



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 412 OF 2001

IN THE MATTER OF THE ESTATE OF MUSEE SHIKOMARI JOSEPH (DECEASED)

RULING

1. The Motion, dated 12th April 2014, principally seeks revocation of the grant made herein on 11th December 2001. It also seeks that an inhibition issues to inhibit dealings in Kakamega/Shiswa/54, pending hearing and determination of the application.
2. The grounds and facts upon which the revocation is sought are set out on the face of the application and in the affidavit in support of the application, sworn by Resbar Lihavi Igoa, on even date. I shall refer to her as the applicant. She avers to be the only surviving child of the deceased, and that the administrator, Matayo Lihavi Mushuhani, was a total stranger to her. She states that she discovered the existence of these proceedings when she visited the lands office over other business relating to Kakamega/Shiswa/54 and 55, when she was informed that Kakamega/Shiswa/54 belonged to the administrator. She then came to court and perused the court record, and established that the administrator had obtained representation to the estate of her father in his purported capacity as stepson of the deceased. She mentioned that she saw a letter from the Chief, where her mother had expressed intention to surrender her interest to the administrator as stepson. She asserts that all that was false, as the administrator was not stepson.
3. In response, through an affidavit sworn on 24th April 2015, the administrator, Matayo Luteya Mushukhani, states that he had bought Kakamega/Shiswa/54 from the deceased in 1996, and the latter died before transferring the same to him. He avers that the deceased was survived by a widow, Clara Muhalulukhu, who died in 2014. The said widow was very old and sickly and authorized him to commence succession proceedings to facilitate transfer of the land to him. He asserts that he was a stepson of the deceased. According to the administrator the deceased had no children. He avers that the applicant is a sister of the deceased, being children of the late Shikomere Shirakaba. He states that he bought Kakamega/Shiswa/54, while Kakamega/Shiswa/55 was registered in the name of the deceased, he surrendered it to the applicant which she sold. He asserts that he obtained the grant lawfully and had it confirmed. He has attached copy of a sale agreement dated 23rd January 1996 and 19th April 1996. There is also a title deed for Kakamega/Shiswa/54, showing that the property is registered in his name. A green card for Kakamega/Shiswa/55 shows that it is registered in the name of the deceased. There are also copies of proceedings of the Shinyalu Land Disputes Tribunal, between the applicant and the widow of the deceased.
4. The applicant filed a further affidavit, on 5th January 2018, sworn on 4th January 2018. He clarified that the deceased was his brother and not father. She avers that Kakamega/Shiswa/54 and 55 belonged to their father, the late Shikomere Shirikava, who allocated Kakamega/Shiswa/54 to the deceased and Kakamega/Shiswa/55 to her. She asserts that the administrator was not a stepson of the deceased, and was not related to him in any way. She states that he obtained registration of Kakamega/Shiswa/54 by fraud. She avers that the deceased and his wife did not have any children and therefore she was the sole heir. She further avers that the deceased never purchased Kakamega/Shiswa/54 from the deceased. She further argues that he could not have purchased the property, and then petition for representation as stepson rather than as a buyer.
5. The application was disposed of by way of written submissions, following directions that were given on 10th July 2018. Both sides have filed written submissions, which I have perused and taken note of the arguments made in them.
6. The principal dispute in the application is on how the two combatants were related to the deceased. When she mounted her application, the applicant claimed to be the only child of the deceased, but changed tune when the administrator said she was in fact a sister of the deceased. The administrator, on his part, claims to have had bought the property from the deceased, and to also be a stepson of the deceased. I have seen the proceedings before the Shinyalu Land Disputes Tribunal, and I am persuaded that the applicant was sister of the deceased.
7. What I am not clear about is the nature of the relationship between the deceased and the administrator. When he sought representation to the estate he projected himself as a stepson of the deceased, yet in his response to the petition, he pushed that to the background, and asserted that his claim to the estate was founded on the fact that he had bought land from the deceased. The question then is whether he was a buyer or a stepson or both. I find his averments in his affidavit curious. He says that the deceased did not have children, but he was a stepson. I would assume that a stepson is a child for succession purposes, and if he was indeed a stepson, then he should have considered himself to be a child of the deceased. Curiously he does not disclose how he was a stepson of the deceased. He does not disclose whether his mother was married to the deceased, for I suppose that that would be how he would become a stepson. The way he refers to the widow of the deceased

should also raise eyebrows. He does not describe her as his stepmother, but just as a widow, who was old and sickly, and who initiated the succession cause to facilitate the sale transaction. Then there is the letter from the Chief which identifies him as a stepson of the late widow of the deceased.

8. The nature of the issues in controversy, that is whether the administrator was a child of the deceased and also a buyer of the land in question, both of which are contested, are best dealt with in an oral hearing, where the witnesses are subjected to cross-examination, and where they present witnesses who breathe life to the documents relied upon, such as sale agreements and Chief's letters. In my view, it was foolhardy for the parties, and the administrator especially to go the way of written submissions in a case such as this, where oral evidence would have been the best.

9. I believe there is more than meets the eye. I am not persuaded that the administrator was a stepchild of the deceased, and there could have been misrepresentation in the way the grant was obtained. Secondly, with regard to the sale that he claims gave him a stake in the estate, it is contested, and there could be need for him to lead evidence to establish it, of course, not in this cause, but before the court vested with jurisdiction.

10. I believe the way forward would be not to revoke the grant herein, given the age of the matter, but to appoint the applicant a co-administratrix with the administrator. There is no evidence that the grant has ever been confirmed, and there is, therefore, no basis for Kakamega/Shiswa/54 to have been transferred to the name of the deceased before the grant was confirmed. The summons for confirmation of grant dated 23rd January 2004 is still pending.

11. The final orders that I feel constrained to make are as follows:

a. That I decline to revoke the grant made on 27th November 2001 in favour of the administrator, due to the age of these proceedings, instead I hereby appoint the applicant as a co-administratrix, and the grant on record shall be amended accordingly;

b. That the administrators shall pursue confirmation of their grant through the application, dated 23rd January 2004;

c. That the applicant herein has thirty days, from the date of this ruling, to file an affidavit protest to the confirmation application dated 23rd January 2004;

d. That I shall allocate a date, for mention, for directions, on the said confirmation application, at the delivery of this ruling;

e. That rather than order cancellation of the title deed issued to the administrator, I shall confirm the inhibition order made on 16th May 2014, and direct that the same shall subsist until further or other orders to be made on the confirmation application dated 23rd January 2004;

f. That each party shall bear their own costs; and

g. That any party aggrieved by these orders has leave of twenty-eight days to move the Court of Appeal appropriately.

12. 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

Mr. Osango, instructed by Messrs. PK Kamau & Company, Advocates, for the applicant

Mr. Getanda, instructed by Messrs. EO Getanda & Company, Advocates, for the administrator