

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 416 OF 2014

IN THE MATTER OF THE ESTATE OF FRANCIS SITUMA KUTORI (DECEASED)

RULING

1. This matter relates to the estate of Francis Situma Kutori, who died on 12th March 2013. According to the letter from the Chief of Kongoni Location, dated 10th March 2014, the deceased had married twice, and had children with his two wives. The name of the first wife is not disclosed in the said letter, but the second wife is said to be Sarah Nelima Kutore. The children from the first wife are said to be Vincent Wanjala Situma, Hudson Nyongesa Situma, Moses Wekesa Situma, Eunice Nasimiyu Situma, Benson Wanyonyi Situma, Patrick Mulongo Situma and Enock Khisa Situma. The children from the second wife are listed as Grace Nafula Situma, Stephen Mutoro Situma, Dorcas Nekesa Situma and Ezekiel Simiyu Situma. Aggrey Jere Lifwende is listed as an interested party who had bought 3.5 acres. The deceased is said to have had died possessed of a property known as Kakamega/Kongoni/2648.

2. Representation to his estate was sought vide a petition lodged herein on 23rd May 2014, by Vincent Wanjala Situma and Patrick Mulongo Situma, in their capacities as sons of the deceased. They expressed the deceased to have had died possessed of Kakamega/Kongoni/2648, and to have been survived by the twelve individuals mentioned in the Chief's letter that I have mentioned above, plus the interested party. Letters of administration intestate were made to them on 11th September 2014, and a grant was duly issued, dated 23rd September 2014. I shall consequently refer to Vincent Wanjala Situma and Patrick Mulongo Situma as the administrators. The said grant was confirmed on 10th June 2016, vide an application dated 11th June 2015. Three assets were listed as available for distribution being Kakamega/Kongoni/1763, 2648 and 2755. Aggrey Jere Lifwende was allocated 3.5 acres out of the 45.62 acres of Kakamega/Kongoni/2648. The balance of the property, that is to say the 42.12 acres of Kakamega/Kongoni/2648, and Kakamega/Kongoni/1763 and 2755 were to be held by the administrators in trust for ten of the children of the deceased. A certificate of confirmation of grant was issued in those terms, dated 21st July 2017 and amended on 20th June 2018.

3. What I am tasked with determining is the summons for revocation of the grant made herein. The application is dated 3rd August 2020 and was lodged herein on 17th August 2020, by Patrick Mulongo Situma, who is one of the administrators of the estate of the deceased, to be hereinafter referred to as the applicant. The grounds upon which the application is premised are set out on the face of the application, while the factual background is given in the affidavit in support of the application, sworn by applicant, on 3rd August 2020. He complains that he co-administrator, Vincent Wanjala Situma has gone rogue, by being hostile and disposing of estate property after the grant was confirmed.

4. The application was initially placed before me on 17th August 2020, when I directed that the same be served. It was placed before Njagi J for mention on 22nd September 2020, when directions were given for disposal of the application by way of written submissions, with a further direction that the other side be served. When the matter was placed before me on 29th October 2020 it was to confirm written submissions, and a date for ruling was allocated.

5. The application before me seeks critical orders, the revocation of a grant and rendering of accounts. Revocation of a grant would necessitate appointment of fresh administrators. These are drastic orders that ought not be granted before the application has been served on the other side. The application is principally directed against Vincent Wanjala Situma. The accusations are against him, that he has become hostile to his co-administrator, the applicant herein, that he is selling estate property, and has become a drunkard who is unreachable. These are pretty serious allegations.

6. Before I can consider the application on its merits, it is critical that I satisfy myself that there was service of the application on the said Vincent Wanjala Situma. I have perused the record before me. It has two affidavits of service, both sworn by Erick Swahili, on 22nd October 2020 and on an unknown date, and both filed on 29th October 2020. The one sworn on an unknown date alleges that the process server served the application on Vincent Wanjala Situma on 3rd August 2020 at his home at Kongoni. He allegedly accepted the documents but declined to sign the documents, to be returned to court, in acknowledgement of receipt. The documents that were meant to be returned to court through the undated affidavit of service are not attached to that affidavit, contrary to the rules that govern return of service. The affidavit of 22nd October 2020, was in respect of a mention notice dated 22nd September 2020. It alleges service on Vincent Wanjala Situma, on 24th September 2020, at his home at Kongoni, which service he accepted but did not sign the document that was meant to be returned to court vide the said affidavit of service.

7. I do not find the service proper. The two are similarly worded, except for the dates of instructions and service, and the documents served. The person served was in both cases introduced by his wife, and he accepted service but declined to accept service. The service in both cases was at exactly 11.10 AM.

8. Secondly, the record reflects that Vincent Wanjala Situma has an advocate on record, the firm of Messrs. Magare Musundi & Company, Advocates. The applicant has exhibited a letter to his affidavit in support of the summons for revocation of grant, marked as PMS2, dated 24th June 2020, from the said advocates, which states categorically that the said advocates were in the matter for Vincent Wanjala Situma.

The petition for grant of letters of administration herein and the summons for confirmation of grant were drawn by the said advocates. They remain on record as I have not seen any document which states that they have since been replaced, or have ceased to act for Vincent Wanjala Situma. I wonder why the applicant saw it fit to serve Vincent Wanjala Situma personally, if he indeed served him, when the said Vincent Wanjala Situma had an advocate on record for him. The applicant is represented by an advocate. It is expected that the advocate would know better than serve a party personally when that party is represented by an advocate. It is a matter of courtesy as between advocates, and it is a matter of the law, for the advocate is on record for the party, and the advocate is the person to serve with process in all circumstances, for as long as the advocate remains on record.

9. I find the alleged service of court process on Vincent Wanjala Situma suspect and inadequate, and I shall accordingly treat the same as non-service. As Vincent Wanjala Situma had not been properly served, I accordingly decline to determine the matter. Let the applicant first of all properly serve the application on Vincent Wanjala Situma, through his advocates, Messrs. Magare Musundi & Company Advocates, before I can proceed to determine it. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 19TH DAY OF MARCH, 2021

W. MUSYOKA

JUDGE