REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 446 OF 2011

IN THE MATTER OF THE ESTATE OF KIMAYO s/o SHIBEYI alias KIMAYO SHIBEYI (DECEASED)

RULING

1. The application that I am tasked with determining is the summons dated 5th June 2020. It principally seeks stay of execution of a judgement that was delivered on 30th April 2020, orders consequential to stay, review of the said judgment with a view to set it aside and the hearing afresh of the matter by way of *viva voce* evidence.

2. On the face of the application, it is argued that the judgment was delivered without notice to the applicant, that is to say George Shakaba Hunter. It is averred that the court had distributed the property of the deceased based on customary law. The applicant argues that he was not given an opportunity to lead evidence on the applicable customary law to the estate of the deceased herein. He now wants to be given an opportunity to present evidence on the applicable customary law. He believes that that would be sufficient ground for the court to review the judgement. He also avers that there are other developments, where the 1st and 3rd interested parties, named as John Hunter Amboyi and David Amboyi Shikami, have renounced their interests in favour of the applicant.

3. The affidavit in support of the application is sworn by George Shakaba Hunter, which largely regurgitates the material set out in the grounds listed on the face of the application. The other affidavit is sworn by John Hunter Amboyi, described or named as interested party. He proposes that his share in the property be transferred to George Shakaba Hunter.

4. There is a response to the application, through an affidavit sworn on 17th June 2020, by Raphael Katambani. He opposes the application, saying that it is an attempt to reopen the case. He states that the applicant was represented in court when the date for judgement was fixed in court on 26th November 2019. He further avers that if the applicant intended to call elders to give evidence on the applicable customary law hey ought to have informed the court of the same, and made relevant applications well before the case was set down for hearing, and before the parties filed their written submissions. He asserts that if the applicant was unhappy with the judgement then he ought to have appealed. He also states that if the applicant and the interested parties have agreed on how to deal with their respective shares as allotted to them in the judgement, then that is a private arrangement in respect of which the court should not be dragged into. He avers that there is no reason at all to warrant review of the judgment.

5. The summons was initially placed before me on 8th June 2020, when I directed service, and made conservatory orders. On 23rd June 2020, the parties agreed to canvass the application by way of written submissions. Both have filed their respective written submissions, which I have read through, and noted the arguments made.

6. The judgment that I delivered on 30th April 2020, was founded on a summons for confirmation of grant, dated 23rd November 2012. Directions on the disposal of the application had been made on divers dates. When it was placed before Dulu J., on 16th April 2013, the direction given was that the same was to be disposed of by way of *viva voce* evidence. When the parties appeared again before Dulu J., on 1st October 2013, they reached consensus that the application be disposed of by way of written submissions, and the court varied the earlier directions, and ordered disposal by way of written submissions. When the parties appeared before Mrima J., on 3rd May 2015, it was directed that the matter proceed by way of oral evidence. That position appeared to have had changed by 20th March 2017, when the parties appeared before Njagi J., as they were then talking about filing written submissions to dispose of the application. By the time it was placed before me, for the first time, on 27th June 2018, the understanding had been firmed up, that the application would be canvassed by way of written submissions, for the parties had, by then, filed their respective written submissions, and were asking for dates for ruling. I allocated the 27th September 2018, as the date for ruling. I delivered a ruling on 27th September 2018, in which I was unable to distribute the estate as the information given had gaps, whereupon I directed that the Chief, for the area that the deceased hailed from, ought to file a report on the family of the deceased. The Chief complied with those directions, hence the judgement of 30th April 2020, through which the estate was distributed.

7. The deceased herein died on 15th February 1972. That was long before the Law of Succession Act, Cap 160, Laws of Kenya, came into operation on 1st July 1981. The deceased died intestate. According to section 2(1) of the Law of Succession Act, the provisions of the Act on intestate distribution would not apply to his estate, since those provisions only apply to estates of persons who die after the Act came into force. Section 2(2) of the Act applies the laws and customs that were in force as at the time of the death of a person dying before the Act

came into force on 1st July 1981. Since the deceased died before then, his estate was subject to section 2(2), by virtue of which it was for distribution under the laws and customs that were in force on 15th February 1972. Intestate estates of Africans were subject to customary law before 1st July 1981. From the material before me, the deceased died a Luhya, from the Isukha subtribe.

8. For avoidance of doubt, sections 2(1)(2) of the Law of Succession Act state as follows:

> *"(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application in all cases of intestate or testamentary succession to estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.*
>
> *(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act."*

9. It was never in dispute that the deceased died before the Law of Succession Act came into force. The person who filed the petition for representation on 1st July 2011, that is to say George Shakaba Hunter, the applicant herein, placed on record the original certificate of death in respect of the deceased, dated 8th August 1989, serial number 202843, which clearly indicated that the deceased died on 15th February 1972. That date, 15th February 1972, is also reflected in the affidavit that the said petitioner swore on 23rd June 2011, in support of the petition, and which he filed simultaneously with the petition. That being the case, it should be taken that he knew or ought to have known that the matter was going to be handled under section 2(2) of the Law of Succession Act, and not section 2(1) of the Act, meaning that the estate was to be distributed in accordance with the relevant customary law, and not Part V of the Law of Succession Act.

10. When the summons for confirmation of grant, dated 23rd November 2012, was mounted, by the applicant herein, through his advocate, who has drawn the instant application, it should have been prime in the mind of the applicant that the deceased had died before the Law of Succession Act came into force, and that the dispositive provisions of the Law of Succession Act, that is to say Part V, were not to apply, and that the applicable law on distribution was going to be customary law, by dint of section 2(2) of the Law of Succession Act. The distribution that he proposed in that application ought to have been in line with what the relevant customary law required. In the affidavit in support of the application, which he swore on 23rd November 2012, the applicant did not mention the law that had guided him in making the proposals that he was placing before the court.

11. The law on proof of customary law is fairly notorious. The Evidence Act, Cap 80, Laws of Kenya, provides for it at section 51, which states as follows:

> *"51. Opinion relating to customs and rights*
>
> *(1) When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed are admissible.*
>
> *(2) For the purposes of subsection (1) the expression "general custom or right" includes customs or rights common to any considerable class of persons."*

12. The Civil Procedure Act, Cap 21, Laws of Kenya, also provides for proof of existence of a custom, under section 87, in cases where the issue arises. Since section 3 of the Civil Procedure Act saves special jurisdiction and powers, and the Law of Succession Act provides for such special jurisdiction and powers. I need not pay too much attention to what the Civil Procedure Act says, I shall focus more on what the Law of Succession Act provides. Section 3 of the Civil Procedure Act, for avoidance of doubt says:

> *"In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force."*

13. The Law of Succession Act does not deal with proof of customary law in the body of the Act. The same is, instead, provided for in the subsidiary legislation to the Act, made pursuant to section 97, the Probate and Administration Rules, at Rule 64, which states as follows:

> *"Where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African customary law he may do so by the production of oral evidence or by reference to any recognized treatise or other publication dealing with the subject, notwithstanding that the author or writer thereof shall be living and shall not be available for cross-examination."*

14. The courts have stated, in such cases as *Ernest Kinyanjui Kimani vs. Muiru Gikanga and another* [1965] EA 735 and *Wambugi w/o Gatimu vs. Stephen Nyaga Kimani* [1992] 2 KAR 292, that customary law or customs are required to be established as facts by parties who seek to rely on them, so long as the same are not notorious or documented. Judicial notice may be taken of the content of a particular custom where the same has achieved notoriety.

15. As stated above, the deceased herein died before the Law of Succession Act came into force. His intestate estate fell for distribution in terms of the applicable customary law, by dint of section 2(2) of the Law of Succession Act. The applicant should have known that when he filed his summons for confirmation of grant, dated 23rd November 2012, so that when he approached the hearing of the application, he was well aware of what he needed to do to prove the content of the applicable customary law, as required in Rule 64 of the Probate and Administration Rules and the dictum in *Ernest Kinyanjui Kimani vs. Muiru Gikanga and another* (supra).

16. I have recited, herebefore, the events in the matter after the said summons for confirmation of grant was filed. Directions had been given on 16th April 2013, at the request of the applicant herein, that the said application be disposed of by way of *viva voce* evidence. Then on 3rd June 2015, the court, on its own motion, directed that the application be heard by way of oral evidence, no doubt alive to the fact that the deceased had died before the Law of Succession Act came into force, and that the estate was to be distributed in accordance with customary law, which necessitated that oral evidence be adduced to establish the content of the relevant customs. In subsequent proceedings, specifically on 18th April 2013, 20th March 2017 and 13th April 2017, for undocumented reasons, the parties appeared to move away from the direction that the disposal of the application be by oral evidence, in favour of written submissions. With that, the applicant herein lost the opportunity to adduce evidence to prove the customs that guided division of the estate of a man who was not survived by either a widow or a child, who had died before 1st July 1981.

17. The tenor of the instant application, and the submissions made by the applicant, with respect to it, is that the applicant was not afforded opportunity to adduce evidence on the applicable customs. That cannot be true. He knew that the deceased died before the Law of Succession Act came into force in 1981, and that his estate fell for distribution in accordance with the custom, of the community from which he hailed, governing the subject. I say that he knew, because he was represented by able counsel, the law on the subject matter is in black and white, and as clear as daylight, as expressed in section 2(2) of the Law of Succession Act. It was not up to the court to direct him, that he was required to lead such evidence. He sought to have the estate of the deceased distributed, which distribution the law required to be under customary law. He was bound to lead evidence on the relevant customs governing the matter. The court gave him that opportunity, when it directed, on 16th April 2013 and 3rd June 2015, that the confirmation application be canvassed by way of oral evidence. He squandered that chance when he elected to take the shorter route, of filing written submissions. He cannot now turn around and claim that he was never given a chance to lead oral evidence on the relevant customs.

18. The instant application is for review or setting aside of the orders that I made on the confirmation application. Review is sought on three principal grounds: discovery of very important matter of evidence that was unavailable at the time the decision was being made, error on the face of the record and any other sufficient reason. The applicant does not allege error on the face of the record, or discovery of new matter of evidence. He grounds his application on other sufficient reason, that there is need to adduce evidence on the applicable custom. Is that a good enough reason?

19. The courts have severally said that the “other sufficient reason” ought to be analogous to the other two grounds. The custom in question, no doubt, was a fact that the applicant knew existed at the time the application was filed and finally determined. He had opportunity to adduce evidence on its existence and content. He has not given any reason at all as to why he did not take the opportunity that the court had offered in 2013 and 2015, to adduce evidence on it. He did not have to wait for the court to prompt him. The law, by dint of section 2(2) of the Law of Succession Act, required him to lead such evidence. He squandered the opportunity. He cannot blame the court for merely applying the law as it is in the Law of Succession Act. He can only blame himself, and, probably, his legal advisers. There is nothing to review. The case presented does not qualify for review. The applicant should have appealed against the impugned order, if he was dissatisfied with it.

20. With regard to setting aside the order, the law is that an order is for setting aside where it was obtained in a process that did not involve all the parties, or where there was an error of some sort, which would make the order untenable. The applicant has not demonstrated that the confirmation application was determined in a process that did not afford him a say. It was his application. He took directions on its disposal, and filed his papers in keeping with those directions. He participated in the hearing, and canvassed it by way of written submissions, the mode of disposal that he had freely chosen. He has not shown that the court had made some error in its final orders, which had the character of making its final orders untenable. The order is, for those reasons, not available for setting aside.

21. It is often stated that there must be an end to litigation. The confirmation application was heard and disposed of in the manner that the parties themselves agreed on by consensus, and without the court imposing anything upon them. If the outcome of the approach they adopted turned out to be displeasing to some of them, it would not be open to them to turn around to say that they should be allowed to adopt the alternative route, the one that the court had proposed to them, but which they, by acclamation, turned away from. Litigation must come to an end. It did come to an end when that confirmation application was determined. The trial court became *functus officio*, with respect to that application. It cannot revisit it, without appearing to sit on appeal on its own decision. Review is not available for the reasons given above, neither is setting aside. The applicant surely cannot have his cake and eat it.

22. There is no merit in the application, dated 5th June 2020, and I hereby dismiss the same. I believe the review application was needless, so I shall order that Robert Katambani shall have the costs of it. The order, of 8th June 2020, that the transmission process be put on hold, is hereby discharged. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30th DAY OF July, 2020

W. MUSYOKA

JUDGE