



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE No. 1 of 1984

IN THE MATTER OF THE ESTATE OF MICHAEL MAHIGA KHAMAKANGA (DECEASED)

BETWEEN:

PHILIP JOSEPHA..... PETITIONER

and

CYRUS LUVOVWA MUKAMBA.....APPLICANT

and

MALLISON NDEDA ISABAI.....APPLICANT/ INTENDED INTERESTED PARTY

RULING

1. The Court has before it an application brought by Chambers Summons filed on 14th December 2020. The Application is brought under **Rule 63** of the **Probate and Administration Rules, Article 50(1) and 159 of the Constitution of Kenya 2010**. The Application was brought under a certificate of urgency but it is unclear if it was certified urgent. The timing is relevant because the underlying succession matter was to come before the Court on 15th December 2020.

2. The Application seeks the following Orders:

“1. THAT Malinson Ndeda Isabai be enjoined as an interested party to these proceedings

2. THAT the consent order adopted on 16th November 2020 be reviewed

3. THAT the Applicant’s provision be taken into account being the 3.2 acres from KAKAMEGA/CHEKALINI/388.

4. THAT the costs of this application be provided for.”.

3. The Grounds relied upon by the Applicant are:

“1. That the Applicant entered into a sale agreement for 3.2 acres of land from Land parcel no KAKAMEGA/CHEKALINI/388 with the petitioner herein

2. THAT the subject parcel of land forms part of the Estate of the deceased herein.

3. *THAT the amount from the purchase price was used by the petitioner to finance this succession matter.*

4. *THAT the Applicant claims purchaser's interest on the 3.2 acres of land comprised on the land parcel KAKAMEGA/CHEKALINI/388*

5. *THAT it is prudent that all parties having an interest in this matter be included.*

6. *THAT the Applicant will suffer substantial loss if he is not enjoined in these proceedings and in view of his interest in these proceedings.*

7. *THAT it is in the interest of justice that this application be allowed.*

4. In his Supporting Affidavit the Applicant informs the Court that he entered into a sale agreement with the Petitioner to purchase 3.2 acres of the Estate. Exhibit MNI-1 is dated 23rd June 2009 and it records that the Petitioner as Vendor was selling to the Intended interested party **three acres** at an agreed price of KShs.920,000/= only. That so called Vendor acknowledged that he had received KShs.87,000/= only and that a further sum of KShs.50,000/= was payable on or before 31st October 2009. Clause 4 provides, "*THAT the vendor shall ensure a valid transfer is executed from from any encumbrances in favour of the purchaser.*". It was also agreed that the purchaser would process the title for the said piece of land. The Agreement was drafted by the same Advocate who represents the Applicant in this Application. Subsequently, (21st March 2019) the Applicant entered into a purchase agreement for a further 0.2 acres for the sum of Kshs.200,000/=. There is also an agreement for sale of two acres on 18th January 2009 for the sum of KShs.620,000/= only. In each case, the Vendor was said to be selling free of encumbrances.

4. Meanwhile, there was a Petition for the grant of letters of administration of the estate of the Deceased. The succession cause has a long and checkered history. Some salient points identified in the proceedings show that the beneficiaries were not in agreement on several points. The Petitioner had petitioned as the eldest son of the Deceased. He listed the heirs as himself, John Mwashu, Barnabas Keya and Thomas Makumba. John Mwashu and his brothers objected to the grant to Barnabas. As the proceedings were going on John Mwashu sadly passed away and his widow Rodah Kahavitsa Makumba made an application for substitution. In his Summons for confirmation of the grant filed on 24th February 2004, the Petitioner listed the **Children** of the Deceased as John Mwabishi, Barnabas Keya, Roda Kahavitsa Makumba, Philip Mudijire and Hezron Mwashu. Philip Mudijira was to receive 6.033 acres of the estate. John Mwashu Mahiga filed an Affidavit in Protest on 20th June 2006 stating that he was the eldest son of the Late Michael Mahiga Khamakanga. He also said that the Petitioner applied for grant of letters of administration, excluding him and adding two person Peter Musasia and Hezron Mwashu who were not the biological sons of the Deceased. Around May 2009, the Court file went missing. This was when there were allegations that "one PHILIP J.M. LUVAYO was seeking letters of administration. Could that be the same Philip Josephat Mudijire Luvayo in this Application" On 24th November 2010 Hezron Mwashu Mwahiga filed application and the supporting affidavit (dated 24th June 2009) asserts that Philip Josephat Mudijire Luvayo caused the land to be registered in his names. The Affidavit of Peter Musasia Mahiga dated 8th February 2011 and filed on 14th February 2011 deponed that Philip Mudijire and his agents have been sub-dividing the land, wasting and sub dividing and disposing of parts thereby intermeddling with land parcel Kakamega/Chekalini/388.

6. That state of affairs continued until the matter came before the Court as currently constituted. On that day the Application before the Court was the Summons for Confirmation dated 25th November 2019. The Parties entered a consent which took into account the interests of the originally named beneficiaries and those who had been omitted as well as the heirs of those who were deceased. On 16th November 2020, the adoption of the Consent was reserved to allow the Judge reading time. Unfortunately, the file was retained in the Registry and in the meantime the intended interested party filed his application for joinder. According to the Submissions of Counsel for the intended Interested Party (Mallison) he purchased land from Philip for a total of Kshs.900,000/= and has been in occupation since 2009. The thrust of the Application is that Mallison be joined and that the distribution be amended to include the parcels he allegedly purchased.

7. The Application for joinder is opposed by the Beneficiaries, including Philip. They wish to have the grant confirmed in the proportions set out in the Consent. The Replying Affidavit is sworn by Cyrus Luvova Makumba. He asserts that if indeed there was a sale agreement, it was null and void ab initio as at the time the Deceased's estate was not capable of being sold. It is undisputed that the alleged sale agreements were **not** entered into during the lifetime of the Deceased and therefore he is advised that it is not a liability on the Estate of the Deceased.

8. In his Replying Affidavit dated 22nd January 2021, Philip Luvayo depones that there was an agreement whereby Barnabas

Keya Mahiga agreed to sell land to the Applicant with Philip selling two acres and Barnaba selling on with a further “intent to sell 0.2 acres. He says that there was a disagreement along the way and it was agreed the Applicant would be refunded his money. In any event it is also asserted, that any agreement would be null and void and that the Applicant would only be entitled to a refund. Both Affidavits assert that the Succession Court does not have jurisdiction to deal with the issue as it lies within the jurisdiction of the Land and Environment Court.

9. In his “Further Supporting Affidavit” the Applicant states that when he purchased the land, Philip was the registered owner. However, the Certificate of Official Search which is exhibited as MNI-1b demonstrates that there were various restrictions against dealing with the title. In particular, the restriction dated 6th December 2010 refers specifically to ***Succession Cause Number 1 of 1984*** (in other words this File) and Objection Proceedings. A restriction in such form is notice to the world at large. If the Applicant did not see the restriction when he first purported to purchase the property, there is no doubt that he would have seen it when he registered his own restriction dated 13th December 2016.

10. The Applicant does not respond to the allegation that the agreements did not reach their logical conclusion. All he says is that the sale agreements were entered into in good faith.

11. In the circumstances, it cannot be disputed, that at the time the sale agreements were entered into, the purported vendors, whether it was Barnabas or Philip, did not have title. Their action amounted to intermeddling within the meaning of ***Section 82*** of the ***Law of Succession Act*** provides inter alia that: “*Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers— (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative; (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best. Provided that— (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and (ii) no immovable property shall be sold before confirmation of the grant*”; The penalty for intermeddling can sometimes be penal.

12. The Applicant’s case, therefore falls foul of that edict. He does not have good title because the purported Vendors did not have good title to sell and they were fully aware of that. In any event negotiations were aborted. In the circumstances, the maxim “*ex turpi causa*” applies and the Applicant has no locus to be joined as a party to these proceedings.

13. The Application for joinder is dismissed with costs.

14. The Consent dated 16th November 2020 is adopted as an order of this Court.

15. The Court regrets that it was not able to deliver this Ruling when it was first scheduled, that was due to the file being incomplete. Due its age some parts of the file appear to have been separated from the main file and were only discovered some time later. Any inconvenience caused is regretted.

Dated 14th January 2022

Order accordingly,

FARAH S. AMIN

JUDGE

Dated and Signed this the 31st day of January 2022 in Kakamega High Court

JUDGE

Dated, Signed and Delivered in Kakamega High Court on 22nd day of March 2022

In the Presence of:

Court Assistant: Clement Okoit

Applicant:

Petitioner:

First Objector:

Second Objector:

Third Objector:



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