



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 148 OF 2015

IN THE MATTER OF THE ESTATE OF AMWAYI MUHALIA MUPILO ALIAS AMWAI MUHALIA MUPILO (DECEASED)

RULING

1. The deceased herein, Amwayi Muhalia Mupilo alias Amwai Muhalia Mupilo, died on 23rd August 2001. Representation to his estate was obtained on 9th September 2015, by Vincent Kasidi Amwayi and Godfrey Anguswa Khakali, in their capacity as son and grandson, respectively, of the deceased. A grant was made to them in that behalf, dated 8th October 2015. I shall hereafter refer to the two as the administrators.

2. The grant herein was confirmed on an application by the administrators, dated 20th July 2016, on 25th October 2016. The four assets of the estate, that is to say Isukha/Shitoto/1285, Plot No. 22 Khayega Market, Isukha/Shitoto/682 and Isukha/Shitoto/1246, were devolved to Vincent Kasidi Amwayi, Godfrey Anguswa Khakali, Emmanuel Musamali Khakali, Evans Jamuhuri Khakali, Benson Kalini Amwayi, Isaac Mutoko Amwayi, Richard Musamali Lukaya, Dennis Ingoi and Wilson Ambeyi at varied proportions. A certificate of confirmation of grant was duly issued to the administrators, in those terms, dated 20th January 2017.

3. On 27th March 2017 a summons for revocation of grant was lodged herein by Charles FL Mbakaya, of even date. I shall hereafter refer to him as the applicant. He sought revocation of the confirmed grant, and injunctive orders with relation to Isukha/Shitoto/1285. In his grounds in support of the application, on the face of the application and in his affidavit sworn on even date, he submitted that the administrators had failed to disclose material facts which were in their prior knowledge at the time of initiating the cause, his father had bought a portion of the subject property yet the grant was confirmed without notice to him, he and his family had always collected and received rent from tenants occupying the premises on the subject property, his father bought the property before he died and the deceased died before he transferred it to his father, and that the administrators had threatened to evict them from the property.

4. In the affidavit, the applicant averred that he was the administrator of the estate of his father, Andrew Mbakaya Bulinda, who died on 29th May 2015, vide a grant of letters of administration *ad litem* granted on 6th March 2017. He stated that his father had bought 1½ acres out of Isukha/Shitoto/1285 from the deceased on 16th October 1993, for a consideration of Kshs. 230, 000.00. He averred further that his father bought an additional smaller portion out of the same property. The property was thereafter extensively developed by his deceased father, by putting up rental houses, from which his family benefitted. He averred that he was unaware of the succession proceedings until tenants on the property were issued with notices to terminate their tenancies. Reports were made to the police with respect to the notices, whereupon the administrators produced the certificate of confirmation of grant issued herein, and it was then that he realized that a cause in the estate of the deceased herein had been initiated, and the estate had been distributed. He attached to his affidavit copies of the grant *ad litem* issued on 6th March 2017; copies of agreements of sale dated 16th October 1993, 8th January 1994, 19th April 1994 and 11th June 1997; an undated acknowledgement of receipt of purchase price money; a notice of termination of a tenancy dated 3rd February 2017; and the certificate of confirmation of grant issued herein.

5. The response to the application was vide a replying affidavit, sworn on 3rd October 2017, by one of the administrators, Vincent Kasidi Amwayi. He averred that the applicant did not raise any objection to the proceedings until they were concluded. He further averred that the applicant was not a member of the family of the deceased, and, therefore, he was not entitled to raise any claim in the estate. He asserted that the estate had been distributed amongst those entitled to it and they were all contented. He further averred that the probate court had discharged its duty, and it could not reverse its orders. He asserted further that the probate court could not determine the claim relating to Isukha/Shitoto/1285 as he had already obtained title to it, through due process. He argued that the application lacked basis. He attached to his affidavit a copy of a title deed for Isukha/Shitoto/1285, dated 2nd June 2017, to demonstrate that the same who registered in his name.

6. The application dated 27th March 2017 was placed before the court on 28th March 2017 under certificate of urgency. Interlocutory orders were made, whose effect was that the first administrator, Vincent Kasidi Amwayi, was restrained from evicting, among other things, the applicant from Isukha/Shitoto/1285, pending the hearing of the application. A formal order in those terms was extracted on 17th May 2017.

7. Directions were given on 11th December 2018, for disposal of the application by way of oral evidence. When the matter came up for

hearing on 15th July 2019, the same was put off, on account of the demise of an interested party, and it was indicated, by the administrators, that they would be filing a preliminary objection.

8. The preliminary objection was lodged herein on 4th March 2020, vide a notice of even date. It stated that the summons for confirmation of grant was incompetent as it had been overtaken by events since the estate had been distributed and fresh title documents issued to the beneficiaries. It was stated, as a second argument, that the applicant was a stranger to the estate, being a purchaser, and he could not raise an objection against the administrators.

9. The parties agreed on 13th July 2020 to dispose of the preliminary objection by way of written submissions. The applicant and the administrators have filed written submissions, which I have read through, and noted the arguments made.

10. I will start by stating that preliminary objections are designed to raise points of law. I have perused the written submissions made by the administrators, and I have not seen any point of law argued in them. No statutory provisions nor case law have been cited, to support the arguments articulated. An objection on an alleged point of law must be supported by legal argument. The law is stated in statutes and case law. A preliminary objection on a point of law cannot possibly be articulated in arguments that are not founded on any statutory provisions or judicial pronouncements. The failure to anchor a preliminary objection, on an alleged point of law, on any statutory provision or judicial pronouncement, underlines the hollowness of the alleged point of law. Statutory provisions and judicial pronouncements which say that a revocation application would be rendered overtaken by events upon distribution of the estate, and that an alleged purchaser of estate property from the deceased could not file for revocation of the grant, should have been cited.

11. Secondly, the principles governing preliminary objections on a point of law are now fairly notorious. They were stated with authority in *Mukisa Biscuits Manufacturing C. Ltd vs. West End Distributors Ltd* [1969] EA 696, and they have been restated by other courts thereafter in numerous decisions, some of which the applicant has cited. The objection should be on a pure point of law. The objection should be one that the court can determine based purely on pleadings, and without having to look at or for facts. The fact of confirmation is borne out by the record, but whether or not title deeds had been issued based on the confirmation order is a fact averred in the affidavit drawn for the revocation application, and is one that cannot found a basis for a preliminary objection. It is not an established fact. It awaits establishment at the proposed oral hearing. Clearly, the objection before me does not meet the standards set in *Mukisa Biscuits Manufacturing C. Ltd vs. West End Distributors Ltd* (supra).

12. Thirdly, applications for revocation of grant are premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The application is brought at the instance of “any interested party.” A person who alleges to have had acquired an interest in the estate of a deceased person, directly from the said deceased person prior to his demise, qualifies to be an interested party. He has a stake in the estate. He might not be a survivor of the deceased, in terms of Part V of the Law of Succession Act, but that does not diminish his interest in the estate. It is true that his interest in an immovable asset of the estate may not be proved in succession or probate proceedings, such as these, but that does not prevent him coming into the proceedings, through section 76, and even section 71, of the Law of Succession Act, to assert their interest, so that, as the probate court deals with distribution, it has it in its mind his interest, and if need be, refer him to the appropriate forum, for determination, of the matter but after removing the property from the schedule of the accounts for distribution, in terms of Rule 41(3) of the Probate and Administration Rules. See *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR.

13. Fourthly, section 76 envisages revocation of a grant, whether it is confirmed or not. There cannot, therefore, be any legal basis for the argument that an application for revocation cannot be mounted after the grant has been confirmed.

14. Fifthly, section 76 of the Law of Succession Act provides that a grant may be revoked “at any time,” whether confirmed or not, whether the estate has been distributed or not, whether fresh title deeds have been issued or not.

15. The relevant portion of section 76, for the purpose of paragraphs 13 and 14 of this ruling reads 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—...”

16. Sixthly, the proviso to section 71(2) of the Law of Succession Act requires administrators to ascertain the identities of all persons who are beneficially entitled to a share in the estate, and, at confirmation, identify their shares. Persons who are beneficially entitled to a share in the estate of a deceased person are not limited to survivors or beneficiaries or family members. They include persons who might have had acquired an interest in the estate during the deceased’s life time by way of sale. So, before the administrators herein places a proposed distribution before the court for confirmation, they ought to have had ascertained the persons who were entitled as survivors of the deceased in terms of Part V of the Law of Succession Act, and those entitled on account of being creditors of the estate, including those who had acquired an interest in the estate, which interest was yet to be completed or perfected. I may add that it is the duty of administrators to complete or perfect any incomplete or imperfect contractual transaction that the deceased might have entered into with any persons prior to his demise. It is also the duty of administrators to ascertain such claims so as to establish their validity or authenticity.

17. The proviso to section 71(2) of the Law of Succession Act says as follows:

“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

18. Among the bundle of documents that the administrators lodged in the record before me, on 23rd March 2015, together with their petition,

were the original certificates of official search in respect of the assets that they said belonged to the deceased, that is to say Isukha/Shitoto/682, Isukha/Shitoto/1246 and Isukha/Shitoto/1285. The search certificate in respect of Isukha/Shitoto/1285, dated 19th January 2015, had, at Item 5, an entry of a caution lodged by Andrew Mbakaya Bulinda, the late father of the applicant, claiming a purchaser's interest. The certificate in respect of Isukha/Shitoto/1285, dated 19th January 2015, was filed by the administrators, not the applicant. It disclosed the father of the applicant as a person claiming a beneficial interest in the estate. The administrators, therefore, knew at the time they sought representation, that the late Andrew Mbakaya Bulinda was claiming an interest in the estate, and they were obliged, by that certificate, to treat him as an interested party for the purpose of succession to the estate of the deceased herein, and as a person who was possibly beneficially entitled to a share in the estate for purposes of confirmation. They were obliged to ascertain him as such, and to evaluate the validity or otherwise of his alleged interest as a purchaser. So, when the administrators describe him as a stranger to the estate, I find myself unable to comprehend what they mean by that.

19. Overall, I find no merit in the preliminary objection raised. The same is hereby disallowed. Costs shall be in the cause. To move the matter forward, a date for disposal of the summons for revocation of the grant herein, dated 27th March 2017, by way of *viva voce* evidence, as directed on 11th December 2018, shall be given at the registry. It is so ordered.

DELIVERED, DATED AND SIGNED IN CHAMBERS ELECTRONICALLY AT KAKAMEGA THIS 19TH DAY OF APRIL, 2021

W MUSYOKA

JUDGE