



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 911 OF 2015

IN THE MATTER OF THE ESTATE OF PETRO AIYA CHISAGHA alias KHAYIYA SHISAKA (DECEASED)

JUDGMENT

1. This matter relates to the estate of Petro Aiya Chisagha, who died on 9th July 1992, going by the certificate of death lodged herein, serial number 0212015, dated 8th January 2015. According to the letter from the Chief of Isulu Location, dated 14th April 2015, the deceased had been survived by two children, being Leah Ahembelwa and Bernard Khayeka.
2. Representation to his estate was sought, vide a petition lodged herein on 31st December 2015, by Bernard Shikoli Khayeka, in his capacity as son of the deceased. I have not seen, in the record before me, a copy of the affidavit that should have accompanied the petition, so I cannot tell who was expressed to have had survived the deceased, nor the property that he died possessed of. There is, however, a consent to the making of the grant signed by Leah Ahembelwa, who is described as a brother of the petitioner, dated 30th December 2015. Lodged together with the petition were copies of official search certificates for Kakamega/Shibuname/616 and 1185. Letters of administration intestate were made to Bernard Shikoli Khayeka on 11th August 2016, a grant was duly issued, dated 7th September 2016. I shall consequently refer to Bernard Shikoli Khayeka as the administrator.
3. On 30th December 2016, the administrator lodged herein a summons for confirmation of his grant. In the application, he expressed the deceased to have been survived by the administrator and Leah Ahembelwa, and the estate to comprise of Kakamega/Shibuname/616 and 1185. It is proposed that the two assets devolve wholly upon the administrator, Bernard Shikoli Khayeka. A consent to distribution, in terms of Form 37, as prescribed by Rule 40(8) of the Probate and Administration Rules, was lodged at the registry, simultaneously with the summons for confirmation. Although it does list the name of Leah Ahembelwa as a survivor of the deceased, the same does not appear to have been signed by her, for the said document bears only one signature, which appears to be that of the administrator.
4. The administrator lodged, 30th March 2017, a further affidavit, sworn on 15th March 2017, in which he avers that Leah Ahembelwa had died on 6th June 2016, and he has attached, to that affidavit, a certificate of death, in respect of Leah Ahembelwa, serial number 0453720, dated 29th August 2016. He describes himself as the sole survivor, but he has not disclosed whether the said Leah Ahembelwa was survived by children.
5. An affidavit of protest was lodged in the cause, on 6th November 2017, by Benedicto Whisheni Khayeka, who I shall hereafter refer to as the protestor, sworn on some unknown date in December 2017. He avers that he had purchased Kakamega/Shibuname/616, from the late Leah Ahembelwa, on 22nd June 2008. Although a copy of the sale agreement and copies of acknowledgement notes were meant to be attached to the affidavit, none were, in fact, annexed to the copy of the affidavit that was lodged in court. The protestor objects to the said property being devolved wholly upon the administrator since that would be adverse to his alleged interests as a purchaser. He goes on to aver that the administrator was not even a child of the deceased, as he describes him as a nephew, and says the deceased's actual child was Leah Ahembelwa.
6. Directions were taken on 20th March 2018, that the said summons for confirmation of grant be canvassed by way of oral evidence.
7. The oral hearing happened on 23rd January 2020. The protestor, Benedicto Mwishen Khayeka, national identity card number 102126416, was the first to take the witness stand. He averred that he had bought the land from the late Leah Ahembelwa, who was a child of the deceased. He stated that the administrator was a neighbour of the deceased, who did not share kinship with the deceased. He stated that the widow of the deceased was still alive. He explained that the deceased had two children, the late Leah Ahembelwa and a Roda. He said that both children were dead. He stated that he did not know whether the father of the administrator was a brother of the deceased. He later said that it was true that the administrator was a nephew of the deceased. He said that he, the protestor, was himself related to the deceased by clan.
8. The protestor produced three sets of documents to support his case. There are copies of two acknowledgement receipt of part of the purchase price exchanged between the two, dated 16th September 2011 and 21st October 2014. Lastly, there is copy of a certificate of official

search in respect of Kakamega/Shibuname/616, dated 31st January 2017, showing that the said property had since been transferred to the name of the administrator.

9. The protestor called Raphael Shikoli as his witness. He did not produce his national identity card. He described the deceased as his cousin, saying that his father and the father of the deceased were brothers. He stated that the deceased had two children, being Roda and the late Leah Ahembelwa. Both were said to have had been survived by children. Roda was said to have had borne five children, while the late Leah Ahembelwa had two children. One of the late Leah Ahembelwa's children is said to have had died, leaving one surviving. It was said that all of Roda's children were alive. He explained that the administrator and the deceased were related, in that they were siblings. He said that the administrator did not involve the children of the daughters of the deceased in the succession process. He said that he was party to the sale agreement between the protestor and the late Leah Ahembelwa, with respect to Kakamega/Shibuname/616.

10. The protestor's third witness was Berneta Benjamin, national identity card number 1959699. He was the *liguru* for the area where the deceased hailed from. He adopted his witness statement as his evidence. In his statement, undated, but filed in court on 23rd January 2020, he stated that he saw the late Leah Ahembelwa and the protestor in the office of the Chief, and the two told the Chief about the sale transaction. They had exchanged money, and they had appeared before the Chief in order to make the transaction official.

11. The administrator did not testify nor call any witnesses, and indicated that he was relying entirely on his application.

12. The parties agreed to file written submissions. In the end, only the administrator filed written submissions, on 24th February 2020, of even date. When the matter came up for mention to confirm filing of submissions, the protestor indicated that he would not be filing any, and would leave it to the court.

13. The administrator submits that his appointment as administrator was not contested in the protest, and that the only issue outstanding related to Kakamega/Shibuname/616. He submitted further the protestor was neither a survivor of the deceased nor a beneficiary of the estate and that the nature of his claim was that of a third party. He cited the decision in *In the Estate of Alice Mumbua (Deceased)* [2017] eKLR, and Rule 41(3) of the Probate and Administration Rules, to make the point that where a third party claims an interest in the estate of a deceased person at the distribution of his estate, then the court ought to appropriate the property claimed and set it aside, to allow the claimant seek determination of that interest in separate proceedings. He asserts that the claim by the protestor ought to fail since the same is the preserve of the Environment and Land Court.

14. Let me start of by disposing of the protest. The protestor does not claim a share in the estate as a child or survivor of the deceased, but rather as a purchaser of an asset of the estate, and, therefore he could be classified as a creditor or liability of the estate. His claim against the estate is not acknowledged by the administrator. That being the case, he has to formally prove that claim against the estate.

15. I agree with the administrator that the claim by the protestor does not lie in these proceedings. He is asserting a purchase of land. Land sales are all about title to land, since sale of land precedes the eventual transfer of the title to that land in the name of the purchaser. A buyer of land, when he claims that he bought land, would be asserting title to the land that he had bought. Disputes around title to land cannot be resolved by the High Court, by dint of Articles 162(2) and 165(5) of the Constitution. The court with jurisdiction to resolve such disputes is the Environment and Land Court, by virtue of the Environment and Land Court Act (No. 19 of 2011), the land Registration Act (No. 3 of 2012) and the Land Act (No. 6 of 2012). Therefore, whether the transaction between the late Leah Ahembelwa and the protestor was valid is something that I cannot determine, in view of the above, and the protestor is better off before the Environment and Land Court.

16. In any case, by virtue of Rule 41(3) of the Probate and Administration Rules, probate proceedings are not the proper forum for resolution of such disputes. Under that rule, the disputed property ought to be appropriated and set aside, to allow the claimant to prove their claim in separate and more suitable proceedings. In this case, that would be at the Environment and Land Court.

17. The alleged transaction occurred after the death of the deceased, and between a third party and a survivor of the deceased who had not obtained representation to the estate. That would raise questions, when the transactions are looked at in the context of sections 45, 79 and 82 of the Law of Succession Act, Cap 160, Laws of Kenya. However, I shall not discuss the issue beyond that, so as not to prejudice any suit that the protestor may be minded to file against the estate.

18. Overall, there cannot be any merit in the protest, for the reasons that I have given above. At the end of this judgment I shall have to consider whether or not I should invoke Rule 41(3) of the Probate and Administration Rules, in favour of the protestor, to allow him to establish his claim against the estate with respect to Kakamega/Shibuname/616.

19. Having disposed of the protest, let me now turn to the confirmation application itself. In confirmation proceedings, the court is tasked with two things, confirmation of the administrators in terms of section 71(2)(a) of the Law of Succession Act, and distribution of the assets, in cases of intestacy, informed by Part V of the Law of Succession Act. The proviso to section 71(2) of the Act is critical. It requires the court not to confirm the grant, in intestacy, until it is satisfied as to the respective identities and shares of all persons beneficially entitled.

20. I have to ask myself, has the administrator herein satisfied me as to the identities of all the persons beneficially entitled and their shares? The administrator obtained representation to the estate herein on the basis that he was a son of the deceased. Is he really a son of the deceased? When a protest was raised to the confirmation of his grant, the protestor claimed, in the protest, that the administrator was not a child or son of the deceased. He was described as a nephew of the deceased. That claim was made in paragraph 8 of the affidavit of the protestor filed herein on 6th November 2017. The administrator did not reply or respond or react to that affidavit, and, therefore, there is no rejoinder to or a refutation of the claim or allegation by way of affidavit. The protestor repeated that allegation in his testimony at the oral hearing, and his witnesses added weight to it. The administrator chose not to testify, and, therefore, he did not avail himself of the opportunity to set the record straight.

21. Under the scheme of things under Part V of the Law of Succession Act, there is a hierarchy in the succession to the estate of an intestate.

Surviving spouses take priority over everybody else, and they are followed by the children of the deceased, then the parents of the deceased, then the siblings of the deceased, then the other relatives of the deceased of the deceased, in that order. If the administrator of the deceased is indeed a nephew of the deceased, before he can assert his entitlement to the estate, he has to demonstrate that the deceased was not survived by persons who had a superior right to his. With regard to the instant estate, the person with superior claim to the estate of the deceased herein, would be a surviving widow or widows of the deceased, children of the deceased, parents of the deceased and siblings of the deceased. The administrator, as nephew, had an obligation to demonstrate that the deceased had no such relatives, before he could begin to assert a right to the estate.

22. Since it would appear that the administrator was not a son of the deceased, but a nephew, it would then mean that he obtained representation to the estate by false pretences and misrepresentation.

23. Did the deceased have his own children? The material before me has disclosed that the deceased had two daughters, one of whom was alive when representation herein was being sought. It is not clear whether she participated in these proceedings at all. She has since died. It emerged at the hearing that these daughters of the deceased had children of their own. These children of the dead daughters of the deceased were not brought to the fore, nor involved in the confirmation process. Yet, the said children of the dead daughters of the deceased, that is to say the grandchildren of the deceased, have a superior right or entitlement to the estate of the deceased over the administrator herein, who is a distant relative of the deceased when his position is juxtaposed against that of the grandchildren. These individuals were not disclosed, and, therefore, the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules were not complied with. Consequently, I cannot confirm the grant until the said provisions are fully complied with.

24. In the end, the final orders that I shall make in this matter are as follows:

(a) That I hereby disallow the protest to the confirmation of the grant herein, and dismiss the same, with no orders as to costs;

(b) That I hereby appropriate and set aside Kakamega/Shibuname/616 to enable the protestor herein initiate, if he is so minded, proceedings at the Environment and Land Court, to prove his entitlement to that property;

(c) That the effect of (b), above, is to temporarily remove Kakamega/Shibuname/616 from the schedule of the assets to be distributed, but the said property shall be liable to reinstatement to the schedule of distribution should the protestor fail to act in terms of (b), above, within one year from the date of this order;

(d) That I hereby postpone confirmation of the grant herein in terms of section 71(2)(d) of the Act, to enable the administrator comply fully with the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules;

(e) That towards compliance with (d) above, I hereby direct the administrator to file an affidavit in which he shall:

(i) disclose whether he is a biological child of the deceased, or a nephew of the deceased;

(ii) disclose the actual biological children of the deceased, be they dead or alive, male or female; and

(iii) disclose all the children of the children of the deceased;

(f) That the final orders on the confirmation application shall only be made after the administrator has complied with (e), above;

(g) That the matter shall be mentioned thereafter for compliance with (e), above, and for further directions;

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

(i) That any party aggrieved by the orders made herein shall be at liberty to appeal against the same at the Court of Appeal within the next twenty-eight days.

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

W. MUSYOKA

JUDGE