REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 247 OF 2005

IN THE MATTER OF THE ESTATE OF AMANYA NAMWIBA (DECEASED)

RULING

1. These proceedings relate to the estate of Amanya Namwiba, who died on 15th August 1987. The letter on record from the Chief of Mulwanda Location, where he hailed from, shows that the deceased had only one daughter, Rael Awinja Atetwe. His wife was said to have had divorced him and married another man. He was said to have died possessed of a property known as Kisa/Mushiangubu/715.

2. A petition was lodged in the cause on 10th May 2005, by Rael Awinja Atetwe, in her capacity as daughter of the deceased, seeking representation to the intestate estate of the deceased. She listed, in the petition, herself as the sole survivor of the deceased. She expressed the deceased to have had died possessed of a property described as Kisa/Mushiangubu/715. The filing of the cause was publicized in the *Kenya Gazette* of 16th January 2009, through Legal Notice No. 377. Letters of administration intestate were duly made to the petitioner on 25th February 2009, and a grant was subsequently issued, dated 4th March 2009. I shall hereafter refer to the petitioner, Rael Awinja Atetwe, as the administratrix.

3. On 11th November 2011, Antony Etindi Kenyakisa, lodged a summons herein against the administratrix and a Geoffrey Ayuku Anyangu, dated 10th November 2011. He claimed to be a purchaser of Kisa/Mushiangubu/715 from the administratrix in a transaction carried out sometime in 2005. He complained that even before the administratrix had had her grant confirmed, she had gone ahead and caused Kisa/Mushiangubu/715 to be transferred to the name of Geoffrey Ayuku Anyangu. He argued that the administratrix had failed to apply for confirmation of grant within the period allowed in law, and had purported to transfer estate property before confirmation, which was an irregular and fraudulent act, designed to defeat his claim against the estate. He attached to his affidavit, copy of a green card for Kisa/Mushiangubu/715, showing that the property was transferred to the name of Geoffrey Ayuku Anyangu on 6th May 2011, and a title deed was subsequently issued to him on 2nd September 2011.

4. The administratrix filed a reply to the application dated 10th November 2011, vide an affidavit that she swore on 16th February 2012. She conceded that she had entered into a transaction with Antony Etindi Kenyakisa for sale of Kisa/Mushiangubu/715, but he failed to complete paying the sale price, they disagreed, whereupon she sold the property to Geoffrey Ayuku Anyangu. She asserted that the said Geoffrey Ayuku Anyangu was in occupation of the subject land, and denied that Antony Etindi Kenyakisa was ever in occupation thereof. She stated that she caused Kisa/Mushiangubu/715 to be transferred to the name of Geoffrey Ayuku Anyangu in innocent ignorance of the requirement for confirmation of her grant prior to any sales or transfers of property.

5. The application dated 10th November 2011 was placed before Thuranira J., on 15th March 2012, whereupon the registration of Geoffrey Ayuku Anyangu as proprietor of Kisa/Mushiangubu/715, was cancelled, and the property was reverted to the name of the deceased herein. The administratrix was directed to file for confirmation of her grant within thirty days, and a *status quo* order was made.

6. In compliance with the directions of 15th March 2012, the administratrix filed an application for confirmation of grant on 15th May 2012, dated 27th April 2012. She listed herself as the sole survivor of the deceased, and proposed that Kisa/Mushiangubu/715 be devolved to her.

7. Antony Etindi Kenyakisa swore an affidavit on 20th March 2013, in reply to the confirmation application. He asserted that it was a lie that the administratrix was the sole survivor of the deceased, or the only person entitled to the property of the estate, or that the estate did not have any liability at all. He avers that he bought Kisa/Mushiangubu/715, for Kshs. 230, 000.00, from the administratrix, and paid the full purchase price. He allegedly took possession of the land, Kisa/Mushiangubu/715, and that he had remained in possession of the said land to date. He argues that it was, in the circumstances, wrongful for the administratrix to leave him out of the schedule of the persons to share the property, to which he was entitled out of a purchaser's interest. He claimed to be a *bona fide* purchaser of the property for value, without notice, and he was thus protected under the Law of Succession Act, Cap 160, Laws of Kenya. He asserted that Kisa/Mushiangubu/715 ought to be devolved to him. He attached to his affidavit copy of a document dated 25th April 2005, titled land sale agreement, wherein the administratrix purported to sell Kisa/Mushiangubu/715 to Antony Etindi Kenyakisa, for Kshs. 70, 000.00, and received a deposit of Kshs. 40, 000.00. Since Antony Etindi Kenyakisa had sworn the replying affidavit in protest to the proposed distribution, I shall hereafter refer to him

as the protestor. The protestor filed affidavit of protest on 26th November 2018, sworn on 23rd November 2018, whose contents are a repetition of the averments in the replying affidavit that he swore on 20th March 2013 and filed herein on 2nd April 2013.

8. Directions were given on 17th April 2013, for disposal of the confirmation application, and the protest to it, by way of oral evidence.

9. The oral hearing happened on 10th April 2019. The first on the stand was the administratrix. She described the deceased as her father, and herself as his sole survivor. She identified Geoffrey Ayuku Anyangu as a relative. She stated that the protestor had bought the subject property from her, vide an agreement that was dated 25th April 2005. She conceded to receiving Kshs. 210, 000.00 from him, as purchase price, and he took possession of the property for about one month in 2006. She stated that that happened before she had obtained representation to the estate of the deceased. The two of them disagreed, and she refunded the total amount of money received, by depositing the same into his bank account. She stated after they disagreed, and she refunded the purchase price, she asked him to give up possession of the land.

10. The protestor took the witness stand next. He averred that he bought Kisa/Mushiangubu/715 from the administratrix, on 25th April 2005, for a sum of Kshs. 210, 000.00, which he paid in full. The transaction was reduced into writing the same day, and was duly executed by both sides. He took possession of the land thereafter, and remained in occupation from then on until 2011. He disputed the allegation that the purchase money was ever refunded to him, and denied the refund agreement that the administratrix had placed on record. He conceded, though, that the amount of the purchase price was deposited into his account. He pleaded that he should be allowed to return the money to the administratrix. He conceded that when the money was being deposited into his account, the property had already been transferred to the name of Geoffrey Ayuku Anyangu. He also conceded that Kisa/Mushiangubu/715 was never transferred to his name. He stated that the refund was forced, as he had not agreed to it.

11. At the close of the oral hearings, the parties were directed to file written submissions. Both sides have complied by filing their respective written submissions. I have read through them and noted the arguments made therein.

12. Confirmation of grants is provided for under section 71 of the Law of Succession Act, which states as follows:

> "Confirmation of Grants
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> 71. Confirmation of grants
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> (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.
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> (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—
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> (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
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> (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or
>
> (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
>
> (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:
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> Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares."

13. At confirmation of grant, the court is called upon to address two issues: confirm appointment of the administrators and distribution of the estate.

14. On confirmation of administrators, I note that the protestor has not complained that the administratrix did not qualify for appointment on account of her not being a person who was beneficially entitled to a share in the estate of the deceased, nor on account of not being competent on the basis of some disability, impairing her capacity to administer the estate, nor on grounds of suitability due to the prevailing circumstances. His principal complaint is that he acquired an interest in the estate of the deceased and that has made him a person who is beneficially interested in the estate, and should have been listed in the petition as such. His argument appears to be that the failure to disclose his name as a person who was beneficially entitled meant that the process of obtaining the grant was defective, and that fraud was practiced by the administratrix.

15. The question that I will first grapple with, in an effort to determine the issue as to the appointment of the administratrix as such, relates to whether the protestor was a survivor of the deceased or a person beneficially entitled to a share in the estate. To assist me deal with the issue, I have to advert to the proviso to section 71(2) of the Law of Succession Act, which makes the prescription that the court ought not to confirm the grant until it is satisfied as to the identities of the persons and shares of all the persons beneficially entitled. That prescription is

reproduced in Rule 40(4) of the Probate and Administration Rules. The two provisions say as follows:

> "71 (2) … Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares."

> "40(4). Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined."

16. At confirmation of grant, the administrator is expected, on account of the proviso that I have referred to above, to place before the court a complete list of the persons that he has identified or ascertained as being beneficially entitled to a share in the estate. In cases of intestacy, such persons would be the survivors of the deceased, in terms of Part V of the Law of Succession Act, depending on whether the deceased was survived by a spouse or children or both. Where he is survived by none in those categories, other relatives. That would also include dependants, as defined in section 29 of Part III of the Law of Succession Act. In the matter before me, it is common ground that the protestor was not related to the deceased, and in any event he was not claiming as a descendant of the deceased, and, therefore, he was not a survivor of the deceased, and he was not entitled to be listed as such in the petition.

17. Sometimes at confirmation, persons who are creditors of the estate are treated as persons beneficially entitled to a share in the estate. However, creditors of the estate are not entitled to the net intestate estate, for that is what ought to be distributed at confirmation, as it is envisaged that debts and liabilities are settled first before the estate is distributed. The category of survivors defined in Part V of the Law of Succession Act is limited to the persons entitled to the net intestate estate, who are strictly members of the family of the deceased, and excludes creditors. It is presumed that administrators would first identify the debts and liabilities of the estate, settle them and thereafter move on to distribute what remains of the estate after payments of debts and liabilities. For that reason, therefore, creditors and purchasers of estate of property ought not to play any role at all at confirmation of grant. They should be sorted out first, before the administrators file the application for confirmation of grant. However, where they have not been settled before a confirmation of grant is filed, then the administrators can quite properly provide for them, within the proposed distribution, and where the administrators fail to do so, the creditors would be at liberty to file protest affidavits, even though their real remedy lies in filing separate civil proceedings against the estate to establish their claims.

18. Was the protestor a creditor of the estate? Was the estate indebted to him? The deceased herein died in 1987, and the transaction, which is the basis of the claim by the protestor, was entered into in 2005. The protestor, therefore, did not transact with the deceased, since the impugned transaction happened after the deceased had passed on. The protestor was not a creditor of the deceased, for the deceased did not owe him anything as at the date of his death. It cannot, therefore, be said that the administratrix inherited any debt by the deceased owing to the protestor, which would have obliged her, under section 83(d), to settle the protestor. To that extent, the administratrix was under no obligation to treat the protestor as a person who was beneficially entitled to a share in the estate. For avoidance of doubt, section 83(d) of the Law of Succession Act, says as follows:

> "83. Duties of personal representatives
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> Personal representatives shall have the following duties—
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> (a) …
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> (b) …
>
> (c) …
>
> (d) to ascertain and pay, out of the estate of the deceased, all his debts;
>
> (e) …
>
> (f) …
>
> (g) …
>
> (i) …"

19. As noted above, the impugned transaction happened, not between the deceased and the protestor, but between the protestor and the administratrix. The question would be, did the transaction of 2005 constitute the protestor as creditor of the estate? Was it binding on the estate? Could it be classified as a contract between the protestor and the estate?

20. The deceased herein died intestate. In law, where a person dies testate, having made a will, which had properly appointed an executor, such executor would be able to take charge of the estate from the date of the death of the property owner. The argument is that the executor is appointed by the will of the deceased, the will becomes effective upon the death of its maker, and, consequently, the executor assumes his duties upon the will appointing him becoming effective, and that is from the moment of death. The document that appoints the executor is the will, he derives his authority from the will, and not from the grant of probate or representation. An executor only requires the grant of probate as evidence of his appointment.

21. The position in intestacy is different. An intestate dies without having given instructions on how and by whom his estate is to be administered. Nobody, therefore, has any authority to deal with his property until an administrator is appointed through a grant of letters of administration intestate. The authority of the administrator in intestacy would, therefore, derive from his appointment in the grant of letters of administration. That would mean that such administrator would only have power to deal with estate property after a grant has been made to him, and not before. Anything done by him before the grant is made to him, would be done without authority, and would be improper and irregular, and a nullity.

22. These positions are stated in section 80 of the Law of Succession Act in the following words:

> "80. When grant takes effect
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> (1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.
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> *(2) A grant of letters* of administration, with or without the will annexed, shall take effect only as from the date of such grant."

23. The making of a grant of representation, be it a grant of probate or of letters of administration, vests the estate of the deceased in the personal representative, that is the grant-holder, be he an executor or administrator. The effect of the vesting is that the grant-holder gets to have the same powers and rights over the estate property as the deceased owner thereof had. In strict legal terms, he would be the legal owner of the property. He can exercise the powers of an owner that are set in section 82 of the Law of Succession Act, which include the power to enter into contracts over the said property and enforce of them for the benefit of the estate, to exercise the power of sale of such property, among others. He also has the burden of the duties set out in section 83 of the Law of Succession Act. By virtue of section 79, the administrator can do anything with the property that the deceased owner thereof would have done were he alive.

24. Section 79 is critical for administrators. The property of the deceased would only vest under section 79 in an administrator upon his appointment. He can only begin to exercise the powers of an owner after he has been appointed as such. That would mean that between the date of the death of the deceased and the date of the appointment of the administrator, the estate of the deceased would not vest in the administrator, he would not exercise the rights and powers of an owner, and he cannot bind anyone with respect to dealings with such property. In short, he would have no authority to deal with the property as he has no rights nor powers over it. To protect estate property from being mishandled by persons who have no power or authority to deal with it because the property does not vest in them, the law outlaws dealing with it without a grant of representation. That provision is in section 45 of the Law of Succession Act, and it says as follows:

> "45. No intermeddling with property of deceased person
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> (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
>
> (2) Any person who contravenes the provisions of this section shall—
>
> (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
>
> (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."

25. The facts of the instant matter indicate that the land transaction between the protestor and the administratrix over Kisa/Mushiangubu/715 happened on 25th April 2005, while the administratrix herein was appointed to that office on 25th February 2009. That means that at the time of the transaction, the administratrix had not yet been appointed the personal representative of the deceased. She had not yet stepped into his shoes as the owner of Kisa/Mushiangubu/715. The said property, Kisa/Mushiangubu/715, had not yet vested in her as legal owner, by virtue of section 79, and she had no authority to handle it as the deceased legal owner would have done were he alive, such as selling it. She could not enter into any binding contracts over it, as she had no legal title to it at the time. She could only deal with in contravention of section 45 of the Law of Succession Act, by way of intermeddling with it. Any transaction entered into by a person, in whom the estate had not vested, amounted to intermeddling with the property and the arrangement between the intermeddler and the purported buyer, who was also an intermeddler, was irregular and unsupported by the law. The purported seller would pass no title whatsoever to the purported buyer. The alleged buyer would, therefore, have no claim whatsoever against the estate, for the person that he dealt with was not a representative of the deceased or the estate. Consequently, the transaction that happened on 25th April 2005 was unlawful, irregular and contrary to the law, and the protestor acquired no rights whatsoever from it with respect to Kisa/Mushiangubu/715. The same did not constitute him a creditor of the estate, and there was no basis in law for the administratrix to treat him as such and to provide for him at confirmation.

26. There is the concept of relation back, which states the principle that a grant representation authenticates the prior acts of the personal representative. It validates acts carried out by the personal representative before the grant was made. However, that principle only applies to a grant of probate, with respect to the acts of an executor between the date of the death of the testator and the date of the grant of probate. The executor's appointment is by will, and he assumes office upon the death of the testator. He has power and authority, deriving from the will, to handle estate property before representation is granted. The grant of probate does not appoint him, it merely provides evidence of his appointment, and, therefore, validates, or authenticates, whatever he might have done before the grant was made. The same does not apply to a grant of letters of administration. A grant of letters of administration appoints the administrator, and vests powers upon him. He can only begin to exercise the powers of an administrator upon his appointment. Whatever he might have done with the property before then would not be authenticated, as the same would have been done without any authority, and would, in any event, amount to intermeddling with the estate. The effect of this would be that the appointment of the administratrix, as such, in 2009, did not validate or authenticate the purported

sale transaction done in 2005, as the grant of 2009 did not relate back to the unlawful acts of 2005.

27. However, the exercise of rights and powers of an owner by an administrator is limited, to the extent that the grant-holder is not the absolute legal owner of the property, but a trustee, holding the same on behalf of others. His powers and rights of ownership are limited or restricted, and he may only be able to do certain things with respect to the property within certain limits. What this means is that even where an administrator has power to sell property, and does enter into sale transactions after his appointment as administrator, he may not still be able to exercise some of the powers, since they are proscribed. For instance, with respect to sale of immovable property, the same cannot be sold before the grant is confirmed. Section 82(b)(ii) of the Law of Succession Act, says:

> "82. Powers of personal representatives
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> Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—
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> (a) …
>
> (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:
>
> Provided that—
>
> (i) …
>
> (ii) no immovable property shall be sold before confirmation of the grant …"

28. The point, therefore, is that even if the administratrix herein had been appointed as such at the time she purported to enter into that sale agreement, which is not the case anyway, the sale would still have been irregular and unlawful, to the extent that the same was entered into prior to the grant being confirmed. So, even if one were to approach the matter from this perspective, the protestor would still not qualify as a creditor of the estate or a person beneficially entitled to a share in the estate of the deceased, and there was no obligation on the administratrix to list him as such.

29. The second matter relates to the assets. Nothing turns on this. There is no dispute that the deceased died possessed of only one asset. The dispute revolves around other issues.

30. The question then is whether the administratrix had properly identified the persons who are beneficially entitled to shares in the estate? On who the survivors of the deceased are, the answer is that there was only one, the administratrix. She was the only person entitled to the property. She should take everything, going by section 38 of the Law of Succession Act, which provides:

> "38. Where intestate has left a surviving child or children but no spouse
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> Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be."

31. The final point is that the administratrix had not been appointed as such when she transacted with the deceased in 2005, she did not represent the deceased then, and she could not sell his property as she had no authority over it. The protestor should not look up to the estate for recompense, he can only look up to the administratrix, personally, once she gets her share of the property, after confirmation of the grant, and following transmission, to make good to him. Another person also stakes a claim to the same property. It would appear that they will have to square it out at the Environment and Land Court, not in this cause, as this court has no jurisdiction, by virtue of Articles 162(2) and 165(5) of the Constitution, to determine questions as title to and occupation of land.

32. The final orders that I shall make in the end are:

a. That I hereby allow the summons for confirmation of grant, dated 27th April 2012, and dismiss the protest by the protestor comprised in his two affidavits, sworn on 20th March 2013 and 23rd November 2018;

b. That the grant of letters of administration intestate made on 25th February 2009, to Rael Awinja Atetwe, is hereby confirmed;

c. That the estate of the deceased shall be distributed in the manner proposed in the summons dated 27th April 2012;

d. That each party shall bear their own costs; and

e. That, in the event any of the parties herein is aggrieved, by the orders made in this judgement, there is a right to move the Court of Appeal, appropriately, on appeal, within twenty-eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 27TH DAY OF FEBRUARY 2020

W. MUSYOKA

JUDGE