



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 640 OF 2006

IN THE MATTER OF THE ESTATE OF TATAYO MUMAKOMBE TALIDI (DECEASED)

RULING

1. I am called upon to determine 2 applications. One is dated 22nd January 2018 and the other 4th December 2020. I will consider the 2 in turns, starting with the earliest in time, that dated 22nd January 2018.

2. The application dated 22nd January 2018 is a summons for revocation of the grant that was made herein on 13th April 2011 to Victor Harry Imbongo and Patterson Sindani, together with the certificate of confirmation of grant issued to them on 7th December 2011. It is also sought that the subsequent registration of South Kabras/Bushu/1970 in the name of Victor Harry Imbongo be cancelled, and the title reverted back to the name of Daniel Njoroge Gichara, the applicant herein, who I shall refer to hereafter as the first applicant, in view of the second application. I shall refer to Victor Harry Imbongo and Patterson Sindani as the administrators in Kakamega HCSC No. 640 of 2006.

3. The first applicant's case is that after the deceased herein died a cause was initiated in Kakamega HCSC No. 317 of 2002, and a grant was made to Sabet Khamete Francis on 2nd December 2004, which was subsequently confirmed, and the administratrix, Sabet Khamete Francis, sold South Kabras/Bushu/1970 to the first applicant based on that confirmation. The administrators in Kakamega HCSC No. 640 of 2006 then initiated the instant cause, without disclosing the existence or pendency of Kakamega HCSC No. 317 of 2002, and the grant made to Sabet Khamete Francis on 2nd December 2004. They had their grant confirmed, and used it to have South Kabras/Bushu/1970 transferred to the name of one of them, Victor Harry Imbongo. He argues that the grant and its confirmation were obtained on the basis of fraud for material information was concealed from the court. He points out that Victor Harry Imbongo was subsequently charged, in Butali SRMCCRC No. 640 of 2012, of procuring registration by false pretenses and of procuring execution of a false document, and that he was convicted of both offences. He asserts that Victor Harry Imbongo was aware of the pendency of Kakamega HCSC No. 317 of 2002, for he had filed objection proceedings in that cause, but he later filed the instant cause, in abuse of court process.

4. He has attached several documents to his application to support his case. There is a title deed dated 27th December 2006, showing that he had been registered as proprietor of South Kabras/Bushu/1970. A copy of the certificate of confirmation of grant, dated 14th December 2004, issued in Kakamega HCSC No. 317 of 2002, showing that South Kabras/Bushu/1970, had been devolved wholly upon Sabet Khamete Francis. A title deed for South Kabras/Bushu/1970, dated 14th September 2006, to show that the same was registered in the name of Sabet Khamete Francis before it was transferred to his name. an agreement of sale executed between him and Sabet Khamete Francis, dated 8th November 2006, over the said parcel of land. Consent from the relevant land control board, dated 8th November 2006, permitting the transfers. Summons for revocation of grant dated 24th January 2007, filed in Kakamega HCSC No. 317 of 2002, by Victor Harry Imbongo, seeking revocation of the grant in that cause, to demonstrate that he was aware of the other proceedings. A copy of the grant made to the administrators in the instant cause, dated 13th April 2011. A green card for South Kabras/Bushu/1970 showing the registrations in the registry relating to ownership by Sabet Khamete Francis, himself and Victor Harry Imbongo. The certificate of confirmation of grant issued herein on 7th December 2011, devolving South Kabras/Bushu/1970 upon Victor Harry Imbongo. The charge sheet and proceedings in Butali SRMCCRC No. 640 of 2012, demonstrating that Victor Harry Imbongo was charged and convicted of creating false documents relating to South Kabras/Bushu/1970.

5. The response to the application, is vide an affidavit that Patterson Sindani swore on 17th January 2020 and filed it herein on 20th January 2020. He avers to be the owner of South Kabras/Bushu/1972, having been registered as the owner thereof on 17th January 2012, and the same being a share from the estate from the confirmation proceedings that were conducted herein on 7th December 2011. He avers to have had originally bought the property from the deceased in 1979. He avers that Victor Harry Imbongo was not a son of the deceased, and that Sabet Khamete Francis was a widow of the deceased, and that the deceased did not have any children with any of his wives. He identifies the parents of Victor Harry Imbongo as Isaac Imbogo Taliti and Esther Imbogo. He further avers that the first applicant, Daniel Njoroge Gichara, had bought South Kabras/Bushu/1970 from Sabet Khamete Francis, and that he was the one who was in exclusive occupation of that property. He avers that at confirmation of the grant, the court had directed that both Sabet Khamete Francis and Daniel Njoroge Gichara be present at confirmation, but they did not attend, and the court proceeded to confirm the grant. He supports the application that the grant herein be revoked, and that South Kabras/Bushu/1970 be given to Daniel Njoroge Gichara and South Kabras/Bushu/1972 to himself. He avers that South Kabras/Bushu/1972 had not been listed in Kakamega HCSC No. 317 of 2002, and that he had stayed on that land since 1980.

6. Harry Victor Imbongo responded to the application, vide his affidavit sworn on 30th November 2020, and filed herein on even date. He asserts to be the registered proprietor of South Kabras/Bushu/1970 since 2012, and describes the first applicant as a stranger to the land, whose interest was extinguished following his subsequent registration. He avers that his registration was pursuant to a court order made in this cause in 2011. He also asserts that this court has no jurisdiction to determine ownership of South Kabras/Bushu/1970, by dint of Articles 162(2) and 165(5) of the Constitution.

7. The application dated 4th November 2020 seeks stay of proceedings in Butali SPMC&L No. 36 of 2020, citation of Harry Victor Imbongo for contempt of court of orders made on 29th September 2020, an order for the agricultural officer responsible for the area to value the damage done on the land, Victor Harry Imbongo to be ordered to render accounts with respect to his utilization of the land and orders to bar him from accessing and using the land. The second application is by Daniel Njoroge Gichara, who complained that Harry Victor Imbongo had forcibly entered South Kabras/Bushu/1970, and harvested sugarcane that was on the land, and taken it away.

8. The affidavit of Harry Victor Imbongo that I have referred to above, in paragraph 6, is in response to the second application. He essentially avers that he was the owner of the land in question, and, therefore, he was the one entitled to utilize it. He also argues that the matter of the use of the land was beyond the jurisdiction of the High Court.

9. Directions were given on 3rd December 2020, for disposal of the application dated 4th November 2020, by way of written submissions. Both sides complied by filing written submissions.

10. The application dated 22nd January 2018 came up for hearing on 23rd March 2021, a date that both sides had settled on 3rd December 2020. The applicant was in court on 23rd March 2021 to present his case, the administrators did not attend court. The said application was canvassed orally by Mr. K'Ombwayo, who was holding brief for Mr. Otsyeno, for the applicant.

11. The file in Kakamega HCSC No. 317 of 2002 has been made available, and I have had occasion to peruse it. The deceased herein had died on 11th July 2000. Representation was sought in Kakamega HCSC No. 317 of 2002 by Sabet Khamete Francis in her capacity as his widow. She only listed herself and another, said to be a liability, as the sole survivors. South Kabras/Bushu/1970 was listed as the sole asset that he died possessed of. Letters of administration intestate was made to her on 14th May 2003, and a grant was issued to her on 27th June 2003. The grant was confirmed on 2nd December 2004, and a certificate of confirmation of grant was issued on dated 14th December 2004, devolving the entire South Kabras/Bushu/1970 upon the administratrix, Sabet Khamete Francis. On 19th July 2007, a summons was filed in Kakamega HCSC No. 317 of 2002, by Harry Victor Imbongo, seeking revocation of her grant, saying that he was an adopted son of the deceased, and that the administratrix was never married to the deceased. He also disclosed that the deceased also owned a second property, being South Kabras/Bushu/1972. The record in Kakamega HCSC No. 317 of 2002 indicates that the summons for revocation of grant dated 19th July 2007 is still pending. Directions on it were given on 26th September 2007 for its service on the administratrix, and on 10th July 2010 for hearing *viva voce*. There is no evidence whether the said application was ever served on the administratrix, and there is no response on record by her.

12. The record in the instant matter, Kakamega HCSC No. 640 of 2006, indicates that the same was initiated in the estate of the same person as that in Kakamega HCSC No. 317 of 2002, on 5th October 2006, by Victor Harry Imbongo, in his alleged capacity as adopted son of the deceased. He listed himself as the sole survivor of the deceased, and expressed him to have died possessed of South Kabras/Bushu/1970 and 1972. Letters of administration intestate were made to him on 9th January 2007, and a grant was issued to him, dated 6th March 2007. He proposed confirmation of the grant, and devolution of the 2 parcels of land to himself, vide an application dated 27th February 2008. An application, dated 22nd May 2009, was then lodged at the registry, on even date, by Patterson Sindani, claiming to have had bought South Kabras/Bushu/1972, from the deceased. The application dated 22nd May 2009, was resolved by having Patterson Sindani made a co-administrator of the estate with Victor Harry Imbongo. An order was made in those terms on 13th April 2011, and a grant issued, on even date. Thereafter, the said grant was confirmed on 7th December 2011, devolving South Kabras/Bushu/1970 upon Victor Harry Imbongo and South Kabras/Bushu/1972 upon Patterson Sindani. Victor Harry Imbongo then mounted an application dated 31st January 2014, in which he contested the confirmation orders, on the basis that Petterson Sindani had not completed paying the purchase price for South Kabras/Bushu/1972. What followed was the filing, on 21st September 2015, of a summons for revocation of grant, by Sabet Khamete Francis, of even date. She averred that she was never served with the revocation application that Victor Harry Imbongo had filed in Kakamega HCSC No. 317 of 2002. She further averred that she was aware that the deceased had sold South Kabras/Bushu/1972 to Petterson Sindani. She complained that the certificate of confirmation of grant obtained in Kakamega HCSC No. 640 of 2006 had been used to change the registration details of South Kabras/Bushu/1970. She also mentioned the criminal charges that faced Victor Harry Imbongo with respect to the said registration. The next significant development is the filing of the summons dated 22nd January 2018, which is the subject of this ruling.

13. Although the criminal proceedings, in Butali PMCCRC No. 640 of 2012, have been alluded to by both the administratrix in Kakamega HCSC No. 317 of 2002 and the applicant, Victor Harry Imbongo did not advert to them. He neither confirmed nor denied the existence of those proceedings, nor their outcome. A certified copy of the judgment in Butali PMCCRC No. 640 of 2012 was placed on record. The case was about South Kabras/Bushu/1970, about how Victor Harry Imbongo had caused it to be transferred to his name. The final conclusions by the court were as follows:

“I have looked at all the documents produced as exhibits in this case, in dealing with the first issue, I find that the prosecution has proved that the accused person, by means of false and fraudulent representation caused the district land registrar to sign title deed No S/Kabras/Bushu/1970. This is because the prosecution was able to prove that the deceased, Tatayo Mumakombe’s wife (PW2) successfully filed succession cause No. 317/2002 before the High Court at Kakamega and vide a certificate of confirmation of grant dated 14/9/2004, she was able to transfer the land from her late husband’s name to that of her own. Prosecution exhibit 7, confirmation of grant on 8/11/2006, PW2 sold the land and transferred the same to PW1, the procedure of transfer was duly followed and Njoroge Daniel was issued with his title deed on 27/12/2006 ... In fact, PW6 the district land registrar who confirmed that PW2 obtained her title than transferred the land to PW1 was categorical that PW2 had obtained earlier certificate of

confirmation therefore the registration of the accused was erroneous after being obtained later. He said the entry of accused person's name was at entry numbers 10 and 11 of the green card.

The accused therefore caused the land registrar to sign the said title deed from exhibits produced and records (especially defence exhibit 9) summons for revocation of title, the same is an application, the accused did not inform court and produce documents showing that the High Court finally revoked the grant issued to Sebeti Khamete (PW2).

On the second issue, although I find that the accused obtained a title deed, he willfully, through illegal ways caused the same to be registered in his name, he even admitted knowledge that PW2 have obtained the grant and title deed, he however decided to file a fresh succession cause No. 640/06 instead of procuring the revocation/annulment proceeding. The action of the accused amounted to obtaining registration by false pretences ... Therefore, find the prosecution had proved the two counts against the accused person who has neither denied nor justified his actions, he is accordingly found guilty as charged and convicted. Since this court has no jurisdiction to cancel title deeds which were obtained fraudulently, the interested party can do so in the correct court with jurisdiction."

14. The decision of the criminal court in Butali PMCCRC No. 640 of 2012, pretty much sums up the matter, and the conclusions that I will come to will not be removed from them.

15. Let me start by stating that there can only be one succession cause over the estate of one individual deceased person. The law does not allow the initiation of multiple succession causes over one estate. The reason for this is obvious, to avoid the possibility of the different courts arriving at differing or conflicting modes of distribution of the same estate or assets. That is precisely what happened here, in Kakamega HCSC No. 317 of 2002 South Kabras/Bushu/1970 was devolved upon was deposed upon Sabit Khavute, Francis; while in Kakamega HCSC No. 640 of 2006 it was devolved upon Victor Harry Imbongo. That would unacceptable, for what would a land registrar confronted with conflicting certificates of confirmation of grant do? Which one would he honour? Which one would he give prominence? There is evidence that Victor Harry Imbongo was aware that the grant in Kakamega HCSC No. 317 of 2002 had been confirmed, hence he sought to have it revoked. However, instead of pursuing his revocation application in Kakamega HCSC No. 317 of 2002 to its logical conclusion, he opted to have his grant in Kakamega HCSC No. 640 of 2006 confirmed, knowing well that that would result in distribution of South Kabras/Bushu/1970, twice, in a manner that was going to create a conflict. Kakamega HCSC No. 317 of 2002 was initiated first, was confirmed long before Kakamega HCSC No. 640 of 2006 was filed. Once Victor Harry Imbongo became aware of Kakamega HCSC No. 317 of 2002, he should have withdrawn Kakamega HCSC No. 640 of 2006, or sought to have the two causes consolidated. Having Kakamega HCSC No. 640 of 2006 run to its final conclusion, despite Kakamega HCSC No. 317 of 2002, amounted to abuse of process. A second run of succession proceedings, after conclusion of earlier succession proceedings, in a separate cause over the same estate were concluded, was fraudulent, and no doubt, those proceedings ought to be nullified. See *Re Estate of Luduska Hornik Plato (Deceased)* [2012] eKLR (GBM Kariuki J), *In re Estate of Maragert Nduta Miana (Deceased)* [2018] eKLR (Muigai J), and *In re Estate of Kariuki Gachenga (Deceased)* [2018] eKLR (Musyoka J).

16. One thing ought to be made clear, that an asset in the same estate cannot be confirmed twice. The confirmation in of South Kabras/Bushu/1970 in Kakamega HCSC No. 317 of 2002 could not be overrun by another or by a second confirmation in Kakamega HCSC No. 640 of 2006. The effect of the second confirmation, in Kakamega HCSC No. 640 of 2006, was that the court, in that matter was acting in vain. The order it made confirming South Kabras/Bushu/1970, after it had already been confirmed in Kakamega HCSC No.317of 2002, was worthless, null and void, and it conferred no rights whatsoever on Victor Harry Imbongo. If the court in Kakamega HCSC No. 640 of 2006 had been made aware of the proceedings in Kakamega HCSC No. 317 of 2002, it would, no doubt, have paused, and called for the said file, to consider whether to consolidate the two causes, or whether to direct that the newest or latest cause be closed. Indeed, the confirmation orders in Kakamega HCSC No. 640 of 2006 would not have been made if it had been brought to the attention of the court that there was a parallel succession cause where the court had already made orders on confirmation and distribution. Victor Harry Imbongo, as an administrator, which is an office of trust, owed a duty to the court, to disclose to it existence of parallel proceedings. The fact that he maintained parallel proceedings, without informing the court, meant that he had a sinister motive, and was undeserving of the high office of administrator, which is of trust and confidence.

17. It is common ground that Patterson Sindani had acquired property from the deceased, and both sides are agreed that he is entitled to South Kabras/Bushu/1972. I shall take that into account in my final orders. I believe they disposes of the first application

18. The second application turns on ownership of South Kabras/Bushu/1970. There is a suit in Butali ML&E No. 36 of 2020, where Victor Harry Imbongo seeks to permanently bar Daniel Njoroge Gichara from utilizing the said property. Injunctions are about ownership of land. The High Court has no jurisdiction, by virtue of Articles 162(2) and 165(5) of the Constitution to venture into such matters. The jurisdiction that the court seized of Butali ML&E No. 36 of 2020 is exercising is derived from Article 162(2) and derivative legislation, principally the Land Registration Act, No. 3 of 2012, and Land Act, No. 6 of 2012. Under the Constitution, the High Court exercises supervisory jurisdiction over magistrates' courts. However, that supervisory jurisdiction does not extend to matters that are the subject of Article 162(2) of the Constitution and the Land Registration and Land Act. With regard to those, the court that supervises the magistrates' courts would be the Environment and Land Court. Therefore, much of what I am invited to order, in the application, dated 4th November 2020 is beyond my powers: stay of proceedings in Butali ML&E No. 36 of 2020, valuation of the damage brought on the land, rendering of accounts with respect to unlawful possession, and injunctions.

19. The prayer on contempt of court with respect to the order that this court made on 29th September 2020 is within my jurisdiction. The order alleged to have been disobeyed was made by this court, and there is jurisdiction for this court to supervise compliance with its own orders. What I have to assess is whether the applicant has made a case for citation of Victor Harry Imbongo for contempt of court. The order was made in the presence of only one party, Mr. Otsyeno, the advocate for the applicant. Neither Victor Harry Imbongo, nor his advocate were present. Contempt of court only arises where the order is brought to the knowledge of the person from whom obedience or compliance is required. I have seen the affidavit of service sworn on 9th October 2020, and filed herein on 20th November 2020, with respect to service of the order of 29th September 2020. I am satisfied that Victor Harry Imbongo was served with the order. He does not deny that he was served, in his replying affidavit. Instead, he justifies his actions, and says that there was an order of injunction against the applicant, issued by the Butali court. See *Michael Kipyasang Cherunya vs. Mary Jeptoo Cherunya & another* [2016] eKLR (Kimondo J) and *In re Estate of*

20. Did Victor Harry Imbongo violate the order of 29th September 2020? Whether he violated the order will depend on what the *status quo* was as at the date the order was made. I have noted from the record that as at 29th September 2020, when I was making the order, the Butali court had made an order, on 10th September 2020, which restrained the applicant from trespassing on, tilling cultivating, alienating or in any other manner interfering with the subject land pending hearing determination of some application pending before that court. The *status quo* obtaining as at 29th September 2020, was that the applicant stood restrained from interfering with the quiet possession of Victor Harry Imbongo, with respect to the subject property. However, the *status quo* also meant that no further adverse action ought to have been taken with respect to that land until further court orders. If Victor Harry Imbongo did anything, like uprooting sugarcane and building houses, then there was violation of the *status quo* order. However, contempt of court borders on criminality. The standard of proof required is higher than that in civil cases, and should be something approaching proof beyond reasonable doubt. Some evidence, quite apart from mere averments in an affidavit, ought to have been placed before the court. Pictures of the uprooted sugarcane and the 2 houses erected on the land. Evidence of a report made to the police or other local government authorities, such as the Chief. I have no means of verifying the authenticity of what the applicant alleges without some proof. I do not have evidence that Victor Harry Imbongo did what the applicant alleges he did.

21. Regarding Victor Harry Imbongo, and without prejudice to the suit in Butali ML&E No. 36 of 2020, am surprised that he is still asserting his entitlement to South Kabras/Bushu/1970, despite the very clear findings and conclusions in Butali PMCCRC No. 640 of 2012, that his registration as proprietor of that parcel of land was fraudulent. The court found that he procured the title deed illegally or fraudulently, and yet it is the same title deed that he is exhibiting here, and in Butali ML&E No. 36 of 2020, to assert ownership. He cannot be the owner of South Kabras/Bushu/1970 when the court in Butali PMCCRC No. 640 of 2012 held that his alleged ownership was procured by fraud. There is no ownership at all. The title deed he is holding is a worthless piece of paper, going by the judgment in Butali PMCCRC No. 640 of 2012. What remains is for the said title in South Kabras/Bushu/1970 to be cancelled, otherwise it has already been declared to have been acquired through a criminal enterprise, which has rendered it worthless. Victor Harry Imbongo was convicted of offences with respect to how he obtained that title. His acts were criminal, and he cannot possibly acquire any rights to a property allegedly acquired through criminal enterprise. If he were wiser, and I dare say, if he was getting proper legal advice, he would refrain from asserting any rights over that property, in view of the conclusions in Butali PMCCRC No. 640 of 2012. A criminal cannot and ought not to benefit from his criminal acts, for which he has been convicted by a court of competent jurisdiction, and which conviction has not been overturned by an appellate court. That is the position we are dealing with here. Victor Harry Imbongo is a convict, and he is asserting rights to a property, with respect to which the court convicted him, of criminally procuring its registration in his name.

22. In view of everything that I have said above, the final orders that I am constrained to make are as follows:

- a) **That I find and hold that the proceedings herein, that is to say Kakamega HCSC No. 640 of 2006, were commenced and maintained in abuse of court process, in view of the proceedings in Kakamega HCSC No. 317 of 2003, I declare all the proceedings conducted in this matter to be null and void;**
- b) **That, as a consequence, I do hereby revoke the grant made in Kakamega HCSC No. 640 of 2006 and set aside the orders that were made in confirmation of the said grant;**
- c) **That, as a consequence of (b), above, I do hereby nullify all transactions carried out on the basis of the orders made in confirmation of that grant, and more specifically the transfer and registration of South Kabras/Bushu/1970 in the name of Victor Harry Imbongo;**
- d) **That, as there is no dispute that Patterson Sindani had purchased South Kabras/Bushu/1972 from the deceased, the orders herein shall not affect his registration as proprietor of the said property, instead I shall direct that the certificate of confirmation of grant in Kakamega HCSC No. 317 of 2002 be amended to reflect that that property was devolved to him;**
- e) **That the Land Registrar for Kakamega County shall cause the registration of Victor Harry Imbongo as proprietor of South Kabras/Bushu/1970 to be cancelled and substituted with the name of Daniel Njoroge Gichara;**
- f) **That cause herein, that is to say Kakamega HCSC No. 640 of 2006, is spent, and, therefore, the file shall be closed, and send to the archives;**
- g) **That the file in Kakamega HCSC NO. 317 of 2003 shall remain open, and any further proceedings in the estate of Tatayo Mumakombe Talidi, deceased, shall be conducted in that cause;**
- h) **That the application, dated 4th November 2020, is hereby dismissed, for the reasons given in the body of the ruling;**
- i) **That any person aggrieved by the orders that I have made in this ruling, has leave of 28 days, to move the Court of Appeal, appropriately; and**
- j) **That Victor Harry Imbongo shall pay the costs of these proceedings to the applicant.**

23. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF September 2021

W. MUSYOKA

JUDGE