



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
SUCCESSION CAUSE NO. 426 OF 2012
IN THE MATTER OF THE ESTATE OF MICHAEL BARAZA OSCAR (DECEASED)

RULING

1. When this matter came up for the hearing of the summons dated 2nd November 2015, Ms. Ashitsa for the administratrix informed that the issues raised in the application brought the matter within the jurisdiction of the Environment and Land Court. She submitted that the suit in HCCC No. 306 of 2012 needed to be argued to its logical conclusion. In response to that submission, Mr. K'Ombwayo for the applicant, in the application dated 2nd November 2015, stated that the appellant had bought the disputed property from the deceased. He conceded that the applicant and the deceased were not related in any way. He submitted that the High Court had jurisdiction under Rule 73 of the Probate and Administration Rules to cancel title deeds obtained fraudulently by or in the name of the deceased. Ms. Ashitsa remarked that the position taken by Mr. K'Ombwayo had cemented her argument, that the central issue raised in that application related to title and the High Court had no jurisdiction. She asserted that the same brought out a contest between two estates over title to property.
2. The application in question was brought on 3rd November 2015, at the instance of Wilson Inyangala Anunda, the applicant, seeking revocation of the grant of letters of administration intestate made in the cause. He claims to be a beneficiary of the estate property, described as Butso/so/Esumeyia/1774, which he claims was originally owned by his uncle, Jackson Matika Nduku. He acknowledges that the same is registered in the name of the deceased, but says that he did not understand how it came to be so registered. He pointed to HCCC No. 306 of 2012, saying that it was a suit that he had brought claiming adverse possession. He said that the grant herein was obtained secretly and that it ought to be revoked to safeguard his interest. He has attached the Originating Summons dated 29th October 2012 filed in HCCC No. 306 of 2012 a suit between himself and the deceased. There is also evidence that he is one of the administrators of the estate of Jackson Matika Nduku.
3. I would agree with Ms. Ashitsa. A succession cause is initiated for the purpose of distributing the property of the dead owner, to the persons entitled. Those entitled are determined on the basis of whether the person died testate or intestate. Where the deceased died testate, the persons entitled would be the persons named in his will. In the event of intestacy the persons entitled would be determined by the law of intestacy applicable. In this case the deceased died intestate, and therefore, the applicable law should be the law of intestacy. He died in 2005, by virtue of section 2(1) of the Law of Succession Act, Cap 160, Laws of Kenya, the applicable law should be Part V of the Act.
4. Under Part V, the mode of distribution provided gives priority to the surviving spouses of the deceased, followed by the children of the deceased, followed by the parents of the deceased, siblings, other relatives and the state, in that order. The applicant herein concedes that he was not related to the deceased in any way, and, therefore, he has no claim to his estate as a relative of the deceased. Part V is silent as to the claims of persons other than those provided for in that Part. Creditors, purchasers of estate property whose titles were not perfected through registration prior to the death of the deceased and other such claims are not provided under that provision. Such persons, therefore, cannot claim to be survivors of the deceased. They can claim as creditors, however. Indeed, valid claims of creditors take priority over the interest of the survivors listed in Part V. It is for this reason that estate debts and liabilities are required to be settled first before the estate is distributed. One of the powers of the administrator, under section 83, is to settle debts and liabilities, and it is only after that that the estate is distributed. Part V is clear that what is to be distributed is the net intestate estate.
5. Creditors may be acknowledged by the administrator. After appointment of the administrator, one of his duties is to ascertain debts and liabilities, and to settle them, as I have stated above. It is up to creditors to place their claims before the administrator for ascertainment and, if found genuine, settlement. Very often many of these claimants would be individuals and entities that went to court, proved their claims and obtained decrees, which they then place before the administrator for enforcement. Where such decrees are not honoured by the administrator, the decree-holders would then enforce them in the manner provided for under the Civil Procedure Act, Cap 21, Laws of Kenya, or whichever other applicable law. Where the claimant does not hold a valid court decree, and their claim is dismissed by the administrator, the option available to him is to sue the estate so as to prove his claim in court. The mandate and function of the probate court is to distribute the net estate of the deceased, it is not to determine disputes between the estate and any claimants who are not survivors of the deceased, such disputes are for determination in separate suits properly initiated under the applicable law.
6. The applicant in the application before me has not placed before the court any valid decree that he might have had obtained against the estate or the deceased during his lifetime. He has not demonstrated that he had placed any claim for verification or ascertainment by the

administrator. Even if he had, from the material before me, I do not see the basis upon which the administrator would have dealt with it. He claims to be entitled to the property under adverse possession. Surely, that is a claim that cannot be dealt with by the administrator, only a court can determine it. He claims that the deceased acquired the registration of the subject property from his late uncle by fraud or other underhand means. That again is an issue that the administrator cannot handle. Only a court of law can deal with it.

7. As the applicant was neither a member of the family of the deceased nor a person that could be properly said to be a creditor of the estate, I do not find any basis upon which he could validly mount an application for revocation of grant. He holds no decree against the estate or the deceased, he has not provided any proof that he had entered into any contractual arrangements with the deceased that would have constituted him a creditor, warranting being listed in the liability schedule of the petition, and being provided from the estate. There cannot have been any obligation on the part of the administrator to involve him in the process of obtaining the grant or confirming it.

8. I have said that that his claim is of such nature that it cannot be handled within the succession cause. Indeed, he appears to be advancing two arguments. One, that the property in question was initially registered in the name of his uncle and that it was subsequently fraudulently transferred to the name of the deceased. This would be an invitation to the court to audit how the deceased came to acquire title to that property. It is a contest about registration and transfer of property. Second, he claims title to the same property by dint of adverse possession. Adverse possession is about occupation of land belonging to another, and asserting a right to be given title to it on the basis of the prolonged occupation of the said property. These are the issues that the applicant is inviting me to determine. Do I have the jurisdiction?

9. Ms. Ashitsa believes that I do not have jurisdiction over the issue raised in the application, and says that the applicant would be better off before the Environment and Land Court, while Mr. K'Ombwayo believes that I can determine the matter on the basis of inherent powers. Jurisdiction is at the heart of any exercise of power by a court of law. A court only exercises such power as has been conferred to it by the Constitution and the law. Its decisions would be illegal, or unlawful, if they are made in absence of jurisdiction. They would be unconstitutional and against the tenets of the principle of the rule of law. It was with that background in mind that the Court of Appeal in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR pronounced as follows on jurisdiction:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

10. The primary source of the jurisdiction of the courts is the Constitution. With respect to matters touching on title and, occupation of land, the relevant provisions are in Article 162(2) and 165(5). Article 162 of the Constitution essentially establishes the superior courts in Kenya. It identifies them as the Supreme Court, the Court of Appeal and the High Court and the courts established under Article 162(2). Article 162(2) envisages the establishment of courts to be of equal status with the High Court, to exercise jurisdiction over, among others, occupation of and title to land. The relevant provision says:

"Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

- (a) ...*
- (b) the environment and the use and occupation of, and title to, land."*

11. Article 165 of the Constitution sets out the jurisdiction of the High Court. Article 165(5) is emphatic that that jurisdiction does not include the matters that have been isolated for the courts envisaged in Article 162(2). Article 165(5) states as follows:

"The High Court shall not have jurisdiction in respect of matters-

- (a) ...*
- (b) falling within the jurisdiction of the courts contemplated in Article 162(2)."*

12. Parliament has complied with Article 162(2)(3) of the Constitution, by passing the Environment and Land Court Act, No. 19 of 2011, to establish the Environment and Land Court, the jurisdiction of which is set out in section 13 of the Act. The court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution, relating to environment and land. Section 13 states as follows:

"13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

13. The applicant herein does not lay claim to Butso/Esumeyia/1774, as an inheritor from the estate of the deceased herein. What he alleges is that the deceased herein acquired that property by dubious means and he would like to wrestle the property from the estate and have it restored back to the estate of his late uncle, of which he is an administrator. That would mean the court will have to decide a question of ownership of the said property as between the two estates. Ownership or proprietorship of a property revolves about title, and that clearly places the matter squarely under Article 162(2) of the Constitution. The other argument, of course, is that he has been in occupation of that property for a long time, indeed long enough to be entitled to claim adverse possession, and he would like this court to make the finding that he is entitled to the property in that respect. Adverse possession is about occupation of property or the land for a long time entitling one to title or ownership of the subject property. Again, this brings the matter within the realm of Article 162(2) of the Constitution. Clearly, these are matters that I can exercise no jurisdiction in view of Article 165(5) of the Constitution.

14. Registration and transfers of property are governed by land legislation, to be specific the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. Land registration is dealt with in Part II of the Land Registration Act, while transfers are governed by Part III of the same statute. The Land Act deals with transfers in sections 43 to 48. A claim that the deceased herein caused Butso/Esumeyia/1774 to be transferred to his name in some fraudulent manner from the name of the late uncle of the applicant would involve an audit of the processes that are governed by these two statutes. Any cancellation of that transfer can only be through the provisions of the two statutes.

15. Since the law governing the processes of registration and transfer of land are all located in the Land Registration Act and the Land Act, questions arise as to which court has jurisdiction to address issues or questions or disputes that may arise with respect to registration and transfer of land. The answer lies in the Land Registration Act and the Land Act. Both statutes carry provisions which state the jurisdiction of the court with regard to the application and interpretation of the two statutes. These provisions are to be found in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.

16. The provisions in the Land Registration Act state as follows:

“Interpretation.

2. In this Act, unless the context otherwise requires—

“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011:
...

Jurisdiction of court.

101. The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

17. The Land Act carries similar provisions, which state as follows:

“2. Interpretation

In this Act, unless the context otherwise requires—

“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011);
...

150. Jurisdiction of the Environment and Land Court

The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

18. My understanding of these provisions, in the context of the matter before me, is that any disputes or questions or issues that require court intervention, which revolve around registration and transfer of land, fall within the jurisdiction of the Environment and Land Court. The Land Registration Act and the Land Act, therefore, confer jurisdiction in the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, any reference in the two statutes to court is meant to refer to the Environment and Land Court and any subordinate court that has been conferred with jurisdiction over the processes the subject of the two statutes. All this adds emphasis to the fact that I have no jurisdiction whatsoever to address the matter that the applicant has placed before me.

19. It was argued by Mr. K’Ombwayo that I could still exercise jurisdiction, even though the same has been taken away by the Constitution and statute, by invoking inherent powers, and he pointed me to Rule 73 of the Probate and Administration Rules. In the first place, Rule 73 is a provision in subsidiarylegislator. There is no way that Rule 73 can override the Constitution and the statutes that I have discussed in the

foregoing paragraphs of this ruling. Secondly, inherent powers are only exercisable within express jurisdiction, and never in cases where the court has no jurisdiction at all. It is invoked within jurisdiction where the law conferring jurisdiction has grey areas. The inherent jurisdiction saved by Rule 73 is exercisable within the jurisdiction conferred to the probate court through the Law of Succession Act. Where there is no jurisdiction, there can be no exercise of inherent power, for such power would be non-existent.

20. A probate court can invoke Rule 73 of the Probate and Administration Rules, to order cancellation of titles, but that invocation can only be with respect to titles created through orders made by the probate court in proceedings initiated within jurisdiction. For example, where confirmation orders lead to either transfer of property or creation of new titles, and subsequently the said confirmation orders are set aside by the probate court in the proceedings where the orders were previously made or on appeal, it would be within the jurisdiction of the probate court to order cancellation of any such transfers and new titles occasioned by its own orders and an appellate court with jurisdiction over such matters can order cancellation of titles wanted on orders of a lower probate court. However, that is not the case here. The transfer in question, of Butso/Esimeya/1774, from the name of the late uncle of the applicant to that of the deceased, has not been shown to have had been through orders that the probate court made in this cause. Consequently, there cannot be any basis for the probate court in this cause to order cancellation of that transfer, since the same was not effected through orders made in this cause. Neither is this court sitting on appeal on orders made by a lower probate court which facilitated the offending transfer.

21. It should be clear from what I have said so far, in the foregoing paragraphs, that the application, by way of summons for revocation or annulment of grant, dated 2nd November 2015, cannot be merited, and the orders it seeks cannot be available for granting. The said application is hereby dismissed. Any party aggrieved by these orders has twenty-eight (28) days to move the Court of Appeal appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14th DAY OF February, 2020

W. MUSYOKA

JUDGE