REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 3142 OF 2003

(CONSOLIDATED WITH HCSC NO . 776 OF 1985, HCCC NO. 614 OF 2006 (OS) AND ELC 121 OF 2009)

IN THE MATTER OF THE ESTATE OF ALICE MUMBUA MUTUA (DECEASED)

RULING

1. This matter carries several other matters within it. It originated with HCSC No. 776 of 1985, relating to the estate of the patriarch, the instant succession cause is in respect of the estate of his widow. The other suits were provoked by sales of assets of the two estates to third parties.

2. I am called upon to determine two (2) applications, dated 8th October 2014 and 4th September 2015. There are directions on record, made on 3rd July 2015, that the two applications be disposed of simultaneously. The parties were required to file written submissions thereon.

3. The first application in time is that dated 8th October 2014. It is brought at the instance of James Masila Mutua, who describes himself as objector. It seeks two (2) orders. The first order is directed at the persons that he has named in the application as interested parties, the administrator of the estate and the petitioner. I shall refer to them hereafter as the respondents. It seeks that the three groups of respondents be ordered to provide security for costs. The second prayer is directed at the administrator, and it seeks that she be compelled to settle outstanding land rates and rents owing to the Nairobi City Council and the Ministry of Lands.

4. The grounds upon which the first application is premised are set out on the face of the application, while the facts are narrated in the applicant's affidavit sworn on 8th October 2014. The narrative is that the patriarch of the family, Titus Mutua Kilomo, died in 1985. Representation was obtained to his estate by his widows, who included the administrator herein, in HCSC No. 776 of 1985. The grant made in HCSC No. 776 of 1985 was confirmed in the terms that the two administrator widows were to hold the estate in trust for the children and they were to enjoy a life interest thereon. One of the widows, Alice Mumbua Mutua, thereafter died, in 2002, and by then the estate of her late husband had not yet been distributed to the individual survivors for it was still under the trust of the two widows. Representation to her estate was sought by her son, John Mutio Mutua, who is named herein as petitioner, in HCSC No. 3142 of 2003, and a grant was made to him. He listed the undivided assets of the estate of their late father, Titus Mutua Kilomo, as forming part of the estate of his mother, Alice Mumbua Mutua.

5. The facts as stated in the affidavit are not clear, but it would appear that the surviving administrator in HCSC No. 776 of 1985 and that in HCSC No. 3142 of 2003 disposed of some of the assets listed in both causes, to the persons named in the instant application as interested parties. The particular asset in question was LR No. 12251/6 Langata, which the two allegedly sold in 2004. It is contended that the administrator in HCSC No. 776 of 1985 had no authority to dispose of the assets under her charge for,

although her grant had been confirmed, the assets had not been devolved to her absolutely as she only held them in trust for the children and enjoyed only a life interest over them. Regarding the transactions by the administrator in HCSC No. 3142 of 2003, it is contended that he had no authority to sell the landed assets for his grant had not yet been confirmed. It is averred that the grant made to the administrator in HCSC No. 3142 of 2003, the party now referred to as the petitioner, was revoked by the court in 2009. It is contended that the alleged sales could only take place with the leave of the court.

6. It is pleaded further that the two administrators and the interested parties purchasers entered into sale agreements for sale of sub-parcels that were to be carved out of LR No. 12251/6 Langata. It is contended that the intended sub-parcels never received the approval of the Nairobi city authorities. It is contended that although the administrators' advocates alleged to have cleared the rates due to the city authorities, the available communication from the said authorities indicated the contrary, and instead stated that rates were outstanding at Kshs. 22, 279, 835.00. The said interested parties are also alleged to be in possession of the said property, and some are said to be running businesses from the suit property. It is contended that continued occupation of the estate property by the interested parties is denying the estate revenue. The applicant expresses apprehension that the city authorities may dispose of the property to recover the outstanding rates, which event is likely to expose the estate to colossal loss for the value of the property is put at Kshs. 160, 000, 000.00 or thereabout.

7. The applicant has attached copies of several documents to his affidavit. There is a copy of the certificate of confirmation of grant issued in HCSC No. 776 of 1985 on 18th July 1986. Regarding LR No. 12251/6 Langata, it is indicated that both widows each took half share of the said property, and indeed of all the other assets. There is copy of a grant of letters of administration intestate in HCSC No. 3142 of 2003 made on 29th March 2004, appointing John Mutio Mutua as administrator of the subject estate. A copy of the petition in HCSC No. 3142 of 2003 is also attached to demonstrate that LR No. 12251/6 Langata was listed in that cause as a property belonging to the deceased in that cause. There is also an extract of proceedings in HCSC No. 3142 of 2003 conducted on 3rd February 2009, where an application dated 18th September 2006 was allowed by consent. That application dated 18th September 2006 is also attached, it was for revocation of the grant made on 29th March 2004. There is also on record copy of an affidavit sworn in 1989 by the administrator in HCSC No. 776 of 1985 to support an application for disposal of estate assets other than LR No. 12251/6 Langata, and there is also copy of a consent to those proposed sales duly executed by the other children of the deceased in that cause in 1988. There is also copy of an application filed in HCSC No. 776 of 1985 by the administrator in 1987 seeking leave to charge estate property. There are also copies of sale agreements with respect to the sub-parcels between the administrator and petitioner herein on one part and Simon Kang'ethe Kimani, Fred Okinyi Makamara, Nyangiry Bwonditi, Rose Khamala Bwonditi and Mary Kerubo Morara. There is copy of a letter from Nairobi City Council dated 12th January 2005 indicating the council had not approved all the subdivisions of LR No. 12251/6 Langata as proposed by the administrators. There are also internal memos of the council dated 23rd November 2006 and 26th February 2009 stating that there was a court order on LR No. 12251/6 Langata and that the proposed subdivisions need to be cancelled and the property reverted to the original LR No. 12251/6 Langata. A copy of a document indicating the rates owed to the council as at 26th July 2004 is exhibited where the outstanding rates are put at Kshs. 12,155,320.00. A letter from the council dated 3rd November 2004, puts the rates outstanding at Kshs. 1, 284, 697.00 as at November 2004. The letter denounces a receipt of Ks. 1, 251, 532.00 of 27th July 2004 being payment of rates and dismisses the same as forged. A letter from the Criminal Investigations Department is also on record, it confirms that the purported payment of rates and the sales of subdivisions from LR No. 12251/6 Langata as frauds. There is also copy of a valuation report which puts the value of LR No. 12251/6 Langata at Kshs. 160, 000, 000.00 as at 10th September 2010.

8. The surviving widow of the deceased and the administrator of the estate the subject of HCSC No. 776 of 1985 swore an affidavit on 12th November in reply to the application. She accuses the applicant of being responsible for the delay in the finalization of the matter, by filing numerous applications. She states that she sees no reason for being required to provide security for costs. She concedes that the rates are payable, but asserts that the estate was not liquid. She explains that after the subdivisions were

cancelled she has been trying to recover the property from the alleged buyer. She urges that the confirmation application which was revoked should be heard afresh.

9. There is a response to the application dated 8th October 2014 by Simon Kang'ethe Kimani. His affidavit was sworn on 26th October 2015. He states that it is in order for administrators to pay council rates. He contests the prayer for security for costs. He states that he used to pay the rates until he was ordered to stop paying by the city council and the lands ministry. He has attached to his affidavit copies of purported receipts issued to him by the city authorities upon alleged payment of rates.

10. The application dated 4th September 2015 is at the instance of Simon Kang'ethe Kimani. He seeks transfer of ELC No. 121 of 2009 to the Environment and Land Court (ELC). In his supporting affidavit, sworn on 4th September 2015. He avers to have entered into a sale agreement on 9th June 2004 with the administrator and the petitioner over LR No. 12251/31 (Original Number 12251/6/16) Nairobi. he does not explain the circumstances which led up to the filing of the suit in ELC No. 121 of 2009, but he avers to receiving a letter from applicant in the application dated 8th October 2014, dated 27th July 2015, threatening to interfere with his rights with relation to the property. He pleads that the court file in ELC No. 121 of 2009 is currently with the Family Division, which he pleads has no jurisdiction over the matter in view of Article 165(5) of the Constitution. He avers that the jurisdiction over matters pertaining to land is vested in the Environment and Land Court (ELC), and the High Court has no jurisdiction whatsoever. He reinforces his argument by citing Legal Notice No. 5178 of 2014, specifically Direction 5, which states that the courts having files before them pertaining to land ought to surrender them to the ELC.

11. James Masila Mutua is not named as a respondent to the said application, but he is one of the parties in the consolidated cause. He filed a Notice of Preliminary Objection dated 12th October 2015. He states that the consolidation order made on 11th May 2010 was by consent of the parties in all five causes, and the applicant in the application was party to the said consolidation. He further avers that the property the applicant is claiming does not exist owing to the order made on 17th November 2006 which reverted the property to its original title.

12. He followed up the Notice of Preliminary Objection by a replying affidavit sworn on 19th October 2015. He avers that the persons who sold the property to the applicant had no capacity or authority to do so as one of them held a grant that had not yet been confirmed, while the other only had a trustee's interest over the property and she could not sell it without the consent of the beneficiaries or that of the court. Orders were made in HCCC No. 614 of 2006 (OS) reverting the subdivisions to LR No. 12251/6 Langata and on 17th November 2006 restraining the buyers from interfering with the said property. He asserts that all the suits touching on the subject property were consolidated by consent of the parties. He adds that the applicant entered the subject property illegally as he had unprocedurally obtained an interest from a person who had no power to sell it.

13. It was directed on diverse dates that the two applications be disposed of by way of written submissions. The parties hereto complied with those directions and have filed their written submissions thereon.

14. The applicant in the application dated 8th October 2014 submits that the parties responsible for the administration of the estate had allowed estate property to accrue huge amounts of land rates and land rent, so huge that the property is exposed to foreclosure. It is in this respect that he feels that respondents ought to be required to provide security for costs. On the interested parties, it is his submission that the said parties are in possession of estate property through transactions that were not valid for they were entered into by persons who had no authority or capacity to sell the subject property. They are therefore deriving benefit from property that they are not entitled to, consequently they ought to provide security for costs. He also submits that the persons responsible for the administration of the estate and who had sold the property unlawfully or improperly and those who are benefitting from the unlawful sale ought to pay the rates and rents that have accrued on the subject property. He has cited a number of authorities that are attached to his submissions.

15. The person named as the petitioner in the application dated 8th October 2014, John Mutio Mutua, concedes that under section 83(c) of the Law of Succession Act, Cap 160, Laws of Kenya, administrators are under a duty to pay all the estate's out-goings. He states that the rates are payable, but he asserts that the estate is not liquid. He blames the applicant for the numerous litigation that he has brought in the matter which has had the effect of affecting the liquidity of the estate. On security for costs, his position is a little ambiguous. On one hand he appears to say that the same cannot be ordered against an administrator, interested parties and objectors; but on the other he appears to be saying that the court can in this case order security for costs, but in this case the application has been brought in bad faith and the right procedures have not been followed. He cites *Beatrice Oloo Omondi vs. Regina Ngundo* and three others (2014) eKLR, *Moses Wachira vs. Nils Bruel and two others* (2015) eKLR and *Peter Onditi Ogugu vs. Allpack Industries Limited and another* (2013) eKLR to buttress his submissions.

16. Simon Kang'ethe Kimani, who is named as interested party, submits on the payment of rates by the administrator. He says that is a statutory duty and the administrator is bound to make the payment. On security for costs, he says that he should not be obliged to provide security for costs for he had been paying rates for the portion that he had allegedly bought, but he stopped after the applicant got the city authorities and the lands office to stop receiving payments from him. He pleads estoppel arguing that the applicant was in fact blowing hot and cold at the same time. He submits that the first prayer of the application ought to be dismissed, but the second one allowed. He relies on the decision of *Serah Njeri Mwobi vs. John Kimani Njoroge* (2013) eKLR.

17. The applicant's in the application dated 4th September 2015 submits that Article 165(5) of the Constitution has divested the High Court of jurisdiction to deal with matters relating to the environment and use and occupation of and title to land. That jurisdiction has been vested in the court contemplated by Article 165(2) of the Constitution, that court is the ELC. It is further submitted that the issues raised by the applicant in his suit in ELC No. 121 of 2009 relate to occupation of and title to land, which then brings the suit within the ambit of Article 162(2) of the Constitution, and therefore removing the matter from adjudication by the Family Division of the High Court. Several decisions are cited which deal with jurisdiction, and they include *Owners of the Motor Vessel Lillian S vs. Caltex Oil* (1989) KLR 1, *Prof Mugenda vs. Kenyatta University and others* Civil Appeal No. 6 of 2012 and *Kenya Power & Lighting Company Limited vs. Njumbi Residents Association and another* (2015) eKLR. The applicant submits that although the consolidation of the suit was by consent of the parties, the consent order can still be revisited. He cites two grounds for revisiting the consent. One, he says that the new Constitution has since made it unconstitutional for the High Court to determine a matter touching on occupation of and title to land. Two, he submits that the consolidation order was defective as not all parties in the matters were party to it, citing the decision in *Hussein Munyendo Nanjira vs. Peter Nambiro Muvatsi* (2007) eKLR, where it was held that for a consent to bind it must be in writing and duly signed by all the parties or their counsel. He proposes that the court ought to comply with the directions in Legal Notice No. 5178 of 2014 and transfer the matter to the ELC.

18. The respondent, John Mutio Mutua and Florence Ndinda Mutio, submit that the application is frivolous to the extent that the applicant was party to the consent that culminated in the consolidation of the suits, arguing that consent orders cannot be that easily set aside. It is argued that the suit sought to be transferred was no longer in existence as it lost its individual identity after the consolidation. They assert that the sale transactions in question were no longer valid after the subdivisions were cancelled by the court. to buttress their case the respondents have cited *Priority Development Company Limited vs. Hacienda Development Holdings and another* (2014) eKLR and *Ndirangu vs. Commercial Bank of Africa* (2002) 2 KLR 603. .

19. James Masila Mutua, on his part, argues that the applicant was party to the consent that was recorded in court for the consolidation of the suits, and that he could not back out of it unless he proves fraud or collusion or contrariness to court policy. He asserts that the sale agreements that brought the applicant into the picture were void. To support these contentions James Masila Mutua has relied on *RB and RGO vs. HSB and ASB* (2014) eKLR, *In Re Matter of Waruru Kairu (Decesaed)* (2014) eKLR and *John Nakhabi Okelo vs. Obura Nelson* (2013) eKLR.

20. Under normal circumstances, I ought to determine the two applications sequentially, in the sense of the first in the first out. However, I do note that the outcome of the second application might have a profound effect on the first application. Consequently, I shall first consider the second application.

21. The applicant in the application dated 4th September 2009 would like the court to transfer ELC No. 121 of 2009 back to the Environment and Land Court. He argues that the High Court no longer has jurisdiction to deal with the subject matter of the suit. He cites the constitutional provisions that establish and confer jurisdiction on the High Court and those relating to the establishment and jurisdiction of the ELC. It is contended by the other parties that the ELC case was consolidated with the other matters by the consent of the parties and therefore the applicant cannot opt out of that consent unless proper basis is laid.

22. Article 165 of the Constitution of Kenya 2010 establishes the High Court. Its jurisdiction is very wide. However, Sub-article (5) thereof categorically states the limitations to that jurisdictions. It provides –

> *'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).'*

23. Article 162 provides for the system of courts in Kenya. Article 162(2) authorizes Parliament to establish courts that are to occupy the same plain with the High Court and whose jurisdiction is to hear and determine disputes relating to employment and labour relations, and environment and the use and occupation of and title to land. Those courts were established by Parliament, for the purpose of land disputes relating to use and occupation thereof and title thereto was established ELC.

24. Read together, Article 162(2) and Article 165(5) of the Constitution 2010 would mean that the High Court has no jurisdiction whatsoever over matters that fall within the jurisdiction of the courts set up under Article 162(2) of the Constitution. In other words, the courts established under Article 162(2) have exclusive jurisdiction over the matters for which those courts have been established.

25. I have not had a chance to peruse through the file in ELC No. 121 of 2009, as the court file in respect of that matter was never put together with this file despite the consolidation order, but what I can gauge from the papers placed before me is that it relates to a dispute between a buyer and a seller of land. It hinges on whether the buyer should have possession or occupation thereof. It is about title, for the buyer is no doubt asserting entitlement to the property having exchanged money with the sellers over the same. That would squarely place the matter within Article 162(2) of the Constitution. In those circumstances, it would mean then that the High Court has no jurisdiction over the matter by virtue of Article 165(5) of the Constitution.

26. It may be argued that the subject land is estate property and by dint of that fact the probate court would have jurisdiction thereon. The position is not as simple. The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

27. Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who a neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

> '*Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under … the Civil Procedure Rules …*'

29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio* so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.

30. Having said that, I do note that the consent that consolidated these suits was recorded on 11th May 2010, that was before the Constitution of Kenya 2010 was promulgated on 27th August 2010. As at 11th May 2010 the High Court had jurisdiction to hear land disputes relating to use and occupation thereof and title thereto, one could properly argue that a land suit relevant to a pending succession dispute could be heard simultaneously by the same court. The promulgation of the Constitution of Kenya 2010 changed the dynamics. Article 165(5) took away the jurisdiction of the High Court with respect to determination of land disputes concerning land use, occupation and title. Clearly, therefore the probate court has no jurisdiction over the suit in ELC No. 121 of 2009.

31. It has been argued that the order of 11th May 2010 was by consent, and that it bound the parties in much the same way as a contract does, and that it could only be vitiated or varied on the grounds of fraud or misrepresentation. That is a correct statement of the law as it is on consents recorded in court. Several authorities were cited on this. I will latch on *Brooke Liebig (T) Limited vs. Mallya* (1975) EA 266 and *Hirani vs. Kassam* (1952) 19 EACA 131, where the courts cited with approval a passage from *Seton on Judgments and Orders*, 7th Edition, Vol. 1 p. 124, which says -

> *'Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them … and cannot be varied, or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court …or if consent was given without sufficient material facts, or misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.'*

32. The respondents to the application advance the view that once a consent order is recorded it cannot be interfered with, it is immutable, unless there is fraud or misapprehension. However, it is clear that it can be altered in general for a reason which would enable the court to set aside an agreement. The law on jurisdiction of the High Court over land matters changed after the consent was entered into. That would suffice to discharge the order as it relates to ELC No. 121 of 2009.

33. The second application invites me to make orders commanding the administrator to pay rates for the subject property and for security for costs.

34. I will consider first the matter of payment of land rates to the city authorities and land rents to the lands ministry. The payment of the rates and land rent is statutory. They have to be paid. This is one thing

that all the parties are agreed upon. It is also not disputed that the administrator is under the statutory duty as stated in section 82(c) of the Law of Succession Act. This is an expense in the administration of the estate. It must be incurred and its payment is one of the reasons why appointment of administrators is critical. It is what administration is all about.

35. The administrator and the former administrator all concede that they incurred that duty when they were appointed as such. However, they plead that the estate is illiquid, and on that account urge the court not to compel them to settle the rates and the rents. They blame the applicant for the illiquidity of the estate. The position taken by the administrators, if I may use that term loosely, is self-defeating. The administrators are admitting that they have failed in their duties. They concede that they are bound to pay land rents and rates on estate property and admit that they have not discharged that duty on the grounds that the estate is not liquid. They are not making any proposes on how they intend to settle the outstanding rates and rents. The applicant puts the figure of the outstanding land rates and land rents at Kshs. 22,000,000.00 or thereabout. That has not been contested by the administrators. The attitude of the administrators appears to me to be that as there is no money to settle the rates and rents, they will sit around and do nothing. Such attitude exposes the estate to loss as the property may be disposed of by the city authorities to recover the outstanding rates.

36. The administrators blame the applicant and they appear to say that they are not going to do anything to right the position. Whether the applicant has done some thing or things to subvert the administration process or not, is in my view, neither here nor there. It does not in any way absolve the administrators of their duty to do the right thing, for either way they will be called to account should the property be disposed of to settle the said debts. Whatever challenges come their way, they must find a way to surmount them. They cannot afford to throw their hands in the air and give up. If the task becomes too onerous for them, then they have no option but to give up their offices as administrators.

37. The quest to have the respondents collectively compelled to provide security in relation to the property is founded on similar grounds. In respect of the administrators, it is argued that they have a statutory duty to settle the rates and rents, and that they have allowed that figure to balloon from Kshs 1,200,000.00 or thereabout in 2004 to Kshs 22,800,000.00 or thereabout to date, by their inaction. They should provide security for costs to secure that amount of debt or to secure future payments. In respect of the interested parties, it is argued that they came into possession of the subject property through sales of land that have be called to question, and in fact cancelled, nevertheless they remain in possession of the subject property. It is averred that they derive benefit from the property at the expense of the estate.

38. The rule in favour of ordering security for costs developed to secure claimants in cases where the ability of the other party to settle the claim, should it be successful, is uncertain, or where the party resides abroad and there could be uncertainty as to the ability of the claimant to recover the judgment amount or costs as may be awarded by the court.

39. I have noted that the respondents have not responded to this component of the application after their pleading they ought not be required to furnish security for costs. They have not stated whether they have the capacity to pay should orders be made against them. Such averments are expected from them given that they are in occupation of premises yet there are orders in place which have nullified the sales of the said property to them. I believe that there is a case for grant of the orders sought.

40. In the circumstances the orders that I feel compelled to make are as follows -

(a) That the administrator in HCSC No. 776 of 1985 is hereby ordered to settle all the outstanding land rents and land rates in respect of LR No. 12251/6 Langata within the next sixty (60) days of the date herein;

(b) That I order security for costs in the sum of Kshs. 12,000,000.00 in favour of the estate, security to be by bond to the satisfaction of the registrar, time for filing bond is twenty-one (21) days from this day;

(c) That the order made herein consolidating ELC No. 121 of 2009 with the other matters herein, and the court file in ELC No. 121 of 2009 shall be returned to the Environment and Land Court for final disposal;

(d) That the Deputy Registrar shall cause the file in HCSC No. 776 of 1985 to be put together with the file herein; and

(d) That there shall be no order as to costs.

41. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 20TH DAY OF JANUARY, 2017.

W. MUSYOKA

JUDGE