

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VIHIGA

SUCCESSION CAUSE NO. 7 OF 2021

IN THE MATTER OF THE ESTATE OF ABISAI LWANE KISAGA (DECEASED)

JUDGMENT

1. The summons herein, dated 21st March 2013, seeks revocation of a grant made in Hamisi SRMCSC No. 2 of 2012, on grounds of non-disclosure of material facts. It is brought at the instance of Hussein Lwane, who I shall refer to hereafter as the applicant.
2. The cause before the primary court was in respect of the estate of Liwane Kisaga Jafeza, who had died on 9th June 2008. According to the Chief of Busali East Location, by his letter dated 23rd November 2011, the deceased had married once, and had four sons. By the time of the writing of the letter, the wife was dead, and so was a son called Elam Lwane. The surviving sons were said to be Javan, Abisai and the applicant. The deceased was said to have died possessed of a property known as Kakamega/Kedoli/471. Representation to his estate was granted jointly to applicant and Abisai Lwane, on 6th June 2012.
3. The summons for confirmation of grant on record was at the instance of Abisai Lwane. He did not make a proposal on distribution. The summons came up for hearing several times. Mr. Chitwa, for the applicant, asked for time, on 29th January 2013 to file a protest. The matter was adjourned to 26th February 2013 and again to 12th March 2013. No protest affidavit was filed. The court declined, on 12th March 2013, to allow a further adjournment, and proceeded to distribute the estate, so that the land was to be shared as shown on the ground between Javan Abisai, Nancy Kadeyitsa Imbugua and the applicant.
4. It would appear that it was the confirmation of the grant on 12th March 2013 that provoked the filing of the summons for revocation of grant dated 21st March 2013. The principal complaint was that the deceased had distributed his estate to his three sons equally before he died. Javan had been given land in Moi's Bridge, where he relocated to, with his family in the 1950s. Abisai was given Kakamega/Chamakanga/645, which was registered in his name during land adjudication. The applicant states that he was the one entitled solely to Kakamega/Kedoli/471, as the same had been given to him by the deceased. He claims that the cause at the primary court was initiated secretly, without his consent, and that he only discovered it after it had been confirmed. He also claims that strangers have been included in the certificate of confirmation of grant. The principal ground raised is that the process of obtaining the grant was not proper.
5. I have perused the original records from the primary court. The petition was allegedly brought jointly by Abisai and the applicant, and it bears two signatures purported to be theirs. The supporting affidavit is not signed by either of them, although it is commissioned by the Hamisi Senior Resident Magistrate. There is also a consent, purported to be that of Javan Likambo Lwane, Nancy Erika Kadeiza and the applicant. The consent bears signatures against the names of Javan and Nancy, but not against the name of the applicant.
6. The fact that the petition was supported by an affidavit, defective for lack of execution by the purported petitioners, means that the petition itself was defective. It was not verified by an affidavit. It was not supported by any facts. Consequently, no grant ought to have been made based on it. The fact that the applicant was purported to be a petitioner and to be consenting at the same time to the petition should raise eyebrows, for a petitioner is not required to sign a consent, which should only be signed by individuals who have equal right to administration, but who are not themselves applying, consenting to those petitioning instead. That should lend credence to the allegation by the applicant that he was not involved in the process. He did not sign some of the documents that bear his name, and, therefore, it cannot be said that he was involved in the process.
7. In view of the above, it is my conclusion that the application meets the threshold in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, for revocation of the grant herein. Consequently, I do hereby revoke the grant that was made on 6th June 2012 in Hamisi SRMCSC No. 2 of 2012, and vacate the orders made on 12th March 2013, confirming the said grant, and cancel the certificate of confirmation of grant predicated on those orders. The High Court file shall be closed, but the Hamisi file shall be returned to the said court, for appointment of fresh administrators and the other processes that ought to follow thereafter, as may be directed by the court at Hamisi. Each party shall bear their own costs. It is so ordered.
8. The application also raised issues around the deceased having distributed his estate *inter vivos*, and the applicant being the person entitled exclusively to Kakamega/Kedoli/471. These are distribution issues that should be raised and determined at confirmation of the grant to be issued afresh by the Hamisi court.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER, 2021

W MUSYOKA

JUDGE