REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 300B OF 2005

IN THE MATTER OF THE ESTATE OF DAVID KALASIA LWANGU (DECEASED)

RULING

1. The application that I am tasked with determining is dated 21st February 2019. In it the applicants, Mary Musanga David and John Paul Klasia, seek several orders, the principal ones being:

(a) that a restriction be placed on Kakamega/Shikulu/1807;

(b) that the ruling of the court delivered on 16th March 2016 be reviewed or set aside; and

(c) that all consequential orders, processes and actions be set aside and the registration of the said property revert to the position prior to 16th March 2016.

2. The grounds upon which the application is premised are set out on the face of it. It is argued that there is an error on the face of the record to the extent that the interests of the applicant in Kakamega/Shikulu/4025 and 4026 were prejudiced and to the extent that the court in that ruling exercised jurisdiction that it did not have. It is argued that the ruling greatly adversely prejudiced the interests of the applicants in the aforementioned properties, hence the review.

3. In the affidavit in support, the applicant avers that his advocate had not informed her of the proceedings that led up to the impugned ruling, hence she did not participate in them. She also avers that the proceedings undertaken subsequent to the ruling were also not brought to her attention. She stated that she was not aware of the certificate of confirmation of grant of 23rd January 2009 which led to the subdivision of Kakamega/Shikulu/1807 into Kakamega/Shikulu/4025 and 4026, which has been registered in her name and that of second applicant. She asserts that she was not aware of the process that led to the collapse of Kakamega/Shikulu/4025 and 4026 into Kakamega/Shikulu/4025 and 4026 Kakamega/Shikulu/1807 and registered in the name of the respondent. She avers that the trial court should not have entertained the application on Kakamega/Shikulu/1807 as jurisdiction over that dispute lay with the Environment and Land Court. She avers that if the respondent had a claim, against her late husband, then she ought to have a lodged a suit against him or his estate at the Environment and Land Court. She asserts that she still holds the title to Kakamega/Shikulu/4025.

4. In her response the respondent, Christina Wirunda, raises several issues. Firstly, she says that the application was filed after a prolonged delay and that it had been overtaken by events. Secondly, she avers that the applicants were at all time represented by counsel, and that many of the steps were taken in the matter by consent of the parties. Thirdly, she argues that the subject property was initially the property of her father, before the husband of the first applicant caused it to be transferred to his name without initiating a succession process in court to the estate of her late father. She asserts that the probate court had the power to make the orders that it made.

5. The parties thereafter filed several affidavits which addressed, back and forth, the same issues.

6. The advocates on record agreed to canvass the application by way of written submissions. Both sides did file their respective written submissions, which I have read and noted the arguments made therein.

7. The application is for review. Review of the orders of a probate court can be done through Rule 63 of the Probate and Administration Rules, which imported the provisions of the Civil procedure Rules on review. Review is sought on three principal grounds. First, that there is an error apparent on the face of the record. Two, that the applicant has stumbled on evidence of great importance that he had not had opportunity to place before the court at the time the decision was made. Third, review may be for any other sufficient reason

8. The applicants appear to found their application on only one ground: that there was an error apparent on the face of the record. They state that the dispute the subject of the impugned ruling did not fall within the jurisdiction of the High Court, and the respondent should have sued at the Environment and Land.

9. They also seek setting aside of the orders on the ground that their advocate let them down, by not communicating to them the proceedings

that were being conducted at that time, hence they did not participate in them.

10. Before I venture to consider the application on its merits, let me just reproduce the pertinent parts of the impugned ruling that was delivered on 16th March 2016. the court said:

> *"6. I have perused the record herein but could only trace submissions on behalf of the objector. I have not been able to trace written submissions made on behalf of the petitioner. I also note that the petitioner did not file a replying affidavit to the summons for confirmation of Grant neither did she tender evidence in this matter on the issue of confirmation of the Grant or concerns raised by the objector.*
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> *7. The objector is a daughter to Chilado Andayi Ingotso who died on 8th July 1986 as can be seen from the certificate of death … At the time of his demise, the deceased, Chilkado Andayi Ingotso, was registered proprietor of Parcel No. Kakamega/Shikulu/1807, having been registered on 19th May 1975. That parcel of land seems to have been transferred and registered in the name of David Lwangu Kalasia on 17th February 1992 and a title deed issued to him, some six (6) years after Ingotso's death.*
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> *8. The objector is opposed to the transfer and has testified in her evidence in chief that her late father did not sell the land to David Lwangu Kalasia. She wants the land given to her since she is the administratrix of the estate of her late father and the only beneficiary to her father's estate.*
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> *9. Although the petitioner was represented throughout these proceedings, she did not respond to the application for confirmation of Grant and more so the suggestion by the objector that she is entitled to inherit Kakamega/Shikulu/1807. I also note that she never tendered any evidence and her counsel never filed written submissions as ordered and as it is, the objector's evidence that the land was not sold has not been controverted.*
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> *10. From the record and the exhibits produced by the objector, Parcel No. Kakamega/Shikulu/1807 was registered in the name of Andayi Ingotso in 1975. The proprietor died on 8th July 1986 but the land was transferred into the name of David Lwangu Kalasia on 17th February 1992 … when the person who could have executed instruments of transfer was already dead and buried.*
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> *11. There has not been any explanation how the land belonging to a deceased moved from a dead person to another without going through succession proceedings given that succession proceedings for that estate were initiated in 2000. This is in clear violation of the law. Section 45 of the Law of Succession Act abhors intermeddling with properties of a deceased person …*
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> *12. Intermeddling with the estate of a deceased person is a criminal offence and can also lead to a civil claim against the inter meddler. Disposition of an interest in land belonging to a deceased person cannot be sanctioned without authority of the court and only by an executor or administratrix. The late Andayi Ingotso's parcel of land was transferred to David Lwangu Kalasia in unexplained circumstances and even though the administratrix to the estate of the late Lwangu was given an opportunity to explain how that was possible, she did not tender evidence or reply to the affidavit in support of summons for confirmation. This left the court to draw inferences that there was no plausible explanation and that the said disposition of land was … unlawful.*
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> *13. The parcel of land the subject of these objection proceedings was included as forming part of the estate of the late David Kalasia Lwangu and upon Grant of representation of that estate being confirmed, was shared out between the petitioner herein, Mary Musanga David and John Paul Kalasia, beneficiaries of the estate of the late David Kalasia Lwangu. From the facts presented in the objection proceedings and the applicable law, it is clear that the objector has demonstrated on a balance of probability that she has made out a case for taking Parcel Number Kakamega/Shikulu/1807.*
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> *14. The Grant of Representation in respect of the estate of the late David Kalasia Lwangu having been revoked, and a new Grant issued in the joint names of the petitioner and the objector herein, I allow the summons for confirmation of Grant dated 8/1/2013. And pursuant to powers conferred to this court by rule 73 of the Probate and Administration Rules, I hereby rectify the certificate of confirmation of grant issued herein on 28th May 2008, to the effect that the whole of Parcel Number Kakamega/Shikulu/1807 shall be transmitted to Christina Wirunda. A rectified certificate of confirmation of grant shall issue incorporating this change. The other properties and distribution thereof shall remain as before."*

11. There are two succession causes that were consolidated into one. The consolidated cause relates to the estates of two individuals, David Kalasia - Lwangu and Chilado Andayi Ongotso. Chilado Andayi Ongotso died first, on 8th July 1986, so the cause relating to his cause was initiated first, being Kakamega HCSC No. 471 of 2000. The letter from the Assistant Chief of Malava Sub-Location indicates that he was survived by only one immediate relative, the only child, the respondent herein. She sought representation to the estate of the deceased in Kakamega HCSC No. 471 of 2000, where she described herself as the sole survivor of the deceased and listed Kakamega/Shikulu/1807 as the property that he died possessed of. Representation was granted to her on 7th September 2001 and a grant was issued dated 3rd October 2001. David Kalasia Lwangu died on 11th April 1998. A letter from the Assistant Chief of Musoli Sub-Location, dated 13th June 2005, indicates that his heir was his widow, the first applicant herein, and he was said to have had died possessed of Indakho/Shikulu/1807, 1938 and 2352. She sought representation in the estate in Kakamega HCSC No. 300B of 2005, and the same was made to her on 8th November 2006, and a grant was issued on 7th December 2006. The grant was confirmed on 21st January 2009, and the assets were shared out between her and her sons. There is a certificate of confirmation of grant on record which is, for some unknown reason, dated 28th May 2008.

12. The events that culminated in the consolidation of the two causes began with the filing of a summons for revocation of the grant in Kakamega HCSC No. 300B of 2005. The application was dated 19th July 2012 and was filed in court on 18th July 2012. The same was placed before the judge in chambers on 19th July 2012, and the prayers for prohibitions to issue with respect to Kakamega/Shikulu/1807 and for consolidation of Kakamega HCSC No. 471 of 2000 and Kakamega HCSC No. 300B of 2005 were granted. When the matter came up for

inter partes hearing of the application on 5th December 2012, the parties agreed by consent to have a fresh grant issue in the joint names of the first applicant and the respondent. The effect of the consent was that the grant made in the two causes had been revoked to pave way for the fresh appointment of new administrators in the consolidated cause. It was also agreed that the respondent would file an application for the confirmation of the new grant. It was directed that that application be disposed of orally. The oral hearing happened, where the respondent and her witness testified and were cross-examined by the advocate for the first applicant. At the close of the respondent's case the first applicant was given a date for her case. On the appointed date, 12th June 2014, she was not in court and the matter was put off to 7th October 2014. Come that date she was not in court and her advocate informed the court that he was closing her case, and asked for a date to file written submissions. It is those oral hearings that culminated in the ruling that was delivered on 16th March 2016, which forms the basis for the review application.

13. I have stated above that the application the subject of this ruling seeks review and setting aside of the orders that were made on 16th May 2016, for the reasons that I have recited. I will start by considering the aspect on setting aside, and I will revert to the review aspect thereafter.

14. Setting aside of court orders is sought where the orders were made in a flawed process. That is to say for example, where the making of the orders was attended by procedural improprieties, such as where the proceedings were conducted in the absence of a party who had not been notified of the hearing.

15. The question then that I need to consider is whether the proceedings that led up to the ruling delivered on 26th March 2016, were improper. The first applicant's case is that her advocate never brought the existence of those proceedings to her notice, and, therefore, those matters proceeded without her participation and without the benefit of her input. There could be some truth in this as the first applicant did not file a response to the revocation application dated 19th July 2012, which was largely resolved without a formal hearing. However, her advocates do not appear to bear responsibility for that. Once the court made the *ex parte* order to consolidate the two causes, the die was cast, joint administration had to follow naturally. The application was as good as resolved by that order and it would have made no difference whether the first applicant filed a reply to the application or not. The revocation application was filed on 19th July 2012 and was placed before the Judge the same day, and the *ex parte* orders were made the same day. The issue of revocation of the grant was *fait accompli*.

16. After the revocation application was compromised, the parties agreed by consent that the advocate for the respondent would file application for confirmation of the fresh grant. The confirmation was filed on 15th January 2013, dated 8th January 2013. That application was the basis for the oral hearing. The first applicant did not reply to it. Her advocate is on record, on 21st February 2013, telling the court that he had lost contact with her and for that reason he had been unable to file a reply to the confirmation application. It was him who proposed that the confirmation application be filed by the advocate for the respondent and not him as advocate for the applicants, and that it be disposed of by oral evidence, directions which the court gave. The confirmation application was filed on 15th February 2013, and a month later, on 21st February 2013, when the matter came up for hearing for the first time, the first applicant's advocate was telling the court that he had lost contact with her. He did not apply for more time to look for her in order to take her instructions, so it cannot be said that any effort was made to contact her. It cannot be said that the respondent had opposed her advocate being given time to look for her, neither can it be said that the court denied the chance. In fact it was her advocate, despite not having taken her instructions, who was very keen to have the matter go on to the next stage of oral hearing. Indeed, on 21st February 2013, it was only the advocate for the first appellant who addressed the court. I would agree with her that it was her advocate who let her down, by proceeding with the matter without getting her instructions on the subject application and being too eager to concede easily to positions that were adverse to her interests.

17. Looking at it overall, I am of the impression that the confirmation hearings was conducted without the first applicant having been made aware of it. His advocate did not make a serious effort to trace her, and was too willing to carry on with the matter despite lack of instructions. The proper course of action in cases where an advocate loses contact with his client is to apply to cease acting so that the other side can serve the client directly or personally. It is curious that the advocate chose to carry on with tithe matter, commit his client to a hearing that would have disadvantaged her given that she had not filed a reply to the confirmation application, knowing full well that the outcome was likely to be adverse to her case. It cannot be said that there was propriety in the manner that that application was handled, and its eventual outcome was adverse to the first applicant, who did not get to be heard without fault on her part.

18. I will now turn to the review prayer. The applicants found their application on error on the face of the record. The error they raise relates to what they refer to as lack of jurisdiction on the court to deal with the dispute that was at hand, on the ownership of the subject property, Kakamega/Shikulu/1807, as between the estate of the deceased in HCSC No. 471 of 2000 and the estate of the deceased in HCSC No. 300B of 2005. I suppose that the starting point in addressing the issue should be the time when the revocation application was filed, for it is at that point that the dispute that was the subject of the ruling of 16th March 2016 was placed before the court. The two separate causes related to the estates of two different individuals. From the material before me the two individuals were not related, whether through blood or marriage. The two deceased persons, therefore, did not have common survivors. The only connection between them was that their estates claimed a common asset, Kakamega/Shikulu/1807.

19. The question then that arises is whether it was proper to have the two causes consolidated. Ideally, consolidation of succession causes is permissible where several of them are initiated with respect to the estate of the same individual who has died intestate. The reasoning behind such consolidation would be that there should not be more than one cause since the deceased individual can only possibly have common assets and common survivors or heirs, and his estate should only be distributed once. Allowing separate succession causes in the estate of the same deceased person to run risks a situation where the courts seized of the different matters make different orders on distribution. That would embarrass the courts and the parties, for having two inconsistent or contradictory orders on confirmation of the grants would present a nightmare at distribution. Parallel processes should not be allowed at all costs, save where the deceased died partially testate and partially intestate, as in such cases there would be separate administrations, one in testacy and the other in intestacy.

20. Is there any occasion for consolidation of causes in respect of estates of separate or different deceased persons? That should never happen. There should be only one cause for each deceased person. No two or more estates should be handled in the same cause. That can only breed confusion. Even where the survivors are common, such as the cases of deceased spouses, consolidation should be avoided. The

best the court can do in such cases is to bring the two causes together, not for consolidation, but for determination simultaneously. It was a mistake, therefore, to have ordered, on 19th July 2012, that the succession causes of two different dead persons be consolidated and handled together. Having estates of two dead persons handled in one cause is an error on the face of the record. The error that the applicants point at emanated from that first error.

21. It would appear that the consolidation of the two unrelated causes was intended to facilitate litigation on the question of the ownership of Kakamega/Shikulu/1807 as between the estate in HCSC No. 471 of 2000 and the estate in HCSC No. 300B of 2005. Did the High Court have jurisdiction to handle that dispute at all? The dispute on that ownership arose in 2012. That was after the Constitution, 2010, was promulgated on 27th August 2010. The new Constitution came with new configurations on the jurisdiction of the High Court. It envisaged creation of a new court, of equal status with the High Court, to handle land disputes. The relevant provision is Article 162(2) of the Constitution, which says as follows:

> "*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."*

22. Article 162(2) should be read together with Article 165(5) of the Constitution, which bars the High Court from exercising jurisdiction over 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-*
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> *(a) …*
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> *(b) falling within the jurisdiction of the courts contemplated in Article 162(2)."*

23. Bending to the command of Article 162(2) of the Constitution, Parliament passed the Environment and Land Court Act, No. 19 of 2011, to establish the Environment and Land Court. The jurisdiction of the said court is set out in section 13 of the Environment and Land Court 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*
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> *(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.*
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> *(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –*
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> *(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."*

24. The two estates take rival positions on Kakamega/Shikulu/1807. In the two causes the said property is listed as comprising part of either estate. Of course, it would be untidy to allow the parties in both causes to go ahead and distribute the said property before it is resolved whether it is an asset in the estate in HCSC No. 471 of 2000 or in the estate in HCSC No. 300B of 2005. That can only be resolved by determining whether it was a property owned by the deceased person in HCSC No. 471 of 2000 or the deceased person in HCSC No. 300B of 2005. That question falls squarely under Article 162(2) of the Constitution, and, by virtue of Article 165(5) of the same Constitution, it would appear that the High Court has no jurisdiction whatsoever to handle that dispute. That dispute was handled by the High Court in error.

25. The Court of Appeal had occasion in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, to address the matter of jurisdiction, where Nyarangi JA stated emphatically that jurisdiction is everything, and a court without jurisdiction must down its tools.. The exact words of the Judge of Appeal were:

> "*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."*

26. Indeed, even if the High Court did have jurisdiction, which, no doubt, it did not have, it would still have been inconvenient to handle the ownership dispute within the succession cause. The mandate of the probate court is primarily to distribute the estate. When questions arise on ownership of assets, such ought to be resolved in a separate forum. The feuding parties ought to file separate suits to resolve those questions, particularly where they arise between the estate and third parties, such as in this case. The two estates should have sued each other in separate proceedings to resolve that question. Ideally, the property ought to be removed temporarily from the schedule of the assets placed before the court for distribution, to facilitate litigation on ownership, to be restored, if at all, after that issue has been settled in the separate suit.

27. The position that I have mentioned above is reflected in Rule 40(3) of the Probate and Administration Rules, which states as follows:

> *"Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate, which cannot at that stage be conveniently determined, the court may, prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant."*

28. In the end I find and hold that there error apparent of the face of the record with respect to the orders made consolidating the two causes and at the confirmation of the grant thereafter, and I hereby proceed to make the following orders and to give the following directions:

(a) That I hereby set aside the order made on 19th July 2012 to consolidate HCSC No. 471 of 2000 and HCSC No. 300B of 2005, and direct that the two causes be henceforth handled separately;

(b) That I hereby set aside the order made on 16th March 2016 to rectify the certificate of confirmation of grant dated 28th May 2008 transmitting the whole of Kakamega/Shikulu/1807 to the respondent herein, Christina Wirunda;

(c) That I hereby remove the said property, Kakamega/Shikulu/1807, from the schedule of the assets distributed in the confirmation orders made on 21st January 2009 and 16th March 2016 and the certificate of confirmation of grant dated 16th March 2016, and direct that its registration details be restored to the position immediately prior to 21st January 2009;

(d) That I declare that the High Court has no jurisdiction to determine ownership of Kakamega/Shikulu/1807 as between the estate in HCSC No. 471 of 2000 and the estate in HCSC No. 300B of 2005, and I hereby direct the parties to place that dispute before the Environment and Land Court, if they are so minded;

(e) That each party shall bear their own costs; and

(f) That any party aggrieved by the orders that I have made herein shall be at liberty to move the Court of Appeal appropriately, within twenty-eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 15TH DAY OF NOVEMBER, 2019

W. MUSYOKA

JUDGE