REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 117 OF 2004

IN THE MATTER OF THE ESTATE OF ALBERT IMBOVA LISILI (DECEASED)

RULING

1. The proceedings herein commenced by way of a citation issued in 2004, dated 27th January 2004, at the instance of Mathias Atila Imbenzi, in his purported capacity as grandson of the deceased, addressed to Regina Isutsa Imbova, requiring her to take or refuse to take out letters of administration intestate in respect of the estate of the deceased. There is evidence on record, which indicates that the said citation was served on Regina Isutsa Imbova. She apparently did not appear in the cause, whereupon the court directed the citor to petition for representation. The petition was lodged herein on 18th July 2005. In the petition the citor, now turned petitioner, described himself as cousin of the deceased, and expressed the deceased to have had died possessed of a property known as Idakho/Shiseso/1174. He listed himself and other persons, not including the citee, Regina Isutsa Imbova, as the survivors of the deceased. The cause was published in the *Kenya Gazette* of 6th October 2006, and a grant of letters of administration intestate was duly made on 7th June 2007. The grant was confirmed on 26th November 2008 on an application dated 14th March 2008, and a certificate of confirmation of grant dated 3rd February 2009 was duly issued. The property, Idakho/Shiseso/1174, was to be shared equally between the administrator and three others.

2. The widow of the deceased, that is to say Regina Isutsa Imbova, was prompted by efforts to have her evicted from the subject property to file a summons for revocation, dated 17th September 2011, on 20th September 2011. Apparently, the said application was not opposed, and when it came up for hearing on 5th October 2016, it was allowed as prayed. The grant of 7th June 2007, confirmed on 26th November 2008, was revoked, registration of the administrator in the said grant as proprietor of Idakho/Shiseso/1174 was cancelled and the title reverted to the name of the deceased, and a fresh grant was made to the widow, Regina Isutsa Imbova. A certificate of grant of letters of administration intestate was duly issued to her dated 25th October 2016.

3. The application that I am called upon to determine is a summons dated 29th June 2018. It is brought by Mathias Atila Imbenzi, the former administrator of the estate. He says that a son of the deceased, by the name Maurice Otunga Imbova, died on 25th June 2018. He avers that the family was planning to inter his remains on Idakho/Shiseso/1174 which he claims to be his ancestral land. He would like that family restrained from doing so. He argues that the burial of the remains on that land would be detrimental to him and to his siblings, and the same would amount to disinheriting them. He asserts that the said land was registered in the name of the deceased to hold in trust for his own father, the late Cyprian Atila Makaka. He states that the family of the deceased has alternative land elsewhere where they can inter the said remains, that is Idakho/Shiseso/875. He accuses the administrator, Regina Isutsa Imbova, who is named in the application as respondent, of failing to apply for confirmation of her grant where the issue of the trust would have been addressed.

4. The respondent reacted to the application by filing an affidavit on 4th July 2018. She avers that the orders sought cannot be granted within the succession cause, but through a substantive suit since the cause of action does not relate to distribution of the estate but a burial dispute. She avers that her son, Maurice Otunga Imbova, whose burial is the subject of the application, was a child of the deceased and lived on the subject land, Idakho/Shiseso/1174. She argues that the applicant was not a child of the deceased and therefore he was not entitled to a share in his estate. She further states that the applicant has never occupied or utilized any part of the disputed land. She says that the remains of her son ought to be interred in the land where he had established a home. She argues that the applicant has no beneficial interest on the land.

5. The application was urged orally before me on 5th July 2018. Ms. Atieno for the applicant argued that the applicant was interested in the estate and accused the respondent of failing to have her grant confirmed. She stated that the subject land was the applicant's ancestral land, but registered in the name of the deceased. She said that those issues would have been thrashed out in a confirmation application if only the respondent had filed one. Ms. Ashitsa argued the case for the respondent. She arged five points – the jurisdiction of the court to handle a burial dispute, the issue of the respondent mother of the person whose remains is the subject of the application being sued instead of the widow who is the closest relative of the said person, whether the principles for grant of injunctions had been satisfied, and the concurrent claims by the applicant that the land was ancestral while at the same time saying that it arises from a liability.

6. On jurisdiction, it is settled law that if the dispute is hinged on African customary law, then the suit ought to have been filed at the magistrates' courts by dint of the Magistrates Courts Act, Cap 10, Laws of Kenya. The suit before me is not founded on African customary law. The applicant is not claiming any right accruing from customary law to bury the remains of Maurice Otunga Imbova. All he seeks is that

the said remains be not interred at Idakho/Shiseso/1174. Consequently, the issue of jurisdiction should not arise. Even if the same were to arise, I do not thing the High Court would lack jurisdiction to handle the same given that it is a court which enjoys, constitutionally, an unlimited original jurisdiction. The filing of such a claim before the High Court would not have the effect of rendering it incompetent. The worst that can happen would be transfer of the same to the magistrates' court for disposal.

7. Still on jurisdiction, it will be noted that the property in dispute is subject to succession proceedings in this cause. The applicant argues that is the basis upon which he has moved the court, to say that he is claiming that property in these proceedings and therefore the court should not allow the burial of the remains of a survivor of the deceased on the land as that would occasion challenges to him later should the court rule that the said land belonged to him and not to the deceased. I am persuaded that an application like the instant one can be entertained by this court. Whether I should grant it is a totally different thing. The land in question is before me in the succession cause and I can quite properly hear any application that claimants may be pleased to present before me over the land.

8. On whether the applicant should have named the widow of Maurice Otunga Imbova the respondent instead of the administrator of the estate of the deceased, I will say that the application herein is brought within the succession cause where the respondent holds a grant of represention. The respondent is the administrator of the estate of the deceased; the property of the estate therefore vests in her by virtue of section 79 of the Law of Succession Act, Cap 160, Laws of Kenya. She is the proper person to sue with respect to anything that relates to the property. The widow of Maurice Otunga Imbova does not hold a grant of representation to the estate and subject property the does not vest in her. She cannot sue or be sued over the same. It is my finding that the application is properly brought against the respondent. The widow of Maurice Otunga Imbova would have been the proper person to sue were the applicant to bring a separate suit under the Magistrates Courts Act.

9. On whether the principles for grant of injunctions as enunciated in *Giella vs. Cassman Brown*,(1973)EA 358 had been met, it is my view that injunctive orders are not for granting in probate and succession matters. The provisions in the Civil Procedure Rules that provide for interlocutory injunctions were not among those imported into probate practice by Rule 63 of the Probate and Administration Rules. Therefore, the issue should not really arise. These are probate proceedings. There is no suit as such. There is no main suit to be heard. The cause is about distribution of an estate. The said principles cannot therefore be neatly applied when it comes to probate matters. Rather than provide injunctive relief in the context of *Giella vs. Cassman Brown*, the probate court normally makes orders for preservation of the estate, so that where a party applies for an injunction, the court ought not ideally issue an injunction, but rather, it should issue orders geared towards preservation of the estate. In exercising discretion on whether to order preservation or not the court may be guided by *Giella vs. Cassman Brown* but is not bound it.

10. The applicant urges his case on the basis that the land in question, although registered in the name of the deceased, was actually his ancestral land. He says that his father was entitled to it but somehow the deceased herein got to be registered as proprietor thereof, and that he, therefore, considers the proprietorship of the deceased to be in trust for him or for the estate of his father. The issue of the applicant asserting a liability in the body of the application is to me neither here nor there as he has not articulated on the alleged liability in his affidavits in support of the application. It is not in dispute that Idakho/Shiseso/1174 is registered in the name of the deceased herein. A certificate of official search on record indicates that the registration happened on 13th November 1981. The property was registered under the Registered Land Act, Cap 300, Laws of Kenya, which has since been repealed. Under that law the registration conferred the proprietor with all the rights of ownership which were spelt out in that statute. The said statute also spelt out the processes for challenging any registration undertaken under the statute. The provisions in the Registered Land Act have been carried over into the new legislation, the Land Registration Act, Act No. 3 of 2012.

11. The applicant claims ancestral rights over the property. He has not given details in his affidavit as to when those ancestral rights accrued. He says it was his father who should have been registered as proprietor instead of the deceased, yet he does not explain the circumstances under which the deceased came to be so registered instead of his father. I do not wish to dismiss offhand the applicant's claims, given that the certificate of official search on record in respect of Idakho/Shiseso/1174 shows that Cyprian Abira Makaka, who the applicant has deposed to be his father, had lodged a caution in the register on 5th May 1989 claiming licencee/beneficial interest. I started the ruling by tracing the history of this cause, and I noted that it was the applicant who initiated it by way of citation to urge the respondent to obtain representation, and grant was made to him after she apparently ignored the citation. It would appear to me that the applicant could have a claim of one kind or other to the property.

12. What perturbs me, however, is that the deceased herein was registered in 1981 as proprietor of the subject property, and a caution was lodged against the title in 1989. I wonder why no steps were taken shortly after the registration in 1981 to challenge it or after 1989 as a follow-up to the registration of the caution. The father of the applicant lodged a caution and then went to sleep. Yet, the Registered Land Act has elaborated on how registration of a title is to be challenged through the office of registrar of land. Even if the applicant or his father did not wish to follow that process, they could still have gone straight to court. The applicant has not placed anything on record to show that he or his father took any steps to challenge the registration of the deceased as proprietor of Idakho/Shiseso/1174. Like the respondent, I am asking why the applicant, and his father before him, should have waited from 1981 only to raise these issues upon the death of the deceased.

13. The matters that the applicant is now raising touch on the ownership of Idakho/Shiseso/1174, as between his father and the deceased. I have already stated that these matters ought to have been placed before the relevant land registrar shortly after the registration of the deceased as proprietor in 1981 or after the lodge of the caution in 1989. I have already noted that these are matters that ought to have been placed before a court of law for determination of ownership and for an audit of the registration process. I agree with the respondent that this probate court would have no jurisdiction to determine the question of ownership of Idakho/Shiseso/1174, if that is what the applicant is pursuing. The Constitution has vested jurisdiction on the Environment and Land Court on matters relating to that. That is where that issue ought to be thrashed out.

14. The applicant accuses the administrator of having delayed in applying for confirmation as that is the forum where he, the applicant, would have had opportunity to ventilate his case through protest proceedings. I would agree to an extent. The respondent was appointed administrator on 5th October 2015, when her application for revocation of grant was allowed, and she was issued with a grant on 25th October 2016. It is nearly two years since then and she has not moved the court to have her grant confirmed. Under section 71 of the Law of Succession Act, she should have sought confirmation of her grant six months after it was made to her. She is way out of time, and she has

given no explanations at all therefor. I agree that if she had done so when the six months elapsed in April or May 2017 the parties would perhaps not found themselves where they are today. That notwithstanding, even if the respondent were to mount an application for confirmation of her grant, to which the applicant files a protest, that would still not grant this court the jurisdiction to determine ownership of Idakho/Shiseso/1174 as between the estate and the applicant, for the reasons that I have given above.

15. As it is the said property is in the name of the deceased herein, who is the father of the person whose remains are sought to be interred there. The registration occurred in 1981. No challenge was mounted to it then, nor after 1989 when a caution was lodged against the title, until the applicant initiated this cause in 2004. The filing of this probate matter does not erase the failures that I have mentioned above. Even if the applicant were to file a suit at the Environment and Land Court and that court found in his favour, he would still be able to recover the land by having the family of the deceased evicted. The graves of his relatives can also be opened so that the family can remove the remains of their loved ones for reburial elsewhere at their own expense. In any event, the fact of the interment of the remains of Maurice Otunga Imbova on Idakho/Shiseso/1174 at this time would not give the family of the deceased a superior claim over the land over that of the applicant and his family. Evidence of who is buried on disputed land is only relevant for determining claims on land held under customary law tenure, at this point the land in dispute is registered land.

16. On the whole, I shall make the following orders in disposal of the application dated 29th June 2018 -

(a) That I am not persuaded that the applicant has made out a case for the court to order that the remains of Maurice Otunga Imbova ought not be interred on Idakho/Shiseso/1174 and I shall therefore dismiss, as I hereby do, the application dated 29th June 2018-

(b) That the family of Maurice Otunga Imbova is at liberty to inter his mortal remains on Idakho/Shiseso/1174;

(c) That in addition to the orders that I made on 5th July 2018, the applicant shall bear the mortuary charges that shall have been incurred for the custody and preservation of the body of Maurice Otunga Imbova upto the day that he shall be released to the respondent, or her family, for burial;

(d) That the respondent shall have the costs of this application;

(e) That should the applicant be dissatisfied with the orders that I have made herein there shall be at liberty to him to challenge the same on appeal at the Court of Appeal within twenty-eight (28) days of date hereof;

(f) That the respondent is given sixty (60) days from date hereof to apply for confirmation of her grant; and

(g) That the matter shall be mentioned after expiration of sixty (60) days to confirm the filing of the confirmation application.

DATED, SIGNED and DELIVERED at KAKAMEGA this 10th DAY OF July,2018

W. MUSYOKA

JUDGE