



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE AND ADMINISTRATION NO.32 OF 1990

IN THE MATTER OF THE ESTATE OF ALBERT OKUMU OKWARA.....
.....DECEASED

GREVAS OMONDI WANYAMA.....APPLICANT

VERSUS

CALISTO EMURUTU AMUKUA.....RESPONDENT

RULING

(Notice of Motion dated 19th April, 2016)

1. The Notice of Motion dated 19th April, 2016 is brought by Grevas Omondi Wanyama. Calisto Emurutu Amukua is named as the Respondent. In the application, the Applicant seeks a transfer of this succession cause to the Environment and Land Court for hearing and determination.
2. In his affidavit sworn in support of the application, the Applicant avers that this Court lacks jurisdiction to hear and determine the matter. He urges the Court to transfer the matter to the Environment and Land Court which has jurisdiction to hear the same.
3. Although there is evidence on record that the Respondent was served, he did not oppose the application.
4. I have perused this file and note that the Applicant is the son of one Augustino Wanyama Musungu (Augustino) who is now deceased. Augustino had bought one acre being a portion of L.R. No. South Teso/Angoromo/68 belonging to the deceased Okungu Okwara (the deceased) whose estate is the subject of these proceedings.
5. The deceased failed or refused to complete the sale transaction and Augustino filed a suit against him being Busia Senior Resident Magistrate's Court Civil Case No. 98 of 1987. On 25th July, 1989 judgement was entered against the deceased and in favour of Augustino. The pertinent order was that the deceased was to surrender one acre from L.R. No. South Teso/Angoromo/68 and have the same transferred to Augustino. Failure to which the Executive Officer of the Court was to execute the requisite documents in implementation of the decision.
6. The deceased passed away on 8th October, 1989 before the Court order could be implemented.
7. Subsequently, the Respondent who is the son of the deceased moved the Court for letters of administration in respect to the estate of the deceased who was his father. A grant was issued and

confirmed. Augustino joined the proceedings and informed the Court that the estate of the deceased was indebted to him to the extent of the one acre awarded to him through the judgement aforesaid. Orders were made to that effect. I only need to refer to the ruling of my sister F. N. Muchemi, J delivered on 2nd June, 2009 directing the District Land Registrar, Busia to demarcate one acre out of L.R. No. South Teso/Angoromo/68 and have the same registered in favour of Augustino.

8. The Court record shows that the District Surveyor did in fact visit the site and prepared a report dated 17th December, 2010. That report was discussed before my brother Tuiyott, J on 2nd February 2016 and on 24th February, 2016 he indicated that upon perusal of the report it was necessary for the Applicant to move the Court for appropriate orders.

9. For completeness of record it is necessary to point out that Augustino passed away on 19th March, 2014 and on 19th May, 2015 the Applicant was allowed to substitute him.

10. The Applicant now seeks to move this cause to the Environment and Land Court. Article 162(2) of the Constitution provides that:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.”

11. According to clause (3) the jurisdiction and functions of the courts contemplated in clause (2) was to be determined by Parliament.

12. In that regard, Parliament passed the Environment and Land Court Act, 2011 which established the Environment and Land Court and at Section 13(2) gives it jurisdiction as follows:

“13(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.

(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes relating to environment and land, including disputes-

(a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court

(5) The Court shall have supervisory jurisdiction over the subordinate courts, local tribunals, persons or authorities in accordance with Article 165(6) of the Constitution.

(6) For the purposes of subsection (7)(b), the Court may call for the record of any proceedings before any subordinate court, body, authority or local tribunal exercising judicial or quasi-judicial functions, or a decision of any person exercising executive authority referred to in subsection (7)(b), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(f) compensation;

(g) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.”

13. Pre-existing the 2010 Constitution is the Law of Succession Act, Cap.160 whose application is provided at Section 2(1)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 estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

14. My understanding of the law is that the Environment and Land Court deals with disputes and other matters relating to land whereas a Court seized with a succession cause deals with transmission of property, including land, to the dependants and debtors of the estate of a deceased person.

15. The history I have highlighted shows that the estate of the deceased herein was indebted to the estate of Augustino to the tune of one acre. The indebtedness has long been established.

16. What remains is the transmission of one acre to the Applicant. I cannot speculate what my brother Tuiyott, J meant when he told the Applicant he could move the Court for appropriate orders but I doubt that he wanted the Applicant to apply to move this matter to the Environment and Land Court. This Court has jurisdiction to deal with matters governed by the Law of Succession Act, Chapter 160. This application is therefore misplaced.

17. If for any reason, the Applicant believes that the transactions that have taken place in respect to L.R. No. South Teso/Angoromo/68 have taken the matter out of the realm of this Court, then he may need to file a fresh case before the Environment and Land Court. However, it is not for this Court to tell the

Applicant what to do in order to propel his claim forward. What is clear is that his application has no merit. The same is therefore dismissed. As it was not opposed, there will be no order as to costs.

Dated, signed and delivered at Busia this 9th day of March, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT