



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 749 OF 2007**

**IN THE MATTER OF THE ESTATE OF KATIMBA IMBIAKHA (DECEASED)**

**RULING**

1. The application that I am tasked with determining is the Motion dated 27<sup>th</sup> May 2019. It seeks review and setting aside of clauses 3 and 4 of orders issued on 27<sup>th</sup> November 2008, and substitution of those orders with orders that the subdivisions of South Kabras/Chesero/828 and 1070 be cancelled, and thereafter the property be reinstated to the original titles, to enable the administratrix transmit the land to the beneficiaries as per the certificate of confirmation of grant.
2. The grounds are on the face of the application. The respondent, Musa Imbiakha Katimba, is said to have had the two parcels of land illegally subdivided. The orders sought to be reviewed were entered into by consent to expedite conclusion of the matter, and were to be in force pending confirmation of the grant. The court made confirmation orders, an appeal was raised, heard and determined. The confirmation orders remain valid and the administratrix wished to have the orders enforced through transmission. The subdivisions ought to be cancelled to facilitate transmission.
3. In her affidavit in support of the application, sworn on 27<sup>th</sup> May 2019, the administratrix, Belia Khayanga Imbiakha, explained that the advocates on record for both sides, Mr. Ondieki and Mr. Manyoni, agreed that the subdivided portions were to remain the property of the deceased pending confirmation of grant. She states that the grant has been confirmed, and transmission should now be done, and need has arisen to revisit the subdivisions in order to restore the property back to the original position. She avers that the application does not prejudice any of the parties.
4. Musa Imbiakha Katimba, the person named in the application as respondent, has filed an affidavit in reply to the application sworn on 22<sup>nd</sup> November 2019. He avers that the court has no jurisdiction to determine issues relating to registration of land, and that the subdivisions in question happened during the lifetime of the deceased.
5. Directions were given, on 26<sup>th</sup> November 2019, that the said application be disposed of by way of written submission. The applicant complied with the directions, by filing written submissions on 22<sup>nd</sup> July 2020. In the said submissions she merely reiterated what she had averred in her application and supporting affidavit.
6. The proceedings in question, of 27<sup>th</sup> November 2008, were captured by Ochieng J. in the following terms:

*“Mr. Ondieki:*

*We have taken instructions from our respective clients; and we have decided that for the sake of enhancing peace in the family, there be a consent as follows:*

*“By consent:*

- (1) The objection proceedings be and is hereby withdrawn, with costs in the cause.*
- (2) The grant of letters of administration to be issued to the petitioner; and the petitioner is to expedite the making of the application for confirmation of the grant. The application for confirmation should be filed by 1/3/2009.*
- (3) The subdivision of land parcels No. South Kabras/Chesero/1070 and South Kabras/ Chesero/828; and its subsequent titles which were created after the subdivision, shall remain the property of the deceased. An inhibition shall be placed on those titles so that there shall be no further dealings with the said titles until the confirmation of the grant.*
- (4) The parties here are to use the parcels of land as they used to do before the subdivision. If there is any development that has accrued after the subdivision the same to be dispensed with to the parties who were in occupation prior to the said*

*subdivision;*

*(5) All the parties are to maintain peace until the determination of the cause.”*

*Court:*

*Orders granted as per the consent set out above.*

*FRED A. OCHIENG*

*JUDGE”*

7. My understanding of the said consent order is that the two parcels of land, although subdivided, and probably registered in the names of other individuals, were to be treated as if they still belonged to the estate, and that at confirmation of grant they were to be dealt with as such.

8. The matter did go to confirmation of the grant. The grant was confirmed in a judgment that Chitembwe J delivered on 25<sup>th</sup> July 2013. South Kabras/Chesero/828 devolved upon the two houses at specified proportions, while South Kabras/Chesero/1070 devolved wholly upon the second house. An appeal was brought, unsuccessfully, against that judgment, in Kisumu CACA No. 59 of 2014, meaning that the distribution ordered in the said judgment stood.

9. The administratrix would now like to implement the orders in that judgment by distributing the assets as per the orders in the said judgment. To facilitate that, the subdivisions of South Kabras/Chesero/828 and 1070 have to be canceled, so that the two assets are reverted to their original position. That is no doubt a natural progression from the consent orders of 27<sup>th</sup> November 2008. The grant was confirmed in contentious proceedings, that went up to the Court of Appeal. The two assets were distributed as assets in the estate of the deceased, without taking into account the subdivisions. I note that the respondent has submitted that the High Court has no jurisdiction over the issue. Yet, that issue is water under the bridge. It was resolved by consent on 27<sup>th</sup> November 2008, and if the respondent had felt very strongly about it, he should have raised it at the confirmation hearing and on appeal.

10. I am persuaded that the application dated 27<sup>th</sup> May 2019 has merit, and I hereby allow it as prayed. Each party shall bear their own costs. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 2<sup>nd</sup> DAY OF October , 2020**

**W. MUSYOKA**

**JUDGE**