



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 407 OF 2013

IN THE MATTER OF THE ESTATE OF ESAU MATIAS CHAMWADA

alias ESAU MACHAMA MATIAS CHAMWADA, DECEASED

RULING

1. The deceased herein died on 27th January 2001. Representation to his estate was sought vide a petition lodged herein on 17th June 2013. The petition was by Jesika Kasieyia Muse, in her capacity as widow of the deceased. He was expressed to have been survived by the widow and nine children, being Hannington Kabiduka, Stephen Boyi, Beatrice Enyola, Abbas Meshack, Farazine Obwamu, Herman Gedi, Evans Sitsi, Gilbert Odanga and Justus Kidundu. He was also said to have died possessed of two parcels of land, being Butsotso/Indangalasia/805 and 2400. A good number of persons are listed as liabilities, being buyers of land from the estate. They are Walter Gimode Mulomas, Alfayo Lisamadi Vusina, Esther Mumbua Muindi, Evalyne Peres Ashioya, Rennox Nyambarjiga, Joash Swali Ambani, Stanley Mavugo Mudasia, John Maluvi and Bahai Bahaula Church. A grant was made on 11th October 2013 and issued on 1st November 2013 to the petitioner.
2. On 29th January 2015 the administrator lodged an application herein dated 28th January 2015 founded on section 45 of the Law of Succession Act, Cap 160, Laws of Kenya, in which she sought inhibitions regarding the estate property Butsotso/Indangalasia/6200, and an order that the subdivision of Butsotso/Indangalasia/805 into Butsotso/Indangalasia/ Butsotso/Indangalasia/6199 and 6200 be cancelled and reverted to the original title, that is Butsotso/Indangalasia/805. She also seeks that all transactions conducted on Butsotso/Indangalasia/805 resulting in the subdivision be nullified.
3. In her affidavit in support of the application, the administrator explains that shortly before she sought representation to her husband's estate, she conducted an official search on Butsotso/Indangalasia/805 only to find that the same had been subdivided into Butsotso/Indangalasia/6199 and 6200, Butsotso/Indangalasia/6199 was registered in the name of the deceased while Butsotso/Indangalasia/6200 was registered in the name of Geoffrey Bakari Muyale, who then charged it with the Family Bank. She has named the two as the respondents to her application. She states that the subdivision and transfers happened after the deceased died and before succession to his estate had been initiated. She asserts that such a transaction could only be undertaken after succession and transmission of the property to the beneficiaries. She has attached documents to her affidavit which show that Butsotso/Indangalasia/805 was first registered to Juma Okoti on 8th December 1972. The following year it was transferred to the deceased, on 23rd July 1973. On 25th September 2012 the said title was closed upon subdivision into Butsotso/Indangalasia/6199 and 6200.
4. There are two replies to the application, one is by the 1st respondent, Geoffrey Bakari Muyale, and the other is by an officer of the 2nd respondent, Peter Makhanu Musungu. The 1st respondent avers that he bought the land in 2012 from Walter Gimode Muloma for Kshs. 800, 000.00. He did not have the money, so the 2nd respondent where he works advanced him the money to buy the land. He conducted a search on the title and he got a certificate of official search indicating that Walter Gimode Muloma was the registered owner thereof with effect from 20th September 2012. The bank official avers that the bank advanced the loan and charged the property after it was satisfied that the property was in the name of the seller.
5. In addition to the two affidavits, the respondents filed a notice of preliminary objection, dated 25th January 2015, where they argued that the High Court had no jurisdiction over the matter and asserted that the dispute was within the preserve of the Environment and Land Court.
6. From the directions on record it would appear that the court decided to have the preliminary objection disposed of first. Both sides have prepared and filed written submissions on the same, complete with detailed authorities.
7. The objection on jurisdiction is founded on Article 162(2) of the Constitution, as read with Article 165(5) thereof. The Constitution reserves the jurisdiction to resolve disputes relating to ownership, use and title to land to the Environment and Land Court, and states categorically that the High Court shall have no jurisdiction whatsoever over such issues. The issue for me to determine is whether the dispute before me is of such nature as to fall within the exclusive jurisdiction of the Environment and Land Court, or is it a matter that the High Court would have jurisdiction over as a probate court.

8. The Law of Succession Act, Cap 160, Laws of Kenya, at section 45, outlaws intermeddling with the property of a dead person. The provision states in very clear terms that no one shall handle the property of a dead person when they have no authority to do so. The authority to handle such property stems from a grant of representation. Section 45 criminalizes the unauthorized dealing with estate property without a grant of representation. The property of a dead person vests in the person who is granted representation. This is by virtue of section 79 of the Law of Succession Act. The person in whom the property vests has the powers that are set out in section 83 and the duties listed in section 82. The principal duty of the administrator is to ascertain the assets of the estate and to distribute the same amongst the beneficiaries. One of his other duties is to collect and get in the estate and to preserve it.

9. The High Court is vested with jurisdiction to deal with estate administration, and to resolve disputes that arise with relation to administration. Section 47 of the Law of Succession Act empowers the High Court to entertain disputes that arise within the context of the Law of Succession Act and to make such orders as are just and expedient. Then there is section 82(ii) which states that immovable assets of an estate cannot possibly be disposed of or sold before confirmation of grant.

10. The facts of this case are that the deceased herein died in 2001. As at the date of his death Butso/Indangalasia/805 was registered in his name. Upon his death the same formed part of his estate. That being the case no one could deal with that property unless they had authority to handle it, which authority could stem only from a grant of representation. No one could take possession of it or even dispose of it unless they had a grant of representation. The record indicates that the register for Butso/Indangalasia/805 was closed in 2012 when the parcel of land was subdivided. That would also be the year one of the subdivisions, Butso/Indangalasia/6200, was transferred to the person who subsequently sold it to the 1st respondent. Representation was obtained in 2013, which would suggest that the transactions done in 2012 were carried out by a process that violated section 45 of the Law of Succession Act, as any subdivision and transfer of the land could only be carried out by an administrator, that is the person in whom the property vested by virtue of section 79 of the Act. The transactions also violated section 82(ii) of the Act to the extent that the property was sold before grant had been obtained and confirmed.

11. The handling of the property after the deceased died in 2001 was in violation of the Law of Succession Act, yet the property in question was estate property. It falls within the jurisdiction of the High Court so long as the High Court is exercising the jurisdiction conferred upon it by the Law of Succession Act. The court has jurisdiction to protect and preserve it in keeping with section 45 of the Act. Consequently, there can be no merit in the preliminary objection raised by the respondents. The same is hereby dismissed with costs. The administrator is at liberty to cause her application dated 28th January 2015 to be listed for hearing.

12. Any party aggrieved by the orders made herein is at liberty to challenge the same at the Court of Appeal within twenty-eight (28) days of the date of this order.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31ST DAY OF JANUARY, 2019

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 7TH DAY OF FEBRUARY, 2019

J. NJAGI

JUDGE