



Lewa v Lewa & 2 others; Bakhressa (Interested Party) (Family Appeal 6 of 2016) [2025] KEHC 3992 (KLR) (17 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL 6 OF 2016
G MUTAI, J
MARCH 17, 2025**

BETWEEN

KHAMIS OMAR LEWA APPELLANT

AND

RIADHA OMAR LEWA 1ST RESPONDENT

HALIMATI OMARI LEWA 2ND RESPONDENT

JUMA KHAMIS LEWA 3RD RESPONDENT

AND

SAEED ABDALLA BAKHRESSA INTERESTED PARTY

RULING

1. Vide a Notice of Motion dated 5th July 2024, the interested party /applicant seeks the following orders:-
 - a. Spent;
 - b. That the honourable court strike out all or part of the pleadings herein referring to the property known as Plot No Mombasa /Block XVI/1346 and exclude the said property from the inventory of the assets of the estate of Khamis Omar Lewa (deceased);
 - c. That this honourable court order the estate of Khamis Omar Lewa, or their agents/advocates and or the firm of Lumatete Muchai and Co. Advocates, to deliver the original certificate of title of property known as Plot No Mombasa/Block XVI/1346 to the purchaser or his advocates; and
 - d. That the petitioners do pay the interested party/applicant's costs of this application.



2. The interested party/applicant averred in the affidavit sworn on 5th July 2024 that the petitioners misrepresented Plot No. Mombasa /Block/1346 was part of the deceased's estate when it wasn't. He stated that the deceased wasn't the owner of the said land and the petitioners ought not to lay claim to it. The said property ought, therefore, to be expunged from the inventory of the deceased's assets. Further the applicant would be prejudiced if this court proceeds with the consideration of the appeal on the misapprehended fact that it was part of the deceased's estate.
3. The applicant deponed that even after the sale of the subject property failed, the beneficiaries of the estate had yet to pay back Kes 1,500,000/- nor had they delivered vacant possession and were still in possession of the property's original title.
4. The application was opposed by the appellant. Mr Khamis Omar Lewa filed a replying affidavit sworn on 4th October 2024 in which he averred that the application was filed so as to confuse the court. He deponed that the entire purchase price in respect of the subject property wasn't paid, and hence, the sale was nullified. It was urged that the vendors cannot give vacant possession of a property whose sale transaction had been rendered a nullity by refund of the consideration, either wholly or in part.
5. It was urged that Riadha Omar Lewa received nothing and that a refund ought to be sought from the firm of advocates who acted in the matter and received funds.
6. Khamis Omar Lewa prayed that the application be dismissed.
7. The court directed the parties to file written submissions.
8. The applicant's submissions are dated 4th November 2024. The applicant identified the sole issue coming up for determination as being whether the suit property ought to be struck out from the pleadings in this matter.
9. The applicant's counsel submitted that a property was sold to the applicant. The fact that full payment had not been made was deemed not fatal. Counsel for the applicant urged that the transaction could only be rescinded if the purchase price was fully refunded to the applicant.
10. Counsel urged that under Rule 41 (3) of the Probate and Administration Rules, the suit property ought to be set aside and not included in the list of properties until there was a determination of its ownership status.
11. It was also stated that the Environment and Land Court, in a decision delivered on 4th October 2017, declared the purchaser as the owner of the land and ordered that he be given vacant possession. In the circumstance it was urged that the applicant ought to get title to the property as well as vacant possession thereof.
12. The appellants/respondents' submissions are dated 26th November 2024. The appellants/respondents, through their advocates, urged that a property that was under succession proceedings could not be sold.
13. Counsel urged that the sale of property before the formal succession proceedings was completed was a nullity.
14. Counsel for the respondent denied knowledge of the case before the Environment and Land Court and urged that the application be dismissed.
15. I have considered the application and the response thereto. Does the application have merit?
16. The matter before this Court is an appeal against the decision the current Chief Kadhi made while Kadhi. The learned Kadhi declined to find that the firm of Wambo Muyala & Co Advocates



represented the appellants in the court below. The appeal has not been heard, and the determined to date.

17. From my perusal of the file, it is evident that Plot No Mombasa/ Block XVI/1346 was transferred to Saeed Abdalla Bakhressa, and a tile was issued on 15th October 2015. Despite the transfer, only Kes 6,700,000/- was paid by the purchaser, out of Kes 12,00,000/- which had been agreed as the consideration. Kes.5,200,000/- was refunded, leaving a balance of Kes.1,500,000/-. It isn't clear if the said balance of the purchase price was ever repaid. It is also not clear if the interested party/applicant terminated the contract of sale or not. Given that this court set aside the consent order made on 20th September 2021 and issued on 22nd September 2021, the appeal was reinstated. The interested party / applicant was made a party to the appeal so that he could ventilate his issues.
18. The appeal is still pending hearing and determination before the judge and two Kadhis (since, as I have stated, the present Chief Kadhi heard the matter before the Court below), and directions haven't been issued. Since what is before the Court is an appeal against an interlocutory order of the Kadhi's Court, the court hearing the substantive succession proceedings is the Kadhi's Court and not this court. It is the court hearing the substantive succession proceedings that should determine which properties comprise the estate of the deceased.
19. In my view, it wouldn't be in the interest of justice to grant the orders sought as the appeal isn't in respect of the extent of the estate of the deceased but rather whether the Kadhi's Court was right to decline to allow the firm of Wambo Muyala to come on record and if the second respondent and his siblings could live on Plot No 1346/XVI located at Majengo pending hearing and determination of the petition.
20. Allowing the application would determine the appeal prematurely and render the substantive hearing in the trial court an academic exercise. In my opinion, all the issues raised in the application may be considered during the hearing of the appeal, which this court will fast-track.
21. Under the circumstances, I don't find merit in the said application. The same is dismissed.
22. Each party is to bear its own costs.
23. Orders accordingly

DATED AND SIGNED AT MOMBASA THIS 17TH DAY OF MARCH 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Abdalla, for the Interested Party/Applicant;

No appearance for the Appellants/Respondents; and

Arthur – Court Assistant.

