REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 136 OF 2011

IN THE MATTER OF THE ESTATE OF MUKHOBI NAMONYA (DECEASED)

JUDGMENT

1. This matter relates to the estate of Mukhobi Namonya, who died on 18th December 1974. The letter from the Chief of Khayega Location, dated 16th February 2010, is not helpful at all, to the extent that it does not disclose the persons that survived the deceased, in terms of his spouses and children. In the letter the Chief proposes how the estate should be shared out amongst the persons named, without disclosing how these persons related to the deceased. The persons mentioned are Frederick Muhanji Mangula, Alphonse Sindu Mukhobi and Paulina Auma. The assets mentioned are Isukha/Shitochi/3 and 266.

2. Before I get into the substance of the matter before me, it is critical that I deal with the importance of the letter from the Chief. It is not a requirement of the law, for it is not provided for in the Law of Succession Act, Cap 160, Laws of Kenya, nor in the Probate and Administration Rules. It was a device resorted to by the court to assist it identify the persons who survived the deceased, for the court has no mechanism of ascertaining the persons by whom the deceased was survived save by relying on officers of the former provincial administration, who represent the national government at the grassroots and are in contact with the people, and therefore, the best suited to assist the court identify the genuine survivors of the deceased.

3. The Chief has no role in succession proceedings beyond what I have stated in paragraph 2. There is no role for the Chief to play in the distribution of the assets. He should simply give the court the names of the survivors, he has no duty of suggesting how the estate should be distributed. Distribution of an estate is the responsibility of the court, guided by the provisions of the Law of Succession Act and customary law, where the latter is applicable. A letter from the Chief, which does not identity the survivors of the deceased and just throws in names without identifying who those individuals were to the deceased, is of no utility to the probate court. The same case should apply to a letter that tells the court how to distribute the estate without identifying how the person to whom it purports to distribute the property to were related to the deceased.

4. Representation to the estate of the deceased herein was sought vide a petition lodged herein on 24th February 2011, by Alphonse Sindu Mukhobi, in his purported capacity as son of the deceased. He expressed the deceased to have had died possessed of the property named in the Chief's letter, that is to say Isukha/Shitochi/3 and 266, and to have been survived by the individuals mentioned in the Chief's letter that I have mentioned above, but without stating the relationship between those individuals and the deceased. Letters of administration intestate were made to the petitioner on 6th July 2011, a grant was duly issued, dated 13th July 2011. I shall consequently refer to him as the administrator. The said grant was confirmed on 24th March 2014, on an application dated 18th November 2013, and the estate was distributed in the manner stated in the Chief's letter. A certificate of confirmation of grant was duly issued, dated 26th March 2014.

5. A summons for revocation of the grant herein was lodged herein on 24th August 2018, by Frederick Machanga Lukhutsu, dated 10th August 2018. There are two copies of the application on record and all of them are accompanied by an affidavit that is not commissioned. An affidavit that is not commissioned cannot pass as one and it cannot said to be of any support to the application. It is of no value, and that means that the application dated 10th August 2018 is not supported by any evidence. To that extent the same is incompetent and is hereby struck out.

6. There is another application for revocation of grant dated 31st October 2018, brought at the instance of Bernard Muhanji Lukhutsu, who I shall refer hereto after as the applicant. He would like the grant made on 6th July 2011 revoked, and the registration, sub-division of and transfer of the resultant subdivisions of Isukha/Shitochi/266, be cancelled. He would like Isukha/Shitochi/266 to be redistributed amongst the persons he says are the rightful and lawful heirs of the deceased.

7. The grounds upon which the application is premised are set out on the face of the summons for revocation, while the factual background is set out in the affidavit that he swore in support of the application on 31st October 2018. From the facts I gather that the deceased had a brother called Isindu Namonya, who is also deceased. The two had been left with two parcels of land by their deceased father, who is not disclosed in the affidavit. Isindu Namonya was said to have been entitled to Isukha/Shitochi/266, while the deceased was entitled to Isukha/Shitochi/3. It is not disclosed whether succession was ever done with regard to the estate of their deceased father. Isindu Namonya was said to have been survived by a widow known as Galara Ajitsa Isindu. The applicant avers that his late father, Lukhutsu Chimwani, bought Isukha/Shitochi/266 from the widow of Isindu Namonya, Galara Ajitsa Isindu, and the two executed an agreement on 8th March

1999. Money changed hands, and the last payments were done in 2009. He avers that the administrator is a son of the deceased, and initiated the cause without involving the family of the applicant. He avers that the grant herein was obtained in concealment of material facts from the family of the alleged buyer. He states that he only came to know about the matter after confirmation of the grant. He states that the administrator has since subdivided the land and transferred it to another purchaser. The administrator is said to be unfit as administrator for that reason. The applicant has attached a document dated 8th March 1999, as evidence of the sale. The document is in Kiswahili and Luhya languages, and a translation ought to have been filed.

8. I have gone through the record and I have not seen any response to the application by the administrator. No such response was ever filed, for when the matter came up for hearing on 5th November 2019, the advocate for the administrator indicated that he had not yet responded to the application. The said summons for revocation is, therefore, not opposed.

9. The application for determination seeks revocation of a grant of representation. The deceased died in 1974, which was before the Law of Succession Act, had come into operation in 1981, however the cause herein was initiated in 2011. His estate, therefore, falls for administration in accordance with the provisions of the section 2(2) of the Law of Succession Act, but distribution should accord with customary law by virtue of the same provision.

10. The Law of Succession Act provides for revocation of grants under section 76, which states as follows:

> *"76. Revocation or annulment of grant*
>
> *A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—*
>
> *(a) that the proceedings to obtain the grant were defective in substance;*
>
> *(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
>
> *(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*
>
> *(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*
>
> *(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or*
>
> *(ii) to proceed diligently with the administration of the estate; or*
>
> *(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*
>
> *(e) that the grant has become useless and inoperative through subsequent circumstances."*

11. Under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining the grant was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or loses the soundness of his mind or is adjudged bankrupt.

12. In the instant case, the applicant appears to anchor his case on the first general ground, that there were issues with the manner the grant was obtained. He has raised arguments about the process of obtaining the grant having had challenges. He has not complained about anything that would bring the case within the second general ground, nor the third ground. My understanding of his case, therefore, is that the process of obtaining the grant was defective, as the administrator used fraud, misrepresentation and concealed matter from the court. His principle argument appears to be that his consent was not obtained before the grant herein was sought.

13. The framework for applications for grants of representation is set out in section 51 of the Law of Succession Act. The most relevant portions, for the purpose of this application, are in subsection (2)(g), which state as follows:

> *"Application for Grant*
>
> *51. (1) …*

(2) Every application shall include information as to—

(a) …

(b) …

(c) …

(d) …

(e) …

(f) …

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h)...”

14. My understanding of section 51(2) (g) is that the petitioner is required to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. However, that provision is only limited to disclosure of relatives of the deceased person. It does not require disclosure of creditors or other claimants.

15. The applicant complains that he was unaware of the proceedings. That would mean that he was not consulted before administration was sought, or, put differently, that his consent was not obtained before representation was sought by the administrator.

16. The law on who qualifies to apply for representation in intestacy is section 66 of the Law of Succession Act, which sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased. Rule 7(7) of the Probate and Administration Rules requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply.

17. For avoidance of doubt, these provisions state as follows:

“*66. Preference to be given to certain persons to administer where deceased died intestate*

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors …”

and

“*7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –*

(a) renounced his right generally to apply for grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him to renounce such right or to apply for a grant. “

18. There is also Rule 26 of the Probate and Administration Rules, which states as follows:

“*26(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same*

degree as or in priority to the applicant.

(2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or *priority, be supported by an affidavit of the applicant and such other evidence as the court may require."*

19. Rule 26(1) (2) applies where representation is sought by a person with equal right to others who have not petitioned like him. In such case, the petitioner is expected to notify such persons with equal entitlement with notice. The individuals with entitlement who have not applied for representation would signify that they had been notified of the petition by either executing their renunciation of their right to administration or by signing consents in Forms 38 or 39, depending on whether the deceased died testate or intestate. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly dealing with these issues, that is by indicating that notice was given to all the other persons equally entitled, and perhaps demonstrating that such person had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

20. The administrator in the instant cause, being a surviving son of the deceased, had a superior right to administration over creditors like the applicant, and other claimants falling outside of the immediate family of the deceased, going by section 66 of the Law of Succession Act. A reading of section 66 and Rules 7(7) and 26 of the Probate and Administration Rules would mean the administrator did not need to comply with the requirements of Rules 7(7) and 26, since those provisions apply only to persons who seek representation while they had an equal or lesser right to administration. They did not, therefore, have to obtain the consents of the applicant herein before he applied for representation to the estate of his late father.

21. So far as creditors are concerned the administrator would have discharged his duty of disclosure by publishing the succession cause in terms of section 67 of the Law of Succession Act through gazettement, the publication of the cause is intended to be a notice to the wide world, that the process of administration has begun so that persons who may be interested in seeking representation to the estate or have a claim of one kind or other against the estate can come forward and state their claims. Beyond that the administrator owes creditors no other duty.

22. The applicant's claim to a stake in the estate appears to be founded on an allegation that his late father had acquired a portion of the estate through purchase. The alleged sale purportedly happened, not between the deceased herein and the father of the applicant, but rather between applicant's father and another person who claimed entitlement to a share of the property. I have seen a copy of a certificate of official search dated 19th January 2011. It indicates that Isukha/Shitochi/266, the property the applicant claims, was registered in the name of the deceased on 3rd June 1975, which was after the deceased had died. The alleged sale transaction over the same between the father of the applicant and Galara Ajitsa Isindu happened in 1999, more than twenty years after the deceased's death, at a time when representation to his estate had not been obtained, for it was only granted in 2011. By that time Isukha/Shitochi/266 was still in the name of the deceased and had not been vested in any administrator by virtue of section 79 of the Law of Succession Act, for there was no administrator in place in 1999. The estate of the deceased did not vest in Galara Ajitsa Isindu and, therefore, she had no power to transact over it, for, by virtue of sections 45 and 82 of the Law of Succession Act, only an administrator could sell or transact over the assets of a dead person. In any event, even if she were an administrator she could not sell estate property before confirmation of the grant. The grant had not been confirmed in 1999, for the grant herein was only obtained in 2011 and confirmed in 2014. The alleged sale in 1999 cannot possibly be valid in the circumstances, for Galara Ajitsa Isindu could not possibly legally sell the asset nor pass a good title to anyone.

23. Whereas the court can sanction sell of a property of a dead person before grant is confirmed, there would be no jurisdiction for a court to sanction such a sale where no representation has not been obtained. Any leave of court to dispose of such property must be preceded by the making of a grant. Since no grant had been obtained by 1999, the issue of a court granting leave to sell estate property before confirmation of grant does not arise. In any event the applicant has not purported that any such leave had been obtained, which would have clothed the transaction with some degree of legality.

24. The omission of persons who claim to be claimants from or creditors of the estate is not a ground for revoking a grant. After all, creditors of an estate are entitled to have their debts settled. It is for this reason that debts and liabilities are given priority over distribution of the estate. Debts and liabilities ought to be settled first. Distribution is of the net estate, after the debts and liabilities have been met. The administrators have a duty to identify the creditors of the estate and to pay them off before proposing distribution, or to make provision for them at confirmation of grant. Such claimants and creditors have an obligation to place their claims before the administrators, and should the administrators fail to settle the same or acknowledge them, move the Environment and Land Court to prove their claims, since the High Court no longer has jurisdiction to determine questions around ownership of immovable property in view of Articles 162(2) and 165(5) of the Constitution.

25. Who exactly is the creditor of the estate or what ought to be treated as a liability of the estate. The most obvious candidates are individuals or entities that transacted with the deceased during his lifetime. Debts that the deceased left unsettled are a burden that the administrators of his estate ought to take care of. Transactions that he left incomplete, such as for sale of land by him or to him, should be completed by the administrators. The administrators are able to do so through the powers conferred upon them by section 82 of the Law of Succession Act, being mindful of section 79, which vests the assets of the estate in the administrator. Section 83 imposes a duty on administrators to settle such debts before distributing the estate.

26. The matter of transactions entered into by the survivors of the deceased after his death, and which affect the assets of the estate, is a different story. In the first place, no survivor, whether as spouse or child of the deceased, has a right to transact over estate assets until representation has been granted to them. Under section 45 of the Law of Succession Act, it is an offence for such a person to handle estate property without first obtaining representation. As I have stated above, the fact of appointment as personal representative of the deceased vests the assets of the estate in the person so appointed, by virtue of section 79 of the Law of Succession Act. It is only then that the person so appointed, and upon whom the estate has vested under section 79, can exercise the powers that are set out in section 82 of the Law of Succession Act and incur the duties imposed by section 83 of the same Act.

27. What the above means is that any transaction that is entered into with regard to the assets before representation is obtained, be it selling or leasing or contracting in connection with the assets, would be unlawful, and the contracts entered into would be unenforceable for that reason. A grant-holder can bind the estate since the assets vest in them by virtue of section 79, and any contracts entered into with regard to estate assets would be enforceable. However, there is a restriction with respect to immovable assets. The proviso in section 82(b) (ii) of the Law of Succession Act is to the effect that immovable property is not to be sold before the grant has been confirmed. That would mean that where it becomes necessary to dispose of estate assets for whatever reason, the administrators have to have regard to that provision. It bars them from selling such property before confirmation. If the estate requires funds so urgently that it cannot wait for confirmation, then the prudent thing would be to move the court for leave to dispose of such property before confirmation for reasons that they should place before the court. Otherwise, any contracts that they would get into contrary to that proviso would leave them with contracts that they cannot enforce on account of their unlawfulness.

28. One of the duties of administrators, set out in section 83(d) of the Law of Succession Act, is to ascertain and pay out of the estate all the debts of the deceased. Ascertainment of the debts of the estate is about identifying them, in terms of finding who the creditors were, how the debts were incurred, what documentation is available, before pay out can be done. If the debts arose during administration, and were necessitated by the exigencies of administration, such as where funds were needed to pay for the administration process, in terms moneys for court fees, advocates costs, land rents and rates, taxes, and attendant expenses, then section 83(c) of the Law of Succession Act would be relevant. That provision requires administrators to pay out of the estate all the expenses of obtaining the grant and all other reasonable expenses of the administration. Where estate assets have been dissipated to address the expenses envisaged in section 83(c) then it must be stated what these expenses were, how they arose and how they were settled. The same would apply where certain debts and liabilities of the estate needed to be settled and estate assets had to be sold to facilitate the settlement of such debts. Section 83(d) of the Law of Succession Act requires administrators to ascertain and pay, out of the estate, all the debts of the deceased. In addition, section 83, at paragraph (e), requires the administrators to render accounts of their administration within six months of their appointment.

29. From what I have said so far, it can be safely concluded that the process of obtaining the grant herein was not defective nor attended by misrepresentation and concealment of matter from the court. The summons for revocation of grant dated 31st October 2018 is without merit and I hereby dismiss the same with costs. Any party aggrieved has a right of appeal to the Court of Appeal within twenty-eight (28) days. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24th DAY OF January, 2020

W. MUSYOKA

JUDGE