



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.73 OF 2005

**IN THE MATTER OF THE ESTATE OF THE LATE RAPHAEL KWAMA SHITIKU
(DECEASED)**

IGNATIUS KWAMA PETITIONER/RESPONDENT

VERSUS

BERNADETТА SHITUKHU OBJECTOR/APPLICANT

RULING

1. **Bernadetta Shitukhu** (the objector) took out summons under section 76 of the law of Succession Act dated 13th June, 2011 and filed in court on the same day, seeking revocation of Grant of representation intestate made to **Ignatius Kwama**, (the petitioner). The grounds upon which the summons is premised are that the grant was obtained by means of untrue allegations of fact in point of law, and that the grant was made fraudulently by the making of a false statement and concealment from the court of the existence of more beneficiaries to the deceased's estate.

2. The summons is supported by an affidavit by the objector sworn on 13th June, 2011. In this affidavit, the objector deposed that he is a brother to the deceased and that the deceased and objector were the only children of the late **Shituku Shimila**. According to the objector, their father left behind a parcel of land known as **Isukha/Shirere/831** on which the objector says she has always lived and developed it. She laments that the petitioner, excluded her from these proceedings thus failing to disclose to court a fact material to the case and took the entire estate thus denying the objector a share of that estate.

3. The petitioner filed a replying affidavit sworn on 27th November, 2012 filed in court on the same day. The petitioner stated that the parcel of land, the subject of these succession proceedings belongs to his late father **Raphael Kwana Shitukhu** and that his father obtained title to the land during the lifetime of their grandfather hence the objector has no beneficial interest on that land as a beneficiary of the deceased herein. The petitioner therefore deposed that he was not under any obligation to inform the objector that he was taking out succession proceedings in respect of his father's estate when the objector was not a beneficiary of that estate. According to the petitioner, he owed the objector no duty when petitioning for a grant of representation for his late father's estate.

4. Directions were given that summons for revocation of Grant be disposed of by way of oral evidence and the matter proceeded as such. PW1, **Bernadetta Shitukhu** told the court that the deceased was her younger brother. Their father, **Shituku Shimila** had three children **Rosa Indasi**, **Raphael Kwama** and herself. The witness told the court that her father is dead but she could not remember when he died. Their father had a parcel of land but she could also not remember the parcel number. She told the court that she lives on that parcel of land. According to the witness, their father was registered as proprietor on

4th May, 1973 while her brother Raphael was registered on 5th May, 1981 but she did not know how Raphael was registered as proprietor of that parcel of land, yet the land had been left for the two of them. She therefore told the court that she was against her brother taking the whole land because she was not informed about succession. In cross examination, the witness told the court that she occupies about 2 acres of that land.

5. PW2, **William George Isnya** told the court that **Shitukho Shimuha** was his father's cousin and that he had three children, a son and two daughters, **Raphael, Rose** and the objector.. Raphael was the first born, Situkhu left behind a parcel of land which Raphael (the deceased) and Bernadetta, (objector) occupied. According to the witness, the deceased took the land because he was living on it but he could not tell when the deceased was registered as the proprietor of the land. He also told the court that Methodist Church was allowed to construct a church on the land by "**the old man**"

6. PW3, **Atnas Mumasi**, told the court that he knew Shitukhu Shimila, father to the deceased herein and the objector. The witness told the court that the late Situkhu left behind a parcel of land which was being used by the objector who lives on the land. The witness at the same time told the court that Raphael, the deceased herein, got the land long time ago but wanted the petitioner and objector to reach a consensus.

7. PW4, **Rose Shitukhu Shimita**, told the court that the deceased herein was her brother. The witness told the court that their father gave **Parcel Number Isukha/Shirere/831** to her brother **Raphael Kwama**, while her sister, the objector was also given a portion on the same parcel of land. However, their brother Raphael later registered the parcel of land into his name without the objector's knowledge, although the objector lives on the land. According to the witness, their father wanted the objector who is unmarried to live on the land. She wants the land shared between her late brother's family and the objector. In cross examination, the witness told the court that the objector is not a daughter to the deceased. The witness further told the court that she knew her father had transferred the land to the deceased.

8. PW5, **Musa Litali Ingosi**, told the court that the deceased herein was his cousin and that he was given **Land Parcel Number 831** by his late father. According to this witness the objector took a portion of the land and for that matter, the objector is entitled to that portion. In cross examination, the witness told the court that he was not present when the deceased was give land by his father. He also told the court that he did not know when the objector's father died. It was the witness' view that the objector is entitled to a portion of that land.

9. DW1, **Ignatiuse Kwama**, (the petitioner) on the other hand told the court that the deceased is his father while the objector is his aunt. According to the petitioner, the deceased left behind two daughters and himself while their mother is deceased. The deceased left behind **Parcel Number Isukha/Shirere/831** which was registered in his name on 12th September, 1981. Before the deceased died on 1st December, 2002, no one claimed an interest on the parcel of land. The petitioner told the court that since the land belonged to his father, he owed the objector no obligation when he petitioned for a grant of representation. The petitioner admitted that the objector lives on the land. The petitioner told the court that he had no intention of chasing the objector away. According to the petitioner, the objector can use the 0.5 acre land she occupies but should not sell it.

10. In cross examination, the petitioner admitted that the land previously belonged to his grandfather, but was given by his grandfather to the deceased in 1981. He also admitted that when he was born, he found the objector residing on the land, but maintained that the land belonged to his late father and that he has no intention of chasing the objector away. At the close of their respective cases, counsel for the parties filed written submissions which the court has considered.

11. The objector filed summons seeking revocation of Grant on the ground that the petitioner concealed material facts from the court. The objector is sister to the deceased and an aunt to the petitioner. The suit land belonged to their father before it was registered in the deceased's name in 1981. Both the petitioner and objector do not seem to know when the objector's father died. The objector admittedly resides on the land.

12. Counsel for the objector submitted that this fact establishes an element of trust. That is the deceased held the land in trust for himself and the objector. Learned counsel submitted that trust resulted from **possession and occupation** by the objector. According to counsel, this is a customary trust and the deceased was in a fiduciary position when he became registered as proprietor of the land.

13. On behalf of the petitioner, it has been submitted that the grant was not obtained fraudulently or through concealment from court of material fact which would call upon revocation or annulment of the grant of representation.

14. The law allows a court to revoke or annul a grant of representation under **section 76** of the law of Succession act. For the court to exercise that discretion, the objector/applicant who seeks revocation of Grant, must show that the grant was obtained fraudulently through concealment from court material facts; that the grant was obtained through some untrue allegation of a fact essential in point of law to justify the grant; that the person to whom the grant was made has failed to proceed diligently or that the grant has become useless due to some subsequent circumstances. There must be evidence to prove any of the above stated circumstances for the court to take steps and revoke or annul the grant. See **Matheka & another v Matheka** [2005] 455 KLR.

15. The objector's complaint is that the petitioner excluded her from the list of beneficiaries of the deceased's estate. The petitioner on the other hand denies this accusation, stating that he owed the objector no obligation to inform her when he petitioner for grant of representation for his father's estate.

16. The proceedings herein relate to the estate of the late **Raphael Kwama**. The deceased was the petitioner's father. The land the subject of this cause is registered in the deceased's name. It is therefore the estate of the deceased that these proceedings relate. The objector is sister to the deceased. Her claim, as I understand it, and as submitted by her counsel, is that the land the subject of this cause, was her father's land. When the deceased became the registered proprietor, he held it in trust for her being a family land and since she also resides on the land.

17. This cause is about the deceased's estate, and not about anything else. The land that constitutes the estate herein is registered in the deceased name. The objector is not a son or daughter of the deceased. Neither the petitioner nor the objector knows how the land ended up in the deceased's name. The land was registered in the deceased's name on 12th September, 1981 and remained so upto the time of the deceased's demise on 11th December, 2012. It is also a fact that the objector resides on the land.

18. Section 76 of the Act sets out various circumstances under which a grant may be revoked or annulled; that is where proceedings were substantially defective, where the grant was obtained fraudulently by the making of a false statement or concealment from court something material to the case or the grant was obtained by means of an untrue allegation of a fact and where the personal representative has failed to proceed diligently or the grant has become inoperative for some reason.

19. The objector relies on **section 76(b)** that there was fraud and concealment from court of something material to the case. That is failure to disclose her existence as a beneficiary of the estate. As stated above, the objector is not a child of the deceased but a sister. **Section 66** of the Act sets out priority to be followed when applying for a grant of representation. The petitioner is son of the deceased has priority over the objector. Not being a child of the deceased, the petitioner had no obligation to inform the objector that he was applying for a grant of representative of his father's estate.

20. Furthermore, **section 39** sets out how the estate of a deceased should devolve where he left no spouse or child. In this case, the deceased left behind children who rank higher in priority than the objector. I also note that the objector is not claiming dependency over the deceased's estate under **section 29** of the Act. She is not claiming to have been a dependant of the deceased in order to stand a chance to benefit from the deceased's estate on that account. She is completely outside those who have first priority over the deceased's estate.

21. The objector's claim being founded on trust or customary trust coupled with prolonged occupation

and use of land, this, in my view, is not a matter that falls within the jurisdiction of this court. The objector's claim that the land, the subject of this cause, was owned by their father and that she therefore has an interest over it, cannot be entertained by this court at this point in time. Learned counsel for the objector has relied on a decision of this court in *Eliseus Mbura M'thara v Harriet Gambaka & Another* [2012] eKLR, where *Lesiit J.* found that there was a customary trust founded on long occupation and use of the deceased's land by the objector and therefore allowed the objector's claim over the deceased's estate in that cause.

22. It is important to note that *Lesiit J* pronounced herself in March, 2012, before the establishment of The Environment and Land Court, (ELC). **Article 162(2) of The Constitution** establishes courts of equal status to the High Court which are to specifically deal with Employment and Labour relations and **the environment and the use and occupation of, and title to Land.** (emphasis). The Environment and Land court (ELC) was established by The Environment and Land Court Act (No.19 of 2011) and the court has since been duly constituted following appointment of Judges to that court.

23. **Article 165(5)** of the Constitution has limited jurisdiction of the High Court by providing thus:-

“The High Court shall not have jurisdiction in respect of matters –

a) ----

b) falling within the jurisdiction of the courts contented in Article 162(2)”

24. The Constitution has in very clear terms excluded this court's jurisdiction from matters that relate to occupation, use of and title to land. Prior to the establishment of the Environment and Land Court, this court had jurisdiction to hear and determine any issue including the one raised by the objector herein. However, as things stand now, this court has no such latitude and cannot proceed as though **Article 165(5)** did not exist.

25. The court in the case of *Malindi Law Society v The Attorney General & others, Constitutional Petition Number 3 of 2016*, observed that the Constitution prohibits the High Court from exercising jurisdiction on matters of employment and labour relations, and matters of Environment, use occupation and title to land. In the case of *Owners of Motor Vessel Lillian 's' v Caltex (Kenya) Limited* [1989] KLR 1, *Nyarangi, JA*, said of jurisdiction at page 14 thus:-

“By jurisdiction is meant that authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means ... A limitation may be either to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend; or it may partake of both these characteristics ... where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment.”
(emphasis)

26. The Supreme Court of Kenya added its voice to the above words and had the following to say while deciding in the case of *Samuel Kamau Macharia v Kenya commercial Bank Ltd and 2 others* [2012] eKLR –

“Court's jurisdiction flows from either the Constitution or Legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law ... whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality. It goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings ...” (emphasis)

27. From both the constitutional stand point and precedent, a court must exercise the jurisdiction it has over a matter. Where its jurisdiction is excluded, it cannot ignore the exclusion clause and proceed in complete defiance of the law excluding its jurisdiction.

28. This court is a creature of the Constitution and the same Constitution has prohibited it from hearing matters that relate to environment, occupation, use of, and title to land. Since the objector's claim is on prolonged occupation and use of land, the subject of this cause, it is my humble view that this court lacks the necessary jurisdiction to pronounce itself on that issue.

29. For the foregoing reasons, the summons dated 13th June, 2011 is declined and dismissed. Each party shall bear their own costs.

Dated and delivered at Kakamega this 15th day of November, 2016.

E.C. MWITA

JUDGE