



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CONST. PET. NO.27 OF 2019

VIKASH KAMALKUMAR DEVISHI SHAH.....PETITIONER

VERSUS

1. ABDALLA ABDULRMAN

2. THE CHIEF LAND REGISTRAR

3. THE LAND REGISTRAR MOMBASA

4. THE ATTORNEY GENERAL.....RESPONDENTS

JUDGMENT

1. This Petition was filed on 19th July, 2019 by the Petitioner who has stated that he brings it on behalf of the Estate of his late father, KAMALKUMAR DEVSHI SHAH and the beneficiaries to his estate being himself and his mother SARSATIBEN KAMALKUMAR DEVSHI SHAH and his sister SHEELAN KAMALKUMAR DEVSHI SHAH. That the Petitioner's late father is the registered proprietor of the property comprised in the title registered at Lands Registry, Mombasa as C.R.28688 (hereinafter referred to as "the suit property"). That the said property falls within the jurisdiction of the County Government of Mombasa for purposes of payment of rates under the Rating Act (Cap 267, Laws of Kenya), and is fenced and the Petitioner's family has their family home thereon which they used as a residence during the deceased's life time as a home, and their mother continued to reside on it until December, 2017 after which the property was let to Light Academy, the trade name for Omeriye Limited and is occupied as a girl's dormitory. That sometime in Mid-July 2019, the Government Valuer, Ms. Jacinta Kore came on site to value the property on the back of a purported transfer which was being undertaken. That a representative of Light Academy called the Petitioner enquiring whether he was selling the property which surprised the Petitioner.

2. The Petitioner states that neither his late father's estate nor the Petitioner had sold the said property nor was the Petitioner aware that it had been transferred to the 1st Respondent nor was he aware of the circumstances in which he was claiming ownership. That upon further investigation and undertaking a search at the Land Registry, it transpired that the 1st Respondent obtained a decree in the Chief Magistrate's Court in Mombasa CMCC No.462 of 2018 (O.S) ABDALLA ABDULRAMAN –V-KAMALKUMAR DEVSHI SHAH for adverse possession in a suit instituted some three years after the Petitioner father's death. The Petitioner avers that that suit and all the proceedings therein as well as the decree are nullity and of no consequence whatsoever. The Petitioner avers that until the said valuer called at the property as aforesaid, the Petitioner was not aware that a suit had been filed against his late father in 2018 by the 1st Respondent herein or that a judgment had been entered against nor had any process or demand been served upon him or the estate. That the Petitioner caused the court file relating to the subordinate court case to be perused in order to ascertain what the true position was and found the following documents in the court file:

- a. a copy of the originating summons, verifying affidavit, supporting affidavit and witness statement of Abdalla Abdulraman all filed on 22nd November, 2018;**
- b. a copy of the plaintiff's list of documents filed on 22nd November, 2018;**
- c. a copy of an application for substituted service filed on 11th December, 2018;**
- d. a letter dated 18th December 2018 requesting the file to be placed before the court for directions;**
- e. an affidavit of service of LEONARD N. SHIMAKA sworn on 16th January 2019 and filed on the same day;**

f. a request for judgment dated 21st January, 2019 and filed on the same day;

g. the handwritten manuscript proceedings in the said suit; and

h. a decree issued on 8th February, 2019.

3. The Petitioner states that he was convinced from the outset that there was a deliberate and concerted effort to wrongfully, unlawfully, fraudulently and arbitrarily deprive him and his late father's estate in contravention of their rights to a property and fair trial, not to be condemned without first being first heard and to protection of the property. The Petitioner states that his late father is and has never been registered holder of Post Office Box Number 80899, Mombasa, allegedly used to effect service of court documents in the said case, and that the 1st Respondent herein has deceitfully and without any candour misled the subordinate court in issuing a decree without any jurisdiction to do so. The Petitioner accused the 1st Respondent of *mala fides* and lack of candour in that matter as he chose to sue the Petitioner's late father well after his death which the Petitioner, relying on advice, believes is a nullity.

4. The Petitioner avers that the property is valued at over Kshs.46,000,000.00 and the Chief Magistrate's Court had no jurisdiction in the matter to hear and determine the same. That in any event, only the High Court could make an order to vest the property in the name of any adverse possessee in law and not the subordinate court. That the subordinate court therefore, had no jurisdiction to hear and determine the suit nor issue the orders it purported to make. The Petitioner believes that the provisions of the Limitation of Actions Act, the Land Registration Act as well as the Environment and Land Court Act were materially breached in consequence of all of which the purported decree and all proceedings as well as the alleged registration of the property in the Respondent's favour are void and a nullity. The Petitioner states that the property is still encumbered for mortgages taken in favour of Commercial Bank of Africa Limited and Nyati Auto Parts Limited whose interests would be materially affected and neither of whom were served with the process. The Petitioner avers that the proceedings, order and decree in the subordinate court had been illegally, unlawfully, irregularly, wrongfully and fraudulently obtained by reason of which the estate of the Petitioner's deceased father and its beneficiaries stand to suffer substantial injury in that they stand to be unlawfully deprived of property whose value is substantial and way in excess of kshs.46,000,000.00 without being heard in the matter or being given an opportunity to be heard and will continue to do so.

5. The Petitioner avers that his and the other beneficiaries' as well as his late father's estate's fundamental rights to receive a fair hearing and trial as well as protection of the property have been contravened by the serious breaches and fraudulent conduct of various parties. Under the circumstances, the Petitioner believes that all the proceedings as well as the judgment and decree issued in the subordinate court and all orders premised thereon and the attempt to arbitrarily deprive and dispossess the estate of the Petitioner's late father and its beneficiaries of the said property are a nullity in law and of no effect or consequence whatsoever and ought to be declared so with an order that all entries made consequent upon the decree and the provisional title issued thereupon be declared a nullity and that the Registrar of Titles be directed to cancel them. The Petitioner avers that the 1st Respondent breached clear provisions of the Constitution of Kenya, and more particularly, Articles 10, 20, 21, 22, 27, 40 47, 48, 50 and 159. The Petitioner avers that the 1st Respondent and its counsel not only deliberately misled the subordinate court into exercising jurisdiction over a matter in which it did not have, but also deceitfully misled the said court to make orders that were in breach of the Petitioner's aforesaid rights and which were, in fact, a nullity for clear want of service of process and institution of a suit against a deceased person. It is the Petitioner's case that this court has the jurisdiction to hear and determine this Petitioner for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights as enshrined in Articles 23 (1), 258 and 259 of the Constitution. That the Respondents' actions complained of are a serious and fundamental violation and/or infringement of the constitution, statutory provisions governing the enforcement of payment of rates as well as the Petitioner's fundamental rights and freedom thereunder.

6. The Petitioner has sought the following prayers in the Petition:

a. A declaration that the first Respondent and his counsel in the subordinate court acted fraudulently and inconsistently with and in breach of their duties and obligations respectively under the provisions of Articles 10, 21, 22, 27, 40 47, 50 and 159 of the Constitution and Section 3 and 3A of the Civil Procedure Rules;

b. A declaration that the Petitioner's Late Father's name KAMALKUMAR DEVSHI SHAH as proprietor was wrongfully, illegally and unlawfully removed from the register relating to the property known as LR. No. MN/I/9779 registered at the Land Titles Registry, Mombasa as C.R. 28688;

c. An order directing the Chief Land Registrar and the Land Registrar, Mombasa County to rectify his records in the register to reflect the name of KAMALKUMAR DEVSHI SHAH as the proprietor of the said property known as LR.No. MN/I/9779 registered at the Land Titles Registry, Mombasa as C. R. 28688 as stated in the Original Title Deed issued to him on the 8th May 1996;

d. Consequently, an order prohibiting the Respondents whether by themselves or through any other person purporting to derive title through or under them from interfering with your Petitioner's estate of the late KAMALKUMAR DEVSHI SHAH'S proprietary rights or enjoyment of the suit property or those of his beneficiaries;

e. The costs of and consequent upon this Petition be paid and borne by the first Respondent and the firm of Messrs.' Marende Nekesa & Company Advocates; and

f. All other or such orders or relief as this Honourable Court may deem just and fit or appropriate to grant.

7. The Petition is supported by the affidavit of Vikash Kamalkumar Devshi Shah. He has more or less reiterated the averments in the Petition which I have already set out above and I see no need of repeating the same. The Petitioner has annexed a copy of death certificate of

his late father, copies of Petition and supporting affidavits in Succession Cause No. 36 of 2019, copy of title deed of the suit property, copies of correspondence exchanged between the Petitioners advocates and Light Academy Advocates, copies of various documents relating to payment of tax on rental, electricity, rates and rent, copies of transfer and other documents.

8. The 1st Respondent entered appearance through the firm of Messrs. Marende Necheza and filed a reply to Petition dated 30th November, 2020 in which they deny the averments in the Petition. The 1st respondent states that the 1st Petitioner has no *locus standi* to institute this suit as he has no letters of administration, either *ad litem* or full. That the 1st Respondent lawfully acquired overriding interest over the suit property from the registered owner. It is admitted that the 1st Respondent lawfully filed CMCC ELC No.462 of 2018 and that the same was served upon the Petitioner herein by substituted service and the trial court satisfied itself with the service and the matter proceeded lawfully. It is the 1st Respondent's contention that the Petitioner has wrongly approached this court to review the decision of the subordinate court and/or as an Appellate Court, yet the Petitioner ought to have filed for review in the lower court or properly appeal the decisions of that court. That any challenge on jurisdiction of the subordinate court, issues of service or allegations of fraud or procedural error as alleged ought to have been raised in the primary suit in the subordinate court, but not by institution of a new case by way of Petition as done herein. It is therefore the 1st Respondent's contention that this suit was prematurely brought before this court. The 1st Respondent urged the court to dismiss the Petition with costs.

9. The 2nd, 3rd and 4th Respondents filed grounds of opposition dated 1st December, 2020 on the following grounds:

i. That the Petition is an abuse of the court process.

ii. That the subject of this suit are proceedings in the Chief Magistrate's Court Mombasa CMCC 462 of 2018 which 2nd, 3rd and 4th Respondents were not party to.

iii. That the Petition does not raise any triable issues against the 2nd, 3rd and 4th Respondents.

iv. That the Petitioner has not shown with exactitude how his rights have been infringed upon by the 2nd, 3rd and 4th Respondents.

v. That it is in the interest of justice that this Petition be dismissed as against the 2nd, 3rd and 4th Respondents with costs.

10. The Petitioner filed written submission on 1st December, 2020. None of the Respondents, filed submissions. When the matter came up for hearing, Mr. Ondego learned counsel for the Petitioner submitted that the response filed by the 1st Respondent offends the directions given by the court on 16th September, 2020 and secondly that it offends the provisions of Rule 15 (2) (a) of the Mutunga Rules as it is neither an affidavit in reply nor a statement of defence. He urged the court to expunge it from the court record.

11. Having considered the pleadings, the evidence and the submissions the issue for determination is whether the Petitioner has locus to bring this suit and if so, whether the orders sought can issue.

12. In the Petition herein, the Petitioner has stated that he brings this Petition on behalf of the estate of his late father, Kamalkamur Devshi Shah who is said to be registered proprietor of the suit property and the beneficiaries to his estate. The Petitioner has annexed a copy of a death certificate showing that the deceased died on 30th July, 2015. The Petitioner has also exhibited a Petition for letters of administration intestate in Mombasa High Court Succession Cause No. 36 of 2019: In the matter of the estate of Kamalkumar Devshi Shah (deceased).

13. It is trite law that the estate of deceased persons can only be represented in any legal proceedings by a person who is authorized to do so on behalf of the estate. Only a person who has been issued grant of letters of administration has capacity to represent the estate of a deceased person. The powers of personal representatives are set out under Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya which provides as follows:

82. Personal representatives shall subject only to any limitation imposed by their grant, have the following powers:-

a. To enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arising out of his death for his personal representatives;

b. To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them as they think best:

i. Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchases; and

ii. No immovable property shall be sold before confirmation of the grant;

c. To assert, at any time after confirmation of the grant to the vesting of a specific legacy in the legatee thereof;

d.

14. Section 80 (2) of the Law of Succession Act which provides as follows: -

80. (2) A grant of letters of administration, with or without the will annexed shall take effect only as from the date of such grant.

Therefore, the granted letters of administration take effect from the date when it is issued as provided under Section 80 (2). Where a suit is commenced without letters of administration in respect of a deceased estate, such a suit is null and void *ab initio* and cannot be cured by a party subsequently obtaining the letters of administration.

15. In this case, the Petitioner has only exhibited a Petition for letters of administration. Since the Petitioner has not obtained a full grant or a limited Grant of Letters of Administration *Ad Litem*, he lacked the legal capacity or the requisite *locus standi* to institute and maintain the suit. The result is that the suit is incompetent and was null and void *ab initio* and cannot be sustained.

16. In the case of **Otieno –v- Ougo & Another (1982-1988) KAR 1048**, the Court of Appeal stated:

“.....an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.....To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has not locus means he cannot be heard, even on whether or not he has a case worth listening to.....”

17. I accordingly order that the suit by the Petitioner initiated vide a Petition dated 19th July 2019 struck out in its entirety. I award costs of the suit to the Respondents.

18. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY DUE TO COVID-19 PANDEMIC THIS 1ST DAY OF MARCH, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant