>st</sup> – 4<sup>th</sup> defendants disposed it, through a sale agreement dated 28 August 2013. In the sale agreement the 1<sup>st</sup> – 4<sup>th</sup> defendants stated that they are the legal representatives and/or beneficiaries of the estate of the deceased. In essence, they were acknowledging that the suit property belonged to the deceased. If it did, and it appears that they were aware of this, then they ought to have disclosed it in the succession matter but they did not. That property has now passed to other hands. It cannot form part of the estate of the deceased for distribution, unless and until, it is reclaimed back. It can only be reclaimed back through proceedings such as these. It is after the plaintiff succeeds (if at all), that the property can now be referred to the succession matter for distribution. The applicant cannot within the succession cause sue for recovery of the property back into the hands of the estate and therefore it is this court and not the court handling the succession matter which has jurisdiction.

9. I think the 1<sup>st</sup> – 4<sup>th</sup> defendants owe an explanation of stating how they disposed off the suit land without seeking the permission of the court to do so, if at all they were aware that the suit property belonged to the estate of the deceased. The purchasers also need to convince this court that they have good title, for they appear to have been aware that the property belonged to a deceased person, yet it was being sold without it having been distributed and without the sanction of court. The allegation that the respondent was aware of the sale does not appear supported by any evidence, at least thus far.

10. I think that the plaintiff has an arguable case. The plaintiff's case is certainly not frivolous. There is some material that the suit property may very well have belonged to the deceased yet it was not disclosed in the succession matter but was sold after the confirmation of grant. It is this court which has jurisdiction, as I have explained above, to handle this case.

11. For the above reasons, I find no merit in this application and it is hereby dismissed with costs.

12. Orders accordingly.

**DATED AND DELIVERED THIS 4TH DAY OF MARCH, 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**