



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 14 OF 2018

IN THE MATTER OF THE ESTATE OF SIMION ROBI MAROA (DECEASED)

BETWEEN

1. ESTHER BOSIBORI MINYONGA

2. KEFA OKETCH MOINDE..... PETITIONERS/RESPONDENTS

VERSUS

GRACE KEMUNTO ROBI.....APPLICANT

RULING NO. 1

1. This ruling is in respect of the Summons for Review of Orders dated 15/04/2019 (hereinafter referred to as '**the application**'). The application was filed by Grace Kemunto Robi who had earlier on filed a Summons for Revocation of the Grant. The Summons for Revocation was dated 02/05/2018.

2. The Summons for Revocation was heard and reserved for ruling. Before the delivery of the ruling aforesaid this Court issued Further Directions on 09/04/2019. The essence of the directions was that the delivery of the ruling was stayed and the matter referred to the Environment and Land Court for determination of whether one of the disputed properties was acquired by way of fraud.

3. Those are the directions which prompted the filing of the application subject of this ruling. Prayers 3 and 4 of the application were tailored as follows: -

(3) The Honourable Court be pleased to Review, Vary, Rescind and/or set aside the Directions and/or Orders issued on the 9th day of April 2019, which directions and/or orders are at variance with the pleadings and/or Reliefs sought by the parties therefore contravenes the Doctrine of Departure.

(4) Consequent to prayer 3 hereof being granted, the Honourable Court be pleased to revert and address itself on the totality of the Summons for Revocation of Grant, which was canvassed and duly submitted by the parties.

4. The application was supported by an Affidavit sworn by the Applicant on 15/04/2019.

5. The application was opposed by the Petitioners. **Kefa Oketch Muinde** swore a Replying Affidavit on 27/05/2019 to that end.

6. Directions were taken and the application was heard by way of oral submissions. The Applicant urged this Court to allow the application on 5 main grounds. First, that the succession law in Kenya is circumscribed under the **Law of Succession Act, Cap. 160** of the Laws of Kenya (hereinafter referred to as '**the Act**'). That, only a Succession Court that has the jurisdiction to deal with all matters relating to the property of a deceased. Second, **Section 3 of the Act** deals with free property of the deceased. A Succession Court is therefore divested with the jurisdiction to deal with all manner of disputes including third party claims relating to free property. Three, staying succession proceedings amount to holding dispute into infinite. That infringes **Article 159(2)(b)** of the **Constitution**. Fourth, the impugned directions were given without hearing the parties. That infringed **Article 47** of the **Constitution**. Fifth, the effect of the directions was to allow parties to depart from their pleadings.

7. The Petitioners were in support of the directions. They posited that the property in issue was not part of the free property of the deceased. They further posited that as such this Court did not have jurisdiction to deal with aspects of its ownership and as well as the allegations of fraudulent acquisition. They submitted that the threshold of review was not attained as the Court acted within its inherent powers with a view to have the real issue in dispute determined. They further submitted that the Applicant will not suffer any prejudice as all issues will be dealt with by a Court of law.

8. The jurisdiction of this Court to entertain the application is rightly not faulted. The application was brought under various provisions of **the Act, the Probate and Administration Rules, The Fair Administrative Actions Act** and the **Constitution**.

9. I will now deal with the grounds in support of the application. There was the submission that the succession law in Kenya is circumscribed under **the Act** and that it is only a Succession Court that has the jurisdiction to deal with all matters relating to the property of a deceased. My response to that submission is that the submission is partly correct. I say so because **the Act** is a pre-2010 statute. At promulgation of the **Constitution** in August 2010 **Article 262** and the Transitional and Consequential provisions under the **Sixth Schedule** of the **Constitution** became operational.

10. **Section 7(1)** of the **Sixth Schedule** of the **Constitution** provides as follows: -

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

11. The effect of the foregoing is that **the Act** which existed before the effective date must be construed in a manner as to bring it into conformity with the **Constitution**. It therefore means **the Act** cannot be taken to be the sole and independent source of the succession law in Kenya. **The Act** must and remains subject to the **Constitution**.

12. It is the **Constitution** which created the High Court and the Courts of equal status in **Article 165**. Each of the three Courts was vested with specific jurisdiction (See the Supreme Court of Kenya in *Petition No. 5 of 2015, Republic -vs- Karisa Chengo & 2 Others [2017] eKLR*).

13. I have previously dealt with this contention. In *Migori High Court Succession Cause No. 77 of 2015 In the Matter of the Estate of Martinus Okore, Randa Okore and Owino Okore (all deceased) (2019) eKLR* I held as follows: -

*11. On the other hand, the duty of a Succession Court is principally to protect estates of deceased persons which it has jurisdiction over and to oversee the transmission of those estates to the lawful beneficiaries. The High Court as a Succession Court is vested with requisite jurisdiction to discharge that mandate. However, if a dispute arises on the ownership of the land subject of the succession proceedings and/or the declaration of trusts over the land in issue, then such a dispute transcends the jurisdiction of a Succession Court courtesy of Article 165(5) of the Constitution, Section 13 of the Environment and Land Court Act, No. 19 of 2011 among other relevant legal provisions. It is a dispute which calls for evidence to establish ownership or the existence of such a trust upon which finding a party may be a beneficiary for purposes of the distribution of the estate property before a Succession Court or not. (See the Court of Appeal in *Peter Moturi Ogutu vs. Elmelda Basweti Matonda & 3 others (2013) eKLR, Muthuita vs. Muthuita (1982-88) 1 KAR 42 and Chogera vs. Maria Wanjira Kimani & Others (2005) eKLR*).*

12. In reaching that position I am alive to the provisions of Section 2(1) of the Law of Succession Act, Cap. 160 of the Laws of Kenya, which provides as follows: -

Except as otherwise expressly provided in this Act or any other written law, the provisions of this act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estate of the deceased persons dying after the commencement of this Act and to the administration of estate of those persons

*13. My response thereto is that the Law of Succession Act is a pre-2010 legislation and pursuant to Article 262 and the Sixth Schedule of the Constitution the Law of Succession Act must be brought into conformity with the Constitution and shall only remain in force and be construed with the necessary adaptations, alterations, qualifications and exceptions. It is the very Constitution that clearly demarcated the boundaries of the superior Courts with their respective jurisdictions. (See the Supreme Court decision in *Petition No. 5 of 2015, Republic -vs- Karisa Chengo & 2 Others [2017] eKLR*). I am further aware of the immense inconveniences, increased costs and unpredicted delay caused to parties who are forced to move from one Court to the other in dealing with disputes which could be easily dealt with by one Court but since jurisdiction is everything and a Court cannot legally act without it, the law must always prevail given that this country is firmly and constitutionally governed by the Rule of Law.*

14. I still hold that position.

15. There was also the submission that **Section 3** of **the Act** deals with free property of the deceased and that a Succession Court is divested with the jurisdiction to deal with all manner of disputes including third party claims relating to free property.

16. **Section 3** of **the Act** defines 'free property' as follows: -

In relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.

17. I see the above definition in two perspectives. The first one is that a free property relates to an interest in a property of the deceased which was not encumbered during the lifetime of the deceased. The deceased would then have freely dealt with the interest in the property. The interest must also subsist even after the demise of the deceased. The other perspective is that if at any time whether during or after the life of the deceased the interest of the deceased in the property is challenged then the property ceases to be free property. The property then becomes a disputed property.

18. The focus then turns to the nature of the dispute. If the dispute is not among those falling within the exclusive jurisdiction of the Courts

of equal status, then a Succession Court has the prerogative to determine it. Conversely, if the dispute falls within the exclusive jurisdiction of the Courts of equal status then a Succession Court must decline jurisdiction and down its tools.

19. Responding to the aspect of delay in splitting of disputes which could easily be determined by a single Court, I reiterate what I stated in *Migori High Court Succession Cause No. 77 of 2015 In the Matter of the Estate of Martinus Okore, Randa Okore and Owino Okore* (supra). In that case I stated that ‘..... I am further aware of the immense inconveniences, increased costs and unpredicted delay caused to parties who are forced to move from one Court to the other in dealing with disputes which could be easily dealt with by one Court but since jurisdiction is everything and a Court cannot legally act without it, the law must always prevail given that this country is firmly and constitutionally governed by the Rule of Law’.

20. I will now deal with how the directions were given. It is true that the directions were given without first hearing the parties. This Court nevertheless has powers to refer a dispute to another Court with a view of determining the real dispute and to render substantive justice. (See *Livingstone Maina Ombette v Kenya Power & Lighting Co Limited (2017) eKLR*, *Pamoja Women Development Programme & 3 others v Jackson Kihumbi Wangombe & Another (2016) eKLR* among others). That power can even be exercised *sue moto*.

21. We are now in a new constitutional dispensation. **Article 10** of the **Constitution** is on the national values and principles of governance. One of them is the calling to uphold human rights. **Article 50(1)** of the **Constitution** provides for fair hearing of disputes. That encompasses the right to be heard. I must admit, as I hereby do, that even in the wake of the powers to transfer matters from one Court to another for the good of justice, it is still prudent for a Court to, in the first instance, hear the parties on the issue.

22. The application must therefore succeed on the ground that the parties were not heard before issuing the directions.

23. The upshot is that the Summons for Review of Orders dated 15/04/2019 is allowed to the extent that the Further Directions issued on 09/04/2019 are hereby vacated and/or set aside. Costs of the application shall be in the Summons for Revocation.

24. This Court shall now assign a ruling date in respect of the Summons for Revocation dated 02/05/2018.

DELIVERED, DATED and SIGNED at MIGORI this 8th day of November 2019.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of: -

Mr. Oguttu Mboya, Counsel instructed by the firm of Messrs. Oguttu, Ochwangi, Ochwal & Company Advocates for the Applicant.

Mr. Nyambati, Counsel instructed by the firm of Messrs. G. M. Nyambati & Company Advocates for the Petitioners.

Evelyne Nyauke - Court Assistant