



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 231 OF 2011

CORAM: D.S. MAJANJA J.

IN THE MATTER OF THE ESTATE OF ATIKA MISIA (DECEASED)

AND IN THE MATTER OF APPLICATION

BETWEEN

WILSON MISIA ATIKA.....PETITIONER/APPLICANT

AND

SAMWEL BONUKE through POWER OF

ATTORNEY AILEEN BONUKE.....PROTESTOR/RESPONDENT

RULING

1. This matter relates to the estate Atika Misia (deceased) of Nyanguru within Kisii County who died on 4th October 1996. His son Wilson Misia Atika (“Wilson”) applied for grant of letters of administration intestate. The grant was issued to him on 23rd April 2012 and confirmed on 15th April 2016. The deceased’s only property NYARIBARI CHACHE/KEUMBU/1550 (“Plot 1550”) was distributed among his surviving sons and the Matangamano Seventh Day Adventist Church.

2. The applicant moved the court by a summons for revocation dated 29th July 2016 under **section 76** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** seeking to revoke the grant of letters of administration issued to the petitioner and confirmed by revocation. The thrust of his contention was that he purchased part of Plot 1550 from the deceased in 1966 and that he ought to have been included in the list of beneficiaries as a known purchaser. The petitioner opposed the application. He denied that the objector purchased the part of the plot as alleged. He contended that there was no proof that in fact the land was sold by the deceased and even if it was, Land Control Board Consent was given for the transaction and that the claim for the land was time barred.

3. Okwany J., heard the objection and by a ruling dated 14th February 2017, found that the objector had established his claim as a purchaser and that the proceedings to obtain the grant were defective by virtue of the fact that the petitioner concealed the interest of the purchaser of the suit land from the court which interest was a material issue to the estate. The court proceeded to revoke the grant, appointed the petitioner and objector as administrators and directed that, *“the new administrators are at liberty to apply for confirmation of the grant in which case, the objector’s interest in the suit land will be factored in the distribution of the estate.”*

4. The applicant then moved the court by a summons for confirmation of grant dated 8th June 2017 seeking to confirm the grant issued to the administrators. In addition to the beneficiaries, he proposed that the purchaser take 0.94Ha as per the agreement entered between himself and the beneficiaries and the balance of the property be distributed to the other beneficiaries. Naturally the petitioner opposed the distribution raising the issue that the deceased never sold the part of the property to the applicant as alleged and that he was a mere lessee. It was common ground that Plot 1550 was originally part of a larger property Plot 699 before the property was subdivided in two Plots; 1550 and 1551 when the deceased sold Plot 1551 to Henry Bikeri Onchari. The court directed the matter be heard by oral testimony.

5. The deceased’s sons testified on behalf of the petitioner. Wilson (PW 1), James Nyariki Atika (PW 2) and Benson Nyamari Atike (PW 3) all testified that the deceased did not sell any land to Bonuke. They were of the view that the land was leased to him. They also testified that Bonuke had planted tea bushes and trees on the land. They all prayed that the land be divided among the deceased’s family. Wilson also recalled that the deceased did not know how to read or write. He pointed out that after the deceased’s death, the issue of the land was not discussed and no one raised any complaint.

6. Irene Bonuke (DW 1) testified that Samuel Bonuke (“Bonuke”) was her father and that he had given her a power of attorney to prosecute

the case as he had left to go to the United States. She stated that Bonuke bought part of Plot 966 through a sale agreement dated 10th April 1966. She told the court that Bonuke had occupied and utilized part of the land for over 50 years by planting trees, tea and food crops. Before he left for the US, he conducted a search on the property, applied for consent to transfer vide an application dated 28th October 1993 which was approved on 3rd December 2013 by the Keumbu Division Office. DW 1 also produced a mutation form dated 26th January 1994 showing the proposed subdivision of Plot 1550.

7. Bonuke's brother, Charles Ndega Buko (DW 2), testified that he was a witness when the property was purchased through sale agreement dated 10th April 1966. He also stated the deceased's son, Wilson Atika, and Bonuke's son, Gilbert Machuka (DW 3), signed the agreement. DW 3 confirmed that he witnessed the agreement and that his father was entitled to the part of the parcel as a purchaser and that the transfer process had commenced though it was not completed. In cross-examination, DW 3 stated that he signed the agreement when he was aged 9 years and in Class 3 at the time. David Monda Nyabuti (DW 4) testified that he was present when the land was being bought and that the portion that had been sold to Bonuke was clearly known and identifiable.

8. The final witness for the protestor was Christopher Mburu Kamau (DW 5), the Kisii County Surveyor. He testified that the deceased was the registered owner of Plot 1550 in 1993 and that the land was further divided in 1994 into Plots 1572 and 1573 as per the mutation forms. He also produced an extract of the register which showed that the subdivision had been recorded in the register.

9. The issue in this case is whether Bonuke purchased part of Plot 1550 from the deceased and is therefore entitled to benefit from the deceased's estate. In this respect both parties agree that the deceased entered into an agreement with Bonuke. What is in dispute is the nature of the agreement. The deceased's family insist that the agreement was a lease and the protestor insisting that the agreement was for sale and that steps had been taken to consummate the agreement as evidenced by the Land Control Board Consent given in the matter and the mutation forms signed by the deceased transferring the land.

10. I have looked at the agreement dated 10th April 1966 and it shows that the deceased sold off part of his land to Bonuke in perpetuity for the sum of Kshs. 3,500/-. The agreement was witnessed by elders and it confirmed that the boundaries had been ascertained. The agreement though did not identify the property being sold or ascertain the area sold. **Section 3(3)** of the **Law of Contract Act (Chapter 23 of the Laws of Kenya)** stipulates that no suit shall be brought upon a contract for the disposition of an interest in land unless some memorandum or note thereof is in writing and signed by the party to be charged. In this case, despite the shortcoming, the agreement complies with the minimum formal requirements (See **Wagichiengo v Gerald [1988] KLR 406**).

11. The validity of the transaction is also governed by the **Land Control Act (Chapter 302 of the Laws of Kenya)** ("the **LCA**"). The transaction subject of this case was entered into on 10th April 1966 which means that **LCA** which came into force on 12th December 1967 was not applicable. The **LCA** replaced the **Kenya (Land Control)(Transitional Provisions) Regulation, 1963 (LN 457/1963)** made under the **Kenya Order in Council, 1963** which was in force at the time the deceased sold part of his land to Bonuke.

12. **Part 3** of the **Constitution of Kenya, 1963** contained provisions regarding "Control over transactions in Agricultural Land." The definition of agricultural land included **section 215(1)(a)** that provided:

215 (1) In this Part of this Chapter:

'Agricultural land' means

(a) All lands in a Region that is not within the jurisdiction of any municipality or township or of any trading centre or market established under any law; and

(b)

Section 218(1) provided as follows:

218 (1) No person shall be a party to any of the following transactions, that is to say:

(a) The sale, lease, charge, mortgage, exchange, partition or any other disposal of or dealing with any estate, interest or right in or over agricultural land situated within an area to which this Part of this Chapter for the time being applies in pursuance of section 216 of this Constitution; or

(b) or

(c)

Unless the consent to such transaction of the Divisional Board in whose area of jurisdiction the land in question is situated (or which has jurisdiction by virtue of a law made under S. 221(1)(b) of this Constitution) has been given in accordance with the provisions of this Part of this Chapter; and every land transaction in respect of which such consent has not been given shall be absolutely void for all purposes.

(2) Any agreement to be a party to any land transaction shall be absolutely void for all purposes:

(a) at the expiration of 3 months after the making of the agreement if the application for consent has not been made within that time

to the appropriate Divisional Board; or

(b) ... [emphasis mine]

13. The effect of these provisions was that prior to the enactment of the *LCA*, consent for any transaction dealing with agricultural land was required under **Part 3 Chapter XI** of the *Constitution of Kenya, 1963* and the *Kenya (Land Control) (Transitional Provisions) Regulations, 1963*. An application was required to be made within three months of the making of the agreement with respect to the controlled transaction. If such an application was not made or the relevant Divisional Board refused consent, then that agreement was null and void for all purposes.

14. In this case it is common ground that consent was never sought or obtained in 1966 or within three months of the agreement. In fact, Bonuke sought and obtained the Board Consent in 1993. This consent obtained 27 years after the transaction. It was outside the scope of the *LCA* and consequently null and void. It was also null and void in terms of the *Kenya Constitution, 1963* and the *Kenya (Land Control) (Transitional Provisions) Regulations, 1963*.

15. The protestor also relied on the fact that deceased had surveyed the land and for purposes of subdivision lodged mutation forms which would have divided the Plot 1551 into Plots 1572 and 1573. As the transaction was void under the *LCA* and its predecessor legislation, it follows that the purported subdivision is also null and void and cannot confer on protestor any title.

16. Since the protestor's claim is founded on an agreement of sale that I found is null and void, I dismiss the protest and allow the summons for confirmation dated 22nd August 2017 in terms of paragraph 5 of the supporting affidavit of Wilson Misia Atika sworn on the same date. I make no order as to costs.

DATED and DELIVERED at KISII this 11th day of October 2018.

D. S. MAJANJA

JUDGE

Mr Nyangwencha instructed by J. M. Nyangwencha and Company Advocates for the petitioner.

Mr Okemwa instructed by Okwemwa Elijah and Company Advocates for the protestor.