



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 440 OF 2015

(Formerly Kisii High Court Succession Causes No. 658 and 659 of 2009)

IN THE MATTER OF THE ESTATES OF: CHACHA MWITA MURIMI *alias* CHACHA MWITA MWIRIMI

and MURIMI MWITA MURIMI (DECEASED)

-between-

JOHN MWITA MURIMI & 2 OTHERS.....APPLICANTS

-versus-

MWIKWABE CHACHA MWITA & ANOTHERRESPONDENTS

RULING NO. 3

1. Before me is a Summons for Review of Orders dated 10/09/2019 (hereinafter referred to as '**the application**'). The application was taken out the three Applicants herein who had earlier on filed a Summons for Revocation of the Grant. The Summons for Revocation was dated 14/03/2016.

2. The Summons for Revocation was heard by way of *viva voce* evidence. A ruling was delivered on 11/10/2017. The Respondents appealed the ruling in the Court of Appeal at Kisumu. The appeal was eventually struck out for want of leave of the Court to prefer the appeal.

3. Resulting from the ruling on the Summons for Revocation, the Applicants filed a Summons for Confirmation of the Grant (hereinafter referred to as '**the Summons**'). The Summons was dated 16/04/2018.

4. On 23/05/2018 this Court issued directions on the hearing of the Summons. The Summons was to be heard by reliance on the Affidavit evidence and written submissions. The Summons was then fixed for judgment on 25/10/2018. For reasons put forth to the parties the Court was not able to render the judgment as scheduled.

5. The Court considered the Summons. It instead rendered a ruling. It was **Ruling No. 2**. The ruling was rendered on 23/11/2018. The Court made the following orders in the said ruling: -

(a) This Court has no jurisdiction to deal with ownership and/or the declaration of trust over Bugumbe/Mabera/324.

(b) There shall be a stay of any further proceedings in respect to the Summons for Confirmation dated 16/04/2018 pending the determination of the issue of ownership and/or the declaration of trust over Bugumbe/Mabera/324 by the Environment and Land Court.

(c) The prevailing status quo shall be maintained pending further orders of this Court.

(d) Parties be at liberty to apply.

6. The finding in Ruling No. 2 is what prompted the filing of the application under consideration in this ruling.

7. The application sought the following orders: -

1. The instant Application be certified urgent and same be heard on priority basis.

2. The Honourable court be pleased to Review, vary, rescind and/or set aside the Ruling and/or Order issued on 23rd day of November, 2018, which Ruling and/or orders are at variance with and/or contrary to the Directions of the Honourable court made on the 31st day of July 2018 and in any event, contrary to the pleadings and/or Reliefs sought by the parties and therefore contravenes the Doctrine of Departure.

3. Consequent to prayer 2 hereof being granted, the Honourable court be pleased to revert and address itself on the totality of the summons for confirmation of Grant dated 16th April, 2018, which was canvassed and duly submitted by the parties.

4. Consequent to prayer 3 hereof being granted, the Honourable court be pleased to render and/or give a Judgment on the basis of the Summons for Confirmation of the Grant dated 16th April 2018 and thereby bring the matter to a just and fair conclusion.

5. Costs of the Application be borne by the Petitioners/Respondents.

6. Such further and/or other orders be made as this Honourable Court may deem fit and expedient.

8. The application was supported by an Affidavit sworn by the First Applicant herein, *John Mwita Murimi*, on 10/09/2019.

9. The application was opposed by the Petitioners. *Mwikwabe Chacha Mwita*, the First Petitioner herein, swore a Replying Affidavit on 14/11/2019 to that end.

10. Directions were taken and the application was heard by way of written submissions. The Applicants complied. The Petitioners did not.

11. The Applicants urged this Court to allow the application on 4 main grounds. First, that the succession law in Kenya is circumscribed under the **Law of Succession Act, Cap. 160** of the Laws of Kenya (hereinafter referred to as '**the Act**'). That, only a Succession Court that has the jurisdiction to deal with all matters relating to the property of a deceased. This Court's decision in **Re Estate of Martinus Okore & 2 Others (All Deceased) (2019) eKLR** was cited in support of the position. Second, staying the succession proceedings amounted to holding the dispute into infinite. That infringes **Article 159(2)(b)** of the **Constitution**. Third, the impugned directions were given without hearing the parties. That infringed **Article 47** of the **Constitution**. Several decisions were referred to. Fourth, the effect of Ruling No. 2 was to allow parties to depart from their pleadings. Several other decisions were referred to.

12. I recall I dealt with the issues raised in the application in **Migori High Court Succession Cause No. 14 of 2018 In the Matter of Estate of Simion Robi Maroa (Deceased) (2019) eKLR**. In that matter I took a similar route like the one before this matter. The only difference was that I instead issued Directions and not a ruling.

13. I am still of the position I took in **Migori High Court Succession Cause No. 14 of 2018** (supra). I will therefore adopt the reasoning therein as part of this ruling and as follows: -

9. I will now deal with the grounds in support of the application. There was the submission that the succession law in Kenya is circumscribed under the Act and that it is only a Succession Court that has the jurisdiction to deal with all matters relating to the property of a deceased. My response to that submission is that the submission is partly correct. I say so because the Act is a pre-2010 statute. At promulgation of the Constitution in August 2010 Article 262 and the Transitional and Consequential provisions under the Sixth Schedule of the Constitution became operational.

10. Section 7(1) of the Sixth Schedule of the Constitution provides as follows: -

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

11. The effect of the foregone is that the Act which existed before the effective date must be construed in a manner as to bring it into conformity with the Constitution. It therefore means the Act cannot be taken to be the sole and independent source of the succession law in Kenya. The Act must and remains subject to the Constitution.

12. It is the Constitution which created the High Court and the Courts of equal status in Article 165. Each of the three Courts was vested with specific jurisdiction (See the Supreme Court of Kenya in Petition No. 5 of 2015, Republic -vs- Karisa Chengo & 2 Others [2017] eKLR).

13. I have previously dealt with this contention. In Migori High Court Succession Cause No. 77 of 2015 In the Matter of the Estate of Martinus Okore, Randa Okore and Owino Okore (all deceased) (2019) eKLR I held as follows: -

11. On the other hand, the duty of a Succession Court is principally to protect estates of deceased persons which it has jurisdiction over and to oversee the transmission of those estates to the lawful beneficiaries. The High Court as a Succession Court is vested with requisite jurisdiction to discharge that mandate. However, if a dispute arises on the ownership of the land subject of the succession proceedings and/or the declaration of trusts over the land in issue, then such a dispute transcends the jurisdiction of a Succession Court courtesy of Article 165(5) of the Constitution, Section 13 of the Environment and Land Court Act, No. 19 of 2011 among other relevant legal provisions. It is a dispute which calls for evidence to establish ownership or the existence of such a trust upon which finding a party may be a beneficiary for purposes of the distribution of the estate property before a Succession Court or not. (See the Court of Appeal in Peter Moturi Ogotu vs. Elmelda Basweti Matonda & 3 others (2013) eKLR, Muthuita vs. Muthuita

(1982-88) 1 KAR 42 and Chogera vs. Maria Wanjira Kimani & Others (2005) eKLR).

12. *In reaching that position I am alive to the provisions of Section 2(1) of the Law of Succession Act, Cap. 160 of the Laws of Kenya, which provides as follows:*

Except as otherwise expressly provided in this Act or any other written law, the provisions of this act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estate of the deceased persons dying after the commencement of this Act and to the administration of estate of those persons

13. *My response thereto is that the Law of Succession Act is a pre-2010 legislation and pursuant to Article 262 and the Sixth Schedule of the Constitution the Law of Succession Act must be brought into conformity with the Constitution and shall only remain in force and be construed with the necessary adaptations, alterations, qualifications and exceptions. It is the very Constitution that clearly demarcated the boundaries of the superior Courts with their respective jurisdictions. (See the Supreme Court decision in Petition No. 5 of 2015, Republic -vs- Karisa Chengo & 2 Others [2017] eKLR). I am further aware of the immense inconveniences, increased costs and unpredicted delay caused to parties who are forced to move from one Court to the other in dealing with disputes which could be easily dealt with by one Court but since jurisdiction is everything and a Court cannot legally act without it, the law must always prevail given that this country is firmly and constitutionally governed by the Rule of Law.*

14. *I still hold that position.*

15. *There was also the submission that Section 3 of the Act deals with free property of the deceased and that a Succession Court is divested with the jurisdiction to deal with all manner of disputes including third party claims relating to free property.*

16. *Section 3 of the Act defines 'free property' as follows: -*

In relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.

17. *I see the above definition in two perspectives. The first one is that a free property relates to an interest in a property of the deceased which was not encumbered during the lifetime of the deceased. The deceased would then have freely dealt with the interest in the property. The interest must also subsist even after the demise of the deceased. The other perspective is that if at any time whether during or after the life of the deceased the interest of the deceased in the property is challenged then the property ceases to be free property. The property then becomes a disputed property.*

18. *The focus then turns to the nature of the dispute. If the dispute is not among those falling within the exclusive jurisdiction of the Courts of equal status, then a Succession Court has the prerogative to determine it. Conversely, if the dispute falls within the exclusive jurisdiction of the Courts of equal status then a Succession Court must decline jurisdiction and down its tools.*

19. *Responding to the aspect of delay in splitting of disputes which could easily be determined by a single Court, I reiterate what I stated in Migori High Court Succession Cause No. 77 of 2015 In the Matter of the Estate of Martinus Okore, Randa Okore and Owino Okore (supra). In that case I stated that '..... I am further aware of the immense inconveniences, increased costs and unpredicted delay caused to parties who are forced to move from one Court to the other in dealing with disputes which could be easily dealt with by one Court but since jurisdiction is everything and a Court cannot legally act without it, the law must always prevail given that this country is firmly and constitutionally governed by the Rule of Law'.*

20. *I will now deal with how the directions were given. It is true that the directions were given without first hearing the parties. This Court nevertheless has powers to refer a dispute to another Court with a view of determining the real dispute and to render substantive justice. (See Livingstone Maina Ombette v Kenya Power & Lighting Co Limited (2017) eKLR, Pamoja Women Development Programme & 3 others v Jackson Kihumbi Wangombe & Another (2016) eKLR among others). That power can even be exercised sue moto.*

21. *We are now in a new constitutional dispensation. Article 10 of the Constitution is on the national values and principles of governance. One of them is the calling to uphold human rights. Article 50(1) of the Constitution provides for fair hearing of disputes. That encompasses the right to be heard. I must admit, as I hereby do, that even in the wake of the powers to transfer matters from one Court to another for the good of justice, it is still prudent for a Court to, in the first instance, hear the parties on the issue.*

22. *The application must therefore succeed on the ground that the parties were not heard before issuing the directions.*

23. *The upshot is that the Summons for Review of Orders dated 15/04/2019 is allowed to the extent that the Further Directions issued on 09/04/2019 are hereby vacated and/or set aside. Costs of the application shall be in the Summons for Revocation.*

24. *This Court shall now assign a ruling date in respect of the Summons for Revocation dated 02/05/2018.*

14. I will therefore allow the application on the ground that the parties were not heard prior to the ruling. It was incumbent upon this Court to allow all the parties to participate in the issues raised in the impugned ruling. Indeed, that would have enriched the impugned decision.

15. The upshot is that the Summons for Review of Orders dated 10/09/2019 is allowed to the extent that **Ruling No. 2** be and is hereby **vacated and/or set aside**. Costs of the application shall be in the Summons for Confirmation.

16. This Court shall now assign a judgment date in respect of the Summons for Confirmation dated 16/04/2018.

17. Orders accordingly.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT MIGORI THIS 10TH DAY OF SEPTEMBER, 2020.

S. J. CHITEMBWE

JUDGE

Ruling delivered in open Court and in the presence of: -

Mr. Ochwangi, Counsel instructed by the firm of Messrs. Oguttu-Mboya & Company Advocates for the Applicants.

Mr. Soire, Counsel instructed by the firm of Messrs. J. O. Soire & Company Advocates for the Petitioners.

Evelyne Nyauke - Court Assistant