



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 26 OF 1999

IN THE MATTER OF THE ESTATE OF JUMA SHITSESWA LINANI (DECEASED)

RULING

1. The application for determination is dated 6th July 2020. It seeks orders directed at the Land Registrar for Kakamega County, to have him directed to record prohibitions to prevent registration of transactions with respect to East Wanga/Lubinu/4189, 4190, 4192, 4193, 4194, 4195, 4196, 4197, 4198, 4421, 4422, 4610, 4611, 4801 and 4802, pending hearing and determination of objection proceedings. The application is brought at the instance of Abdi Banur Aura, who I shall refer to hereafter as the applicant.

2. The grounds upon which the application is premised are that the administrator, Iddi Juma, had obtained representation to the estate of the deceased without consulting family members, and he had gone ahead and obtained a certificate of confirmation of grant. The applicant avers that he filed a summons for revocation of grant dated 24th June 2019, which I suppose is what he is calling the objection proceedings. The administrator is accused of transferring property during the pendency of the revocation application to third parties. He is also accused of having advertised the sale of almost all the parties of the estate. This accusation makes no sense to me since I suppose “all parties” would be a reference to human beings, who cannot possibly be available for sale. The applicant fears the “all parties” that the administrator has advertised for sale may be transferred to third parties before the objection proceedings are determined. He would like prohibitory orders to be issued to prevent registration of transactions in East Wanga/Lubinu/4189, 4190, 4192, 4193, 4194, 4195, 4196, 4197, 4198, 4421, 4422, 4610, 4611, 4801 and 4802 pending the hearing and determination of the objection proceedings. He alleges that the estate of the deceased may be transferred to strangers if the prohibitory orders are not granted, in which case the beneficiaries of the estate would be denied their share of inheritance and the estate would be exposed to wastage.

3. The administrator has responded to the application, vide his replying affidavit, sworn on 10th July 2020. He avers that after the grant was confirmed, the only estate asset, East Wanga/Lubinu/1123, was surveyed, portioned and subdivided with the full participation of the applicant. He avers that the resultant subdivisions were registered in the names of the beneficiaries who now hold separate title deeds in their names as follows: East Wanga/Lubinu/4189 – Mustafa A. Juma, East Wanga/Lubinu/4190 (further subdivided into East Wanga/Lubinu/4421 and East Wanga/Lubinu/4422) – Iddi W. Juma, East Wanga/Lubinu/4191 – Mohamed W. Juma, East Wanga/Lubinu/4193 – Rashid O. Juma, East Wanga/Lubinu/4194 – Thwaha W. Juma, East Wanga/Lubinu/4195 (further subdivided into East Wanga/Lubinu/4419 and East Wanga/Lubinu/4420)– Khathwib O. Juma, East Wanga/Lubinu/4196 – Abdinur A. Juma, East Wanga/Lubinu/4197 – Abdinur A. Juma, and East Wanga/Lubinu/4198 – Shuiab S Juma. He has attached copies of title deeds in respect of the said portions to support his case. He avers that the persons registered as proprietors correspond with the names of the person appearing in the certificate of confirmation of grant, dated 29th July 2009. He has attached copies of the mutation forms (RL 29) of 5th April 2014, which facilitated the subdivisions and creation of the sub-titles, as evidence that the subdivisions were approved by all the eight beneficiaries named in the certificate of confirmation of grant dated, 29th July 2009. The administrator avers that it is not possible for him to sell any of the resultant parcels of land since they are already registered in the names of other individuals. He also avers that a prohibitory order cannot be sought against him, with respect to property that is registered in the names of others parties, who have not been named in the application. He says that the only property that he is capable of selling is East Wanga/Lubinu/4190, which was registered in his name, and which he has since subdivided into East Wanga/Lubinu/4421 and 4422, and which he was, in any case, not selling.

4. The administrator simultaneously filed a notice of preliminary objection, dated 21st July 2020, raising a number of issues. I shall deal with it in a summary manner, as the same cannot be disposed of without the court having to look for evidence to support what is raised. To that extent it is not a proper preliminary objection. It does not meet the test in *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited* (1969) EA 696. I shall disregard it.

5. Directions were given on 14th July 2020, for the application dated 6th July 2020, to be disposed of by way of written submissions. The only written submissions were filed by the administrator, and are dated 3rd November 2020. I have perused through them and noted the arguments made.

6. Let me start by stating that the application for determination is interlocutory, for it seeks temporary orders to maintain *status quo* awaiting determination of the summons for revocation of grant dated 24th June 2019, the so called objection proceedings. The propriety of the application dates 6th July 2020 is itself dependent on the propriety of the main application, on which it rides, the summons for revocation of grant, dated 24th June 2019.

7. I have closely perused the summons dated 24th June 2019, and I am not persuaded that it is a proper application for revocation of grant. It does not seek revocation of the grant of letters of administration intestate that was made to the administrator on 4th May 1999. What it seeks is revocation or annulment of the certificate of confirmation of grant and for directions to be taken on distribution of the estate. Yet the grounds on the face of the application dated 24th June 2019 do not dwell on the confirmation process, but on the manner the grant itself was obtained, fraudulently, on the basis of concealed matter and through stealth. The affidavit sworn by the applicant, on 24th June 2019, in support of the application, equally dwells on how the grant was obtained, rather than the confirmation of the grant, which appears to be the focus of the application.

8. Applications for revocation of grant are provided for under section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. From the language of the provision, it ought to be clear that the discretion given to the court is to revoke or annul the grant of representation, whether it be probate of a will or letters of administration. The provision is not about revocation of certificates of confirmation of such grants.

9. For avoidance of doubt, section 76 of the Law of Succession Act, provides as follows:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either -

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

10. A grant of representation, and not a certificate of confirmation of grant, according to section 76, would be liable to be revoked or annulled on three general grounds. The first general ground is represented in section 76(a)(b) and (c), where there were problems with the manner the grant was obtained, such as where the process of obtaining it was defective, or where the administrator used fraud and misrepresentation to obtain it, or where important matter was concealed from the court. The second general ground is represented by section 76(d), which has something to do with the administration process itself. It is presupposed here that the grant was obtained in a proper manner, but then the administrator had challenges with administration. The challenges identified in section 76(d) are the failure to apply for confirmation of grant within the period allowed in law, failure to exercise diligence in the administration of the estate and failure to render accounts as and when required to under the Law of Succession Act. The third general ground is represented by section 76(e), and it is about the grant becoming useless or inoperative due to subsequent circumstances or events. It is presupposed that the grant was obtained in a proper and procedural manner, but then an event happens which renders the grant useless or inoperative, such as where the sole holder of the grant dies leaving the estate without an administrator, or the sole administrator is adjudged bankrupt thereby losing the legal competence to administer an estate.

11. Section 76 makes no mention of revocation of certificates of confirmation of grants. The only reference to confirmation of a grant is in section 76(d)(i), and it is about the failure to apply for confirmation of the grant within the time allowed in law. That means that a grant-holder who fails to apply for confirmation of his grant in accordance with sections 71 and 73 of the Law of Succession Act exposes their grant to revocation. There is nothing in section 76 about a certificate of confirmation of grant being revoked because there were problems with the process of the confirmation of grant. Neither does section 76 permit the making of orders on a summons for revocation of grant founded on grounds to do with a party being unhappy with the confirmation provision, and the process gives the court no discretion to cancel certificates of confirmation of grant.

12. The ideal situation, where a person is unhappy with the process of confirmation of grant, for it would appear that that is what the applicant herein is aggrieved about, is not to move the court under section 76 for revocation of grant, for the reasons that I have discussed in the foregoing paragraphs. What such a person should do instead, is to file an appeal against the orders made by the court on distribution. The court confirming a grant largely becomes *functus officio* so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review. The grant herein was confirmed on 24th June 2009, and this court became *functus officio* so far as confirmation of the grant was concerned. The applicant ought to have appealed against the orders that confirmed the grant, if he was not satisfied with the distribution that the court ordered. Alternatively, the applicant should have mounted an application for review of those orders, if he had the competence to file such an application, and if he had grounds upon which he could urge review. This court is being invited to relook at its confirmation orders through a process that has not been provided for in law.

13. The other thing is that the applicant invites the court, in that application dated 24th June 2019, to revoke or annul a certificate of confirmation of grant. A certificate of confirmation of grant is a document that the court generates or extracts from the orders that had been made at confirmation as evidence or proof of the making of the said orders. Revoking or annulling the certificate of confirmation of grant without setting aside or vacating the confirmation orders which give it life would be an exercise in futility. Revoking or cancelling the certificate without more only renders the said document ineffective, but leaves the confirmations orders intact. The application of 24th June 2019 invites the court to revoke the certificate but leave the confirmation orders 24th June 2009 intact. Such an exercise serves no purpose, and it would be a wastage of judicial time and effort.

14. I believe that I have said enough to demonstrate that the interlocutory application dated 6th July 2020, stands on shaky ground, so long as it rides on the back of an application, the one dated 24th June 2019, which is itself shaky. Interlocutory orders ought not be made in such circumstances, since such a shaky application stands little chance of being granted, and a court ought not make interlocutory orders in vain.

15. Furthermore, I have seen on the record an order that Njagi J. made on 3rd December 2019, when the application dated 24th June 2019 came up for hearing. It transpired that the said application was driven by persons who were alleged to have had bought estate land, and who had since filed a suit in Kakamega HCCC No. 177 of 2015. Njagi J. ordered the parties to await determination of the said suit before urging the application dated 24th June 2019. The effect of that order was to stay, or hold in abeyance, disposal of the application dated 24th June 2019. In my view, the application dated 24th June 2019 having been suspended by the order of 3rd December 2019, the applicant ought not have filed the application dated 6th July 2020 premised on the application the court froze on 3rd December 2019. If the applicant desired to have orders in place to freeze dealings in the assets the subject of Kakamega HCCC No. 177 of 2015, then he should have mounted his application in that other suit, for proceedings relating to the application dated 24th June 2019 had effectively been stayed by the order of 3rd December 2019. I believe that the applicant is trying a roundabout way of prosecuting the application dated 24th June 2019, or he is trying to go around that order somewhat. That is what abuse of court process is about.

16. I have talked about a court which confirmed a grant being *functus officio*. The grant herein was confirmed on 2th June 2009, and a certificate of confirmation was generated from that order on 29th July 2009. After a grant has been confirmed, the processes that follow, that is to say with respect to the implementation or execution of the confirmation orders as encapsulated in the certificate of confirmation of grant, have nothing to do with the Law of Succession Act, for the said law or the rules made under it, the Probate and Administration Rules, do not provide for what should happen after the certificate of confirmation of grant has been generated from the confirmation orders. The process of the carrying into effect of the confirmation orders is regulated by land legislation through a process known as transmission, which is not provided for under the Law of Succession Act.

17. It would appear in this case, that after the certificate of confirmation of grant was extracted from the confirmation orders of 24th June 2009, the transmission process was undertaken, and the confirmation orders were executed. I have seen on record copies of mutation forms, which are provided for under the Registered Land Act, Cap 300, Laws of Kenya, now repealed, which facilitated the subdivision of East Wanga/Lubinu/1123, presumably in accordance with certificate of confirmation of grant dated 29th July 2009, leading up to the creation of the parcels of land the subject of the instant application. I have also seen the title deeds that were issued subsequent to that transmission. Clearly, therefore, the issue of the confirmation of the grant is water under the bridge. The land in question is no longer subject to the Law of Succession Act, but the relevant land legislation. The probate court no longer has jurisdiction over the land, and that is why I say that this probate court is *functus officio* over the subject.

18. And just so that there is clarity on what I am talking about, let me refer to the relevant law on transmission of property upon death. The principal legislation, on transmission, is the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The Land Registration Act and the Land Act carry complementary provisions on transmission of property upon the death of an owner after the grant has been confirmed.

19. The provisions in the Land Registration Act are in sections 60 to 63, which state as follows:

“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."

20. On the other hand, the relevant transmission provisions in the Land Act are carried in sections 49 to 51, and they 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."

21. Picking up from paragraph 17 here above, where I have stated that this probate court no longer has jurisdiction on the land in dispute, and that the same is now governed by the relevant land legislation, the orders sought are prohibitory in nature, to prevent registration of certain dealing on registered land. Prohibitions take the form of either inhibitions, cautions or restrictions, all of which are provided for under sections 68 to 78 of the Land Registration Act. Registers for registered land, including the titles that the applicant has invited me to issue prohibitory orders over, are maintained under the Land Registration Act, and not the Law of Succession Act. It follows, therefore, that a party wishing to obtain such prohibitory orders ought to move the court vested with jurisdiction over land by the relevant land legislation.

22. With the promulgation of the Constitution of Kenya in 2010, the High Court, which has jurisdiction, under the Law of Succession Act, over probate and administration, lost jurisdiction over issues relating to title to land and the use and occupation of land. The new Constitution envisaged establishment of a court to handle such matters. The constitutional provision on that is Article 162(2). Article 165(5) underlines the fact that the High Court shall exercise no jurisdiction whatsoever over the matters the subject of Article 162(2) of the Constitution. Parliament thereafter established the Environment and Land Court, under the Environment and Land Court Act, No. 19 of 2011, to exercise the jurisdiction conferred by Article 162(2). After enacting the Land Registration Act and the Land Act, parliament vested jurisdiction over any disputes arising from the matter regulated by that law on the Environment and Land Court. The conferment of that jurisdiction is clearly set out in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act. Prohibitions are provided for under those statutes, and the High Court, therefore, has no jurisdiction with respect to the same. In any event, the prohibitions touch on matters around title, use and occupation of land, over which the Constitution has barred the High Court from exercising jurisdiction.

23. The administrator has pointed out that he holds only two of the titles the subject of the application dated 6th July 2020, with the rest being held by other individuals, who have not been named as parties to the application. He has submitted that the prohibition orders, if this court has any jurisdiction to make them, can only affect the two titles registered in his name. I agree with him. I have seen the title deeds; the rest of the parcels are not registered in his name. Any orders relating to them would be in vain for they cannot take hold against him. Yet the

registered proprietors of those titles have not been brought on board with respect to the instant application.

24. The said application is pegged on the ground that the administrator is selling off or transferring the parcels of land to third parties. In the first place no material has been placed on record as proof of the alleged transfers. No sale agreements. No transfer forms duly signed by the administrator. No notices or advertisements of the alleged sales or transfers. There is just no evidence of the alleged transfers or sales. The applicant expects the court to take him for his word. Secondly, there is evidence that the administrator is registered proprietor of only two of the parcels, the rest are in the names of other persons. He can only dispose of the two.

25. I believe that I have said enough. The Motion dated 6th July 2020 is without merit, from what I have discussed above, and I hereby dismiss the same. Each party shall bear their own costs. Any party aggrieved, by the dismissal order, is hereby granted leave to appeal to the Court of Appeal, within twenty-eight (28) days. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF JANUARY 2021.

W. MUSYOKA

JUDGE