



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

P & A CAUSE NO. 15 OF 2009

IN THE MATTER OF THE ESTATE OF MASIKA TABANI NABUTOLA-DECEASED

ALICE NAKHUNGU MASIKA.....PETITIONER/RESPONDENT

VERSUS

LYDIA NAFULA FWAMBA.....APPLICANT

RULING

The grant of representation of the estate herein was confirmed by this court on 27/11/2012 in favour of the respondent. The applicant filed her application dated 20th February, 2020 seeking the following orders;

- 1. The grant so issued to the respondent be rectified by substituting the name of Boniface Fwamba with that of the applicant to hold the share of Boniface Fwamba in trust for his family.**
- 2. The county surveyor and land registrar bungoma do visit land parcel E. Bukusu/N. Kanduyi/4089 and hive off 1¼ Acres therefrom and cause the same to be registered in the applicant's name.**
- 3. The O.C.S Bungoma Police Station be ordered to provide security during the exercise.**
- 4. The respondent be ordered to execute transfer documents in respect of the 1¼ Acres in favour of the applicant, or in the alternative, a vesting order do issue directing the Deputy Registrar Bungoma Environment and Land Court to sign all the transfer documents transferring the 1¼ Acres to the applicant.**
- 5. An order directing the Land Registrar Bungoma to dispense with the production of the original Title Deed in respect of E. Bukusu/N. Kanduyi/4089.**
- 6. Costs of the application.**

The application is grounded on the fact that the applicant is the daughter of the Boniface Fwamba- deceased who was a beneficiary of the estate herein. The applicant has applied and obtained letters of administration in respect of his father's estate. That the respondent has vowed not to execute the transfer documents to effect the transfer.

The respondent filed a replying affidavit deponing inter alia that the applicant lacks capacity to agitate the application as the limited grant she holds is in respect of filing suit. That once the court confirmed the grant on 27/11/2012, it became *functus officio* and the applicant therefore ought to have filed suit in the Environment and Land Court.

She depones that the family of the late Boniface Fwamba sold the parcel to Moses Wangusi and Evelyne Nasambu and they therefore have no parcel to inherit. That there is a concluded suit wherein the court held that the land no longer belonged to the applicant's father which judgment has not been challenged.

The application was disposed of by way of written submissions. The applicant raised the following issues for determination.

- 1. Whether the honourable court has jurisdiction to entertain the application.**
- 2. Whether the court is *functus officio***

3. Whether the applicant has the legal capacity to urge the application.

On the first issue, the appellant's counsel submitted that Section 47 of the Law of Succession Act empowers the court to make such orders or decrees as may be expedient for the interest of justice and the preservation of the deceased's estate. That Rule 73 of the Probate and Administration Rules clothes the court with inherent power to make orders geared towards achieving the ends of justice and prevent the abuse of the court process. The case of *Re estate of Alice Mumbua Mutua (deceased) (2017) eKLR* has been cited in support.

On the second issue, counsel submits that since Boniface Fwamba died before the certificate of confirmation of grant could be implemented fully, the court has not become *functus officio*. That the court becomes functus once Section 83(f) of the Law of Succession Act has been complied with. In the instant case, the same has not been complied with.

On the third issue, the applicant submits that she did obtain limited letters of administration as required by Section 82(a) of the Law of Succession Act. That Section 81 recognizes the survivors of executors or administrators to whom a grant of representation has been made to. That she is one of such survivors.

The respondent on her part raised the following issues;

- 1. Whether the court was rendered *functus officio*.**
- 2. Whether the applicant has capacity to present the application.**
- 3. Whether the application offends Rule 43 of the Probate and Administration Rules.**
- 4. Whether there is land available for the late Boniface Fwamba capable of being transferred to the applicant.**
- 5. Whether the applicant has valid letters of administration to substitute the deceased.**

On the 1st issue, counsel submits that Section 74 of the LSA has no place for the applicant's application. That since the applicant holds a limited power of administration, she is at liberty to move court pursuant to the provisions of Section 13 of the Environment and Land Act and Order 37 of the Civil procedure Rules.

On the 2nd issue, the respondent submits that if an administrator fails to do his part after confirmation of grant, the remedy is instituting suit in the Environment and Land Court. The case of *In Re estate of Peter Karega Kamau (deceased)(2020) eKLR* has been cited in support of this proposition.

On the third issue, the respondent submits that the applicant does not hold a grant and therefore a stranger who has no power to urge the application.

As regards the 4th issue, it is contended that the land set to be inherited by the applicant's father was sold out and there is judgment by the Hon G.P Omondi in Bungoma CMCC ELC No. 83 of 2019 which has not been challenged to date.

The respondent submits on the 5th issue that the limited grant held by the applicant is limited to the purpose of filing suit.

From the above summary of the parties' respective case, the court deems the following issues would adequately determine the matter at hand;

- 1. Whether the court is *functus officio*.**
- 2. Whether the applicant has locus to urge the application and therefore ought to be substituted.**
- 3. Whether the portion intended for Boniface Fwamba was indeed sold.**
- 4. Who bears the costs.**

Whether the court is *functus officio*.

The Black's law dictionary defines the term *functus officio* as;

Without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.

The Court of Appeal in *Telkom Kenya Limited V John Ochanda (Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR* held that: -

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”

The question arising here is whether the court becomes functus after confirming a grant. The relevant provisions of the law is set out hereunder;

Section 47 of the Law of Succession Act provides:

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

On the other hand Rule 73 of the Probate and Administration Rules provides:

Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

In *re Estate of Justus Nyaga Chindano (Deceased) [2019] eKLR*, Muchemi J. held;

A party who has obtained a grant is free to apply to the Court if he is unable to enforce the grant. The Court has inherent powers to make orders.

In the circumstances of the instant application, the court will not hesitate to find that the court is not *functus officio*. It has inherent powers donated by Rule 73 to prevent the ends of justice from being defeated. The applicant is in court seeking to compel the respondent to cede her late father's portion arising out of a grant confirmed, which grant has not been fully implemented.

Whether the applicant has locus to urge the application and therefore ought to be substituted.

It is not in dispute the applicant is the daughter of Boniface Fwamba who was a beneficiary to the estate of the deceased herein. The said Boniface died before his share of the estate could be transferred to him. The certificate of confirmation of grant confirms he was entitled to 1¼ Acres of the estate.

The issue of locus was discussed in *Ibrahim V Hassan & Charles Kimenyi Macharia, Interestedparty (2019) eKLR* where the court held;

“Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.”

A further guidance on this issue is to be found in Section 76 of the Law of Succession Act which provides;

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion...

Applying the above legal provisions to the instant application, obviously the applicant fits the position of an interested party. She is interested in the portion that her late father would have been given. Her father's name is in the certificate of confirmation of grant. Clearly, she is an interested party and ought to be substituted so she can be registered in place of the said Boniface Fwamba-Deceased

Whether the portion intended for Boniface Fwamba was indeed sold.

The issue of the portion belonging to Boniface Fwamba having been sold was raised by the respondent. She has annexed sale agreements to her replying affidavit. The court has perused the same and 2 things are clear. Firstly, the sale to the said Moses Ramunyi Wangusi was executed by the respondent. Secondly the sale to Everlyne Nasambu was executed by Oliver Fwamba and Christine Fwamba. There is no evidence that the applicant participated in any of them.

There is ample evidence that the deceased Boniface Fwamba did not sale the parcels and the purported buyers obviously cannot be liabilities on his estate, nevertheless the sale was entered into even when the grant had not been confirmed. The seller had the requisite power to enter into such transaction.

The duties of a personal representatives are fiduciary in nature. Section 83 (f)-(i) of the Law of Succession Act provides:

(a)

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration”

A reading of the Section clearly shows that the administrator has not fulfilled the mandates of the Section. She was in breach of paragraphs (g) and (h). The purported sale cannot and does not bind the applicant. The respondent is bound to transfer the estate as per the certificate of confirmation of grant. Any claims arising from the sale can only be addressed after the estate has been distributed in accordance with the certificate of confirmation of grant.

The respondent's argument that the proper forum would be the Environment and Land Court cannot stand since, she has not even completed distributing the estate and therefore any claim arising from the administration can only be handled by the this court.

In the end, I make the following orders;

1. The applicant is hereby substituted in place of Bonface Fwamba-Deceased.
2. The applicant to move the court within 45 days from the date of this ruling to indicate to the court how she intends to distribute the estate of Boniface Fwamba among the beneficiaries.
3. Since this is a family matter, each party shall bear their own costs.
4. This matter shall be mentioned on 2/2/2022.

DATED AT BUNGOMA THIS 11TH DAY OF NOVEMBER, 2021.

S. N. RIECHI

JUDGE