REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 412 OF 1998

IN THE MATTER OF THE ESTATE OF CHENGOLI CHEKAMAI (DECEASED)

JUDGMENT

1. The application that I am called upon to determine is the Motion, dated 5th October 2017. It seeks inclusion of Zablon Injendi in the grant, and the setting aside of an application dated 23rd June 2016. The grounds on the face of the application are that the deceased had five wives, and that the applicant, Zablon Injendi, was a son of the elder wife. It is also averred that the cause was initiated without his knowledge, and that he was entitled to two acres out of the estate asset.

2. In the supporting affidavit, the applicant reiterates that he was a son of the deceased, from one of his five wives. He says that the cause was initiated without involving him, and that he came to learn of the matter rather too late in the day. The grant was allegedly made on 15th April 1999 and was confirmed on 27th April 1999. He states that there were proceedings in Tribunal Case No. 86 of 2000, where he was awarded two acres of the land.

3. There is a reply to the application, by Fronicah Chengoli. She confirms that the applicant is a child of the deceased, and asserts that he was always aware of the succession proceedings. She avers that he was given six acres, which he sold and went and bought land in Kitale. There are replying affidavits by Robson Makokha Chengoli, Paul Moi Chengoli and Anne Weswa, who all agree with the respondent, Fronicah Namukuyia Chengoli.

4. The matter was disposed of orally. The applicant stated that he was not aware of how the estate was distributed at confirmation of grant. He complained that the tribunal did not decide the matter based on the documents that he had filed. Daniel Chemuche testified that the applicant had been given his share of the land, which he sold and left, and that he was not entitled to anything else thereafter. Jeremiah Christopher Wakasiba stated that the applicant was given two acres, and not six as alleged. The respondent testified that the applicant had been given six acres by the deceased, while the younger sons got lesser. He then sold his six acres and left.

5. The proceedings herein are not very clear, for the parties have not been forthright with the court, in terms of the information disclosed. What is obvious is that representation was sought herein in circumstances where the applicant, a child of the deceased, was not disclosed to the court. Indeed, it was not disclosed that the deceased had died a polygamist, having married five wives. The applicant, as a child of the deceased, ought to have been disclosed. Whether he was not entitled to take a share in the estate was a separate issue to be handled at confirmation.

6. Material was placed before the court, which shows that there were tribunal proceedings relating to the subject parcel of land. The proceedings before the Kabras Land Disputes Tribunal concluded that the deceased had shared out the land amongst his six sons, the applicant included, and the boundaries were confirmed after the deceased died. It would appear that an appeal was proffered against that, where the appellate outfit found that the applicant had benefited from six acres, which he sold.

7. These tribunal proceedings suggest *inter vivos* or lifetime distributions of the property. There is no evidence that subsequent to that the land was subdivided and individual titles issued to the beneficiaries of the gifts. The tribunal could not have been undertaking succession proceedings, for that is the preserve of the court under the Law of Succession Act, Cap 160, Laws of Kenya. The bottom-line is that the applicant, as child of the deceased, should have been involved in the succession cause.

8. I have seen the confirmation proceedings that were conducted on 27th April 1999. The applicant was not involved. There is no evidence that any subtitles had been created from the original land, for the benefit of the applicant. Evidence that the applicant benefited from *inter vivos* transfers should have been tabled at confirmation. There is no evidence that that was done.

9. Overall, I find merit in the application dated 5th October 2017. The applicant was left out of the proceedings. That is sufficient ground for revocation of a grant, under section 76 of the Law of Succession Act. The distribution of the estate ought not to have been done without his input.

10. Consequently, I do hereby set aside the distribution of the estate that was done through the proceedings of 27th April 1999, and cancel the certificate of confirmation of grant that was issued subsequently. I shall not revoke the grant, but I shall direct that the proceedings, for confirmation of the grant, be carried out afresh, in a process that shall include the applicant, Zablon Injendi. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF OCTOBER, 2021

W MUSYOKA

JUDGE