



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

FAMILY DIVISION

SUCCESSION CAUSE NO. 759 OF 1994

IN THE MATTER OF THE ESTATE OF OSORE DARAJA SULEIMAN DECEASED

BETWEEN

MWANAISHA MOKOYA.....OBJECTOR (DECEASED)

AND

SHABAN MUSUMBA HAJI.....APPLICANT

VERSUS

KASSIM O. DARAJA.....RESPONDENTS/PETITIONERS

AND

JULIUS LIKAMASIA.....INTERESTED PARTY

RULING

The Application

1. The application coming up for determination is the Notice of Motion dated 12.10.2016 seeking orders;-
 - a) THAT the application be certified urgent and its service be dispensed with.
 - b) THAT pending the interparties hearing of this application, the court be pleased to temporarily issue orders canceling the resultant titles out of an illegal subdivision of L.P Kakamega/Lugari/898 and reverting the titles back to its original L.P Kakamega/Lugari/898 and that the Land Registrar to (sic) effect the changes.
 - c) THAT the court be pleased to order cancellation of all titles resultant out of the subdivision of L.P Kakamega/Lugari/898 and reinstating LP Kakamega/Lugari/898 and the Land Registrar is ordered to ensure the cancellation is effected.
 - d) THAT the court do punish and/or imprison the interested party JULIUS LIKAMASIA for a period not less than 45 days for intermeddling with the estate of the deceased and/or such further punishment as the court may deem just for the interest of the estate of the deceased and/or the interested party be ordered not to trespass onto and/or deal in any manner whatsoever and/or

remove any structure on L.P Kakamega/Lugari/898 and/or further restrained from intermeddling with the estate of the deceased.

e) THAT the interested party do bear the costs of this application.

2. The application is premised on the grounds set out on its face and also supported by the applicant's alleged affidavit. I say alleged because upon perusal of the record, I have not seen a copy of the said affidavit.

Submissions

3. Parties agreed to canvass the application by way of written submissions based on affidavits. It is only the applicant, Shaban Musumba Haji, who filed his written submissions through M/S Gichaba Ondieki & Co Advocates. The respondents and the interested party did not file any responses to the application. For the above reasons, counsel for the applicant urged the court to allow the application as prayed and to grant the orders sought. Counsel submitted that since this honourable court dismissed the interested party's claim vide the judgment dated 28.7.2016, the instant application should be allowed and the orders sought granted.

Background

4. This matter has had its turn in court on a number of occasions. But to place the instant application in context, the applicant herein is a grandson to the deceased herein, though it is not very clear from his pleadings whose son he is. The deceased, Suleiman Daraja Osore died on 07.11.1990 at Chekalini sub-location. He was survived by the widow, Mwanaisha Mukoya Daraja and two sons: Kassim Osore Daraja and Abdalla Suleiman Daraja. In 1994, the two sons took out succession proceedings and were issued with the grant on 04.07.1995. The summons for confirmation of grant dated 14.12.1995 was allowed on 31.01.1996. The court distributed the deceased's estate as follows:-

- Kassim Osore Daraja – S/Wanga/Lureko/1207 – ½ share
- Abdallah Suleiman Daraja S/Wanga/Lureko/1207 – ½ share
- Kassim Osore Daraja – S/Wanga/Buchifi/918 – ½ Share
- Abdallah Suleiman Daraja S/Wanga/Buchifi/918 – ½ share
- Kassim Osore Daraja – Kakamega/Lugari/897– ½ Share
- Abdallah Suleiman Daraja Kakamega/Lugari/897– ½ share
- Lugari Muslim Mosque- Kakamega/Lugari/898 – 0.42 acres
- Abdalla Suleiman Daraja- Kakamega/Lugari/898 – 0.4 acres
- Julius Lukamasia – Kakamega/Lugari/ 898 – 3.0 acres
- Mwanaisha Mukoya Daraja – Kakamega/Lugari/898 – 0.1 acres

5. By an application dated 04.06.2003, and being dissatisfied by the mode of distribution, Mwanaisha Mukoya Daraja applied to have the confirmed grant revoked, the ground being that she was not consulted when the deceased's two sons took out the grant. When the parties eventually appeared in court for the hearing of the summons for revocation they agreed to have the grant revoked by consent this was on 10.10.2012.

6. From the 10.10.2012 when the grant revoked until 15.05.2012 when the applicant herein filed an application seeking restraining orders against the respondents/Petitioners to stop them from evicting the applicant from L.P Kakamega/Lugari/898 everything on the deceased's estate was quiet. The applicant's application dated 15.08.2012 was heard and determined by Hon. Mr. Justice Said J. Chitembwe vide his ruling dated 07.02.2013. The last two paragraphs at pages 5 and 6 of Judge Chitembwe's ruling are worth reproducing here:-

“The original objector's application dated 3rd July, 2003 was allowed by consent. The application sought to have the confirmed grant issued on 31/1/1996 revoked and the objector, Mwanaisha Mukoya Daraja be made the Administrator. Ideally, Mwanaisha's claim would have been for a life

interest. Since she is now deceased, Kassim Daraja and Abdalla Daraja would be the ones to apply and have themselves become the administrators. It is not clear what happened to the other properties mentioned in the revoked grant.

Although the interested party could have a valid claim over the deceased's estate, I do find that he used an illegal process to obtain title to part of the estate. The adage that the end justifies the means cannot apply where the means used are illegal. I do find that the application dated 15th August, 2012 is merited and the same is granted in terms of prayers (b) (c) and (d). The respondent, if in occupation, shall continue to occupy part of plot number 898 Lugari. A fresh grant to be issued to the applicant who shall thereafter, take an application to have the grant confirmed. The application for confirmation of the grant to be served upon the respondents, Kassim Daraja and Abdalla Daraja or any of their beneficiaries. Each party to meet his own costs."

7. The above ruling put a burden on the shoulders of the applicant herein, having been given the green light to be issued with the grant of letters of Administration intestate, to make an application to have the grant confirmed. In the said application, the applicant herein had also sought an order for the imprisonment of the interested party herein, Julius Likamasia, for a period not exceeding one year for intermeddling with the estate of the deceased. That prayer was not allowed by Hon. Mr. Justice Chitembwe. That same prayer is part of prayer (d) in the instant application in which the applicant also prays that the interested party be ordered not to trespass onto or in any other manner deal with L.P. Kakamega/Lugari/898.

8. I deliberately set out the last two paragraphs of Hon. Mr. Justice Chitembwe's ruling of 07.02.2013 because they adequately cover the applicant's prayers in the instant application. It is also clear that the applicant has not complied with the orders made by Hon. Chitembwe J on 07.02.2013 and cannot now be seen to be asking the court to grant orders that have either already been granted or refused by this same court. From the ruling of Hon. Mr. Justice Chitembwe J, the interested party was allowed to continue occupying part of L.P Kakamega/Lugari/898 until further orders of this honourable court. The applicant was and is still under a duty to move the court for the confirmation of the grant issued to him on 27.02.2013.

Conclusion.

In light of the above, I find the applicant's instant application to be partly premature and partly frivolous. The same therefore lacks merit and is accordingly dismissed. As there was no response from the respondents, I make no orders as to costs.

It is so ordered

Ruling delivered, dated and signed in open court here at Kakamega this 13th day of July 2017

RUTH N. SITATI

JUDGE

In the presence of

.....Mr. Ondieki (present).....for Applicants

.....Mr. Kiveu (Absent).....for Respondents

.....Polycap.....Court Assistant.