REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 836 OF 2013

IN THE MATTER OF THE ESTATE OF PRISCA ONG'AYO NANDE (DECEASED)

JUDGMENT

1. The application that I am tasked with determining is a summons for revocation of grant, dated 26th May 2017. It seeks that the applicant be enjoined as a liability of the estate and that the certificate of confirmation of grant issued to the administrator on 28 th April 2014 be revoked. The applicant is Hallies David Shitika. The principal grounds upon which the application is founded are that the applicant had bought 2 acres from the deceased, where he settled. He also purchased another parcel from Fred Nyongesa, with the full blessing of the deceased. He averred that the administrator concealed matter from the court by omitting his name from the confirmation process, when he knew that he was a liability of the estate. He has attached copies of sale agreements signed between him and the deceased and Fred Nyongesa.

2. There is a reply to the application, through an affidavit sworn on 19th July 2017, by Timothy Andanje Indika, a son of the late administrator. He acers that the applicant was not one of the beneficiaries of the estate, and that the claim could only be entertained by the Environment and Land Court.

3. The dead administrator was subsequently substituted as administrator by Timothy Andanje Indika, through orders made on 2nd October 2018 on an application dated 17th May 2017. I shall hereafter refer to Timothy Andanje Indika as the administrator.

4. Directions were taken on 2nd October 2018, to the effect that the application, dated 26th May 2017, would be disposed of disposed of by way of oral evidence, and that the parties and their witnesses would file witness statements.

5. The oral hearing happened on 3rd December 2018. The applicant was the first on the witness stand. He narrated how he bought land from the deceased, and produced documents to support his case. The land in court was Butsotso/Indangalasia/337. He called a son of the deceased, called Samuel Nandwa Wande, who confirmed the sale. He also called Livingstone Atika Shinali, who also confirmed the sale.

6. The administrator testified on 17th September 2019. He stated that he was a step grandson of the deceased. He contested the sale saying that it was Timothy Andanje Indika, who was causing all the trouble, using the applicant, in a bid to get a larger share of the estate. He asserted that the applicant should get his share of the land he bought from Timothy Andanje Indika. He called several witnesses to support his case that the property sold ought to be recovered from Timothy Andanje Indika, the principal beneficiary of the sales, and not from the estate.

7. The application for determination is premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The said provision 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."

8. Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or *vice versa*. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.

9. What is sought to be revoked here is not the grant itself, but the certificate that was issued upon the confirmation of the grant. In principle, the applicants appear to be unhappy with the confirmation process. That is what comes out from the body of the application and the affidavits sworn in support of the application, as well as the oral testimonies of the applicant, his witnesses and his written submissions. The principal prayer in the application is for revocation of the certificate of confirmation of grant.

10. The power or discretion given to the court by section 76 of the Law of Succession Act is for revocation of grants of representation. The Law of Succession Act does not define grant of representation, for the section that carries definitions or interpretations of terms or words used in the Act, that is to say section 3, does not include the word or term "grant". The Probate and Administration Rules, the subsidiary legislation made under the Law of Succession Act does define the term, at Rule 2, in the following words:

> ""*grant" means a grant of representation, whether a grant of probate or of letters of administration with or without a will annexed, to the estate of a deceased person."*

11. Rather than dealing with the definition of the term, what the Law of Succession Act does at, at sections 53 and 54, is to provide for the forms that the grant may take, which then gives us some sense of what a grant of representation is or means or refers to. The provisions say as follows:

"*Forms and Grants*

53. Forms of grant

A court may—

(a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either—

(I) probate of the will to one or more of the executors named therein; or

(ii) if there is no proving executor, letters of administration with the will annexed; and

(b) if and so far as there may be intestacy, grant letters of administration in respect of the intestate estate.

54. Limited grants

A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act."

12. As stated above, the principal concern of the applicant is the confirmation of the grant. What he seeks principally is revocation of the certificate of confirmation of grant. The question then that arises is whether a certificate of confirmation of a grant is in fact a grant of representation intestate or the equivalent of a grant, to be revoked or annulled through section 76 of the Law of Succession Act. The answer to that question, appears to me, to be that a certificate of confirmation of grant is not a grant of representation.

13. Grants of representation take the form stated in sections 53 and 54 of the Law of Succession Act. They are either a grant of probate or of letters of administration intestate or of letters of administration with will annexed or limited grants. A certificate of confirmation of grant does not take any of those forms, and it cannot possibly, therefore, be a grant of representation. It is a document extracted from the orders that a court makes after confirmation of a grant under section 71 of the Law of Succession Act, as evidence the fact that a grant of representation has been confirmed. It should be emphasized that the confirmation process does not produce another grant. The grant sought to be confirmed, through that process, remains intact, after confirmation. Whereas a grant of representation appoints personal representatives or administrators, the certificate of confirmation does not do anything of that sort. All what it does is to confirm that the court has approved the persons appointed under the grant to continue to administer the estate, with a view to distribute it in accordance with the distribution schedule approved. A certificate of confirmation of grant is akin to that order or decree that is extracted from a ruling or judgement made by a court; it is an extract of the orders that the court makes on an application for confirmation of grant. Quite clearly, therefore, a certificate of confirmation of grant is not a grant of representation, and for that reason it is not available for revocation under section 76 of the Law of Succession Act.

14. In any event, as the certificate of confirmation of grant is a mere formal expression of the orders made by the court on a confirmation application, the revocation of the certificate, if at all it is revocable under section 76, which I continue to assert that it is not, would be of little consequence, for it is only the certificate that would be affected by such an revocation order, since the orders on confirmation, from which it is extracted would remain intact. The certificate is a mere extract, its revocation would not affect its source, the orders of confirmation of grant. A grant of representation is not equivalent to a certificate, it is not an extract from some order, and it is the order itself, appointing administrators, and it is the court granting representation. The orders on confirmation of a grant remain unaffected by a revocation or annulment of the certificate of confirmation of grant. The proper thing to do should be to have the confirmation orders vacated and thereafter the certificate of confirmation of grant annulled, following the setting aside of the orders from which it draws its life. Otherwise, failure to vacate the orders would mean that a fresh certificate could still be extracted from the same orders. The confirmation and the certificate are two separate or different things.

15. The certificate of confirmation of grant is provided for under Rule 41(5) of the Probate and Administration Rules, which says as follows:

> "*Where the court in exercise of its power under section 71(2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and …*"

16. Section 76 of the Law of Succession Act has nothing to do with confirmation of grants. It carries no provisions which relate to what a court should do with confirmation orders or certificates of confirmation of grant. Indeed, the provision says nothing about the powers prescribed in it being used for the purpose of the court intervening in the confirmation process, once orders are made on a confirmation application. The only connection between confirmation of grants and revocation of grant is that set out in section 76 (d) (i) of the Law of Succession Act. It has nothing to do with a grant having been confirmed, rather it deals with situations where a personal representative or holder of a grant or administrator has failed to apply for confirmation of their grant. Section 76 of the Act relates to confirmation of grants to that very limited extent, not with confirmation itself, but the failure to apply for confirmation. A person who is aggrieved by the orders made with respect to a confirmation application, which are encapsulated in the certificate of confirmation of grant, has no remedy under section 76 of the Law of Succession Act, for that provision does not envisage revocation of certificates of confirmation of grants.

17. I have very closely perused through the provisions of the Law of Succession Act, and I have not come across any provision that provides a remedy to a person who is aggrieved by confirmation orders. Sections 71, 72 and 73 of the Law of Succession Act, which deal with confirmation of grants, do not address the question of redress for parties who are unhappy with the confirmation process, nor do they deal generally with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process. In the absence of any provision in the Law of Succession Act, for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say appeal and review, to the extent that the same is permissible under the Law of Succession Act. I would believe that one can also apply for the setting aside or vacating of confirmation orders, where the same are obtained through abuse of procedure.

18. I reiterate that the power or discretion granted to the court by section 76 of the Law of Succession Act is for revocation of grants. The application that I am tasked with determining does not carry or contain a single prayer for revocation of the grant made herein to the administrator. I doubt, therefore, whether I should go ahead to invoke the power to revoke the grant when there is no prayer for it. A party is bound its pleadings, and the court only decides a matter based on the pleadings before it. Affidavit and oral evidence is intended to breathe life to the pleadings. For life to be successfully breathed into the suit or cause or application, to enable the court grant the orders sought or meet the prayers made, the evidence tendered must be in sync with the pleadings. The heading of the application purports it to be an application for revocation of grant, but there is no prayer for revocation of the grant, the evidence placed on record targeted the confirmation process, not the revocation of the grant.

19. Clearly, therefore, there is no proper application before me for revocation of the grant of letters of administration intestate made in this matter.

20. The applicant considers himself to be a liability of the estate, in other words a creditor, in the sense that the estate was indebted to him. Often, at confirmation, persons who are creditors of the estate are treated as persons who are beneficially entitled to a share in the estate. That should not be, for distribution of an intestate estate should be of the net estate. It is envisaged that debts and liabilities are settled first before the estate is distributed. It presuppose that administrators ought to identify the debts and liabilities of the estate first, settle them and thereafter move on to distribute the net estate after payment of debts and liabilities. For that reason, therefore, creditors and purchasers of property estate ought not to be entertained at this stage. They should be sorted out first before the administrators file the application for confirmation of grant. However, where they have not been settled, an application for confirmation of grant is mounted, the administrators can quite properly provide for them, within the proposed distribution.

21. It would appear that the administrator did not address the matter of debts and liabilities in the context of the application for confirmation of grant. He also did not say at confirmation whether he ascertained any debts and liabilities of the estate, nor whether such debts and liabilities had been settled or provided for. The confirmation application dated 26th May 2015 did not identify any creditors and did not

isolate any shares in the estate to settle any such creditors.

22. I note that the administrator has vehemently contested the alleged sales of land to the applicant, arguing that they should look up to one of the sons of the deceased for recompense. To him the applicant was not a creditor of the estate, warranting being listed as persons beneficially entitled to a share in the estate. Was the applicant a *bona fide* purchaser of property from the deceased to warrant being treated as a creditor of the estate, who ought to be catered for from the estate? Documents were placed on record, to demonstrate that there were agreements of sale and that money changed hands. However, I have no jurisdiction to make a finding one way or the other, with regard to whether the alleged sales were valid and resulted in the applicant acquiring a stake in the estate. That is a matter which revolves around title to land. Under Articles 162(2) and 165(5) of the Constitution, I have no jurisdiction over that question. The parties are better of placing the issue before another forum for determination of the question. I shall not pronounce as to whether the applicant was a *bona fide* creditor of the estate, entitled to be allocated shares in the estate, he shall have to prove his entitlement to the property he claims he bought from the deceased by commencing suits against the estate at the appropriate forum.

23. The primary source of the jurisdiction of the courts is the Constitution. With respect to matters touching on title to and, and occupation of land, the relevant provisions are in Article 162(2) and 165(5). Article 162 of the Constitution essentially establishes the superior courts in Kenya. It identifies them as the Supreme Court, the Court of Appeal and the High Court and the courts established under Article 162(2). Article 162(2) envisages the establishment of courts to be of equal status with the High Court, to exercise jurisdiction over, among others, occupation of and title to land. The relevant provisions says:

> "*Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –*
>
> *(a) …*
>
> *(b) the environment and the use and occupation of, and title to, land.*"

24. Article 165 of the Constitution sets out the jurisdiction of the High Court. Article 165(5) is emphatic that that jurisdiction does not cover the matters that have been isolated for the courts envisaged in Article 162(2). Article 165(5) states as follows:

> "'*The High Court shall not have jurisdiction in respect of matters-*
>
> *(a) …*
>
> *(b) falling within the jurisdiction of the courts contemplated in Article 162(2).*"

25. Parliament has complied with Article 162(2)(3) of the Constitution, by passing the Environment and Land Court Act, No. 19 of 2011, to establish the Environment and Land Court, the jurisdiction of which is set out in section 13 of the Act. The court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution, relating to environment and land. Section 13 states as follows:

> "*13. Jurisdiction of the Court*
>
> *(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.*
>
> *(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –*
>
>> *(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*
>>
>> *(b) relating to compulsory acquisition of land;*
>>
>> *(c) relating to land administration and management;*
>>
>> *(d) relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*
>>
>> *(e) any other dispute relating to environment and land."*

26. The applicant herein lays claim to Butsotso/Indangalasia/337, not as an inheritor from the estate of the deceased herein, but by alleging that portions of that property was sold to him by the estate. The sales are contested by the administrator. That would mean the court has to decide a question of ownership of the said property as between the estate and the applicant. Sale of property is about conveyance of title from the seller to the buyer. The dispute, therefore, is at the heart of title and ownership. Ownership or proprietorship of a property revolves about title, and that clearly places the matter squarely under Article 162(2) of the Constitution.

27. The property in question is registered land. Registration of property and transfers are governed by land legislation, to be specific the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The two pieces of land legislation have elaborate provisions of sale of

registered land, and transfer and registration thereof. A determination of the question as to whether there was a valid sale of the registered land in accordance with the relevant land legislation, is an issue that is well outside the jurisdiction of the High Court. Both statutes carry provisions which state the jurisdiction of the court with regard to the application and interpretation of the two statutes. These provisions are to be found in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.

28. 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."*

29. 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."*

30. My understanding of these provisions, in the context of the matter before me, is that any disputes or questions or issues that require court intervention, which revolve around sale, registration and transfer of land, fall within the jurisdiction of the Environment and Land Court. The Land Registration Act and the Land Act, therefore, confer jurisdiction in the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, any reference in the two statutes to court is meant to refer to the Environment and Land Court and any subordinate court that has been conferred with jurisdiction over the processes the subject of the two statutes. All this adds emphasis to the fact that I have no jurisdiction whatsoever to address the matter that the applicant has placed before me.

31. Jurisdiction is at the core of exercise of power by a court. Where there is no jurisdiction the court cannot exercise power without violating the principles of rule of law and legality. It was in that context that the Court of Appeal, in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, stated:

> "*Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

32. I believe that I have said enough, to demonstrate that there is no merit in the application dated 26th May 2017. I shall accordingly dismiss the same with costs to the estate. Any party aggrieved by these orders has liberty to move the Court of Appeal appropriately, within twenty-eight days.

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

W. MUSYOKA

<u>JUDGE</u>