



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 194 OF 2011

IN THE MATTER OF THE ESTATE OF WANDO SANDE (DECEASED)

JUDGMENT

1. The necessity of this judgment arises from a ruling that Kimaru J. delivered herein on 23rd June 2011, where the Judge stated:

“... It was clear from the pleadings filed that there is a dispute between the applicant and the respondent with regard to who is entitled to inherit the suit property. Whereas the respondent is the son of the deceased, the applicant is a brother of the deceased. There is evidence that the respondent and his mother relocated from the suit property to Bungoma sometime soon after the death of the deceased.

It was not clear from affidavit evidence who is the current occupant of the suit property. This is because two persons are claiming purchaser's interest in regard to the suit property. The two alleged purchasers were sold the suit property respectively by the applicant and the respondent. To establish who is actually entitled to inherit the suit property this court will require both parties to adduce viva voce evidence. This is because it appears that both the applicant and the respondent are intent on gaining financial advantage by selling the suit property. Neither of them is interested in occupying the suit property ...”

2. Subsequent to that, directions were given on 22nd March 2012, that the administrator file a summons for confirmation of grant. The summons for confirmation of grant was filed, dated 23rd July 2012. It identified the survivors of the deceased as a widow, Yunia Mary Sande, and a son, George Kenn Wando. The asset for distribution was identified as Kisa/Ikomero/1472. It was proposed that the same devolve wholly upon the son, George Kenn Wando.

3. I have not seen any response to the application by Edward Okango Sande or his successor.

4. The response to that application, that is on record, takes the form of an affidavit in support of objection proceedings, sworn on 5th November 2020, by Joseph Bulinga Keya. It is averred that the deceased herein had died in 1993, and that subsequent to his death, his brother, Edward Okango Sande, sold the estate asset, Kisa/Ikomero/1472, to Joseph Bulinga Keya. The sale agreement was executed in the presence of the local Chief, and another was subsequently drawn by an advocate and executed. At the time of sale, the land in question was still registered in the name of the deceased herein. The seller, Edward Sande, had apparently intimated to the buyer, Joseph Bulinga, that he had bought the land from the deceased, but that the deceased had died before he had effected transfers to him. The said Edward Sande was said to be the person who was in actual occupation of the land. When he sought to have the land transferred to him, he found, at the lands office, that the property had been transferred to the name of George Kenn Wando. He also established that George Kenn Wando was in the process of transferring the same property to Richard Anzaya Sumba, which process was scuttled by the ruling of 23rd July 2011. It is averred that George Kenn Wando, a son of the deceased herein, knew that the land had been sold to his uncle, Edward Sande, who subsequently sold it to the deponent. He accuses the son of the deceased of initiating the Butere cause, in SRMCSC No. 86 of 2010, without involving him. He asserts that he was a *bona fide* purchaser for value. He says he bought the land in 2004, and the only attempt to throw him out came in 2011.

5. The oral hearing of the case commenced on 27th September 2016, with Roselyne Musundi Wamalwa on the witness stand. She was the widow of Edward Sande, and a co-administratrix of the estate with George Kenn Wando. She testified that at the time she married her late husband, in 1989, Kisa/Ikomero/1472 was under the control of her husband. The land had been sold to a Jackton Omusebe, but then it was retrieved by the family, and taken over by her late husband, who began to utilize it, and there was no interference at all with their occupation of it. She described George Kenn Wando and his mother, the son and widow of the deceased herein, as residents of Bungoma, who never disturbed her late husband's occupation of the said property. She asserted that it was her late husband who was entitled to the land. She said that George Kenn Wando never attempted to put up any structures on the land. She said that her late husband was entitled to sell the land to anyone because she had stayed on it for a very long time. She said that she knew that the land was registered in the name of the deceased, who was brother of her late husband.

6. During cross-examination, she stated that she did not stay on the land, and that when her husband died, he was not buried on the land, instead he was buried on Kisa/Ikomero/1471, where he had lived with her. She explained that Kisa/Ikomero/1471 and 1472 were separate

pieces of land. She said that her late father-in-law, the father of the deceased herein and of her late husband, Sylvanus Sande, had three parcels of land, although she only knew of Kisa/Ikomero/1471 and 1472, and could not recall the details of the third parcel, which she said she was the one using it. She said that she had not been married when George Kenn Wando and his mother moved to Bungoma, and she could not tell whether they had bought land there. She said that she was not present when Kisa/Ikomero/1472 was bought by Captain Omusebe, as she had not been married then, and she was never shown the sale agreement. She said the land was being utilized by Joseph Keya, who had bought it from her late husband, sometime in 2005. She said that when that sale was happening, the registered proprietor, the deceased herein, was already dead. She further stated that her late husband was not the administrator of the estate of the deceased herein at that time. She said that she was aware that George Kenn Wando had obtained representation to his father's estate and sold the property to someone else. She stated that her late husband wanted the land back since he was the one who had bought it back from Captain Omusebe.

7. The next witness was Moses Sunguti Aluchier. He was a local village elder, and was related to the family of the deceased. He stated that a daughter of Sande fell ill and the subject land was sold to raise money for treatment. The land was sold to Jackton Omusebe. Later, Edward Sande and his siblings decided to buy the land back from Omusebe. The deceased herein and his wife were said to have died while Okango was on the land. Then Okango sold the land to Bulinga. He said George Wando died and was buried in Bungoma. He said that he never lived on the subject land. Okango was said to have sold the land as his. They sat at the Chief's office and executed an agreement on 7th July 2004, where he stood as a witness for Sande. The Chief and his assistant were also present, and were aware of the circumstances. He said that if the land did not belong to Okango, they would not have been party to the proceedings. He asserted that George Kenn Wando was not entitled to the property, since his father had moved to Bungoma, and that it was Okango who had been living on the land. He said that the title deed was in the name of the Edward Okango, who had bought it from Omusebe to salvage it. He said that he did not know why he decided to sell it to Bulinga Keya. He said he was not aware whether succession to the estate of the deceased herein had been done prior to 7th July 2004.

8. Okango John Sande followed. He said that the subject land was originally in the name of his uncle, Wando Sande, but he never lived on the land, as he had land in Bungoma. Wando was said to have had issues in 1962, for treatment of his child, so he sold the land to Omusebe. Later in 1985, his late father decided to buy back the property. He sat with Omusebe, and bought the land. He said that between 1985 and 2004, it belonged to his father. Wando Sande was said to have showed scant interest in the land, as he lived in Bungoma. His late father subsequently sold the land to Bulinga Keya. He said that George Kenn Wando was not entitled to the land, and that he was claiming it long after his father died, yet he had never lived on the land, after they bought land in Bungoma. He asserted that he could not get Keya out of the land. He said that it was the father of Edward Sande who sold the land to Omusebe, in 1962, and that the land had always been in the name of Wando. He said that there was an arrangement that the property would be returned to any son who would salvage it. He confirmed that the land was still in the name of Wando Sande. He said that the land was sold by Sylvanus to Omusebe, and Sylvanus was the owner of the property then. He said that Sylvanus had given authority for the land to be registered in the name of the Wando Sande, saying that it was family land.

9. Charles Eshikumo Amakobe was the next witness. He was the local Chief for the area where the land in dispute is situated, and a maternal relative of the parties. He was party to the sale agreement of 7th July 2004. He said that the seller was the deceased, selling the land to Joseph Bulinga Keya. He said that there was no objection at the time. He also said that Joseph Bulinga was the first buyer. He said that the land was owned by Edward Sande, who had been on the land since 2004. He said that the parties did not have a title deed nor a search certificate. He said that he was aware that the title deed was in the name of the deceased, and not Edward Sande. He said that the deceased had died by 2004, when the sale agreement was entered into. He said that the son of the deceased was not involved in the process. He said that the property originally belonged to Sylvanus, the deceased needed money, so the family agreed that the land be given to Edward Sande, and that was why they did not involve George Kenn Wando in the transaction. He said that George Kenn Wando had no claim to the property.

10. Joseph Bulinga Keya was the last witness. He said that he bought the land, and entered into a sale agreement. The property was, at the time of sale, registered in the name of the deceased, but was sold to him by Edward Sande. He had been given the history of the land, and so he bought it, and asserted that it was his since 2004. He said that he did a search on the title and established that it was registered in the name of the deceased, who had died before 2004. He said that he did not see George Kenn Wando at the family meeting where the history of the land was given. He said that he had been summoned but he did not attend the meeting. He said that George Kenn Wando did succession and the land was given to him. He said that there was an agreement between Edward Sande and Wando Sande over the land, but he could not recall whether there was any written agreement.

11. At the close of the oral hearings, the parties put in written submissions, which I have read through, and noted the arguments made.

12. The application before me is for confirmation of grant. In confirmation applications, there are two principal factors for the court to consider, appointment of administrators and distribution of the assets. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

“Confirmation of Grants

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a

confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

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.”

13. The issue of administrators is not contested; given that they were appointed by the court in its ruling of 23rd June 2011. That then leaves me with the issue of distribution.

14. The principal purpose of confirmation is distribution of the assets. The proviso to subsection (2) of section 71 requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons entitled to the estate have been ascertained and determined.”

15. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? The immediate family of the deceased person is the widow and her son, Yunia May Sande and George Kenn Wando. The deceased died in 1993, after the Law of Succession Act had come into force. So distribution should strictly follow part V of the Act. Going by that law, and as was stated in *In re Estate of Joshua Orwa Ojode (Deceased)* [2014] eKLR (Musyoka J) and *In re Estate of John Musambayi Katumanga (Deceased)* [2014] eKLR (Musyoka J), where an intestate is survived by a widow and children, the other relatives of the deceased would not be entitled to a share in the estate, as the surviving spouse and child would be entitled to the exclusion of every other relative. That would mean, for the purpose of this case, the proper persons entitled to the estate of the intestate herein are his surviving widow and son, to the exclusion of the brother of the deceased, Edward Okango Sande and his family.

16. The issue raised by the family of Edward Okango Sande, however, is that the asset which comprises the estate of the deceased, although registered in the name of the deceased, was not his. It was suggested that it was family land, to which the late Edward Okango Sande was entitled. The family of Edward Sande appears to make two arguments. One, that the land had been sold by the family to Omusebe, to raise funds to take a child to hospital. It is not very clear from the evidence whose child was being taken to hospital. It is also not clear who sold the property, as no documents relating to the sale were produced. It is also not clear when the alleged sale happened. Some witnesses talked of 1962, while the property itself was registered in the name of the deceased in 1964. Edward Sande then allegedly bought the property back from Omusebe. The date when that transaction between Edward Sande and Omusebe happened is not disclosed. Documents relating to that transaction were not produced. Thereafter, he sold the property to Bulinga Keya in 2004. His family asserts that he is entitled to it on account of having salvaged it from Omusebe. Second, the family of Edward Sande also appears to argue that the family of the deceased relocated to Bungoma, where it lives, and did not use the land, and that the person who has been suing it all through was the late Edward Sande. They appear to argue that they are entitled to it on account of adverse possession.

17. So, between the deceased and the family of Edward Sande, who is entitled to this property? It is common ground that the same is registered in the name of the deceased. The certificate of official search on record, dated 10th August 2009, indicates that it was so registered on 11th November 1964, and that registration stands to date. The family of Edward Sande talk of a sale to Omusebe, but no documentary evidence was provided as proof that that alleged sale did happen. There is also no evidence as to who sold the land to the said Omusebe. Apparently, after that sale, the land was not transferred to the name of Omusebe but remained registered in the name of the deceased. The family of Edward Sande also talk about a buy back of the property from Omusebe by Edward Sande. No documentary proof of the buyback was provided. Omusebe is the central figure in all this, yet he was not called to testify. He did not file any affidavits. No witnesses, who might have been present in the transactions involving Omusebe, were called to the stand. Consequently, there is no material upon which I can conclude whether or not those sales involving Omusebe ever happened. Consequently, it is my finding and holding that Kisa/Ikomero/1472 is still an asset in the estate of the deceased, available for distribution to his survivors.

18. And what becomes of the claim by Bulinga Keya? Bulinga Keya purportedly bought the property from Edward Sande. At the time that he allegedly bought it, the same did not belong to Edward Sande. It was registered in the name of the deceased. Although it was alleged that Edward Sande had bought it back from Omusebe, no evidence was provided that could establish that the property had validly been sold to Omusebe, and validly bought back from him, vesting title in Edward Sande, which he could then dispose of to Bulinga Keya. Edward Sande had nothing to sell to Bulinga Keya, and Bulinga Keya acquired no title to the subject property.

19. The deceased herein died on 26th October 1993. The transaction between Edward Sande and Bulinga Keya happened in 2004. They were transacting over property belonging to a dead person. By then Edward Sande did not hold a grant of representation over the estate of the deceased herein, and, therefore, Kisa/Ikomero/1472 did not vest in him, virtue of section 79 of the Law of Succession Act, and he could not exercise the powers of sale of estate property given by section 82 of the Law of Succession Act. What the two engaged in amounted to intermeddling with the estate of a dead person, contrary to section 45 of the Law of Succession Act, which conduct amounts to criminality. A transaction that amounts to criminal activity cannot have any legitimacy, it cannot be valid nor lawful, and no rights can accrue from it.

20. For avoidance of doubt, sections 45, 79 and 82 of the Law of Succession Act provide as follows:

“45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

“79. Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

“82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

(i) ...

(ii) no immovable property shall be sold before confirmation of the grant...”

21. I believe that, from the discussion above, I have answered the question that Kimaru J had left for determination. I have found that the survivors of the deceased were George Kenn Wando and Yunia Mary Sande. The family of Edward Sande has not established that Kisa/Ikomero/1472 ever became his property, and, therefore, the said property shall devolve to George Kenn Wando in the manner proposed in the summons dated 23rd July 2012. The grant is confirmed in those terms. Any party aggrieved has leave of 28 days to move the Court of Appeal appropriately on appeal. It is so ordered.

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

W MUSYOKA

JUDGE