



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 272 OF 2006

IN THE MATTER OF THE ESTATE OF THE LATE SALATIEL MUKUNZA (DECEASED)

AND

STANLEY CHAVANGI MUKUNZA.....PETITIONER/APPLICANT

VERSES

NELSON MUKUNZA.....1ST RESPONDENT

CHARLES ENONDA MUKUNZA.....2ND RESPONDENT

JAPHETH N. MUKUNZA.....3RD RESPONDENT

FRANCIS A. MUKUNZA.....4TH RESPONDENT

JOHN VUSIVA MUKUNZA.....5TH RESPONDENT

SOLOMON MUKUNZA.....6TH RESPONDENT

HUDSON BUSAGE MUKUNZA.....RESPONDENTS/BENEFICIARIES

RULING

1. Vide his application dated 31st May, 2018 the applicant herein prays for the following orders ;

(a). That restrictions be placed in titles numbers BUNGOMA/NDALU/730, 731, 732, 733, 734, 735, 736,737 AND 738 which was originally comprised in land parcel number BUNGOMA/NDALU/91.

(b). That the Land Registrar Bungoma County be and is hereby ordered to cancel the above titles so as to revert to Parcel number BUNGOMA/NDALU/91.

(c). The Respondents together with their agents be and are hereby restrained by means of injunction from dealing with the aforementioned parcels in whatever form.

2. The deceased's herein died on 19th December, 1976 leaving behind the following ;

a). Seth Ombeva Mukunza.....Son (Deceased)

b). Nelson mukunza.....Son

c). Charles Enonda Mukunza.....Son

d). Selina Chavangi Mukunza.....Daughter-in- law

e). Japheth N. Mukunza.....Son

- f). Francis .A. Mukunza.....Son
- g). John Vusiva Mukunza.....Son
- h). Solomon Mukunza.....Son
- i). Stanley Chavangi Mukunza.....Son
- j). Hudson Busage Mukunza.....Son.

3. It was the applicant's case that the deceased left behind land parcel number **BUNGOMA /NDALU /91** as the only asset which was to be inherited by the beneficiaries.

4. That his late brother Seth Ombeva Mukunza applied for the letters of administration on behalf of the entire family which were granted to him but unfortunately he died before transmitting the parcels to them.

5. The applicant then vide the consent of the rest of the beneficiaries was allowed to be the administrator on 26th July, 2012. He was issued with a grant which was confirmed on 29th May, 2014. The said grant spelled out clearly the respective shares and acreages.

6. Apparently by the time he attempted to execute the grant the respondents had already moved and divided the parcels which according to him was illegal as the transmission was unlawful for want of the relevant grant. More importantly the respondents have locked him out of the said parcel ostensibly that he had already had Parcel No. **BUNGOMA/NDALU/738** measuring 15 acres given to him by the deceased.

7. The Respondent through the replying affidavit of **NELSON MUKUNZA** has disputed the assertion by the applicant and aver that the said transmission was above board. He said that the same was done vide the grant which was confirmed on 29 November, 2007 by Hon. Justice Ochieng. He further stated that the applicant had no part in the share as he had parcel number **Bungoma/Ndalu/738** which according to them belonged to the deceased.

8. He stated that the applicant was all along in the picture and he even gave his consent. For the above reasons the application ought to be disallowed .

ANALYSIS AND DETERMINATION

9. From the courts records, this matter began at the lower court and was later transferred to this court. A grant was then confirmed by Hon. Justice Ochieng on the 29th November, 2007. From perusal of the same the Applicant herein was not given any share.

10. The petitioner/administrator therein Seth Mukunza passed on and it appears before the parcel was subdivided and transmitted. This then necessitated the parties to carry out a substitution which came in the name of the Applicant.

11. In a very interesting turn of events the Applicant again with the consent of the rest of the beneficiaries applied for the confirmation of grant again which was allowed by this court on 29th May, 2014. The shares therein included that given to the applicant. This was different from the earlier one which he had been left out.

12. In my view therefore the second grant issued by this court was in error. There can never be two different confirmed grants unless the second one was a rectification, which in this case it was not.

13. Secondly it appears that the second grant took into consideration the interest of the Applicant as opposed to the 2007 grant. The Respondents have argued that he has no right over Parcel number 91 as he already owned parcel number 738.

14. Looking at his replying affidavit the applicant has clearly and correctly in my view explained that parcel number 738 belonged to one **PAULO KISORIO ARAP SANG** and not their deceased father. He has even attached the relevant land control board consents which does not in any way involve their late father. He infact obtained his title on 29th November, 2010 several years after the deceased had died.

15. In a nutshell this court is not convinced that **Parcel Number 738** has any correlation with the estate herein. At any rate the Applicants would have raised their complaints if they believed that the same belonged to their late father.

16. Having stated so, does the applicant have any right over **Parcel No. 91**? The answer to this will also determine the fate of the two rival grants. To the extent that he is the son to the deceased just like the respondents, the answer is on the affirmative. Regardless of whether he had another parcel ,which he has proved and not controverted by any other evidence, he is entitled to have a portion in **Parcel No. 91**.

17. It was contented that the Respondent did carry out the subdivision without a proper confirmed grant. I do not think so as they may have used the grant granted by Ochieng J although I have not been shown who signed the R.L 7 forms.

18. Regardless of this the applicant had been left out. It was argued that he signed form 38. He however countered this by stating that he signed it only for processing but not renouncing his rights. This courts view is that, that line of argument by the respondents was watered down by the second grant which gave the applicant his share, an issue not contested by the Respondents.

19. What then is the way forward? Having found that the Applicant has a stake in his father's estate the way to go is to ensure that the two grants are dealt with so that at least one would remain. The provisions of Rule 73 of the Probate Rules as provided under the rules in our Succession Act permits this court to carry out a review so to speak to ensure that justice is served to all parties. In the premises this court shall set aside the grant issued and confirmed on the 29th November, 2007 for the simple reason that it did not include the share due to the Applicant.

20. The grant issued on 26th July, 2012 and confirmed on 29th November, 2014 is hereby sustained as it takes into account the interest of the Applicant.

21. Consequently let parcel number **BUNGOMA /NDALU/ 91** reverts to its original status and any other titles which emanated from the earlier subdivisions be and are hereby cancelled and they should be surrendered to the relevant land registry.

22. The parties as per the said grant be at liberty to carry out the appropriate survey work taking into consideration the historical positions on the grounds especially the fixed developments by the beneficiaries.

23. Each of the parties shall meet the cost of the survey fees on a prorata basis.

24. Costs of this cause in the cause.

Dated, signed and delivered in open court at Kitale this 16th day of May, 2019.

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H. K . CHEMITEI

JUDGE.

16/5/19

In the presence of:-

M/s Munialo for 1st and 2nd Respondents

M/s Arunga for M/s Chungu for the Applicant

Court Assistant – Kirong

Ruling read in open court.