



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 286 OF 2009

IN THE MATTER OF THE ESTATE OF SANANGA OKONDA (DECEASED)

RULING

1. The cause herein is with regard to the estate of Sananga Okonda, who died intestate on the 27th October 2001. By consent of parties, Thomas Nathaniel Okonda, Eunice Opindi Keya and Eris Abucheri were appointed as Administrators of the estate of the deceased and were tasked with filing their mode of distribution that would include all the beneficiaries.

Each administrator filed their proposals on distribution, however, from their affidavits several issues emerged that needed clarification, and the court, via its ruling dated 9th April 2020, directed;

(a) the administrators to file a further affidavit in which they should provide documentary evidence on the ownership of the assets of the estate that are so far not supported by any documentation, especially Mbururu Farm and Nzoia Farm /151; and

(b) the administrators clarify whether Beatrice Sananga and Joan Sananga are different persons, and, if not, whether they both are children of Rose Onyoni.

2. In compliance with the said directions, two affidavits were filed. Thomas Okonda deposes that the deceased entered into a sale agreement, with one Solian Keitenya, to purchase a piece of land identified as Mbururu/26/5580/2, measuring approximately 25 acres. He states that the parties obtained consent from the land Control Board, on 21st August 1981, for transfer. However the same became the subject of a legal tussle, in Eldoret HCCC No. 303 of 1977, in which the consents were invalidated, and the matter left at the mercy of the then President. He stated that the then President, Daniel Moi, vide Gazette Notice No. 187 of 1987, exempted the said transactions with relation to Mbururu Farm, from all the provisions of the Land Control Act, Cap 302, Laws of Kenya. However, the said titles were not transferred, prompting the filing of Kakamega HC Misc. Civil Application No. 21 of 2006, which proceedings are still pending before court. He clarifies that he was the one staying on the parcel of land, and has been doing so for the last seventeen (17) years with his family. He states that he was following up with the issue of the title as he has settled on the land, and objects to the same being distributed amongst his siblings and Eris Abucheri. With regard to the Nzoia Plot, he states that the land was bought by the deceased on 21st January 2000, from Fred Ochiel and Luka Opondo. He states that the said parcel of land, measuring eleven (11) acres, does not have a title deed, and that the process of transfer of title of the said parcel of land was not effected during the deceased's lifetime. He suggests that the same be issued to Eris Abucheri and Livingstone Aswani, who are in occupation of the land. He further states that Beatrice Sawanga and Joan Sawanga are children to Rose Onyoni. He, however, argues that Beatrice Sawanga was not a child to the deceased, and that she has no stake in the estate.

3. The other administratrix, Eris Abucheri, in her affidavit, says that Thomas Okonda has all the details on the documentation of the said parcels of land, and that she was not informed of the same. She states that Beatrice Sawanga and Joan Sawanga are sisters, and children of Rose Onyoni, and that they were taken in by the deceased before his death as members of his family.

4. From the affidavits filed by the administrators, it is clear that the titles relating to the Mbururu Farm and the Nzoia plot were yet to be processed by the deceased before his death, and that Beatrice Sawanga and Joan Sawanga are sisters, and that they are children of Rose Onyoni.

5. With respect to the assets of the estate, which should be considered to be available for distribution, the court, in *In Re Estate of Stephen Nzau Koka (Deceased)* [2019] eKLR, said:

“45. It is important to determine which properties belong to the deceased estate. The issue for determination here is the distribution of the estate of the deceased. According to section 3 of the Act “estate” means “the free property of a deceased person” while “free property” “free property”, in relation to a deceased person, means “the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.” It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by that time his interests had not been terminated.

46. *Therefore, as held in Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others (2017) eKLR:*

“...before distribution of the estate of the deceased under Section 71 of the Law of Succession Act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution.”

47. Section 24(a) of the Land Registration Act provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 26(1) of the same Act on the other hand provides that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge save for the exceptions provided thereunder.”

6. The powers and duties of personal representations are set out at Section 82 and 83 of the Law of Succession Act, in the following terms:

“82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following power -

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

(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) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant;

(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of the estate, and to make any transfer which may be requisite for giving effect to the appropriation:

Provided that, except so far as otherwise expressly provided by any will

(i) no application shall be made so as to affect adversely any specific legacy;

(ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.

83. Personal representatives shall have the following duties -

(a) to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts;

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”

7. With respect to these provisions, the court in *In Re Estate of David Kyuli Kaindi (Deceased)* [2016] eKLR, said:

“14. Section 79 must, of necessity, be read together with section 82(a) (b) (c) of the Act. The powers vested in personal representatives, by section 82, stem from the fact that the estate of the deceased is vested in the personal representatives. Section 82(a) (b) (c) states that -

‘Personal Representatives shall, subject only to any limitation imposed by their grant, have the following powers-

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

(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) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant;

(c) To assent, at the any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof ...’

15. Then there is section 45 of the Law of Succession Act, which prohibits intermeddling and creates an offence against it. The relevant portions of that provision state that –

‘(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 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 ... or to a term of imprisonment ... or to both such fine and imprisonment ...’

16. I cite these provisions to address the helplessness displayed by the executor in his statement of account. He expresses frustration that some of the assets of the deceased do not have title documents, that some have been sold off by his brothers, and intruders have invaded some of the lands. The executor has been vested with the property of the deceased. That vesting alone gives him the same rights and powers over the property as the deceased had, as aforesaid. Additional powers are granted to the executor under section 82 of the Act.

17. For the properties without title documents, what the deceased would have done were he alive, would be to take steps to obtain title documents. That then is what the executor is expected to do. He is the only one expected to act in that behalf for it is in him, and in him alone, that the estate has been vested. Regarding the alleged sale of some of the assets by his brothers, there is section 82(2) (ii) of the Act. The assets alleged to have been sold were immovable, and no such sales should have taken place before confirmation of the grant. In any event, such sales could only be through the executor, for it is only in him that the property was vested, and it is only he who can therefore pass a valid title. Transfer of title in the immovable property that was allegedly sold cannot be effected otherwise than through the executor, which would then mean that the alleged sales do not in any way prevent the executor from completing administration of the estate since the said transactions amount to mere expressions of intent by the beneficiaries to dispose of the interest once the property is transferred to their names, for they cannot at this stage transfer the title in the assets to the purchasers.”

8. The administrators herein have clearly stated that two parcels of land, that is to say the Mbururu farm and Nzoia plot, do not have title deeds. It should be noted that these parcels form the larger percentage of the estate of the deceased. From the above authorities it is clear that the duty of obtaining the title documents in respect of these parcels is imposed on the administrators by law, as part of their duty of collecting or getting in the estate in readiness for distribution. Save for the fact that the Mbururu farm is locked up in litigation in court, no explanation

has been offered as to why the title documents in respect of the Nzoia farm have not been obtained. Section 71(2), provides that before a court confirms the grant, it ought to be satisfied about the identities of all the persons beneficially entitled to a share in the estate and of their respective shares. That presupposes that the court has to be satisfied that the administrator has ascertained all the assets that are available for distribution and identified all the persons entitled to a share in the said assets, and it is also satisfied in the manner the estate is proposed to be distributed.

9. The ownership of the two parcels is yet to be ascertained as the administrators are yet to furnish the court with satisfactory proof of title as they are yet to perform their duty of procuring or perfecting the titles to the said parcels of land. As it is, the property is not yet available for distribution. The court will not distribute property that is not yet in the name of the deceased. Let the administrators perfect the title to the two assets, by causing them to be registered in the name of the deceased before placing them before the court for distribution.

10. Consequently, I do hereby postpone confirmation of the grant herein, in terms of section 71(2) (d) of the Law of Succession Act, to allow the administrators to complete the exercise of collecting, gathering and getting in all the assets of the estate, particularly by perfecting the titles of the assets that the deceased had bought before he died, and which he had not yet managed to get transferred to his name as at the date of his death. The application should be revived only after that has happened.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF JULY, 2020

W MUSYOKA

JUDGE