



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 190 OF 1994

IN THE MATTER OF THE ESTATE OF PETER MACHISU SHIREKULI (DECEASED)

RULING

1. The application for determination is the summons dated 8th August 2021. It seeks a variety of orders: revocation of the letters of administration intestate made herein on 10th February 1995 and the grant issued on 10th January 1996; revocation or annulment of a certificate of confirmation of grant issued on 19th November 1998 based on the confirmation orders made on 23rd September 1996; issuance of a fresh or amended grant of letters of administration intestate; cancellation of the entry in the register in Isukha/Shiswa/887 on 8th April 1998; 0.43 hectare out of Isukha/Shiswa/887 allocated at confirmation to the late Peter Shilombole Nandi be allocated to Sr. Jendeka Kavutsira to hold in trust for the Sisters of the Divine Saviour (Savatorian Sisters); alternatively the said share be transferred or allocated to the widow of the late Peter Shilombole Nandi, Christine Lukanji Nandi; that Isukha/Shiswa/887 be distributed as per a consent attached to the affidavit in support; and a fresh certificate of confirmation of grant be issued.

2. The grounds upon which the application is premised are set out on the face of the application, as well as in the affidavit sworn in support by the applicant, Joseph Abung'ana Machisu, sworn on 8th August 2021. It is averred that the deceased died sometime in 1985, and a grant of letters of administration intestate was made and issued to the administrator, Linzeni Adriano Machisu, in 1996, it was confirmed the same year and a certificate of confirmation to that effect was issued. The applicant avers that since then the administrator became a person of no fixed abode, who has failed to have the assets transmitted as per the certificate of confirmation of grant. He is said to have prepared and registered Form RL 7 & 19, but failed to obtain consent of the relevant land control board in terms of the provisions of the Land Control Act, Cap 302, Laws of Kenya, to facilitate transmissions as the certificate of confirmation of grant. He is also accused of not having the land partitioned. The applicant asserts that the relevant forms for the transmission exercise cannot be prepared and executed in the absence of the administrator. It is further averred that two of the beneficiaries under the certificate of confirmation of grant have since died, Peter Shilombole Nandi and Emmanuel Amalemba Machisu, before the transmission of their shares to their names. Peter Shilombole Nandi is said to have given 0.43 hectare of his share to the Sisters of the Divine Saviour, who took possession and have retained uninterrupted use and occupation of the land. It is also averred that the said Peter Shilombole Nandi had been survived by a widow, who had taken out letters of administration to his intestate estate. Peter Machisu Shirekuli is also said to have been survived by a widow and children, whose details are given, and it is proposed that the estate be redistributed to accommodate all those changes.

3. The summons for revocation was never served personally on the administrator, according to the affidavit of service on record, sworn on 27th September 2021. The process server says that he slipped the papers into a house that the administrator is thought to temporarily occupy at Nambale, Busia.

4. When the application was placed before me on 28th September 2021, I was informed that the application was unopposed. It was urged that twenty-five years after confirmation of grant the administrator had failed to diligently administer the estate. I was also told that it was thirty-six years after the demise of the deceased. I was told that the distribution was not contested, but I was urged to revoke the certificate of confirmation of the grant.

5. The application before me is premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, which provides for revocation of grant. A grant of representation is revocable on three general grounds. The first is where the process of obtaining it was attended by difficulties or challenges, such as defects in the process, fraud, misrepresentation and concealment of matter from the court. The second is where the administrator has challenges with administration, by either failing to apply for confirmation of grant within the given timelines, or fails to proceed diligently with administration, or fails to render accounts relating to the administration as and when required. The last ground is where the grant has become useless and inoperative due to subsequent events, such as where the sole administrator dies leaving the estate without an administrator, or is rendered incapacitated, physically and mentally, making it impossible for him to discharge his duties, or is adjudged bankrupt rendering him legally incompetent to continue discharging the duties of that office.

6. In the instant matter, the applicant appears to ground his application on the second general ground, lack of diligence in administration. It is pointed out that the grant was made and confirmed in 1996, but since then, the administrator has not completed administration, by way of causing the estate to be transmitted to the beneficiaries in accordance with the certificate of confirmation of grant. The application was not properly served, for the process server has not disclosed how he got to know that the house where he left the papers in Nambale was the

temporary residence of the administrator. The administrator has, consequently, not responded to the application, and there is, therefore, no explanation of what may have caused delay in the completion of administration. The delay in winding up administration after confirmation is inordinate, and the court can quite properly infer that from the circumstances.

7. The failure to have the transmission done appears to be the only reason why revocation is sought. The applicant has no issues at all with the distribution of the property. The other prayers are intended only to accommodate some of the changes that have happened since confirmation, such as deaths of some of the beneficiaries and sales of shares by some of them. I am invited to revoke the certificate of confirmation of grant. The discretion given to me under section 76 is for revocation of grants, and not certificates of confirmation of grant. A grant of representation and a certificate of confirmation of such a grant of representation are two different instruments, obtained under two different processes. So when the law provides for revocation of one, the power to revoke that one does not extend to the revocation of the other. I am asked to revoke the certificate of confirmation of grant. The certificate is nothing more than an extract of the orders made at confirmation. A cancellation, which is the proper term for it, of a certificate of confirmation would serve no purpose, so long as the orders upon which it is premised remain intact. What the applicant should be asking me to do, for the order to serve any purpose, should be to set aside the orders made at confirmation, which are the basis of the certificate of confirmation. The setting aside of confirmation orders, automatically render any certificate, issued on the basis of the orders impotent and useless. Otherwise, cancelling the certificate without interfering with the orders is an exercise in vain.

8. The applicant should not even be thinking of cancellation of the certificate of confirmation of grant or even the setting aside of the orders from which it germinates. He would like the distribution of 1996 to remain largely intact, except for changes to accommodate the death of the two beneficiaries, and the sale of land to the Sisters of the Divine Saviour. To effect such changes, there would be no need to revoke the certificate, for revocation applies where something went wrong with the process, but not where circumstances have changed. The applicant is not complaining that there was anything wrong with the orders on distribution, so the issue of setting aside the confirmation orders or cancelling or revoking the certificate of confirmation of grant should not arise. What he should be seeking should be the amendment of the certificate of confirmation of grant to accommodate the changed circumstances. Even then, the certificate of confirmation of grant cannot be effected without varying the orders made by the court at confirmation of grant. So, it should not be an issue of merely cancelling the certificate of confirmation and issuing a fresh, one with amendments, without the orders from which it was extracted being reviewed or varied. The applicant should, therefore, be asking me to vary or review the confirmation orders so as to provide basis for amendment of the certificate of confirmation of grant. The certificate of confirmation of grant has no life of its own, independent of the confirmation orders. It cannot survive without its parent, the confirmation or distribution orders.

9. In any case, I do not see any need to interfere with the confirmation orders or the certificate of confirmation. There is no need to review confirmation orders because a beneficiary named in it has died. What should happen is that the share allocated to the dead beneficiary should be transmitted to the name of the estate of the dead beneficiary or the administration of his estate, for distribution in a cause in the estate of such dead beneficiary. That is what should happen with respect to the shares allocated to Peter Shilombole Nandi and Emmanuel Amalemba Machisu. There is no need to review the confirmation or distribution orders or amending the certificate of confirmation of grant to devolve the shares to their successors and heirs. That would amount to conducting a succession within another succession, that is to say succession to the estates of the dead beneficiaries being conducted within the instant cause in the estate of their late father.

10. The same principle should apply to the portion sold to the Sisters of the Divine Saviour. There is no need to review the confirmation orders to allocate any share to the Sisters of the Divine Saviour. The Sisters of the Divine Saviour did not transact with the deceased or the estate, and, therefore, there should be no necessity of introducing its issues into this cause. It bought a share allocated to a beneficiary at confirmation. It should pursue its interest from the beneficiary who sold the interest to it. That beneficiary is dead, so it should pursue that interest with the administrator of the estate of the dead beneficiary in the cause initiated in his estate. The Sisters of the Divine Saviour has no interest in the instant estate. Let the transmission happen, so that the share due to the estate of Peter Shilombole Nandi is transferred to that estate, and let the administration of that estate transfer the interest, that the deceased person in that estate sold to the Sisters of the Divine Saviour, to it. If the administrator of that estate fails to do the needful, let the Sisters of the Divine Saviour commence recovery proceedings at the court with jurisdiction to determine questions relating to title, use and occupation of land.

11. It should be clarified that the issue raised by the Sisters of the Divine Saviour has nothing to do with succession to the estate of the deceased herein. It is a transmission issue, and transmission is not a succession matter, but a land issue. Transmission is a concept in land legislation. It is provided for under the Land Registration Act, No. 3 of 2012 and the Land Act, No. 6 of 2012. It does not feature at all in the Law of Succession Act. Any disputes that arise with respect to transmission of property should be handled in accordance with the legislation which governs transmission, that is to say the Land Registration Act and the Land Act, in courts that administer the said legislation. According to sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act, the said court is the Environment and Land Court and any subordinate court to which jurisdiction has been extended by the said legislation.

12. I believe I have said enough. The way forward should be to revoke the current grant, as it would appear that the administrator has been unable to complete administration, by causing transmission of assets in accordance with the certificate of confirmation of grant. I should appoint a fresh administrator, to complete administration. His grant shall not be available for administration but only for completion of administration, what is known as a grant of letters of administration *de bonis non*. His role shall be limited to having transmission done, so that each beneficiary gets the assets devolved to them. Those who have sold segments of their shares, can then transfer whatever has been sold to whoever bought them. Those who have died, administration of their estates can be done, and the shares distributed in those causes, where any buyers would then get the shares due to them at confirmation of the grants in those causes. I shall, therefore, not interfere at all with the distribution that was ordered in 1996. It shall remain intact, and the estate shall be transmitted in that form. The only amendment to be made to the certificate should be with respect to removing the name of the current administrator and substitution of his name with that of the administrator to be appointed in this ruling.

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

(a) That I hereby revoke the grant made on 10th February 1995, and issued on 10th January 1996, to Linzeni Adriano Machisu;

(b) That I hereby appoint Joseph Abung'ana Machisu administrator of the estate herein for the sole purpose of completing administration thereof, and a grant of letters of administration limited in that manner shall issue to him;

(c) That the revocation order in (a) shall not affect the orders made on 23rd September 1996, on distribution of the estate, and the certificate of grant dated 19th November 1996 shall be amended only to the extent of removing the name of Linzeni Adriano Machisu, and substituting it with that of Joseph Abung'ana Machisu;

(d) That the administrator *de bonis non* shall proceed to have transmission of the estate carried out in accordance with the provisions of the Land Registration Act and the Land Act, in terms of the certificate of confirmation of grant, dated 19th November 1996, as amended by order (c), above;

(e) That the shares due to the late Emmanuel Amalemba Machisu and the late Peter Shilombole Nandi shall be transmitted to their respective estates or administrators of their estates, for administration in causes initiated in those estates;

(f) That the the Sisters of the Divine Saviour (Savatorian Sisters) to pursue the interest, that it allegedly bought from the late Peter Shilombole Nandi, with the administrators of his estate, in the succession cause initiated in his name; and

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

14. 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. Shikoli and Mr. Shivega, instructed by Victor Shivega and Company Advocates, for the applicant