



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 133 OF 2010

IN THE MATTER OF THE ESTATE OF BERNARD KARANI AYUGU, DECEASED

RULING

1. On 3rd December 2018, I delivered a ruling herein wherein I made the following orders:

(a) That the application dated 29th October 2015 be and is hereby allowed in the terms set out here below;

(b) That the estate of the deceased shall be distributed as follows –

(i) Nzoia/Moi's Bridge/Block 1/1727 to Alice Sebi Minayo;

(ii) Nzoia/Moi's Bridge/Block 1/652 to Mary Grace Ayugu;

(iii) Nairobi/Block 82/1086 to Mary Grace Ayugu;

(iv) The pensions and the death gratuity to Mary Grace Ayugu and the children of the deceased; and

(v) Any other assets to Mary Grace Ayugu;

(c) That a certificate of confirmation of grant to issue accordingly;

(d) That each party shall bear their own costs; and

(e) That any party aggrieved by the orders that I have made herein has a right to challenge the same at the Court of Appeal.

2. After that several applications have been filed herein, one is dated 15th April 2019, the others are dated 23rd April 2019 and 25th June 2019.

3. The application dated 15th April 2019, was at the instance of the administratrix of the estate, Mary Grace Ayugu, and it is principally for review of the orders that I made on 3rd December 2018, distributing the estate. She principally would like the ruling on distribution to conform to the orders made in the judgment that Chitembwe J. delivered on 29th May 2013. Her principal concern appears to be with respect to Nzoia/Moi's Bridge/Block 1/1727 being devolved upon Alice Minayo Sebi. She argues that Nzoia/Moi's Bridge/Block 1/1727 was her matrimonial home where she lived with her family. She proposes that Alice Minayo Sebi be allocated a portion of Nzoia/Moi's Bridge/Block 1/652 instead.

4. Alice Minayo Sebi swore an affidavit in response to the application dated 15th April 2019. She argues that the court was *functus officio* after distributing the estate. She asserts that even as the court delivered the judgement of 29th May 2013, it recognized that she had been in occupation of Nzoia/Moi's Bridge/Block 1/1727. She states that the administratrix had obtained judicial separation orders against the deceased, and had declared the Greenfields property in Nairobi to be her matrimonial home. She contests the claim that Nzoia/Moi's Bridge/Block 1/1727 was the administratrix's matrimonial home, saying that she was misleading the court. She points to the judicial separation order of 2006 to say that she was already living with the deceased while the administratrix was separated from him. She asserts that the administratrix never stepped on Nzoia/Moi's Bridge/Block 1/1727 except when she came for the burial. She asserts that the administratrix only accessed the property for the burial through a court order that had been obtained in Eldoret HCCC No. 5 of 2010, as she had not lived with the deceased for over four years. She claims that the home on Nzoia/Moi's Bridge/Block 1/1727 was constructed by the deceased in 2004 for her, as he was already separated from the administratrix. She states that there was such bad blood between the two of them that it was impossible for them to work together towards putting up a matrimonial home together at the time. She further avers that after

burying the deceased, the administratrix once gain retreated to Nairobi where she has a matrimonial home. She argues that the ruling of 3rd December 2018 had allocated her only one property, with the bulk of the property going to the administratrix. She asserts that she was the one staying on Nzoia/Moi's Bridge/Block 1/1727 with the deceased, and had contributed to the developments on the said land. She also argues that the applicant had also collected the lump sum of the pension. She states that the Greenfields property was valued at Kshs. 14, 000, 000.00, while Nzoia/Moi's Bridge/Block 1/1727 was valued at Kshs. 15, 000, 000.00. She complains that if she got a portion of Nzoia/Moi's Bridge/Block 1/652 she should be short changed as the value of that property was Kshs. 4, 000, 000.00. She argues that the ruling of 3rd December 2018 had given her Nzoia/Moi's Bridge/Block 1/1727 after the court had taken into account the fact that she had been in occupation of the property to the exclusion of the administratrix.

5. Among the annexures to the affidavit in reply is the petition in the Nairobi (Milimani) CMCJSC No. 29 of 2005, brought by the administratrix against the deceased, where she described her matrimonial home to be at Greenfields estate, while she averred that the deceased had married the deponent and lived with her at his rural matrimonial home. It is also mentioned that the cohabitation between the deceased and the administratrix ended in 2000 when he moved out of the matrimonial home at Greenfields. There is an order in Nairobi (Milimani) CMCJSC No. 29 of 2005, issued in 2007, to the effect that the two were not bound to cohabit, custody of a minor child was awarded to the administratrix and the deceased was to pay maintenance. There are various attachments of documents to show that Alice Minayo Sebi had bought construction materials in 2006/2007. There is a letter from the Director of Pensions indicating that the deceased's terminal benefits were paid to the administratrix.

6. The administratrix swore a replying affidavit on 19th June 2019. She avers that she and the deceased had acquired Nzoia/Moi's Bridge/Block 1/1727 jointly and put up a matrimonial home there in 1987. She avers that the deceased was buried on the land, and, as a custom, as surviving widow she should be allocated the same. She states that the land measured 5 acres, and 2 acres were sold to Jackson Agada Abila, who took possession and resides there, while she and her family lived on the remaining 3 acres. She averred that the Court of Appeal upheld the decision by Chitembwe J to the effect that Alice Minayo Sebi was a dependant of the deceased, and did not interfere with the order that required her to account for sale of three vehicles and part of the land. She also avers that the appellate court had found that the estate of the deceased was jointly acquired, and did not solely belong to the deceased. She complains that Alice Minayo Sebi has sold parts of the estate to unsuspecting persons, and accuses her on being out to plunder the estate of the deceased, given the various orders made by the court against her Alice Minayo Sebi by Lenaola J and Kimaru J. The administratrix further avers that Alice Minayo Sebi had not accounted for the sale of the motor vehicles, which accounts, in the administratrix's view, would be relevant in determining what Alice Minayo Sebi ought to be entitled to.

7. To support her case, the administratrix has annexed several documents to her affidavit. There is a certificate of lease in respect of the Greenfield property, that is to say Nairobi/Block 82/1086, showing that the same was jointly registered in the names of the administratrix and the deceased. The second page of the document which has the proprietary column has not been exhibited, and I cannot tell whether the nature of tenure was joint or in common. There is also the ruling that Lenaola J delivered on 17th November 2010, where the court declined to find Alice Minayo Sebi was married to the deceased and granted orders, relating to intermeddling with the estate, against her. There are various other documents that she has filed to support her case.

8. The Motion dated 23rd April 2019 is brought at the instance of Jackson Agada Abila, who claims to have had acquired a portion of Nzoia/Moi's Bridge/Block 1/1727 from the deceased. He then took vacant possession of the subject property and put up a home on it. He asserts that he bought 2 cares and that what was available to the estate was 3 acres, where the deceased and the administratrix had put up a matrimonial home, and that was also where the deceased was buried. He states that although he was aware of the matter, he expected the deceased or administratrix would effect the relevant transfers, but he was surprised when Alice Minayo Sebi brought in buyers who threatened to evict him.

9. The application dated 23rd April 2019 attracted a response from Alice Minayo Sebi, through an affidavit she swore on 26th April 2019. She argues that Jackson Agada Abila had no locus to bring an application for review of confirmation orders. She asserts that Jackson Agada Abila was never listed as one of the creditors of the estate. She further avers that Jackson Agada Abila did not raise any objection at confirmation of grant for his interest to be taken into account. On Nzoia/Moi's Bridge/Block 1/1727, she argues that it was allocated to her in the ruling of 3rd December 2018, and she was not aware of the developments that Jackson Agada Abila had made on the land. She pointed to a suit in Kakamega SPMCCC No. 287 of 2006, that had been initiated by Jackson Agada Abila against the deceased and the administratrix over Nzoia/Moi's Bridge/Block 1/1727, and argued that the said sale was null and void for lack of consent of the relevant Land Control Board.

10. The administratrix also responded to the application dated 23rd April 2019, through her replying affidavit, sworn on 19th June 2019. She essentially supports the position of the applicant in that application, that he had bought a portion of Nzoia/Moi's Bridge/Block 1/1727 from the deceased. The portion sold was 2 acres and that he took possession.

11. The application dated 25th June 2019 is at the instance of Ngare Sagwe Ombiro, Mary Wairimu Kigia and Kennedy Wanjala Barasa. The orders they seek are that the court enjoins them to the matter as interested parties, and upholds the portion of the Court of Appeal declaring Alice Minayo Sebi a dependant, and the ruling of 5th December 2018 of this court which distributed the estate. The applicants in that application claim that the administratrix and Alice Minayo Sebi had sold a portion of Nzoia/Moi's Bridge/Block 1/1727 to them and others, and they claim that they would suffer if the same is redistributed.

12. The administratrix has responded to that application dated, 25th June 2019, through the affidavit that she swore on 18th September 2019. She avers that the sale transactions that the applicants alleged to have entered into in 2010, with Alice Minayo Sebi, were illegal as they amounted to intermeddling with the estate of the deceased, and pointed to the orders of Lenaola J of 29th June 2010 and his ruling of 17th November 2010, to the extent that they related to Nzoia/Moi's Bridge/Block 1/1727. Finally, she avers that the said applicants have no legal standing to ask the court to stand by the decision of the Court of Appeal and the orders of this court of 5th December 2018.

13. The various applications filed herein arise from the confirmation orders that I made on 3rd December 2018. In making those orders I took

into account the fact that the court had adjudged Alice Minayo Sebi to be a dependant of the deceased rather than a wife, and in distribution I took that into account, holding that she was entitled to much less from the estate compared with the administratrix, the lawful widow of the deceased and her children. I also took into account the fact that it appeared from the record that as at the date of the deceased's death, he and the administratrix were separated, and that he lived with Alice Minayo Sebi on Nzoia/Moi's Bridge/Block 1/1727, and it was on that basis that I awarded Nzoia/Moi's Bridge/Block 1/1727 to Alice Minayo Sebi. I shall treat the application dated 15th April 2019 as the primary application, with the rest being secondary to it.

14. The primary application is for review of orders that I made on 3rd December 2018, primarily as they relate to Nzoia/Moi's Bridge/Block 1/1727. The administratrix argues that that was her matrimonial home, and should have been given to her as the widow of the deceased as opposed to Alice Minayo Sebi, who was not a widow, but a mere dependant.

15. Review, as a remedy, is provided for under the Civil Procedure Rules, and is adopted into probate practice through Rule 63 of the Probate and Administration Rules. It is available on two general grounds, where the applicant has discovered evidence which she did not have access to at the time of the hearing, and error on the face of the record. There is also the general ground, captioned as any other sufficient reason. The administratrix has invited me to consider the application on the basis of section 47 of the Law of Succession Act, Cap 160, Laws of Kenya, and Article 159 of the Constitution. I do not believe that section 47 grants the High Court any special jurisdiction, but Article 159 of the Constitution would allow the court the jurisdiction to look at a matter globally or substantively without paying too much regard to technicalities of procedure in order to do justice to the parties.

16. From the material on record, that is the rival affidavits and the entire record, there is no denying that the deceased and the administratrix contracted a statutory marriage in 1980, and remained so married, save for a judicial separation in 2007, till the deceased died in 2009. The property in question was registered in the name of the deceased in 1998, it is not clear when the same was bought. The point is that the same was acquired during coverture, and before the two separated, and before Alice Minayo Sebi came into the picture. There is a dispute as whose matrimonial home it was, but since Alice Minayo Sebi was never a wife of the deceased, she cannot claim to have had a matrimonial home. So if there is a home on Nzoia/Moi's Bridge/Block 1/1727 then it cannot be her matrimonial home, for the deceased could only possibly have had a matrimonial home with the administratrix. Alice Minayo Sebi claimed that she contributed to the putting up of the home, and attached some receipts to her affidavit. A weighty issue as to how a party put up the home cannot be resolved through affidavit evidence. It take it that Nzoia/Moi's Bridge/Block 1/1727 was the place where the deceased's upcountry home was, since that was where his remains were interred, and, therefore, if that was the matrimonial home then the same should naturally devolve upon the widow.

17. Alice Minayo Sebi raised the issue that the administratrix got the matrimonial home in Nairobi, and argued that she, Alice Minayo Sebi, should get a property of almost equal value elsewhere. Firstly, I have seen the certificate of lease in relation to Nairobi/Block 82/1086. The property was in the joint names of the deceased and the deceased. As noted elsewhere the entire document was not annexed, and the page which would have showed whether the property was jointly owned or held in common is missing. On the face of it would appear to be a joint tenancy, to which the principle of *jus accrescendi*, as stated in section 101 of the Registered Land Act, Cap 300, Laws of Kenya, and now repealed, and the Land Registration Act, No 3 of 2012, section 60. Under that principle, Nairobi/Block 82/1086 should not have been scheduled as a property of the estate for it passed directly to the surviving proprietor upon the death of the other proprietor, the deceased in this case. That property did not form part of the estate of the deceased, and should not have been distributed. That then would mean that the administratrix did not, in reality, benefit substantially from the estate, and it would appear that it was Alice Minayo Sebi who benefitted more. The argument by the administratrix is, therefore, plausible. Section 60 of the Land Registration Act states as follows:

“Transmission on death of joint proprietor.

60. If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate.”

18. The other concern that was raised, and that I had not taken into account, related to the fact that my predecessors had required Alice Minayo Sebi to account for sales of various motor vehicles, as well as income from other assets. I have not seen any accounts on record. It would appear that she benefited from the property in question as it was under her control before the Public Trustee and the administratrix came on board as administrators.

19. I am of the persuasion that I should revisit the confirmation orders that I made on 3rd December 2018, for review purposes, on the reasons given above. I accordingly hereby review the said orders, so that Nzoia/Moi's Bridge/Block 1/1727 devolves upon the administratrix while 1/7 acre of Nzoia/Moi's Bridge/Block 1/652 devolves upon Alice Minayo Sebi.

20. The application dated 23rd April 2019 is by a person who alleges to have had bought a portion of Nzoia/Moi's Bridge/Block 1/1727 from the deceased. That is contested by Alice Minayo Sebi. However, the said contest is not of much value given that she was not found to be a widow of the deceased. The alleged buyer should ideally have been dealt with by the administratrix before she proposed distribution of the estate, and I suppose that once the entire Nzoia/Moi's Bridge/Block 1/1727 is conveyed to her, she shall sort him out.

21. The application dated 25th June 2019 is by individuals who had allegedly bought same assets in 2010 from Alice Minayo Sebi, before the administratrix came on board. The activities of Alice Minayo Sebi during that period were decreed by Lenaola J to have had amounted to intermeddling. The court cannot entertain them. If they have an interest that they feel should be addressed by the court, then they are better off before the Environment and Land Court, as I have no jurisdiction to determine questions of ownership. The same awaits Jackson Agada Abila, should the administratrix fail to transfer what he claims to be due to him.

22. In the end the orders that I make in the circumstances are as follows: -

(a) That the application dated 15th April 2019 is allowed so that Nzoia/Moi's Bridge/Block 1/1727 devolves upon the administratrix while ½ acre of Nzoia/Moi's Bridge/Block 1/652 devolves upon Alice Minayo Sebi;

(b) That the certificate of confirmation of grant dated 28th January 2019 shall be amended accordingly;

(c) That the applications dated 23rd April 2019 and 25th June 2019 are hereby dismissed, with no orders as to costs;

(d) That each party shall bear their own costs; and

(e) That any party aggrieved by the orders that I have made herein has a right to challenge the same at the Court of Appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE