



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 69 OF 2002

IN THE MATTER OF THE ESTATE OF OMARY MALOBA MAKWALI (DECEASED)

RULING

1. What I am called upon to determine is a summons for revocation of grant, dated 23rd August 2019. It is brought at the instance of eight individuals, who I shall refer hereto as the applicants. It is sought that the grant made in here on 28th April 2005, and its confirmation in 2009, be revoked, and the sole estate asset reverted back to the name of the deceased. The grounds on the face of the application are that the applicants were not involved in the process of obtaining the grant and confirming it. In the affidavit in support, it is averred that that the deceased had married five times, and had children with all five wives.

2. The reply to the application is by Rukia Osiako Maloba, the administratrix. She concedes that the deceased had married five times, and that there was a total of twelve children. She avers that the matter was *res judicata*, as a protest was raised to the confirmation application, which the court heard and determined. She asserts that all the survivors of the deceased have been catered for.

3. The application was argued orally on 27th May 2021.

4. When representation was sought in the cause, the deceased was said to have had been survived by a widow, five sons and five daughters. Butso/So/Shibeye/76 was said to be the property that the deceased died possessed of. Representation was sought by the administratrix as widow, and there is no evidence as to whether she sought to obtain consents of the children. An objection was raised, which appears to have been dealt with by the court on 23rd September 2004, and eventually a grant was made to the administratrix on 28th April 2005.

5. A summons for confirmation of grant was mounted herein, dated 21st November 2008, filed herein on 1st December 2008. The confirmation application does not appear complete, for I am unable to find the affidavit sworn in support of it. I am unable, therefore, to tell the distribution proposed. The said application came up for hearing on 5th November 2009, 3rd March 2010 and 1st October 2012. There is no evidence that the grant was ever confirmed, for I have not seen any minute by a Judge stating that the application was placed before him or her, and orders were made confirming it.

6. I have seen copy of a certificate of confirmation of grant dated 16th March 2009, suggesting that the grant was confirmed on 15th March 2009. I doubt the authenticity of that document. The handwritten record before me has no minutes for 15th March 2009. It reflects that on 9th June 2008 the matter was before the Judge, when an application dated 9th May 2008 was stood over generally. On 1st December 2008, the summons for confirmation of grant, dated 21st November 2008, was fixed for hearing on 22nd July 2009. There is no record of anything happening on 22nd July 2009, for the next events happened on 5th November 2009, when the summons for confirmation of grant was fixed for hearing on 3rd March 2010. On 3rd March 2010, the matter was placed before the Judge, who directed that confirmation be done in the presence of all the beneficiaries on 26th May 2010. The hearing scheduled for 26th May 2010 did not happen, because on 13th July 2012 the same application was allocated a date for hearing on 1st October 2012. When it was placed before the Judge on 1st October 2012, it was stood over generally, on account of non-attendance by the parties. No other steps have taken on the confirmation application thereafter.

7. Let me just reproduce, *verbatim*, the proceedings in the matter, between 1st December 2008 and 1st October 2012, both dates inclusive:

“1/12/08

In the Registry

Fatamu for Namatsi Advocate for the petitioner

N/A for the objector

Order

Application for confirmation dated 21st November 2008 fixed for hearing on 22nd July 2009. Namatsi Advocate to serve.

5-11-2009

In the Registry

Fatuma for Namatsi adv. for pet

Order: Summons for confirmation of grant dated 21st Nov 2008 is fixed for hg on 3-3-2010. Namatsi to serve.

DEPUTY REGISTRAR

3/3/2010

Coram – Before I. Lenaola J

cc Mudoto/Okumu

Mr. Ombaye for Respondent

Mr. Namatsi for Petitioner

By Consent

All beneficiaries to attend court for confirmation on 26.5.2010.

3/3

13/7/2012

In the High Court Registry

Ms. Omar for Namatsi for the petitioner

N/A for Ombaye for the Resp

N/A for the Objector

Order.

Application for confirmation of grant dated 21st Nov 2008 fixed for Hearing on 1st Oct 2012 HNTI

17/7/2012

1-10-12

Before B. Thurania Jaden J

C/C Polycap

CT – N/a - SOG”

8. From what I have set out above, there can be no doubt that there could not possibly have been any confirmation of the grant herein on 15th March 2009, and, therefore, the document purported to be a certificate of confirmation of the said grant, dated 16th March 2009, can only be a false document, created to serve some nefarious ulterior purposes. There is absolutely no evidence that the grant herein has been confirmed. If the property herein has been subdivided, then the same could only have been done on false or forged documents.

9. In view of what I have said above, I feel that I should not belabour the point. The deceased died a polygamist. He had five wives. The grant was made to a member of the family from one of the five houses. It would have been more democratic and representative if majority of the houses had an administrator. If each of the sections of the family was represented, perhaps, the animosity demonstrated so far, and the shenanigans evident in the administration of the estate herein, would have been avoided. Secondly, the grant was never confirmed. There is evidence of subdivision of the estate land, and its transfer to individuals. The same must have been founded on false documents, and should

not stand.

10. I am persuaded that the orders sought in the application, dated 23rd August 2019, are available for granting. Consequently, I hereby grant the orders in prayers 1, 2, and 3 of the said summons. I shall not appoint new administrators. The family shall sit and agree on four administrators to represent the different sections of the family, and who shall exclude Rukia Osiako Maloba. The matter shall be mentioned for that purpose on a date to be given at the delivery of this ruling. The new administrators shall, thereafter, apply for confirmation of their grant, to facilitate distribution of the estate. It is so ordered.

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

W MUSYOKA

JUDGE