



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VIHIGA

SUCCESSION CAUSE NO. 39 OF 2021

IN THE MATTER OF THE ESTATE OF DANIEL KHASIEVERA ANUSU (DECEASED)

RULING

1. The application for determination is dated 22nd July 2021. It seeks that no other or further transactions be registered on Tiriki/Serem/762 by the Land Registrar, Vihiga, whether out of survey and partition or otherwise until further orders of the court; the survey or partition of the said property pursuant to the certificate of confirmation of grant issued by the court should not be effected or finalized in a manner that will dislocate the applicant from his current dwellings; that the survey and partition should ensure the portion occupied by the applicant as his homestead forms part of his share and ought to be registered in his name; and a surveyor appointed for that purpose should file survey documents in court to confirm that the land is distributed in accordance with the orders of the court.
2. The said application is at the instance of Evans Khasievera Anusu, the administrator, who I shall refer hereafter as the applicant. The court had ordered equal distribution of Tiriki/Serem/762. He avers that the beneficiaries are not in good terms, and asserts that the distribution should be done in a way that recognizes the developments by the beneficiaries.
3. The reply to the application is by David Khasievera Anusu. I shall refer to him hereafter as the respondent. He complains that the applicant had failed in his duties as administrator, for he had refused to sign forms to facilitate distribution, and opines that he is doing so because *status quo* favours him. He argues that the developments made by the applicant prior to the distribution orders by the court were illegal and should not form the basis or benchmark for distribution on the ground or the partitioning of the land. He asserts that since the refusal by the applicant to sign the requisite papers or forms, the respondent had moved the court for the Deputy Registrar to sign them on his behalf.
4. There are also affidavits by John Vitsengwa, Mary Augotso Khasievera and Doris Chesang. They support the position taken by the respondent, and oppose that of the applicant. They are identified and referred to as interested parties in the application.
5. I directed, on 3rd August 2021, that the said application be canvassed by way of written submissions. There has been compliance, for both sides have filed their respective written submissions. I have read through them, and noted the arguments made in them.
6. The grant herein was confirmed on 25th May 2017, in a ruling that was delivered on that date. The effect of the ruling was that Tiriki/Serem/762 was to be distributed equally between five named individuals. A certificate of confirmation of grant thereafter issued, dated 31st August 2018, and was amended on 5th May 2019.
7. The dispute that arose thereafter is not on the orders made by the court on distribution, on 25th May 2017, but rather on how to implement them on the ground. There are fights over execution of documents to facilitate partition of the land equally. The Deputy Registrar was directed to sign certain papers on behalf of the administrators. There are also quarrels over survey works, and wrangling on how the distribution on the ground should shape up.
8. The High Court handled this matter while sitting as a probate court. Its remit as such is limited, to distribution of the assets of the estate. It pronounced itself on that in the ruling of 25th May 2017. The land is to be shared equally. A certificate of confirmation of grant issued. Once a grant is confirmed, the work or role of the probate court would largely be at an end. It is not the role or function or mandate of the probate court to superintend over how the land is to be thereafter distributed on the ground. The provisions of the Law of Succession Act, Cap 160, Laws of Kenya, and the Probate and Administration Rules do not deal with that. They do not provide for it. The probate court is pretty *functus officio*, once it confirms the grant.
9. What follows confirmation of a grant is transmission of the assets to the named beneficiaries as per or according to the certificate of confirmation of grant. Transmission of property as per the certificate of confirmation of grant is a concept in land or property law. It is not regulated by succession law, hence the silence in the Law of Succession Act and the Probate and Administration Rules on it. It is not a succession matter whatsoever, and, therefore, transmission of assets as per the certificate of confirmation of grant should not tax the mind of the probate court at all. I even doubt whether the High Court has any jurisdiction to touch anything to do with transmission of property after confirmation of the grant.

10. Transmission of property after confirmation of grant is provided for under land legislation, specifically the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012.

11. The Land Registration Act deals with it at Part VI, sections 60 to 62, which provide as follows:

“PART VI—TRANSMISSIONS AND TRUSTS

Transmission on death of joint proprietor.

60. If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate.

Transmission on death of a sole proprietor or proprietor in common.

61. (1) If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative’s name of the words “as executor of the will of [deceased]” or “as administrator of the estate of [deceased]”, as the case may be.

(2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission—

- a. any transfer by the personal representative; and
- b. any surrender of a lease or discharge of a charge by the personal representative.

(3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.

Effect of transmission on death.

62. (1) Subject to any restriction on a person’s power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but enforceable and subject to which the deceased proprietor held the land, lease or charge, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor of the land lease or charge with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.

(2) The registration of a person as provided in section 61, shall relate back to and take effect from the date of the death of the proprietor.”

12. The Land Act provides for it in Part V, sections 49 to 51, which state as follows:

“49. Transmission on death of joint proprietor

If one of two or more joint proprietors of any land, lease or charge dies, the Registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate.

50. Transmission on death of a sole proprietor or proprietor in common

1. If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative’s name of the words “as executor of the will of () [deceased]” or “as administrator of the estate of () [deceased]”, as the case may be.

2. Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission—

- a. any transfer by the personal representative; and
- b. any surrender of a lease or discharge of a charge by the personal representative.

3. In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.

51. Effect of transmission on death

1. Subject to any restriction on a person's power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor thereof with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.

2. The registration of any person as aforesaid shall relate back to and take effect from the date of the death of the proprietor."

13. Transmission of land often involves subdivision or partition of land for sharing between several individuals, and that has something to do with boundaries, transfers, registrations, among others. The Law of Succession Act and the probate and Administration Rules do not deal with such processes. These are, instead, regulated and governed by the Land Registration Act and the Land Act. So subdivision, partition, survey, boundaries, maps, transfers, registrations, etc., are dealt with in the context of land legislation, and not succession legislation. The Land Registration Act deals with these at Parts II, III and IX. The Land Act, on the other hand, deals with them at Part V.

14. The two pieces of land legislation, that is to say the Land Registration Act and the Land Act, are specific, that any disputes, actions or suits relating to matters governed or regulated by the two, are to be resolved by the Environment and Land Court. Indeed, the Land Registration Act and the Land Act provide that "court," for the purposes of the two Acts or within their contexts, means the Environment and Land Court.

15. The Land Registration Act states so in sections 2 and 101, in the following terms:

"Interpretation.

2. In this Act, unless the context otherwise requires—

"Court" means the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011: ...

Jurisdiction of court.

101. The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."

16. The Land Act says so in sections 2 and 150:

"2. Interpretation

In this Act, unless the context otherwise requires—

"Court" means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011); ...

150. Jurisdiction of the Environment and Land Court

The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."

17. Clearly, by placing a dispute, before the probate court, relating to transmission of property, as per the certificate of confirmation of grant, and about survey, partition, transfer and registration of land, is to engage this court in matters that are beyond its jurisdiction. I decline to exercise a jurisdiction that I do not have.

18. The chamber summons dated 22nd July 2021 is, therefore, incompetent, for the reasons that I have discussed above. I hereby strike it out. Let the applicant move the appropriate court, the Environment and Land Court. Under the land legislation, the Land Registrar has broad quasi-judicial roles and powers, and can address some of the issues raised by the applicant, before they are escalated to the Environment and Land Court. Not every conceivable dispute should be rushed to court, let other mechanisms be exhausted first. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25TH DAY OF FEBRUARY, 2022

W. MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Ms. Sijenje, instructed by ABL Musiega & Company, Advocates, for the applicant.

Mr. Iddi, instructed by Nandwa & Co., Advocates, for the respondent and the interested parties.