



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 539 OF 2006

IN THE MATTER OF THE ESTATE OF JOHANA INDAKWA alias INDAKWA ODERA (DECEASED)

RULING

1. The certificate of death serial number [particulars withheld], dated 4th June 1991, indicates that the deceased person to whose estate this cause relates, known as Johana Indakwa, died on 1st January 1981. There is a letter on record from the office of the Chief of Isongo Location, dated 25th August 2006, which indicates that the deceased was survived by two individuals, being his widow, Filister Amboko Indakwa, and a son, Silas Odera Indakwa, and that he died possessed of a property known as East Wanga/Isongo/668. Representation to the estate was sought by the son, Silas Odera Indakwa, vide a petition he filed herein on 7th September 2006, in his capacity as son of the deceased. He expressed the deceased to have been survived by the widow and the son listed in the Chief's letter, and to have died possessed of the asset listed. Letters of administration intestate were made to him on 11th January 2007. A grant was duly issued, dated 17th January 2007. I shall refer to Silas Odera Indakwa hereafter as the former administrator for reasons to become clear later in this ruling

2. There is an affidavit of protest on record, that Emmanuel Odera Omumasaba swore on 5th November 2007, and filed herein on even date. It is not clear what he was protesting to, but he avers that the deceased herein was his paternal uncle, by virtue of being a brother to his father, the late Aggrey Omumasaba Odera. He states that prior to his death, his father lived on East Wanga/Isongo/668, together with the deceased. He submits that the deceased recognized him as his son and was dependent on him during his lifetime, and that after his father died, the deceased permitted him to continue living on the sad land. He complains that after the deceased passed on the former administrator chased him away. He states that East Wanga/Isongo/668 was ancestral land that ought to have been shared equally between his father and the deceased. He avers that the former administrator had been given East Wanga/Isongo/711 by the deceased during lifetime, and the same was registered in the name of the former administrator. He complains that the former administrator deliberately left out his name from the petition. He says that the former administrator filed the petition after he, Emmanuel Odera Omumasaba, filed Kakamega HCSC No. 241 of 2006, to have a citation issued to him. He further says that the widow of the deceased died sometime in June 2007. He asserts that the survivors of the deceased were the former administrator, himself and his brother, William Odera. He argues that East Wanga/Isongo/668 ought to be shared equally between the former administrator, on one hand, and himself and his brother, on the other. He has attached to his affidavit a certificate of official search dated 31st October 2007 in respect of East Wanga/Isongo/711, which was registered on 16th February 1967 in the name of Odera Indakwa.

3. A summons for confirmation of grant was filed in the matter on 17th April 2008, dated 1st February 2008, by the former administrator. It listed him as the sole survivor of the deceased, and proposed devolution of the sole asset, East Wanga/Isongo/668, to him.

4. On 5th June 2008, a summons for revocation of grant, dated 5th June 2008, was filed at the instance of Emmanuel Odera Omumasaba. He sought that the grant made to the former administrator be revoked, for it was obtained in proceedings that were defective, it was obtained on the basis of false statements and concealment of matter from the court, and that the former administrator had failed to apply for confirmation of grant within reasonable time. The affidavit sworn in support of the said summons, on 5th June 2008, was word for word what he deposed in his affidavit of protest sworn on 5th November 2007, and filed herein on even date. The only new thing was that the former administrator had failed to apply for confirmation within one year from the date the grant was made to him, and that he had failed to proceed diligently with administration of the estate. He asked that the grant be revoked.

5. Emmanuel Odera Omumasaba filed an affidavit of protest to the summons for confirmation of grant, on 29th April 2009, effectively saying the same things that he had said in the affidavits that he had sworn earlier, dated 5th November 2007 and 5th June 2008. There were further affidavits filed by both sides thereafter.

6. Chitembwe J conducted an oral hearing founded on both summonses, for confirmation and revocation of grant, and delivered a ruling on 12th May 2015. The court held that East Wanga/Isongo/668 had been registered in the name of the deceased in trust for the father of Emmanuel Odera Omumasaba, and confirmed the grant on terms that 5.5 acres of East Wanga/Isongo/668 were to devolve upon the former administrator, while 5 acres were to devolve upon Emmanuel Odera Omumasaba. The court ordered that a confirmed grant be issued to Emmanuel Odera Omumasaba. A grant of letters of administration intestate was issued in the name of Emmanuel Odera Omumasaba, dated

21st July 2015, and a certificate of confirmation of grant dated 18th September 2015 issued in the terms of the ruling by Chitembwe J dated 12th May 2015. I shall refer to Emmanuel Odera Omumasaba as the current administrator.

7. Upon confirmation of the grant and issuance of a certificate of confirmation of that grant, the next step should have been transmission of East Wanga/Isongo/668 to the names of the beneficiaries named in the certificate of confirmation of the grant, that is to say the former administrator and the current administrator. It would appear that the former administrator was not satisfied with the orders made in the ruling delivered on 12th May 2015, and he filed a notice of appeal herein on 2nd July 2015, dated 30th June 2015. It is not clear whether an appeal was subsequently lodged. The current administrator, on his part, filed several applications seeking orders to the effect that he was entitled to the 5 acres that the court had ordered to devolve to him. The tussle over whether he was entitled to those 5 acres, which this court had ordered in his favour, spilled over to other courts, for two suits were filed under the Environment and Land Court Act, No. 9 of 2011, in Bungoma ELC No. 287 of 2015 and Mumias MCL&EC No. 25 of 2020.

8. What I have stated above is a background to the application that I am called upon to determine, a summons for revocation of grant dated 30th July 2020. It is brought at the instance of Hellen Omusotsi Kokola, who claims to be a daughter of the deceased. She avers that she and the former administrator were the sole survivors of the deceased. She avers that the former administrator did not disclose her when he petitioned for representation to the estate, and she was not provided for at confirmation of grant. She also complains that the property was distributed to Emmanuel Odera Omumasaba, who was not entitled to a share in the estate. I shall refer to her as the applicant.

9. Emmanuel Odera Omumasaba has responded to the summons for revocation of grant vide his affidavit, sworn on 22nd September 2020. He avers that the applicant was a biological daughter of the deceased, and adds that he had nothing to do with her exclusion from the process of obtaining representation, and distribution. He explains that East Wanga/Isongo/668 was registered in the name of the deceased in trust for his own father, and goes on to give details of their respective families. He asserts that Chitembwe J had declared that the deceased held the property in trust for his late father, and it was on that basis that the court held that he was entitled to five acres out of that land. He accuses the applicant of not acting in good faith, for the summons for revocation of grant was filed shortly after he had served the former administrator with court papers filed in Mumias MCL&EC No. 25 of 2020.

10. Although the application seeks revocation of his grant, the former administrator herein does not appear to have responded to that application. I have ploughed through the papers filed in the folder herein and I have not come across any document filed by him by way of replying affidavit.

11. Directions were taken on 30th September 2020, where it was agreed that the revocation application be disposed of by way of written submissions. I have ploughed through the pile of papers before me, and I have come across written submissions filed by Emmanuel Odera Omumasaba. I have read through the same and noted the arguments made therein.

12. The deceased herein died on 1st January 1981, that was before the Law of Succession Act came into force on 1st July 1981. By dint of section 2(1) of the said Act, the said law applied universally to estates of persons who died after the said law became operational on 1st July 1981. Section 2(2) applied to estates of persons who died before the Law of Succession Act came into operation. That is not to say that the Law of Succession Act does not apply at all to such estates, for section 2(2) also provides that Part VII of the Act, which governs administration of estates, does apply to administration of the estate of a person who died before 1st July 1981. Section 2(2) states that the law to apply on distribution of the estate of a person who died before 1st July 1981 is the law or custom that was in application as at the date of death, but administration should be under Part VII of the Law of Succession Act. The deceased herein died before the Law of Succession Act came into force, and, therefore, his estate was for distribution under Luhya customary law, for that was the law that applied to the estate of an intestate like the deceased, but the estate was to be administered under part VII of the Law of Succession Act.

13. Section 51 of the Law of Succession Act carries provisions on applications for confirmation of grant, and the same ought to be read together with Rule 7 of the Probate and Administration Rules. Under section 51(2)(g), where the deceased died intestate, among the persons to be disclosed at the point of applying for representation to his estate ought to be all the children of the deceased, whether or not such children will ultimately get a share in the estate. Rule 7 of the Probate and Administration Rules has similar provisions.

14. One of the reasons upon which a grant may be revoked, according to section 76 of the Law of Succession Act, is that the process of obtaining it was defective, or founded on false statements or misrepresentation or concealment of matter from the court. Sections 51 and section 76 dovetail, in the sense that failure to disclose the material stated in section 51(2) would amount to a defect in the process or the misrepresentation and nondisclosure that section 76 talks about. The failure to comply with section 51(2), therefore, is good ground, when that provision is read together with section 76, for revocation of a grant made through such a non-compliant process.

15. Section 76 of the Law of Succession Act provides as follows:

“76. Revocation or annulment of grant

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 order or allow; 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.”

16. It is common ground that the applicant herein was a biological child of the deceased. She is, therefore, one of the individuals that ought to have been disclosed in the petition by virtue of section 51(2)(g) of the Law of Succession Act. Her non-disclosure, therefore, amounts to a defect in the process of obtaining the grant, or to misrepresentation of facts or concealment of facts in the process. In short the court was misled into believing that the deceased had only one child, the former administrator. A fertile ground exists for revocation of grant in the circumstances.

17. The other thing is that the grant that was made on the basis of the petition that did not disclose the applicant, that is the petition filed in court on 7th September 2006, was not filed by the current administrator, but by the former administrator. The current administrator did not file a defective petition, and equally he did not conceal anything from the court or mislead the court. The grant was made to him by the court on the court's own motion, at confirmation of grant, which meant that the grant made to the former administrator was revoked and a fresh one made. His grant is, obviously, in the circumstance, not available for revocation.

18. One other thing. The deceased died before the Law of Succession Act came into force. Under section 2(2) of the Law of Succession Act, the law to apply to distribution of his estate is Luhya customary law. African customary law on intestate succession is notorious, daughters are not in the matrix. That would mean that where an intestate's estate is to be distributed under that law, daughters would not feature, and whether they are disclosed or not in the petition for representation may not be of much consequence. However, Kenya is under a new constitutional dispensation. Article 27 of the Constitution 2010 require equal treatment of women, that is to say that it provides for freedom from discrimination based on gender. Customary law tolerated such discrimination, maybe there was some good reason for it then. The constitutional dispensation under which the Law of Succession Act was passed in 1972, and under which it became operational in 1981, also allowed it. However, given the promulgation of the new Constitution, in 2010, the paradigm shifted. Discrimination based on gender is no longer tenable.

19. Should I proceed to revoke the grant anyway? Section 76 is in permissive language, the court may revoke the grant where it is established that it was obtained in the circumstances envisaged in sections 76(a) and (b). The court may or may not revoke the grant. It has discretion on the matter, after taking due consideration to the surrounding circumstances.

20. In this case, I note that the deceased had only two children, the former administrator and the applicant. I note too that Chitembwe J had determined that the estate of the deceased was entitled to 5.5 acres in East Wanga/Isongo/668, while that of the father of Emmanuel Odera Omumasaba was entitled to 5 acres. I trust that rather than revoke the grant made to the current administrator, who, I persist in stating, is not guilty of any misfeasance in the manner he obtained his grant, I should order, instead, that the share of the deceased herein in East Wanga/Isongo/668 be divided equally between her and the former administrator. The order made by Chitembwe J, with regard to the share due to Emmanuel Odera Omumasaba, remains undisturbed.

21. The applicant complains that the current administrator is not entitled to a share in the estate as he was not a survivor of the deceased. That issue is a water under the bridge. It was placed before Chitembwe J, and it was resolved in favour of the current administrator, in the ruling dated 12th May 2015, which Sitati J delivered on 23rd June 2015. I cannot reopen it, unless on review, but no review application has been placed before me. Otherwise, the matter can only be taken up on an appeal.

22. In the end, the final orders that I shall make in this matter are as follows:

(a) That I hereby decline to revoke the grant of letters of administration intestate made in the ruling of Chitembwe J, dated 12th May 2015, to Emmanuel Odera Omumasaba;

(b) That instead I shall order that the applicant, Hellen Omusotsi Kokola, be included in the matter as a survivor of the deceased, and that she be provided for from his estate to the extent of taking half share of the 5.5 acres in East Wanga/Isongo/668 that the court on 12th May 2015 allocated to the former administrator, Silas Odera Indakwa;

(c) That the share given to Emmanuel Odera Omumasaba in the said decision of 12th May 2015 shall remain undisturbed;

(d) That the certificate of confirmation of grant, dated 18th September 2015, shall be amended to reflect that the 5.5 acres due to Silas Odera Indakwa shall be shared equally between him and Hellen Omusotsi Kokola, which translates to each of the two taking 2.75 acres out of East Wanga/Isongo/668;

(e) That each party shall bear their own costs; and

(f) That any party aggrieved by the orders that I have made herein has leave of twenty-eight (28) days to move the Court of Appeal appropriately.

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

W. MUSYOKA

JUDGE