



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 19 OF 1999

IN THE MATTER OF THE ESTATE OF LAURENT AMBEYI MUNALO (DECEASED)

RULING

1. The application that I am called upon to determine is dated 22nd June 2020. It is at the instance of Morrice Imbova Laurent. He seeks that two assets, Isukha/Shitochi/858 and 859, that had been distributed as part of the estate of the deceased be removed from the schedule of distribution as they did not form part of the estate; that he be appointed administrator so as to work jointly with the current administrator, Paul Tsalwa Ambeyi; that the fresh title deeds issued with respect to Isukha/Shitochi/858 and 859 be revoked and reinstated to their original numbers; and that Isukha/Shitochi/856 be redistributed between the sons of the deceased, being Paul Tsalwa Ambeyi, Joseph Machicha Ambeyi, Morice Imbova and Makali Musonye. I shall hereafter refer to Morrice Imbova Laurent as the applicant, and to Paul Tsalwa Ambeyi, as the administrator.

2. In the affidavit sworn in support, on even date, he avers that the deceased died possessed of only one asset, Isukha/Shitochi/856; and Isukha/Shitochi/858 and 859 did not belong to the deceased as he, the applicant, had bought it from Gerald Kashindi Mulalu and Mulama Mulele, and he has attached copies of the title deeds and sale agreements. He accuses the administrator of concealing material from the court, hence his prayer that he, the applicant, be appointed as an additional administrator. Attached to the affidavit is a copy of the title deed for Isukha/Shitochi/858, dated 21st November 1989, which shows that the applicant was registered proprietor of that property on 19th January 1988. There is also copy of an undated handwritten document, which appears to be a sale agreement/acknowledgement of money in respect of Isukha/Shitochi/859, between the applicant and Anna Ingasiani Mulama and Julius Lukulu Mulama.

3. The administrator responded to the application, vide an affidavit that he swore on 30th September 2020. He avers that the issues that the applicant was raising were afterthoughts, as he had all along participated in the proceedings, including attending court when the grant came up for confirmation. He avers that there had been a sale transaction relating to Isukha/Shitochi/856 and 858, but explains that the same was rescinded, and the purchase money refunded to David Manani. He says that Isukha/Shitochi/859 was exchanged within the family with Isukha/Shitochi/1365. He accuses the applicant of forcefully putting up structures on Isukha/Shitochi/858 and 859, and was utilizing the two parcels of land to the exclusion of everyone else, and had extended the boundaries between Isukha/Shitochi/856 and Isukha/Shitochi/858, thereby making his portion bigger. He has attached to his affidavit several documents. There are documents dated 6th July 2011, 8th July 2011 and 5th October 2011, ostensibly relating to refund of moneys and cancelation of a sale of Isukha/Shitochi/856.

4. There is also another replying affidavit, purportedly sworn by Joseph Machicha Ambeyi, on 30th September 2020, which is an exact replica of the affidavit of the administrator, inclusive of the annexures.

5. My understanding of the applicant's case is that administrator placed before the court for distribution, as assets of the estate, property that did not belong to the deceased. He talks of two particular properties, being Isukha/Shitochi/858 and 859. He has attached evidence that suggests that as at 21st November 1989 Isukha/Shitochi/858 was registered in his name. That is the case that the administrator faces, and should have responded to. Unfortunately, the administrator has not, in his response answered that case. He has said nothing about registration of Isukha/Shitochi/858 in the name of the applicant. The documents attached to his reply relate to Isukha/Shitochi/856, which is not in dispute. In fact, the applicant argues that Isukha/Shitochi/856 was the only asset in the estate of the deceased, and that should have been what the administrator should have placed before the court for distribution.

6. When the administrator filed his petition for representation herein on 31st December 1998, he launched, simultaneously with it, half a dozen copies of an official search for Isukha/Shitochi/856, dated 2th October 1998, which showed that the deceased had been registered as proprietor of the said property on 3rd June 1975. He did not attach search certificates for Isukha/Shitochi/858 and 859, and there is no telling whether, as at 31st December 1998, those two assets belonged to the estate. When the grant of letters of administration intestate was issued on 24th May 1999, it indicated that the estate comprised only of Isukha/Shitochi/856. What should be clear, therefore, is that as at 31st December 1998, the property that was presented as making up the estate of the deceased was Isukha/Shitochi/856.

7. The administrator then applied for confirmation of his grant, vide a Motion, dated 13th January 2000. The property that he proposed for distribution was Isukha/Shitochi/856, and he stated, in his affidavit sworn on even date, that the same be devolved to himself wholly. It is not clear what became of the Motion, dated 13th January 2000, for it was never fixed for hearing, and no orders were apparently ever made on it.

8. The administrator subsequently filed another Motion, dated 21st May 2013, in which he was applying for a certificate of confirmation of grant, on grounds that the Land Registrar was demanding one to facilitate distribution. The application of 21st May 2013 also sought confirmation of the grant. He proposed that Isukha/Shitochi/856 be devolved upon himself, Isukha/Shitochi/857 upon Makali Musonye Ambeyi, Isukha/Shitochi/858 upon Morice Imbova Ambeyi and Isukha/Shitochi/859 upon Joseph Machicha. In his affidavit in support, he averred that Isukha/Shitochi/856 had been subdivided into Isukha/Shitochi/856, 857, 858 and 859. He did not attach copies of title deeds or search certificates for the four assets, that is to say, Isukha/Shitochi/856, 857, 858 and 859, that he was proposing to be distributed, as proof that they belonged to the estate and were available for distribution.

9. It is not clear from the record which Motion was placed before the Judge on 19th September 2013, in the presence of the administrator, the applicant and a Joseph. Nonetheless, the court noted that the beneficiaries had agreed on the mode of distribution, and the grant was confirmed, with the court stating that the format for a summons for confirmation of grant had not been used. A certificate of confirmation of grant was subsequently issued, dated 1st November 2013, apparently founded on the Motion, dated 21st May 2013, whose effect was to devolve Isukha/Shitochi/856 upon the administrator, Isukha/Shitochi/857 upon Makali Musonye Ambeyi, Isukha/Shitochi/858 upon Morice Imbova (Laurent) and Isukha/Shitochi/859 upon Joseph Machicha Ambeyi.

10. Thereafter, a Motion was lodged at the registry, on 21st May 2017, dated 18th October 2016, at the instance of Anna Ingasiani Mulama. Her case was that Isukha/Shitochi/859 had been erroneously made part of the estate of the deceased and distributed at the confirmation of the grant. She sought that the same be removed from the schedule of assets, and be reverted to the name of the late Mulama Mulele. She averred, in her affidavit in support, of even date, that Mulama Mulele, was her husband, who died in 1988, and was the registered proprietor of Isukha/Shitochi/859. She said that she did a search on the title, in preparation for initiating succession proceedings to his estate, only to discover that Isukha/Shitochi/859 had since been transferred to the name of Joseph Machicha Ambeyi. The records at the lands registry revealed that the instant succession cause had been concluded and Isukha/Shitochi/859 was transmitted to the administrator, who then transferred the property to Joseph Machicha Ambeyi. She averred that the inclusion of Isukha/Shitochi/859 as an asset in the estate of the late Laurent Ambeyi Munalo was wrongful.

11. Attached to the affidavit in support of the application dated 18th October 2016, was copy of a green card for Isukha/Shitochi/859. It indicated that the register for Isukha/Shitochi/859 was opened on 3rd June 1975, and on the same date the property was registered in the name of Mulama Mulele. On 22nd January 2015, the property was transferred to the administrator herein, on the basis of an order in this cause made on 24th May 1999. On 10th June 2015, the property was transferred to Joseph Machicha Ambeyi and a title deed was issued to him on 19th November 2015. A copy of a certificate of official search was also attached, dated 3rd May 2016, confirming that Joseph Machicha Ambeyi was registered as proprietor of Isukha/Shitochi/859 on 10th June 2015, and a title deed was issued to him on 19th November 2015.

12. On 14th August 2017, three affidavits were lodged in this cause, in apparent response to the application dated 18th October 2016. The three affidavits were sworn on the same day, 14th August 2017, by the administrator, Joseph Machicha Ambeyi and Anna Ingasiani Mulama, the applicant in the application dated 18th October 2016.

13. I will recite the contents of the three affidavits, starting with that sworn by the administrator. He averred that the applicant, that is to say Anna Ingasiani Mulama, lacked standing to bring the application dated 18th October 2016. He stated that he had obtained representation to the estate of the deceased herein, who was the registered proprietor of Isukha/Shitochi/856. He proposed distribution of the property, and at confirmation each of the sons got their share. He averred that Morice Imbova (Laurent), to whom Isukha/Shitochi/858 had been devolved at distribution, exchanged the property with Isukha/Shitochi/1365 belonging to the husband of Anna Ingasiani Mulama. He accused the applicant, Morice Imbova (Laurent), of causing confusion, with a view to encroach on the parcels belonging to the other sons of the deceased, with a view to disinherit them.

14. In his replying affidavit, sworn on 14th August 2017, Joseph Machicha Ambeyi asserted that he was the proprietor of Isukha/Shitochi/859, through transmission. He accused the applicant, Morice Imbova (Laurent), of using proxy to cause confusion.

15. In her further affidavit, Anna Ingasiani Mulama, denounced her affidavit, sworn on 18th October 2016, in support of her application of even date. She stated that she was tricked into visiting the offices of the advocates for the applicant, where she signed some documents. She asserted that Isukha/Shitochi/859 belonged to Joseph Machicha Ambeyi, having been exchanged with Isukha/Shitochi/1365 belonging to her late husband.

16. In a curious twist, Anna Ingasiani Mulama, swore another affidavit, on 14th November 2017, to deny her affidavit filed in court on 14th August 2017, which I have recited in paragraph 15 hereabove. She averred that she was the one who had instructed Mr. Mukavale, Advocate, to file the application dated 18th October 2016, to have Isukha/Shitochi/859 included, probably meaning excluded, from the instant proceedings. She asserted that she was unaware of the affidavit of 14th August 2017, purported to have been sworn by her. She asserted that that affidavit was never sworn by her, and that the same was a forgery. She further asserted that her late husband, Mulama Mulele, never exchanged Isukha/Shitochi/859 with Joseph Machicha Ambeyi.

17. The application dated 18th October 2016 has not been determined, and, therefore, the issues raised in it remain moot, but the documents that the applicant in that application placed on record to support her case are of great relevance to the matters in controversy in the application the subject of this ruling, and it is for that reason that I have recited the papers filed with respect to that application. The impression I get of the matter is that the administrator has probably no idea of what he should have done at confirmation of grant, or he is a devious character who is abusing the court process to take away property from its legitimate owners.

18. The application dated 22nd June 2020 was argued before me on 2nd December 2020. Mr. Khayumbi, advocate, for the applicant submitted that except for Isukha/Shitochi/856, the rest of the assets did not belong to the deceased. The administrator submitted that

Isukha/Shitochi/856 and 857 had been sold but the family refunded the purchase price. He said that Isukha/Shitochi/859 was exchanged for Isukha/Shitochi/1365, and Isukha/Shitochi/858 was bought by the deceased from one of his sons, but it was never registered in the name of the deceased.

19. Let me start by stating that the matter herein is pretty untidy, and reiterate what I have said earlier here above, that the administrator has not at all answered the case presented by the applicant in the application dated 22nd June 2020. The case by the applicant, that the administrator is yet to answer, is that two of the assets that were presented for distribution at the confirmation of the grant, being Isukha/Shitochi/858 and 859, did not belong to the estate, and should not have been distributed. The applicant placed on record copy of a title deed for Isukha/Shitochi/858, dated 21st November 1989, showing him, the applicant, as the proprietor of that property. The deceased herein died on 2nd December 1990. The administrator did not place any document on record to establish that the deceased had bought Isukha/Shitochi/858 from the applicant, and that the said property had been transferred to the name of the deceased by the time he died on 2nd February 1990. He admitted in court, on 2nd December 2020, that Isukha/Shitochi/858 was never registered in the name of the deceased. Since it was not registered in the name of the deceased as at 2nd December 1990, it follows that it did not form part of his estate.

20. Regarding Isukha/Shitochi/859, the applicant did not attach any documents as proof that the same did not belong to the deceased. The documents relating to the registration status of Isukha/Shitochi/859 were placed on record by Anna Ingasiani Mulama, through her affidavit of 18th October 2016. She has attached a copy of the green card for Isukha/Shitochi/859, which shows that the said property was registered in the name of Mulama Mulele, who she averred was her late husband, on 3rd June 1975. The next entry followed on 22nd January 2015, when the said property was transferred to the name of Joseph Machicha Ambeyi. The name of the deceased does not feature in the green card, which means that the property was never transferred to the name of the deceased at any time, and that as at the date of his death, on 2nd February 1990, it was not registered in his name, and, therefore, it did not form part of his estate.

21. At confirmation of grant, the property available for distribution ought to be that which belonged to the deceased as at the date of his death. That is to say his free property, property that he would have dealt with as his own. Which he would have been able to sell and transfer to the buyer, which he would have charged or mortgaged, or given out as a gift and transferred to the name of the beneficiary of the *inter vivos* gift. Property that is not in the name of the deceased is not his free property. It does not form part of his estate, and is not available for distribution at confirmation. The explanation is that that is property that the deceased could not, during his lifetime, transfer to the name of another since it was not in his name in the first place.

22. Under section 79 of the Law of Succession Act, Cap 160, Laws of Kenya, the property of the estate vests in the personal representatives upon representation being granted to them. What is vested in them is the free property of the deceased, that is to say property registered in the name of the deceased; property that the deceased could, during lifetime, cause to be transferred to the name of another. Property registered in the name of another does not form part of the estate of the deceased, but that of the registered proprietor, and it would not vest in the personal representative. Since such property does not vest in the personal representative, there would be no legal basis, for the personal representative, to place it before the court for distribution at confirmation of grant. It would be a grave error to place property that does not belong to the estate before the distribution court, and any purported distribution of such property would amount to a nullity. The court at confirmation only has jurisdiction to distribution that which belongs to the deceased, a purported distribution of property which did not belong to the deceased amounts to the court acting without jurisdiction, and the outcome of an order made outside of jurisdiction is that the same would be void *ab initio*.

23. It is clear beyond per adventure that Isukha/Shitochi/858 and 859 were assets that were not registered in the name of the deceased as at the time he was dying on 2nd December 1990. They did not form part of his estate, and they, therefore, did not vest in the administrator on 19th May 1999 when representation was granted to him. It follows, therefore, that the said assets ought not have been presented to the court for distribution, and the approval of their distribution was done without jurisdiction, with the result that the order distributing them was a nullity.

24. It could be that the deceased was entitled to Isukha/Shitochi/858 and 859 for one reason or other, although, from the material before me, I have not seen any basis for finding that he was entitled to the two assets in any way. But let it be assumed that he was entitled to them in some way. The bottom-line is that as at the date of his death, they had not been transferred to his name, and so, as said above, they did not vest in him, and subsequently to his estate. They were in the names of other persons, and, therefore, they belonged to those other persons. What the administrator ought to have done, in the event the deceased was entitled to these assets, was to have them transferred to the estate, so as to make them available as assets in the estate. That he never did, and the property remained the property of other persons, and, therefore, unavailable for distribution.

25. I was told that Isukha/Shitochi/859 was made available to the estate by way of exchange, with Isukha/Shitochi/1365. I have not seen any evidence of that alleged exchange. From the vague averments by the administrator and Joseph Machicha Ambeyi, about the alleged exchange, it happened, if at all, after the deceased had died, and the deceased had no role at all in the alleged exchange. Let me reiterate what I have stated above, that an asset that was not registered in the name of the deceased as at the date of his death, would not be treated as an asset in the estate. Where the administrator has perfected the same, by having the said property registered either in the name of the deceased, or that of the administrator on behalf of the estate, the property becomes an asset in the estate, and available for distribution. In the instant case, there is vague information about the alleged exchange, but what is clear is that the alleged exchange did not culminate in the property being transferred to the name of the deceased or that of the administrator, so as to be bring it within the estate, and thereby available for distribution as an asset in the estate, so that at confirmation of the grant the said asset was registered in the name of a person other than the deceased or the administrator.

26. From what I have said so far, I do find merit in the application dated 22nd June 2020, with respect to Isukha/Shitochi/858 and 859.

27. Let me now turn to considering the matter of the appointment of the applicant as administrator, to work with the current administrator. From the material before me, it is clear that the administrator has committed grave blunders, that will force the parties to go back to the exercise of redistribution of the estate, limited to Isukha/Shitochi/856. It would suggest that the current administrator is incompetent and

needs to be assisted. I also hazard, from the material on record, that he could be mischievous or devious or both. Either way, for proper and fair administration of the estate, another administrator should be appointed.

28. The final orders are:

(a) That the orders made on 19th September 2013, confirming the grant made herein on 19th May 1999, are hereby vacated for the reasons given in the body of the ruling, with the resultant consequence that the certificate of confirmation of grant dated 10th October 2013, and signed on 1st November 2013, is hereby cancelled;

(b) That the registration of Isukha/Shitochi/858 and 859, done on the basis of the said certificate of confirmation of grant, is hereby nullified, and the Land Registrar is hereby directed to revert the same to the status of the registration of the two parcels of land that obtained prior to 19th September 2013;

(c) That I appoint Morice Imbova Laurent an administrator of the estate, to work jointly with the current administrator, and a grant of letters of administration intestate shall issue to them;

(d) That the administrators shall, within thirty days, apply for confirmation of their grant, to distribute such assets of the estate herein, as were registered in the name of the deceased as at 19th September 2013;

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

(f) That any party aggrieved by these orders has leave, of twenty-eight days, to move the Court of Appeal, appropriately.

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

W MUSYOKA

JUDGE