



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 772 OF 2019

IN THE MATTER OF THE ESTATE OF DAVID MULANDA KATAKA alias DAUDI MULANDA KATAKA (DECEASED)

RULING

1. The deceased person herein died on 7th October 2007. The letter from the Chief, of Musingu Sub-Location, dated 8th October 2009, shows that he was survived by a widow, Jeridah Khakasa Mulanda, and four daughters, namely Trufosa Mulanda, Anne Mulanda, Mary Kataka and Night Mulanda, and two sons, namely Elias Barasa and Peter Mulanda, and three grandsons, namely Roy, Dennis and Teddy Mukonyi. He was said to have died possessed of South Kabras/Chemuche/ 712 and 719, and South Kabras/Chesero/357.
2. Representation to the estate of the deceased was sought in a petition filed herein on 11th December 2009, by Jeridah Khakasa Mulanda and Anne Mulanda, as widow and daughter, respectively. They listed themselves and all the other individuals listed in the Chief's letter, and they also listed the three assets mentioned in the same letter. Letters of administration intestate were made to the two on 29th March 2010, and grant was duly issued, dated 1st April 2010. I shall refer to the two as the administratrices.
3. The 1st administratrix, the widow, filed a summons for confirmation of grant, dated 17th September 2013. She listed six individuals as survivors of the deceased, being Peter Mwombe Mulanda, Jelidah Mulanda, Night Mulanda, Ann Nechesa Mulanda, Mary Mulanda and Trufosa Mulanda. She proposed that South Kabras/Chesero/357 be shared between Peter, Jelidah, Trufosa, Night, Ann and Mary at diverse proportions; while South Kabras/Chemuche/712 be shared between Jelidah and Elias in unequal proportions. Jelidah was to take South Kabras/Chemuche/719 absolutely. The grant was confirmed on 9th December 2013 in those terms, and a certificate of confirmation of grant was duly issued, dated 16th December 2013.
4. The application that I am determining is dated 7th December 2019. It seeks revocation of the grant made on 29th March 2010, and confirmed on 9th December 2013, principally on grounds that the process of obtaining it was defective in substance, beneficiaries were not involved in distribution and were not served with the confirmation application, and some beneficiaries were disinherited. It is brought at the instance of Elias Barasa Mulanda. He avers that the deceased died possessed of South Kabras/Chesero/357 and South Kabras/Chemuche/719, 1482 and 1483. He further avers that the survivors of the deceased were the individuals listed in the Chief's letter. He states that the confirmation proceedings did not provide for Teddy, Dennis and Roy Mukonyi, who were the sons of the late Eliud Mukonyi Mulanda, a dead son of the deceased. He also states that the distribution was uneven and unequal. He states further that the fact that the deceased died a polygamist should have been considered. I shall refer to Elias Barasa Mulanda as the applicant.
5. The response to the application is in the affidavit of Anne Mulanda, the 2nd administratrix, sworn on 5th March 2020. She avers that the court was *functus officio* with respect to the confirmation orders of 9th December 2013. She avers that the applicant had all along participated in the succession process. She states that the assets had ceased to exist after confirmation of the grant. She describes the applicant as a child born outside wedlock, who got what he was entitled to out of the estate of the deceased. She avers that the applicant was given part of his share during the lifetime of the deceased. She explains that the deceased had subdivided South Kabras/Chemuche/712 prior to his death, into South Kabras/Chemuche/1481, 1482 and 1483. South Kabras/Chemuche/1481 was given to Rose Naliaka Obaire, South Kabras/Chemuche/1482 was given to Anne Mulanda and South Kabras/Chemuche/1483 was given to the applicant. She avers that Rose sold South Kabras/Chemuche/1481 and settled elsewhere. She avers that South Kabras/Chesero/357 was subdivided equally, as per the confirmation orders of 2013, into South Kabras/Chesero/3530, 3531, 3532, 3533, 3534 and 3535. South Kabras/Chesero/3530 was given to Peter, South Kabras/Chesero/3531 to Jelidah, South Kabras/Chesero/3532 to Night, South Kabras/Chesero/3533 to Anne, South Kabras/Chesero/3534 to Mary, and South Kabras/Chesero/3535 to Trufosa. South Kabras/Chemuche/719 was transferred to Jelidah, the widow and 1st administratrix, who has since died, and it was meant to be devolved to the sons of the late Eliud Mukonyi that is to say Teddy, Dennis and Roy Mukonyi, as soon as they showed interest in coming home, and petitioning for representation to the estate of the late Jelidah Khakasa. I shall refer to Anne Mulanda, for the purpose of the revocation application, as the respondent.
6. The respondent has attached to her affidavit a copy of the certificate of death in respect of her co-administratrix, Jelidah Khakasa Mulanda, who died on 28th May 2019. The title deeds in respect of South Kabras/Chesero/3530, 3531, 3532, 3533, 3534 and 3535, and South Kabras/Chemuche/719, are also attached. There is also a copy of a document, dated 21st December 2002, intended to demonstrate that the applicant was troubleshooter, as the respondent describes him, although I believe that she meant troublemaker.

7. The application was disposed of by way of *viva voce* evidence. The hearing was on 28th January 2021. The applicant, Elias Barasa Mulanda, was the first on the stand. He testified that he was not aware that his sisters and stepmother had filed for representation to the estate, and he only got to know after the grant had been confirmed. He said that he wanted the estate shared equally. He said that the deceased had not distributed his property before he died. He said that on his part he utilized only two acres of the land during the lifetime of the deceased, although he had been given one acre. He said that the administratrices did not allocate any land to him. He said that it was the deceased who gave out the land that he was utilizing, and not the administratrices. He further said that the deceased did not sell any land, but he gave out portions of it to his daughters. He said that he was not aware that the respondent had been given land. He said that he was taking care of some of the grandchildren of the deceased. He said the land due to grandchildren, whose parents were dead, should go directly to the said grandchildren. He said that he did not have any objections to daughters getting their due shares in the estate, and that what he was fighting for was equal sharing.

8. The respondent, Annah Nechesa Mulanda, testified next. She said that she was the sole administratrix. She stated that the sons of the late Eliud Mukonyi Mulanda, were allocated South Kabras/Chemuche/719, in the name of her co-administratrix, the late Jelidah Khakasa Mulanda. She said that she did not live with the three grandsons, and that they had been away for over thirteen years. She said she would give them their share once they showed up. She stated that she wanted them to attend court so that the rest of the family could get to see them. She said that the deceased had allocated his land before he died, and that the administratrices merely distributed the same at confirmation according to his wishes. She said that the applicant had been given South Kabras/Chemuche/1483, as the deceased had wished, and that that was where the applicant lived with his family, and built his house. She said that the deceased had not left a will. She stated further that the share due to the children of the late Eliud was not indicated as held in trust for them. She said that South Kabras/Chemuche/1482 was sold by the deceased, and that there was a sale agreement. She said that she processed it in her name after the deceased died. She conceded that the distribution was not equal.

9. Night Ataka Mulanda followed. She supported what the respondent had told the court.

10. At the end of the oral hearings, the parties were directed to file and serve written submissions. They have complied. I have seen and read through the written submissions, and noted the arguments made in them.

11. Although the applicant has brought a summons for revocation of grant, premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, it is clear that his principal complaint concerns how the estate was distributed, and not how representation was obtained. A person who is unhappy with confirmation orders ought not to file a summons for revocation of the grant, instead he should seek to appeal or to have the orders reviewed, for the jurisdiction conferred or given to the court, under section 76, is for revocation of grants where the process of obtaining the grant had issues, or where the estate is not administered properly in accordance with the law, or where the grant has become useless or inoperative, and not where there are grievances with how the grant was confirmed. Indeed, under section 76, the only issue relevant to confirmation is where the administrator fails to apply for confirmation of his grant within the timelines given under the law, and not where the grant has been confirmed but there is unhappiness with the orders on confirmation, and especially on distribution.

12. I note that one of the initial administratrices was a widow of the deceased. Under section 66 of the Law of Succession Act, a surviving spouse has a superior right to administration to the children of the deceased, and he or she need not issue citations on the children. See *In re Estate of Mwaura Gitukui* [2016] eKLR (Musyoka J). The same principle applies with respect to renunciation, a person with prior right to administration, such as a surviving widow or widower, need call upon persons with a lesser right to administration, like the children of the deceased, to renounce such right. See *In Re Estate of Naftali (Deceased)* [2002] 2 KLR 684 (Waki J) and *In re Andrea Buluma Wangaki (deceased)* [2020] eKLR (Musyoka J). Equally so with consents, as a consent to a grant being made is only mandatory where the petitioner has a lesser or equal right to administration, so that a person with a prior right does not have to obtain consents of persons with a lesser entitlement to administration. See *In re Estate of Festo Akwera Kusebe (Deceased)* [2019] eKLR (Musyoka J) and *In re Andrea Buluma Wangaki (deceased)* [2020] eKLR (Musyoka J). A surviving spouse does not have to seek consent of a child of the deceased to obtain representation to the estate of her deceased husband or his deceased wife. So, the applicant cannot complain that his consent was not sought.

13. However, I note that theirs is a blended family. There were children born within wedlock, and also children born without wedlock. To avoid mistrust in such cases, it would be prudent to have administration or representation spread out, so that it does not create a monopoly in administration by a section of the family. Those not represented in administration may feel that their interests are not protected and that their views or voices in the matter of the estate would not be heard, even if nothing untoward was happening.

14. In view of what I have said above, I am not persuaded that this is a proper revocation application, for it is not properly anchored on the grounds set out in section 76 of the Law of Succession Act, but it is more about what transpired at confirmation of grant, which is not one of grounds for which a grant may be revoked. As stated above, the applicant should have appealed or sought review of the confirmation orders, if he was unhappy with them.

15. He says he was not involved in the process of confirmation, yet I see his signature on the Form 37 filed on 23rd September 2013, dated 17th September 2013. He has not renounced that form, especially the signature in there that is purported to be his. But he does make a valid point, with respect to how the property was shared out. The estate was shared equally amongst the children as envisaged in section 38 of the Law of Succession Act. There is also the formidable argument that the children of the late Eliud Mukonyi Mulanda were not provided for. They were listed in the Chief's letter and the petition, but they were concealed at confirmation, and the estate was distributed as if they did not exist. I was told that South Kabras/chemuche/719 was meant for them, but the same was not devolved to them, and it was not indicated that the person to whom it was devolved held the same in trust for them. I was also told that the three will get it once they come home. With respect, their entitlement to the land is not conditional on or tied to their coming home, or even claiming their share. The law does not say so. They are entitled to it by law, whether they come home or not, and it should be devolved to them directly, without any conditions, and without it being held in trust for them by anyone. See and compare with *Christine Wangari Gichigi vs. Elizabeth Evans & 11 Others* [2014] eKLR (**Nambuye, Ouko & J. Mohammed JJA**) and *In re Estate of Joyce Kanjiru Njiru (Deceased)* [2017] eKLR (Gitari J), where the principle was laid and stated that lack of active involvement or participation in succession litigation is not a disentitling factor, and a beneficiary does not lose their entitlement to a share in the estate on account of it. As it is, the person to whom it was devolved has died, and it is now available as an asset in her estate, to be distributed, not just to the three, but all the children of that person, the late Jelidah Khakasa Mulanda. It is an untenable position. The administratrices did not, no doubt, act in the best interests of those three grandsons of the deceased,

whose own father is dead.

16. In the end, these are the orders that I make:

(a) that I shall not revoke the grant herein, but I shall confirm Annah Nechesa Mulanda as administratrix, and appoint, in addition, Elias Barasa Mulanda as administrator;

(b) that a grant of letters of administration intestate shall issue to the two of them to complete administration of the estate herein;

(c) that I hereby set aside the orders that were made on 9th December 2013, in confirmation of the grant herein, to pave way for a fresh distribution where all the survivors of the deceased, and all those beneficially entitled to a share in the estate, are provided for and involved in the process in accordance with the law;

(d) that to facilitate a fresh distribution, I hereby cancel the certificate of confirmation of grant, that issued out of the orders of 9th December 2013, dated 16th December 2013, and annul all transactions that were or might have been carried out on the basis of the said cancelled certificate;

(e) that each party shall bear their own costs; and

(f) that any party, aggrieved by these orders, has leave of twenty-eight days, to challenge the same at the Court of Appeal.

17. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF DECEMBER, 2021

W. MUSYOKA

JUDGE

IN THE PRESENCE OF:-

ERICK ZALO – COURT ASSISTANT

MR. MUTOKA FOR MR. MOMANYI FOR OBJECTOR

ANNE MULANDA

NIGHT KATAKA

ELIAS BARASA MULANDA