

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 407 OF 2013

**IN THE MATTER OF THE ESTATE OF ESAU MATIA CHAMWADA alias ESAU MACHAMA MATIAS CHAMWADA
(DECEASED)**

RULING

1. The application that I am called upon to determine is dated 28th January 2015. It is brought at the instance of Jesika Kasieyia Muse, the administratrix of the estate of the deceased. I shall refer to her hereafter as such. She principally seeks orders relating to Butsotso/Indangalasia/805, the property listed in the petition as the asset of the estate. She seeks inhibitions, cancellation of titles and nullification of transactions that led up to the subdivision of that property to subtitles, their transfer to third parties, and related dealings.
2. The case by the administratrix is that the estate herein comprised of two properties, being Butsotso/Indangalasia/805 and Butsotso/Indangalasia/2400. According to her, as at the time the deceased was dying, Butsotso/Indangalasia/805 was intact, and still registered in his name. As at the time she was initiating the cause, she was unaware that the property had been subdivided, into two portions. She discovered thereafter that the same was subdivided on 25th September 2012, to create two new titles, being Butsotso/Indangalasia/6199 and 6200, without being taken through the succession process, and Butsotso/Indangalasia/6200 was transferred to the name of the Geoffrey Bakari Muyale, the 1st respondent, and charged with the Family Bank, the 2nd respondent. She asserts that all those transactions were null and void, and the acts of the respondents amounted to intermeddling with the estate.
3. The respondents have responded separately to the application. According to the 1st respondent, Butsotso/Indangalasia/6200 was sold to him by one Walter Gimode Muloma, for valuable consideration. He did due diligence by carrying out a search at the lands office, which confirmed the ownership of the property. He obtained a loan from the 2nd respondent to finance the purchase. He obtained the relevant consents from the land control board, and there was no impediment. The response by the 2nd respondent is through, Peter Makhano Musungu, one of its managers. The 2nd respondent explains how the 1st respondent approached the 2nd respondent for a facility to purchase the said property. A copy of the title deed for Butsotso/Indangalasia/805 was placed with them, and after evaluating it they were satisfied that it belonged to the person named on its face. The title had no encumbrances, and it was transferred and charged by the bank. The 2nd respondent argues that a title cannot be cancelled once it is passed from the hands of the seller to the buyer, and the same is charged. It further argues that what is sought in the application cannot be achieved through succession proceedings.
4. The court directed that the application be determined by way of written submissions. Both sides have filed detailed submissions, complete with authorities cited, I have gone through both the written submissions and the authorities cited, and noted the arguments made by the parties.
5. From the record before me, it is not clear whether Walter Gimose Muloma is a survivor of the deceased, but I can see from the documents lodged together with the petition, principally the letter from the Chief, that he was a buyer, but it is not indicated from whom he had bought the property. He was not named as a party to the subject application, and he did not, therefore, have a chance to tell the court how he came to be registered as property of Butsotso/Indangalasia/6200, or even when he bought the portion, and from whom. It could be that he bought the same from the deceased, and that the process of its excision and transfer to his name took a long time to complete, and he died before that could be done. Without his input, there is a huge gap in the matter, and the court may not properly determine whether there was any wrongdoing in the process.
6. Secondly, the orders sought are primarily available for making by the Environment and Land Court. I trust that the probate court does have a limited window to order cancellation of subtitles where the mother title was in the name of the deceased as at the date of his death, and was subdivided and transferred to individuals before the court finalized the exercise of confirmation. That can only happen, however, where the parties place clear evidence before the court, relating to how the subdivision happened and the roles played by the actors. In the present case the respondents were not party to the subdivision. They only came into the picture after the subdivision had happened and the property transferred to the name of the persons who later sold the property to the 1st respondent. They would, therefore, be the wrong persons to ask to account for the subdivision, so that the court can intervene.
7. The dispute herein is between the administratrix and persons who claim no beneficial interest in the estate. I agree with the 2nd respondent, such disputes fall outside the mandate of the probate court, whose function is to distribute property belonging to the estate, and any disputes that the court would entertain ought to be between parties who claim a beneficial interest in the property. The respondents do not claim as survivors or dependants or heirs or beneficiaries or creditors of the estate. They never transacted with the deceased, and they do not claim to have transacted with any of the survivors of the deceased, to warrant the probate court intervening in the dispute.
8. The way out is for the parties to file a suit before the Environment and Land Court, where all the outstanding issues can be thrashed out, to determine how the said property came to be subdivided, and whether there was a breach of the law in the process. The dispute as framed in the instant application, cannot be conveniently determined in this forum. That is the spirit of Rule 41(3) of the Probate and Administration Rules. It relates to confirmation, but the principle it states would apply here. If the dispute were to arise during confirmation, the court would, no doubt, push the parties to take the route prescribed in Rule 41(3). That is the route that the parties hereto ought to take.

9. To avoid the estate being prejudiced in the meantime, I reiterate the order that was made herein in on 10th February 2015, the inhibition ordered on that date shall be extended, to last pending the hearing and determination of the suit that the administratrix shall file in terms of paragraph 8 here above, if she is so minded. Parties are at liberty to apply hereafter. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF JUNE,2021

W. MUSYOKA

JUDGE