



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 172 OF 2008

IN THE MATTER OF THE ESTATE OF IBRAHIM LIKABO MIHESO (DECEASED)

JUDGMENT

1. This matter relates to the estate of Ibrahim Likabo Miheso, who died on 12th December 2005. According to the letter from the Chief of Khayega Location, dated 21st April 2008, the deceased had been survived by three sons, being Clement Luchitio Likabo, Alexander Muhambe Likabo and Clement Boyio. He was said to have had died possessed of a property known as Isukha/Shitochi/1064.
2. Representation to his estate was sought, vide a petition lodged herein on 28th April 2008, by Clement Luchitio Likabo, in his capacity as son of the deceased. He expressed the deceased to have had died possessed of Isukha/Shitochi/1064, and to have been survived by the individuals mentioned in the Chief's letter, that I have mentioned above. Letters of administration intestate were made to him on 17th June 2015, a grant was duly issued, dated 28th August 2008. I shall consequently refer to Clement Luchitio Likabo as the administrator. The said grant was confirmed on 17th February 2010, vide an application dated 28th October 2009, and the property was devolved equally between the three sons. A certificate of confirmation of grant was issued in those terms, dated 22nd February 2010.
3. What I am tasked with determining is the summons for revocation of the grant made on 17th June 2008 and confirmed on 17th February 2010. The application is dated 22nd December 2018, and was lodged herein on 16th January 2019, by Clement Boyio, to be hereinafter referred to as the applicant. The grounds upon which the application is premised are set out on the face of the application, while the factual background is given in the affidavit in support of the application, sworn by applicant, on 22nd December 2018. He acknowledges that the deceased was survived by the three sons listed in the petition, but states that the deceased had two parcels of land, one ancestral and the other self-acquired. According to him, the self-acquired piece of land, which he has not identified in his papers, was given to Alexander Luchitio Muhambe, who settled on it. He states that the ancestral land, which he identifies as Isukha/Shitochi/1064, was to be shared between him, that is to say the applicant, and the administrator, asserting that Alexander Luchitio Muhambe was not entitled to a share in it. He avers that he was not aware of the succession cause, and that he only discovered it after strangers descended on the Isukha/Shitochi/1064, saying that they had bought a portion of it from Alexander Luchitio Muhambe. He names the strangers as Fredrick Muhanji Mangala and Margaret Masitsa Luchesi, who have had the portion sold to them transferred to their names. He avers that he has established from the land registry that Isukha/Shitochi/1064 was shared equally between the three sons, contrary to the wishes of the deceased.
4. Although there is material on record, to show that the administrator was served with the relevant process, it would appear that he did not file any response.
5. The application came up for hearing on 24th July 2019. Ms. Rauto informed me that the same was unopposed, but since the administrator was not represented, I directed that the application be heard orally, that way Ms. Rauto would get to cross-examine him, and get to establish his response to the applicant's case.
6. The applicant the applicant was the first to take the witness stand. He described himself as the half-brother of the administrator, and confirmed that the deceased had the three sons disclosed in the petition. He stated that the deceased had a farm at Virhembe, which he gave to Alexander Muhambe Likabo, and the former settled there. He said that he was not sure of the reference number for the parcel of land at Virhembe. He asserted he, that is to say the applicant, and the administrator, were the only persons entitled to Isukha/Shitochi/1064. He stated that he was not involved in the succession cause, from initiation to confirmation. During cross-examination, he stated that he and the administration went to the office of the District Officer at Shinyalu, where he was asked to sign some forms, but he refused.
7. The administrator followed. He stated that he involved the applicant in the succession cause, saying that on the day the grant was confirmed, all three sons of the deceased attended court. He stated that Alexander Muhambe Likabo lived at Shamberere, Virhembe, where he moved after the deceased died. He stated that Alexander Muhambe Likabo bought the Shamberere land, and that the deceased did not give it to him. He said that Alexander Muhambe Likabo sold a piece of land to Fredrick Muhanji Mangala, and used the money to buy that other land. He said that he, that is to say the administrator, also moved out of Isukha/Shitochi/1064, and settled at Kabras. He too sold his portion to Fredrick Muhanji Mangala. He stated that the applicant was left on Isukha/Shitochi/1064. He testified that surveyors came to the ground and fixed boundaries.
8. Alexander Muhambe Likabo testified next. He confirmed that the applicant and the administrator were his brothers. He said that he

moved out of Isukha/Shitochi/1064 to Virhembe a long time ago, when his parents were still alive. He stated that by then the deceased had not shared out his land. He stated that he bought the land, although the deceased had also contributed some money for the purchase. He said that the deceased had said that Isukha/Shitochi/1064 was for the three of them, but the Virhembe land was his, Alexander Muhambe Likabo. He said that his father wanted him to get the Virhembe land and a share of Isukha/Shitochi/1064 as he had not been educated like his brothers. He said that it was the applicant who was left using his share of Isukha/Shitochi/1064. He stated that the applicant was involved in the succession process, and that all three sons attended court at confirmation of grant. He confirmed selling a portion of Isukha/Shitochi/1064 to Fredrick Muhanji Mangala and Margaret Masitsa.

9. At the end of the oral hearing, I directed that Fredrick Muhanji Mangala and Margaret Masitsa be served so that they could attend court on 20th November 2019 to state their respective positions. On 20th November 2019, the two did not attend court, instead Mr. KÓmbwayo informed me that Mr. KÓfuna was to come on record for them. I gave more time to them, and stood the matter over to 9th March 2020. When the matter was next mentioned, on 16th July 2020, neither Mr. KÓfuna nor Fredrick Muhanji and Margaret Masitsa had filed any papers.

10. The applicant has filed written submissions. He submits that the proceedings to obtain the grant were defective in substance, principally because Rule 26 of the Probate and Administration Rules had not been complied with, for the applicant had not executed any consent to allow the administrator file for representation, neither had he renounced his entitlement to apply. He also submits that Rule 40 of the Probate and Administration Rules had not been complied with, to the extent that he did not sign Form 37, to consent to the mode of distribution proposed in the administrator's confirmation application, which gave rise to the confirmation orders that he is complaining about. He also submits that there had been nondisclosure of the fact that Alexander Muhambe Likabo had benefited from a lifetime gift from the deceased, which is a fact that ought to be taken into account, by virtue of section 42 of the Law of Succession Act. He also raises issues about the acreage of Isukha/Shitochi/1064, which is an issue that does not arise from the application for revocation of grant, or the affidavit sworn in support, or in the oral evidence tendered at the hearing of the application.

11. I have looked at the record before me. The applicant was disclosed as a survivor of the deceased. The deceased was said to have been survived by three sons. By virtue of section 66 of the Law of Succession Act Cap 160 Laws of Kenya, all three had equal right to administration of the estate of the deceased. In the end, only one of them applied for representation. Where that happens, the petitioner is required to comply with Rule 26 of the Probate and Administration Rules, by getting consents from the other sons, not applying for representation, or to file a document, executed by the other sons, renouncing their right to apply for representation.

12. I note too that when the administrator sought confirmation of his grant, he did disclose the three surviving sons of the deceased, and indicated the shares that he was allocating to all the three, as required by the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules. All appears to have had been done properly, save that the applicant complains that he was not involved in the process, and cites Rule 40(8). I have looked at the record, and noted that when he filed his summons for confirmation of grant, the administrator did not file a consent on distribution, in Form 37, as contemplated by Rule 40(8), duly signed by all the survivors. Rule 40(8) is in mandatory terms. The filing of Form 37, duly executed by survivors guides the court as to whether the survivors are aware of the application for confirmation of grant, and if they are, it gives an indication of those who support the application, and who do not. It is from the contents of Form 37 that the court is able to pick out the survivors who it may have to direct to file affidavits of protest. The administrator did not comply with Rule 40(8).

13. The applicant complains that he was not involved in the confirmation process. He says that when the matter came up for confirmation, he did not attend court, and he only got to know of the matter when strangers came to the land. I find credence in that argument. The grant was confirmed on 17th February 2010, by Lenaola J. According to the minutes recorded by Lenaola J. only the applicant attended before him that day. The record reads as follows:

“17/2/2010

Coram – Before I. Lenaola J

CC Mudoto/Okumu

Applicant present

Order: There being no objection, the grant is confirmed as prayed. Costs in the cause.”

14. The record of 17th February 2010 is clear that the only person who was in court at confirmation was the administrator. This tallies with the claim by the applicant that he was not present. The applicant did not sign a consent in Form 37. There is no affidavit of service on record to demonstrate that he was ever served with the summons for confirmation of grant. There is credence, therefore, for his argument that he was not involved either in the confirmation process, yet he had serious issues that he would have raised at that stage, with respect to how the estate ought to have been shared out. The failure to serve him denied him a chance to present his case.

15. I am persuaded that this is a proper case for revocation of the grant herein, on the ground that the process of obtaining it was defective, as the applicant was not involved in it. The failure to be involved led to a confirmation process which excluded him, and thereby denied him a chance to argue his case on the distribution of the estate. Had the administrator fully complied with the law as laid down in the Law of Succession Act and the Probate and Administration Rules, the issues that the applicant is now raising would not have arisen. It transpired that the deceased was a polygamist, and in such cases both sides of the family ought to be represented in administration.

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

(a) That I hereby allow the summons for revocation of grant, dated 22nd December 2018, with the result that the grant made

on 30th June 2008 is hereby revoked;

(b) That I hereby appoint Clement Luchitio Likabo, Alexander Muhambe Likabo and Clement Boyio administrators of the estate of the deceased, and direct that a grant of letters of administration intestate issues to them;

(c) That as a consequence of the revocation ordered in (a) above, the confirmation orders made on 17th February 2010 are hereby vacated, and the certificate of confirmation of grant dated 22nd February 2010 is hereby cancelled;

(d) That the Land Registrar, responsible for Kakamega County, is hereby directed to cancel the subdivision of Isukha/Shitochi/1064 into Isukha/Shitochi/3353, 3354 and 3355, and to have the said property restored back to the name of the deceased;

(e) That the administrators appointed under (b), above, shall, whether jointly or severally, file for confirmation of their grant, to pave way for a fresh distribution of the estate, in a manner that fully complies with section 71 of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules;

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

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

(h) 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 16th DAY OF October 2020

W. MUSYOKA

JUDGE