



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Leya Sibilike Amutala (Deceased) (Succession Appeal
E001 of 2022) [2023] KEHC 2960 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2960 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL E001 OF 2022**

PJO OTIENO, J

MARCH 31, 2023

**N THE MATTER OF THE ESTATE OF LEYA SIBILIKE AMUTALA
(DECEASED**

BETWEEN

JEREMIAH OPONDO MUNAYI 1ST APPELLANT

RODAH KHAYAKI 2ND APPELLANT

PHILIS MUKANDA SIBILIKE ALIAS PHILIS NAMAEMBA

SILIKHANI 3RD APPELLANT

AND

GEORGE SITATI SIBILIKE 1ST RESPONDENT

WASIKE ABDALLA JOHN 2ND RESPONDENT

JUDGMENT

1. Following the death of Leah Sibilike Amutala (“Deceased”) on May 7, 2011, Andrew Mukanda Sibilike petitioned for a grant of letters of administration intestate for the administration of the estate of the deceased which comprised of parcel of land known as LR No Kimilili/Sikhendu/1337. According to the petition, the deceased was survived by the following: -Suleiman Kadima Mulama-sonJacob Silikhani Amutala-sonJeremiah Opondo Munayi-sonFatuma Bukoshe Wanyonyi-daughterPhilis Namaemba Silikhani-daughterRodah Khayaki Sibilike-daughter
2. A Grant of Letters of Administration Intestate was consequently issued to Andrew Mukanda Sibilike, herein after called the 1st administrator, on August 24, 2017 and confirmed on October 10, 2018.
3. In the affidavit in support of summons for confirmation of grant, only four survivors of the deceased were listed as Jeremiah Opondo Munayi, Fatuma Bukoshe Wanyonyi, Philis Namaemba Silikhani,



- Rodah Khayaki Sibilike and Andrew Mukanda Sibilike. It is of note that Jacob Shilikhani Amutala and Suleiman Kadima Mulama, persons named in the petition as sons to the deceased were excluded, without any reason being proffered. The deceased's estate was also disclosed to comprise of property known as land parcel No Kimilili/Kimilili/3291 in addition to LR No Kimilili/Sikhendu/1337, the only property disclosed in the petition.
4. The anomalies notwithstanding, the grant was confirmed as proposed by the Administrator and evidently no share was given to the two excluded sons while the Administrator was apportioned the newly introduced property in whole.
 5. Andrew Mukanda Sibilike, the Administrator, then passed on and two people, the Respondents, George Sitati Sibirike and Wasike Abdallah John, who described themselves as brothers to the Administrator, filed an undated Notice of Motion, sought to be substituted for the Administrator. A grant was issued to them dated June 12, 2019 and confirmed on June 11, 2019, by which the Respondents herein were appointed as the personal representatives of the estate of the deceased in substitution to the deceased Administrator.
 6. That decision attracted an application by Summons for Revocation of Grant dated July 3, 2019. The grounds proffered for revocation were that; as at the date of the Administrator's death, the Certificate of Confirmation had been registered, that the proceedings leading to the issuance of the grant was defective in substance for reasons that the consent of the Objectors was never obtained, that there was fraud and concealment of material facts which then portended disinheritance of the Objectors.
 7. It was supported by an Affidavit of Phillis Namaemba Silikhani who swore to have been authorised by the other Objector and to conversant with the facts of the matter. She reiterated that the estate had been fully administered and transmissions registered; that the deceased Administrator later relinquished his interests in the land parcel number Kimilili/Shikhendu/1337 by executing all transfer instruments in her favour and those instruments had been registered and title issued in her favour. She exhibited the transfer and the title issued on June 7, 2019. She added that the family sat and proposed her as the Administrator of the estate by a letter dated February 9, 2017 by the Chief, Kimilili Township location. It was her contention that the administration having been concluded, the Court had become *funtus officio* and bereft of jurisdiction to entertain the application for substitution. She reiterated that the consent of the beneficiaries was never sought nor obtained and that the certificate had redistributed the estate and a parcel of land allotted to the Respondents.
 8. The same deponent filed a Further Affidavit sworn on the October 10, 2019 whose gist was to respond to the Replying Affidavit by the Respondents, to assert that the Respondents are step-siblings and that the land having been transferred to her by the first Administrator was not available for claim by the Respondents in the Succession Cause.
 9. When served with the application for revocation of grant, the 1st Respondent swore a Replying Affidavit on September 6, 2019 in which he confirmed that the amended Grant and Certificate of Confirmation were issued to them in their capacity as step-children to the deceased. The deponent then asserts that even though registered in the name of the deceased, Kimilili /Sikhendu/1337, was acquired by joint efforts of the family including the fact that purchase price was from the proceeds of sale of a property belonging to Julius Sibilike Amutala and that the land was thus held in trust for the family by the first Administrator, Andrew Mukanda Sibilike. In that trust, the deponent asserts that he, his Co-Respondent and the children of the deceased, as wife to Julius Sibilike, were the beneficiaries. He then expressed surprise that prior to his death, the first Administrator had transferred the property to himself then to the Appellant which transfer he termed fraudulent for which reason, the Appellant cannot have a clean title. In conclusion, he asserted that the Appellant was not a child to Julius Sibilike



- Omutala but a daughter to Jacob Silikhani Omutala and thus she has no right to inherit the estate of Julius Sibilike Omutala and therefore it would not be right to have the grant revoked but it is the registration of the Appellant as the proprietor of the title that deserve revocation.
10. It appears from the record that parties filed witness statements and other documents then asked the Court that the matter proceeds by way of viva voce evidence at which the Appellants' side called two witnesses while the Respondents' side called three.
 11. In a reserved Ruling, the trial Court held that the first Administrator died before he could fully administer the estate thus necessitating the application by the Respondents to be substituted. She then found that the Appellant even though accepted as a child of the deceased did not avail evidence how the property was transferred to her and that she had no capacity to deal with the land as she did, that the Certificate of Confirmation had been registered and the Court was thus not functus officio. As a consequence of such findings, the Court found the application for revocation of grant not to meet the threshold and had the same dismissed with costs.
 12. That decision has provoked the instant appeal in which the Appellants faults the trial Court on the following grounds: -
 - a. That the trial magistrate grossly erred in issuing a grant and confirmed grant to the respondents without the consent of the applicants who are heirs of the estate of the deceased.
 - b. That the trial magistrate erred in failing to find that the grant had already been issued and confirmed in favour of the appellants and the court was functus officio.
 - c. That the trial magistrate erred in issuing an amended grant and confirmed grant to the respondents when they had no capacity to substitute the deceased Andrew Sibilike.
 - d. That the trial magistrate erred in finding that the respondent were heirs of the estate of the deceased, therefore entitled to the estate of the deceased.
 - e. That the trial magistrate erred in failing to consider the evidence of the objectors.
 13. Only the Appellants have filed their written Submissions in regard to the appeal as the court prepares this decision in which submissions it is argued that in their application for substitution of the deceased Administrator, the Respondents altered the mode of distribution of the estate of the deceased without the consent of the Appellants. They argue that the Respondents failed to attach any evidence to show their relationship with the deceased Administrator and proof that the deceased Administrator was not survived by a wife, children or other dependants.
 14. The Appellants further contend that upon issuance of the Confirmation of Grant on October 9, 2018, the trial Court became functus officio and the share allocated to Andrew Mukanda Sibilike was not available to be administered in the instant Succession Cause. They claim that the Respondents are children of Julius Sibilike Amutala in whose estate the Respondents got their shares but failed to disclose this position to the Court. They conclude by submitting that their evidence that the Respondents were not children of the deceased was ignored by the trial Court and that the order that the Appellants do pay costs on their dismissed application for revocation was draconian and those orders ought to be set aside.

Issues for determination

15. The Court has perused at the Memorandum of Appeal and the record of the trial Court together with Submissions by the Appellant and it identifies the issues for determination to be; whether the trial court had been rendered functus officio at the time of appointing the Respondents as Administrators of the



estate of the deceased and whether the Respondents were rightfully appointed as the Administrators of the estate of the deceased.

Analysis

Whether the trial Court had been rendered *functus officio* at the time of appointing the Respondents as Administrators of the estate of the deceased

16. The Court becomes *functus officio* when it remains without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.
17. It is now tritely settled that the core duty and mandate of a Probate Court is to determine the net property of the estate, those entitled to inherit and distribution of the estate to those entitled. The Court retains its mandate till the estate is fully transmitted in full but still retains the residual duty, as a Court of law, that when an impropriety is detected as having committed in the process of administration and ultimate distribution, to revisit its order with the purpose of asserting that the law and Court process is not breached and abused.
18. Consequently, the Probate Court is hardly constrained by the strict rules of civil procedure including limitation by time but focuses that inheritance justice prevails. The Court indeed becomes *functus officio* when the estate has been transmitted in full and no genuine dispute persist regarding who among the beneficiaries got his fair share in the estate¹. Put differently, succession matter closes effectively upon completion of the administration and when the distribution and transmission of the estate of the deceased by the personal representative to beneficiaries.
19. Here, the estate comprised of parcels of land known as LR No Kimilili/Sikhendu/1337 and Kimilili/Kimilili/329. Which, according to the grant confirmed on October 10, 2018, was to be distributed as follows: -

Land Parcel No Kimilili/kimilili/3291
Jeremiah Opondo Munayi-0.5Ha
Fatuma Bukoshe Wanyonyi-0.5Ha
Rodah Khayaki Sibilike-0.6Ha
Philis Namaemba Silikhani-0.6Ha
Andrew Mukanda Sibilike-0.28Ha

Land Parcel No Kimilili/Sikhendu/1337
Andrew Mukanda Sibilike-whole
20. Having established that a Probate Court becomes *functus officio* when an Administrator distributes the estate of a deceased in line with the confirmed grant, the question that this court is called upon to determine is whether Andrew Mukanda Sibilike had overseen the transmission of the estate of the deceased to the deceased's beneficiaries as per the Confirmed Grant prior to his demise.
21. A Certificate of Official Search dated 23rd April, 2019 and another dated May 14, 2019 for Land Parcel No Kimilili/Kimilili/3291 and Land Parcel No Kimilili/sikhendu/1337 respectively depict that the properties are registered in the name of Andrew Mukanda Sibilike. That is an indication of partial transmission of the estate, the effect of which is that the trial Court became *functus officio* in relation to the deceased estate in property known as Land Parcel No Kimilili/Sikhendu/1337. The trial Court

¹ Juma Shitseswa Linani (Deceased) [2021] eKLR



thus had the legal right to hear and adjudicate on any applications in relation to the estate of the deceased but only in relation to Land Parcel No Kimilili/Kimilili/3291.

22. At the time of the demise of Andrew Mukanda Sibilike, Land Parcel No Kimilili/Sikhendu/1337 formed part of his estate and any issue regarding the administration of this property could only be addressed in a Succession Cause relating to that estate. In that regard, I find that the trial Court erred in giving directions on the transmission of Land Parcel No Kimilili/Sikhendu/1337 to the effect that it be held jointly by the Respondents when in law, what the trial Court ought to have done was down its tools in relation to the property which had been fully distributed to the deceased Administrator as per the Confirmed Grant.

Whether the Respondents were rightfully appointed as the Administrators of the estate of the deceased

23. Following the death Andrew Mukanda Sibilike as the deceased Administrator of the estate, what the Respondents did was seek an amendment of the grant by substitution of them as Administrators of that deceased. The Court then issued a Grant as well as a Certificate of Confirmation of Grant in favour of the Respondents on June 12, 2019 and confirmed on 11th June, 2019. It is first both anomalous and curious that the Grant was confirmed before issue.
24. The *Law of Succession Act* does not provide nor envisage the substitution of an Administrator where he or she was appointed singly. What is envisaged in Section 81 of the Act is a situation where there are several Administrators. The provision stipulates that :-

“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them...”

25. Where a single administrator dies, the position is that one applies to be appointed on the basis that the earlier Grant has become inoperative on account of the death of the Administrator. The process of substitution of a deceased single Administrator has been addressed by the Courts in a number of decisions all reiterating that the office of an Administrator is a personal office.
26. The Court of Appeal in the case of *Florence Okutu Nandwa & Another v John Atemba Kojwa*, Kisumu Civil Appeal No 306 of 1998 held as follows: -

“A grant of representation is made in personam. It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another. The issue of substitution of an administrator with another person should not arise. Where the holder of a grant dies, the grant made to him becomes useless and inoperative, and the grant exists for the purpose only of being revoked. Such grant is revocable under section 76 of the *Law of Succession Act*. Upon its revocation, a fresh application for grant should be made in the usual way, following procedures laid down in the *Law of Succession Act* and the Probate and Administration (Rules)...”

27. This position had been taken by Khamoni J *in Re Estate of Mwangi Mugwe alias Elieza Ngware (deceased)* [2003] eKLR where he held thus; -

“...the operative word is “substitution”. The *Law of Succession Act* has no provisions talking about substitution of a deceased single administrator...In the circumstances therefore, it is my considered view that the proper provisions of the law to apply is section 76(e) of the *Law of Succession Act* and Rule 44 of the Probate and Administration Rules whereby the Applicant would apply for revocation or annulment of a grant on the ground “that the grant



has become useless and inoperative through subsequent circumstances.” The Applicant would proceed to put a prayer in the same application that a new grant be made to him and could as well add a further prayer, if need be, for confirmation of the new grant. The application, should, of course, be supported by consent from adult beneficiaries in the estate of the first deceased person, the second deceased person being the deceased administrator.”

28. Finally, I wish to associate myself with the holding of Musyoka J *In Re Estate of George Ragui Karanja (Deceased)* [2016] eKLR on the process of substitution of a single deceased Administrator where he observed as follows: -

“The *Law of Succession Act* does not expressly provide for substitution of personal representatives who die in office, particularly in cases where the estate is left without one. The closest provision is section 81 of the Act, which provides for vesting of the powers and duties of personal representatives in the survivor or survivors of a dead personal representative... It would appear to me that once all the holders of a grant die, section 81 of the Act would be of no application. Indeed, the said grant becomes useless and inoperative, and liable to revocation under section 76(e) of the *Law of Succession Act*, to pave way for appointment of new administrators. The appointment of fresh administrators to take the place of the previous ones following their death is subject to the provisions of sections 51 through to section 66 of the Act.”

29. I thus find that the trial Court erred in affirming the substitution of Andrew Mukanda Sibilike with the Respondents, a process is unknown to the law. More critical was the failure to observe the order of priorities after it was clearly shown to Court that the Respondents were not children of the deceased as compared to the Appellant who was.

30. Accordingly, and in conclusion drawn from the reasons set out above, the court makes the following orders: -

- a. The decision of trial Court by which the Grant dated June 12, 2019 appointing the Respondents as Administrators of the estate of the deceased was issued and confirmed on June 11, 2019 is hereby set aside and in its place substituted and order that the said Grant and the related Certificate of Confirmation stands revoked.
- b. The directions and order by the trial Magistrate that costs of the Appellant’s application for revocation of grant dated July 3, 2019 be borne by the Appellants is hereby set aside and substituted with an order that the Respondents having unfairly engaged the Appellants in the administration of their biological mother’s estate acted ignobly and must bear the costs of that application.
- c. The Appellants are hereby directed to move the trial Court appropriately to have the estate comprised in Land Parcel No Kimilili/Kimilili/3291 by having the Grant issued to the deceased revoked and for new Administrator to be appointed while observing the vested title to the beneficiaries adjudged by the Certificate of Confirmation of Grant dated October 10, 2018. That be done within 60 days from the date of this decision.
- d. Having acted in less honourable manner, and having been condemned to pay the costs at trial, and as a sign of disapproval of their conduct, the Respondents shall pay half of the cost of this appeal.
- e. For the avoidance of doubt, if any action has been taken in furtherance of the Ruling subject of this appeal, such be reversed within 21 days from today.

Dated, signed and delivered at Kakamega this 31st day of March, 2023.



Patrick J O Otieno

Judge

In the presence of:

No appearance for the Appellants

No appearance for the Respondents

Court assistant: polycarp

