



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 452 OF 2014

IN THE MATTER OF THE ESTATE OF MILABI NDAKWA ALIAS KHAYONGO NDAKWA (DECEASED)

RULING

1. The application for determination is the summons dated 22nd March 2021. It seeks confirmation of the grant made 30th July 2020, to Rose Anyona Simwa, the administratrix. In her amended affidavit, sworn on 28th June 2021, and I doubt whether this affidavit is properly on record, for affidavits are never amended, as they are not pleadings, instead they are withdrawn and fresh ones filed, she identifies three survivors – herself, as widow of a dead son of the deceased known as the late Jacob Simwa; Dorcas Khalechi Masai, as widow of a dead grandson of the deceased known as the late Wycliffe Mafubo, being a son of a dead son of the deceased known as the late Benjamin Lihutsa; and John Chitala Milavi, a son of the deceased. The deceased is said to have had died possessed of South Kabras/Lukume/929, it is proposed to be shared between the three survivors, so that Dorcas Khalechi Masai and John Chitala Milavi take 3.6 acres each, while the administratrix takes nothing, for she had sold her share, which is proposed to go to Shem Mutwenje Mukhwana, who is allocated 1.8 acres.
2. There is an affidavit of service on record, sworn on 14th June 2021, which indicates that the said summons was served on Dorcas Khalechi Masai and John Chitala Milavi. None of them have filed affidavits of protest.
3. The application was heard on 27th September 2021. Four individuals attended court on that day. Rose Anyona, Shem Mutwenje, John Chitala and Dorcas Khalechi. Shem Mutwenje told the court that he had bought land from the administratrix, Rose Anyona. John Chitala said that his mother had only three children, being himself, Jacob Simwa and Benjamin Lihutsa. He stated that his brothers Jacob Simwa and Benjamin Lihutsa had died, and were survived by spouses and children. The administratrix, Rose Anyona, was said to be the widow of Jacob Simwa. He disclosed that the widow of Benjamin Lihutsa had also died. The two had two children, said to be Wycliffe Paul Lilavi and Eunice Makonjo, who had also died. Eunice Makonjo was said to have been survived by three children who were in school. He named them as Joyce Joram, Florence Joram and Zipporah Joram, who lived with him. He said that Rose Anyona had sold her share, to Shem Mutwenje Mukhwana, and relocated.
4. Rose Anyona and Dorcas Khalechi did not address the court.
5. Confirmation of grants is provided for under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya. The court confirms appointment of the administrators, in terms of section 71(2)(a); and distributes the estate, in terms of section 71(2)(b)(c)(d).
6. There is a proviso to section 71(2), which requires that the court be satisfied of certain things, before it proceeds to confirm the grant. What the court has to be satisfied about relates to ascertainment of the persons beneficially entitled to a share in the estate, and the shares allocated to them. It should only proceed to deal with distribution after the administrator has satisfied it as to the two issues. That provision is reproduced in Rule 40(4) of the Probate and Administration Rules.
7. So, before I consider the distribution proposed in the application, I need to ask myself whether or not the proviso to section 71(2) of the Act and Rule 40(4) of the Rules have been complied with, in terms of satisfying the court that the administrator has ascertained the persons beneficially entitled to a share in the estate, and whether the shares due to each of those entitled have been identified.
8. I am not satisfied that the administratrix has properly ascertained the survivors of the deceased. There is an application for revocation of the grant, dated 4th January 2015, which appears to indicate that the deceased had more survivors than those disclosed in the summons for confirmation. Secondly, he also had more assets than those placed before me. From that application, it appears that the deceased had married three times, and, therefore, his estate comprised of three houses. That has not come out in the confirmation application. Where a person dies a polygamist, the estate is disposed of in accordance with section 40 of the Law of Succession Act, and to facilitate that then all the houses and the members of the family in each house must be disclosed. That was not done, and I cannot, therefore, distribute the estate as per section 40, in the circumstances. The deceased had six sons, being Jeremiah Saidi Milavi, Thomas Mutendeya Milavi, David Asman Milavi, Philip Wanjila Milavi, John Mukangai Milavi and Jacob Simwa. I am not persuaded that the deceased did not have any daughters with any of his three wives. He died in 1992, after the Law of Succession Act had come into force in 1981. The definition of child or children in the Act is not limited to sons. It includes daughters. They should have been disclosed alongside the sons. Section 51 requires disclosure of all the

children of the deceased, daughters included. Without saying more, it should be clear that the administratrix has not properly ascertained the persons beneficially entitled to a share in the estate. Daughters are entitled to a share in their parent's estate equally with the sons of the deceased, by dint of sections 35(5) and 38 of the Law of Succession Act, unless they renounce their right to a share in the estate, either orally in open court, at the hearing of the confirmation, or in writing.

9. On the assets disclosed, the confirmation application only discloses one asset, South Kabras/Lukume/929. The other assets, disclosed in the revocation application, being South Kabras/Lukume/1585 and Bungoma/Kiminini/215, were not disclosed, and proposed for distribution. That is another failure, to ascertain assets and shares. The distribution proposed is, therefore, only partial. Distribution is about assets, and, therefore, all the assets must be disclosed, and proposed for distribution. A partial disclosure and distribution of the assets would not do. All must be disclosed, and if they are not available for distribution, that must also be disclosed, and explanations given. Such assets should not be concealed, if not available for distribution, a disclosure must be made and explanation given why they are not being proposed for distribution.

10. The final thing to say relates to Shem Mutwenje. He is clearly not a child of the deceased. He did not survive the deceased. He comes in as a creditor, yet he bought nothing from the deceased. He says he acquired an interest in the estate property from Rose Anyona. That was after the deceased died, and before she was appointed administratrix, and before the grant was confirmed. He is, therefore, not a creditor of the estate, for the deceased was not indebted to him, he never sold him any property, he never transacted with him. He also did not buy the same from an administrator. Section 79 of the Law of Succession Act vests the intestate estate in the administrator, and such administrator can sell land and pass a good title, but only if, by virtue of section 82, such property is sold after the grant was confirmed.

11. Rose Anyona was not an administratrix of the estate in 2016, when the alleged sale took place, for she only became an administratrix in 2020. The property did not vest in her in 2016. She had no power or authority to sell it in 2016. She had nothing to sell to Shem Mutwenje. She could pass no good title to him, and he bought nothing from her, for she had no land to sell. Secondly, the grant herein has never been confirmed. That would mean that, even if she were administratrix in 2016, which was not the case, the grant had not been confirmed in 2016, and, therefore, by dint of section 82, the land could not be sold, and any sale was unlawful, and, therefore, of no effect. Shem Mutwenje has no claim against the estate, for he never transacted with it. His claim lies properly with Rose Anyona, the person that he dealt with, and who purported to sell to him property that she did not have. He should be looking up to her to recover the land or his money. He has no claim against the estate, and he should get nothing from the estate.

12. Rose Anyona is not a child of the deceased. She is a daughter in law of the deceased. Daughters in law are not recognised in Part V of the Law of Succession Act. What she claims is what is due to her late husband. She has no direct claim as daughter in law, and, to access her late husband's share, she ought to have obtained administration to his estate. It is her children, in their capacity as grandchildren, who have a direct claim to the estate, by dint of section 41, and they would not require to obtain administration to their late father's estate. Shem Mutwenje, therefore, dealt with a person who was claiming a share in the estate of his late father in law, to which she was not entitled directly, and who had not obtained representation to the estate of her late husband, to clothe her with authority, to claim from her father in law's estate, what was due to the estate of her late husband.

13. I note that the revocation application, dated 4th January 2015, has never been heard. It is still pending, and the confirmation application ought not to have been filed or entertained before the revocation was disposed of. Directions on the said application have never been taken.

14. The orders that I am moved to make in the circumstances are as follows:

- a. That I hereby postpone determination of the summons for confirmation of grant, dated 22nd March 2021;**
- b. That the same shall be disposed of simultaneously with the summons for revocation of grant, dated 4th January 2015;**
- c. That two applications shall be allocated a date at the delivery of this ruling for directions on disposal, and notice shall be issued to all the survivors of the deceased disclosed in the summons for revocation of grant ;**
- d. That, in the meantime, the administratrix shall make a full disclosure of all the survivors of the deceased, the assets and shares of each of the persons beneficially entitled to a share in the estate; and**
- e. That any party aggrieved by these orders has twenty-eight days to move the Court of Appeal appropriately.**

15. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF
JANUARY, 2022**

W. MUSYOKA

JUDGE

Mr. Erick Zalo, court assistant

Ms. Nafuye, instructed by Messrs. KN Wesutsa & Company, Advocates, for the administratrix

Shem Mutwenje Mukhwana

John Chitala

Dorcas Khalechi