



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 285 OF 2004

IN THE MATTER OF THE ESTATE OF FESTO LIKHAYA SHILESERA (DECEASED)

RULING

1. I am tasked with determining a preliminary objection on a point of law raised in a notice filed herein, dated 15th May 2017. The same is to the effect that an application herein dated 8th February 2017 be struck out as the probate court has no jurisdiction to grant the orders sought.

2. The summons dated 8th February 2017 is brought at the instance of the administrators of the estate, and it seeks orders against persons who are neither survivors of the deceased nor heirs or dependants, but who are said to be in illegal occupation of the estate property, that is to say LR No. 10123 Kitale. The grant herein was confirmed on 17th December 2012, but the administrators aver that they are unable to complete administration by distributing the estate because of the respondents who have encroached on the land and intermeddled with it by erecting structures and cultivating on it. . The administrators would like this court to issue orders to have them restrained from intermeddling with the land and to order them out. It is the orders that are sought in these prayers that the respondents in their preliminary objection argue that I have no jurisdiction to make.

3. Upon confirmation orders being made, the next step should be transmission of the property in terms of section 61 of the Land Registration Act, No. 3 of 2012. Transmission of property upon death, after confirmation of the grant is a process which is governed by the Land Registration Act, and not the Law of Succession Act, Cap 160, Laws of Kenya. Upon transmission, the beneficiaries named in the certificate of confirmation of grant are issued with title deeds from the property the subject of the transmission. Upon being issued with such title deeds they should then move the court formally for eviction of any intruders or trespassers.

4. Just so that the parties are clear on these provisions, section 61 of the Land Registration Act provides as follows:

“Transmission on death of a sole proprietor or proprietor in common.

61. (1) If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased ...

(2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission—

(a) any transfer by the personal representative; and

(b)

(3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.”

5. Land in Kenya is today regulated or governed by the Land Act, No. 6 of 2012 and the Land Registration Act. The Land Act carries elaborate provisions on unlawful occupation of land and removal of persons who are in such unlawful occupation. These provisions are in sections 152A to 152I of the Land Act. It involves issuance of notices and proceedings in court.

6. For avoidance of doubt, the said provisions state as follows:

“152A. Prohibition to unlawful occupation of land

A person shall not unlawfully occupy private, community or public land.

152B. Evictions to be undertaken in accordance with the Act

An unlawful occupant of private, community or public land shall be evicted in accordance with this Act.

152C. ...

152D.

152E. Eviction Notice to unlawful occupiers of private land

(1) if, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.

(2) the notice under subsection (1) shall—

(a) be in writing and in a national and official language;

(b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;

(c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and

(d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

152F. Application to Court for relief

(1) Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to Court for relief against the notice.

(2) The Court, after considering the matters set out in sections 152C, 152D and 152E, may—

(a) confirm the notice and order the person to vacate;

(b) cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;

(c) suspend the operation of the notice for any period which the court shall determine; or

(d) order for compensation.

152G. Mandatory procedures during eviction

(1) Notwithstanding any provisions to the contrary in this Act or in any other written law, all evictions shall be carried out in strict accordance with the following procedures —

(a) be preceded by the proper identification of those taking part in the eviction or demolitions;

(b) be preceded by the presentation of the formal authorizations for the action;

(c) where groups of people are involved, government officials or their representatives to be present during an eviction;

(d) be carried out in a manner that respects the dignity, right to life and security of those affected;

(e) include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;

(f) include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction; (g) include mechanisms to protect property and possessions left behind involuntarily from destruction;

(h) respect the principles of necessity and proportionality during the use of force; and

(i) give the affected persons the first priority to demolish and salvage their property.

(2) *The Cabinet Secretary shall prescribe regulations to give effect to this section.*

152H. Disposal of property left after eviction

The competent officer of the Commission or County Government, community owning a registered community land or owner of private land shall at least seven days from the date of the eviction, remove or cause to be removed or disposed by public auction, any unclaimed property that was left behind after an eviction from private, community or public land.

152I. Demolition of unauthorized structures Where the erection of any building or execution of any works has commenced or been completed on any land without authority, the competent officer shall order the person in whose instance the erection or work began or was carried, to demolish the building or works, within such period as may be specified in the order.”

7. Both the Land Act and the Land Registration Act are specific that reference to court in the two statutes means the Environment and Land Court. That provision is in section 2 of both statutes. That would mean that a private property owner who seeks relief under section 157F of the Land Act, should seek such relief from the Environment and Land Court, and not from the High Court. The application that I am determining in this application is about illegal occupation of private land. The applicants should, therefore, have moved the Environment and Land Court in terms of section 157F for the removal of the respondents from LR No. 10123 Kitale.

8. Furthermore, the High Court has no jurisdiction to make determinations on title to and the right to use or occupy land, in view of the Constitution 2010, and in particular Articles 162(2) and 165(5), which state as follows:

“162. (1) ...

(2) *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.*

(3) ...

(4) ...

163 ...

164 ...

165. (1) ...

(2) ...

(3) ...

(4) ...

(5) *The High Court shall not have jurisdiction in respect of matters—*

(a) ...

(b) *falling within the jurisdiction of the courts contemplated in Article 162 (2).*

(6) ...

(7) ...”

9. Parliament in obedience to Article 162(3) of the Constitution passed the Environment and Land Court Act, No. 19 of 2011, to establish the court envisaged in Article 162(2)(b) and to lineate the jurisdiction of the said court. The preamble to the Act states the objective of the Act to be: -

“... to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land; and to make provision for its jurisdiction functions and powers and for connected purposes.”

10. The scope and jurisdiction of the said court is set out in section 13 of the Act, which states as follows:

“13. *Jurisdiction of the Court*

(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.*

(2) *In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –*

(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.”

11. The dispute before me turns around the right to use and occupy land. That squarely places the matter within the scope of Article 162(2) of the Constitution. I have no jurisdiction to determine the matter. I reiterate that the applicants ought to have filed the same at the Environment and Land Court.

12. I must emphasize that a probate court effectively becomes *functus officio* once it has confirmed a grant, save for any relevant post confirmation applications that the parties may file relating to such matters as review, rectification, among others. The processes relating to transmission of the property to those entitled upon confirmation of grant moves to the land registries, banks, company registries, *et cetera*, where the registrations of the interests have to be done. Those processes have nothing to do with the probate court, and so does the process of evicting trespassers from estate property to which a beneficiary might be entitled to after confirmation of grant.

13. Jurisdiction is everything as was ruled by the Court of Appeal in *Owners of the Motor Vessel ‘Lillian S’ vs. Caltex Oil (Kenya) Limited* (1989) KLR 1, where it said: -

‘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 ... 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.’

14. As I have no jurisdiction I must down my tools. Proceedings brought before a court without jurisdiction are incompetent and abusive of the process. Consequently, the application by way of summons dated 8th February 2017 is incompetent to the extent that I have no jurisdiction to entertain it. I shall and hereby strike it out with costs. Any party aggrieved shall move the Court of Appeal appropriately within twenty-eight (28) days of this ruling.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8th DAY OF November 2019

W. MUSYOKA

JUDGE