



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

PETITION NO. 11 OF 2019

IN THE MATTER OF: CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: ARTICLES 10, 19, 20, 21, 23, 40, 50, 60, 165 AND 170

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 40 AND 60 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: RIGHTS AND FUNDAMENTAL FREEDOMS AND PROTECTION OF RIGHTS TO PROPERTY UNDER CHAPTER 4 OF THE CONSTITUTION

AND

IN THE MATTER OF: SECTION 70 OF THE LAW OF SUCCESSION ACT CAP 160, LAWS OF KENYA AND PROBATE AND ADMINISTRATION RULES

AND

IN THE MATTER OF: ARTICLE 170 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE PUBLIC OFFICER ETHICS ACT CAP 183 LAWS OF KENYA

BETWEEN

DAVID KANDIEPETITIONER

= VERSUS =

LAND REGISTRAR KWALE.....1ST RESPONDENT

KADHI'S COURT KWALE.....2ND RESPONDENT

ALI HAMISI CHANDE.....3RD RESPONDENT

JUDGEMENT

1. The Petitioner brought this petition complaining that;

a) The 3rd respondent commenced proceedings in Kwale Kadhi's Court Succession Cause No. 155 of 2018 in which properties known as Title Nos. Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847, and Kwale/Diani/2848 properties belonging to the Petitioner were the only alleged assets of the deceased Mwanajuma Hamisi Chande.

b) The Petitioner was not party to and/or aware of the proceedings in Kwale Kadhi's Court Succession Cause No. 155 of 2018 despite the fact that his properties were subjected to succession when indeed the said properties did not belong to the estate of the deceased.

c) The 2nd respondent in its ruling delivered on 25th May, 2018, it conferred ownership of the petitioner's properties known as Title Nos. Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847 and Kwale/Diani/2848 when there was no proof of ownership of the assets of the late Mwanajuma Hamisi Chande.

d) The 2nd respondent's order made on 25th May, 2018 directed the 1st respondent to issue Title Deeds of properties known as Title Nos. Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847 and Kwale/Diani/2848 properties belonging to the Petitioner to the 3rd respondent which Order the 1st respondent complied with by issuing the Title Deeds in the name of the 3rd respondent.

e) When the Petitioner realised that Grant of Letters administration had been confirmed by the 2nd respondent he moved with speed and filed Summons for Revocation of the Grant which application meant to bring to the attention of the 2nd respondent the irregularities that influenced its decision.

f) Before the Petitioner's application was heard, the 3rd respondent filed a Preliminary Objection dated 4th January, 2018 on the ground that the Petitioner did not profess the Muslim faith to be heard before the Kadhi as per Article 170 of the Constitution of Kenya 2010 and Section 5 of the Kadhi's Courts Act.

g) The 2nd respondent upheld the 3rd respondent's Preliminary Objection on 31st January, 2019 thereby denying the Petitioner his fundamental right to be heard as envisaged under article 50 of the Constitution of Kenya which right takes precedent over other conflicting rights under the Constitution and the Statutes.

h) The 2nd respondent in its ruling did not address the issue that the properties did not form part of the estate of the deceased contrary to Article 10, 19, 20, 21(1) and Section 70 of the Law of Succession Act.

i) The 2nd respondent failed to observe its role of determining whether the properties belonged to the estate of the deceased as per Section 70 of the Law of Succession Act.

j) The deceased Mwanajuma Hamisi Chande passed away on 14th March, 2005 yet the Title Deeds in respect of the properties known as Title Nos. Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847 and Kwale/Diani/2848 were allegedly issued to the deceased in the year 2013 a period of over 8 years since she passed away.

k) The Petitioner is the registered owner of the properties known as Title Nos. Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847 and Kwale/Diani/2848 and the decision of the 2nd respondent deprives the Petitioner his fundamental rights under Articles 40 on the protection of right to property and Article 60(b) on security of land rights and Article 50 of the Constitution of Kenya, 2010.

l) The 2nd respondent's directive to the 1st respondent to have the petitioner's properties known as Title Nos. Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847 and Kwale/Diani/2848 registered in the 3rd respondent's name without proof of ownership and/or any point of good title to ownership other than that of the Petitioner is a clear, blatant and intentional violation of the Constitution of Kenya, 2010 aimed at depriving the petitioner his rights thus unconstitutional.

2. Pursuant to his complaints, he urges the Court to grant him the following prayers;

1) That the Honourable Court do declare that the 2nd respondent failed to observe the rule of law as envisaged under the Constitution and the statutes thereto in making decisions that are meant to deprive the Petitioner's rights.

2) That this Honourable Court do declare that all the decisions of the 2nd respondent in Kwale Kadhi's Court Succession Cause No. 155 of 2018 conferring ownership of the Petitioner's property known as Title Nos. Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847 and Kwale/Diani/2848 on the 3rd respondent were unconstitutional and unlawful.

3) That this Honourable Court do declare that the Petitioner is the owner of all that property known as Title Nos. Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847 and Kwale/Diani/2848.

4) That this Honourable Court do direct the 1st respondent to cancel all title deeds registered in the name of the 3rd respondent agents, assigns, legal representatives or whosoever claiming under him in respect of properties known as Title Nos. Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847 and Kwale/Diani/2848 and re-register the properties in the Petitioner's name.

5) That this Honourable Court do grant general damages to be paid by the 2nd and 3rd respondent for their unconstitutional, illegal, irregular calculations and moves meant to deprive the Petitioner his rights.

6) That this Honourable Court be pleased to grant such orders or further order as it may deem just and expedient.

7) That the costs of the petition be borne by the respondent.

8) Any other or such further relief that this Honourable Court may deem fit and just to grant.

3. The 3rd respondent swore a replying affidavit dated 15th April 2019 challenging the petition. He deposed that;

(i) He petitioned at Kadhi's Court at Kwale as an administrator of the Late Mwanajuma Hamisi and subsequently got registered as the proprietor of all those parcels of land registered as Kwale/Diani S.S./2845, Kwale/Diani S.S./2846, Kwale/Diani S.S./2847 and Kwale/Diani S.S./2848 that were registered in his name (Annexed and Marked as 'AHC 1a, 1b, 1c and 1d are certified copies of the Title Deed in respect of the suit properties).

(ii) The Late Mwanajuma Hamisi was granted the said parcel of Land by the government of Kenya through the settlement scheme (Annexed and marked as 'AHC 2' is a copy of the letter of offer to the deceased dated 2nd February 1978).

(iii) After the demise of the deceased, there were numerous attempts by fraudsters to interfere with the Land Register at Kwale Lands office including the Petitioner herein by working in cahoots with the officials at the lands office in ensuring that the genuine green cards in favour of the deceased are misfiled in its correct position on the binder file and creating an impression that there are no records for the respective properties and latter misleading the Land Registrar that he is the registered owner based on forged Title deed for Kwale/Diani S.S./464 and applying for opening new Green Cards vide gazette notices and having new green cards issued.

(iv) There is nothing that will stop the registration and or issuance of a title or any entry on the land register upon the death of a registered owner if the process had been initiated prior to the death of the registered owner as is the current case.

4. The 3rd respondent further contended that the petitioner was arrested and charged in Kwale Law Courts with 5 counts of forgery as per copy of the charge sheet that he annexed. That the petitioner used a forged title deed to create sub-division Nos. Kwale/Diani SS/2845, 2846, 2847 and 2848. That any subdivision arising from a forged title is null and void. The 3rd respondent also pleads that the failure of the petitioner to sue the Land Registrar in Kwale ELC No. 80 of 2018 is deliberate. That the Kadhi's Court properly exercised its jurisdiction and the law in dismissing the petitioner's application dated 28th December 2018. It is the 3rd respondent's position that the petitioner has no legal claim on any of the parcels of land numbers Diani SS/2845 – 2848. That the petitioner is abusing the court process by filing multiple suits. He urged the court to dismiss the petition for lack of merit and for being an abuse of the Court process.

5. The 1st respondent also filed a replying affidavit sworn by D. J. Safari, who is the Land Registrar on 9th July 2019 stating thus;

"2. That I hereby annex certified copies of the land registers for KWALE/DIANI SETTLEMENT SCHEME/2845, KWALE/DIANI SETTLEMENT SCHEME/2846, KWALE/DIANI SETTLEMENT SCHEME/2847, and KWALE/DIANI SETTLEMENT SCHEME/2848 (Annexed and marked herein as 'DJS 1a, b, c and d' are certified copies of land register for the above-mentioned parcels of land) indicating the history of ownership of the said parcels of land to the current registered owners.

3. That what is stated herein is true to the best of my knowledge information and belief".

6. The 1st Interested Party filed a replying affidavit on 3rd July 2019 through her advocate on record Ms Wangai Nyuthe. Ms. Nyuthe stated that the 1st Interested Party is the registered owner of Kwale/Diani S.S./2848. He deposed that the petition is misplaced and mischievous as it raises issues that can be ventilated in normal proceedings in an ordinary Environment and Land Court where an ordinary suit has been filed i.e. **Mombasa ELC No. 273 of 2018; David Kandie Vs Ali Hamisi Chande, Nasra Sharif Mohamed & Rutine Ltd.** That the suit was transferred to Kwale CMC's Court and registered as Kwale CMCC 80 of 2018 which suit is still pending for determination.

7. The 1st Interested Party deposed that the petitioner should have filed a normal appeal process instead of filing this suit. That the 1st Interested Party is a bonafide purchaser who got registered long before this petition. The 1st Interested Party further stated that he was informed by the 3rd respondent that the suit land Kwale/Diani S.S./464 belonged to her late Sister Mwanajuma Hamisi before her demise. That no genuine title exists in the petitioner's name as the documents annexed in the supplementary affidavit are based on a fake green card as confirmed in a forensic report annexed to this affidavit.

8. The 2nd Interested Party also filed a replying affidavit on 9th July 2019 to oppose the petition. He deposed that he is a bonafide purchaser for value without notice of L.R. No. 2845 from the 3rd respondent. He also deposed that the 3rd respondent informed him that he acquired the suit title by way of inheritance. That the petitioner's title No. Kwale/Diani S.S./464 is forged as was confirmed through investigations carried out by Directorate of Criminal Investigations which culminated in the petitioner being charged with forgery. The 2nd Interested Party deposes that the petitioner is a busy body, intermeddler and interloper who has no colour of right on the suit property.

9. The 2nd Interested Party further deposed that the petitioner is guilty of abusing the court process as he has filed Kwale CMCC No. 80 of 2018 and JR App No. 17 of 2019 where he is seeking similar prayers against the decision by the Kadhi's Court. That the Kadhi's Court could not entertain the petitioner's application dated 28/12/2018 when it was not seized of jurisdiction. That this petition should fail for failure to annex a certificate of title for Kwale/Diani S.S./2845.

10. Parties filed written submissions which I have read. From the pleadings filed, the questions for determination are;

(a) Whether the petition is properly before this court.

(b) Whether or not the suit title Kwale/Diani S.S/464 and the resultant sub-division titles comprised part of the estate of Mwanajuma Hamisi-deceased.

(c) Whether the Kadhi's Court had jurisdiction to entertain the claim before it.

(d) What orders commends to be issued.

11. The 3rd respondent and the two Interested Parties have pleaded that the petitioner is guilty of abuse of court process for filing multiple suits hence the petition should be dismissed. They annexed pleadings in Kwale CMCC No. 80 of 2018 and MSA HC JR Application No. 17 of 2019 annexed by the 2nd Interested Party was in respect to an application dated 1st April 2019 which sought leave to apply for orders of prohibition to prohibit the CM's Court Kwale from taking further proceedings and executing any orders in Kwale CMC Criminal Case No. 206 of 2019 (R Vs David Kandie). The issues raised in this petition cannot thus be determined in the J.R. application No. 17 of 2019.

12. In regard to Kwale CMC ELC No. 80 of 2018, the plaintiff who is the petitioner herein sought orders of permanent injunction against the 3rd respondent and the Interested Parties. Although the prayers made in this petition could have easily been determined in the existing Kwale CMC ELC No. 80 of 2018, the issues cannot now be raised in it because the suit was transferred from the High Court to the magistrate's court and is still pending determination before the Chief Magistrate's Court. The Chief Magistrate Court share concurrent jurisdiction with the Kadhi's court. The CM's Court cannot therefore question the decisions made by the Kadhi's Court. Consequently, the submissions rendered that the petitioner is guilty of filing multiple suits is mischievous and misleading.

13. The second issue is whether the suit title Kwale/Diani S.S/464 and the resultant subdivision numbers comprised the estate of Mwanajuma Hamisi – deceased so as to donate jurisdiction to the Kadhi's Court to vest the properties in the 3rd respondent through succession proceedings in Succession Case No. 155 of 2018. The petitioner annexed a copy of the ruling made in Kadhi's Court Succession No. 155 of 2018. He also annexed a certificate of search (annex DKI) dated 20th November 2013 which shows that he was registered as owner of Kwale/Diani S.S/464 on 10th August 2008 and title issued to him on 12th August 2008.

14. The petitioner further annexed copies of application made to the Msambweni Land Control Board to sub-divide L.R. No. 464 (annex DK2); letter of consent to subdivide and the mutation form registered on 10th December 2013 creating the new numbers Kwale/Diani S.s/2845-2848. Lastly the petitioner annexed copies of searches for the numbers 2845-2848 showing him as the registered owner of these new numbers as at 10th December 2013.

15. The Interested Parties are separately claiming L.R Nos. 2845 and 2848 as purchasers having purchased the same from the 3rd respondent. The 3rd respondent annexed a copy of a letter dated 2nd January 1978 addressed to Mwanajuma Hamisi – deceased which letter he stated allocated the original title no 464 to the deceased. The letter however did not give/mention any plot number. The 3rd Respondent's annexures **AHC 9(b), 9(c) and 9(d)** are certified copies of the register with entry number 1 dated 10th December 2013 having Mwanajuma Hamisi Chande – deceased as the registered owner and title issued to her on the same date. Mwanajuma Hamisi is stated to have died on 14th March 2005 as per the certificate of death produced as annex "**DK10**". The 3rd respondent pleaded that although the titles were registered in the deceased name long after her death, the process had commenced during her lifetime. The 3rd respondent however did not annex any evidence of such process that was ongoing before the date of death of Mwanajuma.

16. The property can only constitute the estate of a deceased person if at the time of death, the same was registered in her name. Under **section 3(1)** of the Law of Succession Act Cap 160, estate of a deceased person is defined as "**the free property of a deceased person.**" In this case, although the 3rd respondent stated that the suit titles were registered in the deceased name at the time he took out the letters of administration; once an application was taken challenging the deceased titles, the jurisdiction of the Kadhi's court was ousted. That question ought to have been determined before they could be vested in the 3rd respondent and to allow him transmit it to other parties.

17. The 3rd respondent in opposing the petition accused the petitioner of forging documents of his title. There was no cross-petition filed by the 3rd respondent to raise the issue of forgery as a question for determination by this court. There has been no determination made either in Civil or Criminal proceedings finding the petitioner as guilty of fraud and forgery. At least there were no documents annexed to these proceedings to include such a finding. This court does not exercise criminal jurisdiction thus I cannot make a finding based on Directorate of Criminal Investigation report where there is a criminal case pending regarding the same. The 3rd respondent and the Interested Parties can apply to move the court for the determination of the question the validity of the titles held by the petitioner.

18. However, as things stand now I am persuaded to find merit in the petition because there is evidence presented by the petitioner to show his interest in the property. Unless the order made by the Kadhi in Kwale Succession Cause No. 155 of 2018 is set aside, the petitioner's right to defend his right to property in Kwale ELC No. 80 of 2018 or any other suit will be defeated. For this reason, I do enter judgment in his favour in the following terms;

1. That the Honourable Court do hereby declare that the 2nd respondent failed to observe the rule of law as envisaged under the Constitution and the statues thereto in making decisions that are meant to deprive the Petitioner's rights.

2. That this Honourable Court do hereby declare that all the decisions of the 2nd respondent in Kwale Kadhi's Court Succession Cause No. 155 of 2018 conferring ownership of the Petitioner's property known as Title Nos. Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847 and Kwale/Diani/2848 on the 3rd respondent were unconstitutional and unlawful.

3. That this Honourable Court do hereby direct the 1st respondent to cancel all title deeds registered in the name of the 3rd respondent agents, assigns, legal representatives or whosoever claiming under him in respect of properties known as Title Nos. Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847 and Kwale/Diani/2848 and re-register the properties in the Petitioners' name.

4. No damages was proved so none is awarded.

5. Costs of the petition is awarded to the Petitioner.

Dated, signed and delivered at BUSIA this 12th day of May, 2020.

A. OMOLLO

JUDGE

Judgment delivered electronically through mail this 12th Day of May, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE