



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO. 362 OF 1997
IN THE MATTER OF THE ESTATE OF JOSEPH WESONGA MUTOBERA (DECEASED)
RULING

1. The application that I am called upon to determine is dated 5th June 2017. It seeks orders against the District Land Registrar and District Land Surveyor, requiring that they visit E. Wanga/Lubinu/488 with a view to ascertain the exact acreages occupied on the ground by the beneficiaries, as those in the certificate of confirmation of grant were more than what was on the ground. Three beneficiaries of the estate, as per the certificate of confirmation of grant, are the ones who have brought the application. They begrudge the administrator for presenting acreages to the court which do not match the occupation on the ground. They also accuse him of not getting the property distributed after confirmation of the grant. They urge that the land be resurveyed to confirm the acreages on the ground, and to thereafter have the estate distributed equally.
2. There is a response to the application by the administrator, Patrick Kalelwa Mutobera. He states that his grant had been confirmed, but at the time of confirmation he had not involved the surveyor to determine the acreages as occupied on the ground by the beneficiaries. He blamed the beneficiaries for not cooperating, in terms of availing funds for the exercise. He stated that he was willing to have the land subdivided so long as the beneficiaries paid the money required for the exercise. There is another response, curiously headed affidavit of protest, curious because such an affidavit is only necessary with respect to applications for confirmation of grants, sworn by Douglas Okomba Wesonga. He has a bone to pick with the inclusion of the Lusheya Health Centre in the proceedings, arguing that the health centre was not entitled to the property that it was given.
3. The applicants swore an affidavit responding to those by the administrator and Douglas Okomba Wesonga. They assert that their principal complaint was that the administrator had failed to distribute the estate. They only wanted the property distributed as per the boundaries on the ground, and they appear to have no problem with the distribution save for the acreages. They assert that the health centre was a rightful beneficiary.
4. The application was placed before Sitati J. on 23rd October 2017, who directed the County Surveyor to visit the land and confirm the boundaries on the ground, in the presence of all the parties. The District Surveyor did as instructed. He visited the land on 31st January 2018, took measurements and prepared a report, which he dated 5th February 2018. He also prepared charts on E. Wanga/Lubinu/488 and 500, showing the layout of the land, and how the same was occupied on the ground, by the beneficiaries, indicating the acreages occupied by them. He attached the charts or maps to his report. The report was lodged in court on 16th October 2018, through a letter of even date.
5. I heard the application on 26th November 2019. The parties addressed me orally and breathed life to the averments made in their respective filings.
6. The grant herein was confirmed in proceedings that were conducted on 9th June 1999. The application for confirmation of grant had not been opposed. A certificate of confirmation of grant, of even date, was issued. There was no step taken in the matter, between 1999 and 2017, to challenge the confirmation orders, until the instant application was filed.
7. My understanding of the application is that it does not, *per se*, challenge the distribution of the estate as set in the certificate of confirmation of grant dated 9th June 1999. It would appear that the estate was distributed in accordance with the occupation of the land on the ground. The only complaint is that the figures that were placed by the administrator before the court in 1999, were not actual, for survey work had not been done on the ground, to ascertain the actual acreage occupied by the beneficiaries. The administrator concedes that he did not ascertain the acreages, and cites lack of cooperation from the beneficiaries. The administrator and the applicants appear to be agreed on that, and are on all fours on the need for survey works to be done to ascertain the acreage.
8. The third player in the application raises the issue of the health centre. The application before me is not for the setting aside or review of the confirmation orders. It is only for an order that the surveyor visits the land to take the actual acreages of the portions as occupied by the parties. Whether some party or other is not entitled to get a share is not before me. I shall not even revisit confirmation to order equal distribution as suggested by the applicants. If they are minded, they should challenge the confirmation orders on appeal or review, if they can or if they are still within the permissible timelines.
9. I note that the surveyor has already done his work and placed a report on record. I shall make my orders based on that report, which was done on the basis of court orders.
10. I should also mention that since the court has already confirmed the grant, then it follows that these proceedings relate to transmission of property. Transmission is the process that follows after the grant is confirmed, of having the property conveyed from the names of the deceased to the names of the beneficiaries stated in the certificate of confirmation against the assets the subject of the certificate. That process is not governed by the Law of Succession Act nor the Probate and Administration Rules, but by the land legislation. The principal legislation is the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The Land Registration Act and the Land Act carry complementary provisions on transmission of property upon the death of an owner after the grant has been confirmed.
11. The provisions in the Land Registration Act are in sections 60 to 63, which state 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.

Transmission on death of a sole proprietor or proprietor in common.

61. (1) If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative’s name of the words “as executor of the will of [deceased]” or “as administrator of the estate of [deceased]”, as the case may

be.

(2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission—

(a) any transfer by the personal representative; and

(b) any surrender of a lease or discharge of a charge by the personal representative.

(3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.

Effect of transmission on death.

62. (1) Subject to any restriction on a person’s power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but enforceable and subject to which the deceased proprietor held the land, lease or charge, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor of the land lease or charge with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.

(2) The registration of a person as provided in section 61, shall relate back to and take effect from the date of the death of the proprietor.”

12. On the other hand, the relevant transmission provisions in the Land Act are carried in sections 49 to 51, and they state as follows:

“49. *Transmission on death of joint proprietor*

If one of two or more joint proprietors of any land, lease or charge dies, the Registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate.

50. *Transmission on death of a sole proprietor or proprietor in common*

(1) *If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative’s name of the words “as executor of the will of () [deceased]” or “as administrator of the estate of () [deceased]”, as the case may be.* (2) *Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission—*

(a) *any transfer by the personal representative; and*

(b) *any surrender of a lease or discharge of a charge by the personal representative.*

(3) *In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.*

51. *Effect of transmission on death*

(1) *Subject to any restriction on a person’s power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor thereof with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.*

(2) *The registration of any person as aforesaid shall relate back to and take effect from the date of the death of the proprietor.”*

13. The challenges raised in the application before me relate to transmission of the property, which, I beg to repeat, is a process which happens outside of the provisions of the Law of Succession Act. Consequently, the remedy available should be sought, not under the Law of Succession Act, but, under the legislation that provides for transmission, that is to say the Land Registration Act and the Land Act. Indeed, under the Land Registration Act and the Land Act the court with jurisdiction with respect to matters that fall under those statutes is the Environment and Land Court. That is spelt out in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.

14. The provisions in the Land Registration Act state as follows:

“*Interpretation.*

2. *In this Act, unless the context otherwise requires—*

“*Court*” means the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011: ...

Jurisdiction of court.

101. *The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”*

15. The Land Act carries similar provisions , which state as follows:

“2. *Interpretation*

In this Act, unless the context otherwise requires—

“*Court*” means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011);

...

150. *Jurisdiction of the Environment and Land Court*

The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

16. The point, therefore, is that the application before me ought ideally to have been filed at the Environment and Land Court. However, since this court has already taken initial steps in the matter, by ordering that survey work be carried out, I shall make final orders as follows:

(a) That the certificate of confirmation of grant dated 9th June 1999 shall be amended to reflect the acreages set out in the report of the District Surveyor, Kakamega, dated 5th February 2018;

(b) That the administrator shall thereafter present the amended certificate of confirmation of grant to the Land Registrar, responsible for Kakamega County, for transmission of the property in accordance with the relevant land legislation;

(c) That any disputes that shall arise thereafter, or any other which relates to transmission of the property as set out in the amended certificate of confirmation of grant, shall be placed before the Environment and Land Court; and

(d) That each party shall bear their own costs.

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