REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 913 OF 2013

IN THE MATTER OF THE ESTATE OF APOLLO ZEYANZI

MUNUBI alias APOLLO ZAYAZI MUNUBI (DECEASED)

JUDGMENT

1. According to the certificate of death on record, serial number 102160, dated 16th June 2009, the deceased herein, Apollo Zeyazi Munubi, died on 30th April 2009. According the letter from the Chief of Sinoko Location, dated 24th August 2012, the deceased is said to have had been survived by a widow, Gladys Minayo, and children, Aggrey Munubi, Wilberforce Musira, Christopher Ludwaye, Kennedy Munubi, Albert Alumasa and Nancy Kavaya.

2. Representation to the intestate estate of the deceased was sought in a petition that was lodged herein in 11th December 2013 by Gladys Minayo Apollo and Wilberforce Musira Munubi, in their capacities as widow and son, respectively, of the deceased. They listed the survivors of the deceased to be the widow and the six children. The assets of the estate were listed as S/Maragoli/Lugovo/860, Butsotso/Shikoti/1447, Plot 120 Nzoia Scheme No. 10, Plot No. 47B Nzoia Township, shares in a number of several blue chip firms, dividends on shares in some of the firms and money in a bank account. Liabilities were listed as Kshs. 1, 000, 000.00. A consent in Form 38 was executed by the five children who were not applying for representation. Representation was made to Gladys Minayo Apollo and Wilberforce Musira Munubi, on 4th July 2014, and a grant was issued, dated 8th July 2014. The initial administrators, appointed on 4th July 2014 passed away, and were replaced by Christopher Lidweye Munubi, on 21st July 2020, and grant was issued to him dated 23rd July 2020.

3. The grant was confirmed on 30th March 2017, on a summons for confirmation of grant, dated 18th July 2016. The estate was shared out between the widow and the six children, and a John Munubi, at varying degrees. A certificate of confirmation of grant was subsequently issued, dated 5th October 2017.

4. What is for determination is a summons for revocation of grant, dated 31st October 2018. It is brought at the instance of Peter Mbiyu Munubi. I shall refer to him hereafter as the applicant. He would like the grant made on 4th July 2014 to be revoked, on grounds that it was obtained in proceedings that were defective, attended by fraud, false statements and concealment of matter from the court, and on untrue allegations of fact. He is a nephew of the deceased, in that his father, the late Gideon Gudai Munubi, and the deceased were siblings, being sons of the late Elisha Munubi. The late Elisha Munubi is said to have been the father of 5 sons, being Peter Vuyiya Munubi, Gideon Gudai Munubi, Zakaria Ovamba Munubi, Apollo Zeyazi Munubi and Japheth Rombo Vuyiya. The said Elisha Munubi was said to be the registered proprietor of South Maragoli/Lugovo/860, 925 and 993, which were yet to be shared or distributed to his 5 sons. He avers that South Maragoli/Lugovo/860 was subsequently registered in the name of the deceased herein, Apollo Zeyazi Munubi, to hold in trust for the rest of the other 4 sons, including his father, Gideon Gudai Munubi. He explains that it was his mother, Dorcas Inyambula Munubi, together with elders, who facilitated the transfer of the property to 3 of the brothers as follows: South Maragoli/Lugovo/860 to Apollo Zeyazi Munubi, South Maragoli/Lugovo/925 to Peter Vuyiya Munubi and South Maragoli/Lugovo/993 to Gideon Gudai Munubi. He avers that Peter Vuyayi Munubi was the administrator, and he died in 1998, before subdivision and transfer was completed. He avers that Apollo Zeyazi Munubi was the first registered proprietor of South Maragoli/Lugovo/860, but the same was ancestral property with belonged to their father, the late Elisha Munubi. He avers that South Maragoli/Lugovo/860 was registered in the name of Apollo Zeyazi Munubi out of necessity or convenience, so as to hold it in trust for the other children of Elisha Munubi. He avers that Peter Vuyiya Munubi was the administrator of the estate of Elisha Munubi, but he, Peter Vuyayi Munubi, died in 1998, before he completed administration, which he says is a fact well known to the administrators. He avers that his family, of the late Gideon Gudai Munubi, had been utilizing and cultivating on South Maragoli/Lugovo/860 ever since. He avers that when representation was sought, in this cause, it was not disclosed that his family had been cultivating and utilizing South Maragoli/Lugovo/860. It is argued that in the circumstances, the procedure adopted was defective in substance. He avers that upon confirmation being done surveyors visited the land to place beacons, and all this happened without notice to them. They fear being dinsherited.

5. The response to the application was by Wilberforce Musira Munubi. He asserts that the deceased was the registered proprietor of South Maragoli/Lugovo/860, having bought it from the late Zacharia Ovamba. He avers that South Maragoli/Lugovo/860 was family land that the late Elisha Munubi had sold to the late Zacharia Ovamba in the 1940s, and which the late Zacharia Ovamba then sold to the deceased herein

in the 1960s, before land adjudication, so that when land demarcation and registration was done, the property was registered in the name of the deceased. He contests that allegation by the applicant that it was his mother, Dorcas Inyambula, who assisted during the adjudication process, saying that it was the father of the applicant who was given funds by the late Peter Vuyiya and the deceased herein to carry out the exercise. He avers that the late Elisha Munubi died in 1955, and, as at that date, he owned only 2 pieces of land. When the land adjudication process began in the 1970s, it was these two parcels of land that were available for registration, being South Maragoli/Lugovo/925 and 993, which were registered in the names of Peter Munubi and Gideon Munubi, respectively. He asserts that South Maragoli/Lugovo/860 ceased to be family property in the 1940s when it was sold to the late Zacharia Ovamba, who later sold it to the deceased in the 1960s to pay school fees for his children. He asserts that South Maragoli/Lugovo/860 was not held in trust as it was property that he had purchased. He accuses the applicant of not calling a family meeting, after the demise of his father, to discuss the distribution of South Maragoli/Lugovo/993, which his father held in trust for other family members. He submits that South Maragoli/Lugovo/925 and 993 were to be held in trust for the family of the late Elisha Munubi by Peter Vuyiya and Gideon Gudai. He avers that the family of the deceased herein obtained representation to the estate after following due process. He avers that the families of the late Gideon Gudai Munubi and the applicant had established homes and residences away from South Maragoli/Lugovo/860. He further accuses them of being unfair to the family of the late Elisha Munubi by filing a case at the Eldoret Environment and Land Court, in ELC No. 83 of 2013 (OS), against the estate of the late Peter Munubi and an objection in Eldoret HCSC No. 30 of 1999 in the matter of the Estate of Peter Vuyayi Munubi (Deceased).

6. Directions were given on 29th July 2020, for disposal of the application dated 20th February 2018, by way of *viva voce* evidence.

7. The oral hearing commenced on 7th October 2020, with the applicant on the stand. He said that he had a problem with South Maragoli/Lugovo/860, as it was land that they had occupied since 1966, and which they used to grow maize, Napier grass and eucalyptus trees. He stated that the same was among the lands owned by his late grandfather, and that he died before he had distributed the same. During land adjudication, it was his mother on the ground. He said that the family sat, and agreed on distribution of the lands. South Maragoli/Lugovo/860 was to be given to Gideon, Gudai Munubi but it was registered in the name of the deceased herein, to hold in trust for the rest of the families. He said that his father died in 2003 and that he had not initiated succession to his estate. Zachary Ovambo died in 2015, and he could not tell whether his family had initiated a succession cause to his estate. Peter Vuyiya died in 1998, and succession proceedings were initiated to his estate, which culminated in South Maragoli/Lugovo/925 passing in 2009 to the name of his widow, Ruth Auma Vuyiya. He stated that he had filed a challenge in that cause. He said that he could not initiate succession proceedings relating to South Maragoli/Lugovo/993, registered in the name of his father, since the three parcels of land were subject to the proceedings in the Eldoret cause. He asserted that he was a descendant of Elisha Munubi and he ought to be included in the distribution of South Maragoli/Lugovo/860. He said that he was utilizing both South Maragoli/Lugovo/860 and 925. He asserted that he could not file for succession to South Maragoli/Lugovo/933, before issues relating to this cause and the one in Eldoret were resolved. He stated that all the other families had moved out, leaving his family on the land. He said that Peter, Zachary, Japheth and Apollo agreed that the lands in Maragoli were too small, and so they moved to Kitale.

8. Chrispo Ombeva Agoi testified next. He said that he did not know the deceased, but he did know his late father, Elisha Munubi. He also stated that he knew the applicant, as the person occupying and using South Maragoli/Lugovo/860. He said his land was next to South Maragoli/Lugovo/859. He said Gideon Gudai Munubi was using South Maragoli/Lugovo/860, and when he died his sons took over. He said that he never saw anyone else use the land. He explained that the deceased had 3 pieces of land, which were registered in the names of 3 of his sons in trust. He averred that all the sons of the deceased, save for Gideon Gudai Munubi, had left the land, by the time of land adjudication. He confirmed that South Maragoli/Lugovo/860 was registered in the name of the deceased herein in 1975.

9. Peter Lugusa Kavehagi testified next. He largely said that he knew the family of the deceased. Sammy Bulimu Alubisi followed. He was a retired Assistant Chief for the area. He said that he did not know Elisha Munubi, for he died before the witness was born. He said that he knew about the family. He said that he had been born during the demarcation, but he was not involved in the process. Paul Kaisha Munubi was a brother of the applicant. He said that succession to the estate of his father, who died in 2003, had not been done. He said that the land registered in his name was not his, and that his land was the one the subject of the proceedings in Eldoret, by persons who were claiming to be the owners of the land. Samuel Kavehi Obondo said that he did not know the applicant, but he knew Elisha Munubi and some of his sons. He said that the deceased herein moved out of Maragoli a long time ago.

10. The case for the administrator opened on 17th October 2020, with the administrator taking the stand. He stated that the deceased had 7 children, and owned South Maragoli/Lugovo/860, another piece of land in what he described as the Scheme and shares. He said that the family had agreed on distribution. He said his family was utilizing South Maragoli/Lugovo/860. He explained that South Maragoli/Lugovo/860 had initially been given to his uncle Zachary Ovambo after he got married, so that he could put up a house on it for his family. He then sold it to the deceased so as to raise for the education of his children. After which the deceased was registered as proprietor. He said he had no evidence of what he was saying, and he was only speaking about what he was informed by others. He said that the deceased died in 2009, and was buried at the Nzoia Settlement Scheme. Aggrey Zeyazi Munubi followed, a brother of the administrator and a son of the deceased. He was born in 1967, and, therefore, much of what he knew about the matter was information received by word of mouth, and largely mirrored the testimony from his brother, the administrator. Enos Alumasa was a relative of the parties, being a cousin of the father of the deceased, Elisha Munubi. He explained that the deceased had 3 pieces of land, being South Maragoli/Lugovo/860, 925 and 993, which he gave to Zachary Ovambo, Peter Vuyayi and Gideon Gudai, respectively. He stated that although the deceased had 5 children, he shared out his three pieces of land to 3 of the sons, the other 2, Vulimu and Apollo Zeyazi were to get their share from P/No. 993, as it was the largest. He explained that South Maragoli/Lugovo/860 was sold to the deceased by Zachary Ovambo. He said that he was 13 or 14 years when these things happened, he might have not known much about land then, but he said he saw the events, he was not told. He said that he was involved in the fixing of boundaries, and he did not know of the understanding between the adult on these parcels of land. Dickson Onyayi Ovamba, a son of Zachary Ovambo, testified next. He explained that South Maragoli/Lugovo/860 was initially given to his father by his grandfather, Elisha Munubi, who then gave the same to the deceased, before he moved to the Scheme. He explained further that the deceased did not settle on the land, because he also moved to the Scheme. He said that the father of the applicant had also been given another piece of land adjacent to South Maragoli/Lugovo/860. He said that the parcels of land were given to the individuals to hold in trust, but that did not include South Maragoli/Lugovo/860. He said he was present when the land was shared out.

11. At the close of the oral hearing, I directed the parties to file written submissions. They complied. I have read through the said submissions and I have noted the arguments made.

12. What is for determination is for revocation of grant. Revocation of grants is provided for under section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, which says 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."*

13. Under section 76 of the Law of Succession Act, grants of representation are liable to revocation on three general grounds. The first is that the process of obtaining the grant was fraught with problems. It could be that there were defects in the process or that the court is misled in some way. Such would include where the grant is sought by a person who is not qualified to obtain representation to the estate of the deceased, or where certain facts as are required under the law have not been disclosed or are concealed from the court or are misrepresented. The second general ground is where the grant is obtained procedurally and properly, but subsequently the grant holder encounters challenges with administration, such as where they fail to apply for confirmation of grant within the period allowed in law or fail to proceed diligently with the administration of the estate, or fail to render accounts as and when required. The last general ground is where the grant has subsequently become useless or inoperative, usually in cases where the sole administrator dies or becomes of unsound mind or is adjudged bankrupt.

14. In the instance case, the applicant raises issues that point to the first general ground, that the process of obtaining the grant herein was attended by challenges. His principal argument being that the administrator did not disclose that the property sought to be disposed of through the cause was held in trust by the deceased for others.

15. Applications for grants of representation, which include a grant of letters of administration intestate, are governed by section 51 of the Law of Succession Act. Section 51(2) states the details of what ought to be disclosed, as follows:

> *"(1) …*
>
> *(2) Every application shall include information as to—*
>
> *(a) the full names of the deceased;*
>
> *(b) the date and place of his death;*
>
> *(c) his last known place of residence;*
>
> *(d) the relationship (if any) of the applicant to the deceased;*
>
> *(e) whether or not the deceased left a valid will;*
>
> *(f) the present addresses of any executors appointed by any such valid will;*
>
> *(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;*
>
> *(h) a full inventory of all the assets and liabilities of the deceased; and*

(i) such other matters as may be prescribed."

16. The deceased herein died intestate. The provision in section 51(2)(g), requires that all the persons mentioned listed or mentioned in there be disclosed, whether or not they will take a share in the estate. that list includes parents, brothers and sisters of the deceased. These are not immediate family members of the deceased. There must be a reason for their inclusion, to address such issues as that arise in this case, that some of the assets proposed for distribution were actually assets for the larger family held in trust for the siblings of the deceased. Technically, therefore, the administrators were in default, when they listed only the immediate members of the family of the deceased, and omitted to list the siblings of the deceased.

17. Should that be a good enough reason for the court to revoke the grant? Was such non-disclosure fatal to the petition? I do not think so. The purpose of petitioning for representation is appointment of personal representatives. The categories of the persons not disclosed herein were those who did not have prior right to administration, so that their omission did not result in persons who had inferior right to administration being appointed administrators. The persons who qualify to apply for administration in intestacy are set out in section 66, which gives an order of priority to guide the court in exercising discretion in the matter of appointment of administrators. The provision states as follows:

"66. Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors: Provided that, where there is partial intestacy, letters of administration in respect."

18. Section 76 grants the court a discretionary power to revoke the grant. So should I exercise that power and revoke the grant? I do not think I should, for the reasons given in paragraph 17. The persons left out, being members of families of the siblings of the deceased, did not rank in priority with or over the widow and children of the deceased. They could not possibly have been appointed administrators over the widow and children, and, therefore, there would be no good reason to revoke the grant. What I ought to consider, in the event I am persuaded that a case has been made out for revocation of the grant, is whether other orders could be made instead, like revisiting the confirmation orders on distribution. In this case that would be necessary if it is established that the land in dispute was actually held in trust, for that is the bone of contention in the application before me.

19. I have seen a copy of the land certificate for South Maragoli/Lugovo/860. It is in the name of the deceased herein. It was issued on 25th February 1975. The document, on the face of it, does not say that the absolute proprietor held the title in trust for someone else. There is also a copy of certificate of official search on the same property, dated 13th July 2012. It shows the deceased as the registered proprietor. Registration is reflected as having happened on 14th December 1973, and land certificate was issued on 25th February 1975. The certificate of search does not indicate that the property was held in trust for anyone. So, the administrators cannot be said to have had misled the court or withheld information from the court, regarding the proprietorship of the property.

20. So should I infer a trust in favour of the applicant or his family or late father? I have closely perused through the written submissions filed by the applicant, curiously he has not submitted on that point, the law on trusts in such cases as this one. The administrator has cited cases where the courts have said that a party claiming existence of a trust has to prove it through evidence. The Court of Appeal said so in *Charles K. Kandie vs. Mary Kimoi Sang* [2017] eKLR (Waki, Nambuye and Kiage JJA), when it asserted that the law never implies or presumes a trust, except where it has to give effect to the intentions of the parties, and that such intentions to create a trust must be clearly determined before the trust is implied. In *Felista Muthoni Nyaga vs. Peter Kayo Mugo* [2016] eKLR (Olao J.), it was said that there must be evidence upon which a court can conclude that the registered owner of the property held the same in trust for the benefit of others. There is a host of case law, to the effect that there ought to be concrete evidence, that there was an intention to create a trust, before a one is implied.

21. Was such evidence presented? I do not think so. Those who asserted existence of that trust were either not born or were too young at the time the property was being registered in the name of the deceased. So, whatever oral evidence they presented was largely hearsay, second hand information from the persons who might have been present at the time. Yet registration of land is subject to elaborate processes, preceded by demarcation and land adjudication. It is the adjudication process that would explain the background to registration of the property in the name of the registered proprietor. In the instant case, no effort was made to present material from the demarcation and adjudication process to give a background, from which the court would have been able to ascertain the intentions behind the deceased being registered as such. Without that evidence, I clearly have no basis upon which I can conclude that the registration of the deceased as proprietor of South Maragoli/Lugovo/860 was in trust for others, including the father of the applicant.

22. Additionally, I doubt whether I have any jurisdiction to even address the issue. I sit as a Judge in a probate matter, to exercise the powers and jurisdiction granted to me under the Law of Succession Act. The principal purpose of the succession process is distribution of the estate of the deceased, and not determination of highly contested issues relating to ownership of land. The spirit of Rule 41(3) of the Probate and Administration Rules is that such disputes ought to be determined in separate proceedings, in a suit properly framed to address the pertinent issues that arise. Secondly, whether or not a trust exists raises an issue on ownership of property. In a senses a person holding property in trust is not the absolute owner of it. The High Court no longer has jurisdiction to determine questions relating to title or ownership of

property, by dint of Articles 162(2) and 165(5) of the Constitution. By venturing to determine whether the deceased had absolute title to South Maragoli/Lugovo/860, or he held a trust for the benefit of other individuals, would be exercising a jurisdiction that I do not have.

23. Overall, I do not find merit in the application dated 31st October 2018. I do hereby dismiss the same. It is a dispute within the family, so each party shall bear their own costs. The Deputy Registrar shall cause the file in Eldoret HCSC No. 30 of 1999 to be returned to the relevant registry. Any party who shall be aggrieved by the orders made herein is hereby granted leave of 28 days to move the Court of Appeal, appropriately, on appeal. The property is situated within Vihiga County, so this cause shall be transferred to the High Court at Vihiga for the purposes of any subsequent proceedings.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6th DAY OF AUGUST 2021

W MUSYOKA

JUDGE