



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 20 OF 2004

IN THE MATTER OF THE ESTATE OF TIMONA LUMUNYASI KAHIKHANA (DECEASED)

JUDGMENT

1. The deceased herein, Timona Lumunyasi Kalukhana, died on 21st July 2000. According to the Assistant Chief of Shivanga Sub-Location, the heirs to his estate were Fredrick Mutachi Lumunyasi, Susana Khakasa Timona, Thomas Timona and Masinya Timona. Jotham Barasa Lusasi, a person who allegedly purchased one acre of the land from Fredrick Mutachi Lumunyasi, is also listed as an heir. The deceased was said to have had died possessed of a property known as North Kabras/Malava/1842.

2. Representation to his intestate estate was sought by Fredrick Mutachi Lumunyasi and Susana Khakasa Timona, in their capacities as widow and son of the deceased, respectively, in a petition that was filed herein on 15th January 2004. According to the petition, the survivors are listed as Fredrick Mutachi Timona, Susana Khakasa Timona, Thomas Timona, Masinya Timona and Mary Timona. The estate was said to have had comprised of an asset known as North Kabras/Malava/1842. Jotham Barasa Lusasi is listed as a liability. Letters of administration intestate were made to the two petitioners on 15th April 2004, and a grant was duly issued on 31st May 2004. The said grant was confirmed on 20th April 2010, on an application dated 11th December 2009. The estate was distributed between Fredrick Mutachi Lumunyasi, Susana Khakasa Timona, Thomas Timona, Masinya Timona and Jotham Barasa Lusasi at divers proportions.

3. Jotham Barasa Lusasi filed an application dated 28th September 2011, seeking the removal of a caution on North Kabras/Malava/1842 to facilitate registration of the certificate of confirmation of grant, and thereafter to have a restriction registered against the shares meant for the administrators, Fredrick Mutachi Lumunyasi and Susana Khakasa Timona. That application was never determined and it is still pending.

4. Another application was filed on 21st February 2012, by Reuben Soita Nambosio, dated 21st February 2012. It sought his joinder as interested party to the succession cause, preservation of the caution on North Kabras/Malava/1842, and rectification of the certificate of confirmation of grant to remove the name of Fredrick Mutachi Timona and its replacement with his, on grounds that he, Reuben Soita Sambosio, had bought the property from him. The said application was allowed on 23rd February 2012, with a specific order that a fresh grant issue as per one of the prayers in the application.

5. The other application was filed on 22nd May 2012, by Wafula Mwanje Mukolola, Stanley Enock Yingu, Nathan Nyamu Lumunyas and Julius Barasa Elijah, dated 22nd May 2012, seeking revocation of the grant made on 31st May 2004 and confirmed on 23rd February 2012. They also sought to be added to the cause as liabilities. They all claimed that they had bought portions of the estate but had been excluded from the proceedings, through fraudulent concealment. That application was heard on 4th July 2012, and was allowed. The grant made on 23rd February 2012 was revoked, and North Kabras/Malava/1842 was to revert to the name of the deceased.

6. After that an application was filed on 18th November 2013, dated 4th November 2013, seeking amendment of the certificate of confirmation of grant, and substitution of Susan Khakasa Timona, as beneficiary in that certificate with Mary Salano Timona. The application also sought the substitution of Fredrick Mutachi Timona, as administrator, with Thomas Timona, on grounds that he had failed to distribute the estate amongst the beneficiaries. Directions were taken on 2nd April 2014 on that application, where the court said that since the grant had been revoked, let the application dated 4th November 2013, be disposed of by way of oral evidence. Curiously, despite the application dated 22nd May 2012, having been disposed of on 4th July 2012, the court gave directions on 26th November 2014, for its disposal.

7. What followed was an application for confirmation of grant, dated 27th July 2015, and filed on 28th July 2015, by Timona Lumunyasi Kahikhana, in which he proposed a distribution of the estate amongst the children of the deceased, and he recognized several persons who had purportedly bought land from the deceased. The grant that he sought to have confirmed was that made on 15th April 2004, to Fredrick Mutachi Timona.

8. Directions on the disposal of that application were given on 29th July 2015, for parties to file responses to it, and a date was set for the

hearing of that application. Further directions were given on 27th July 2010, for filing of witness statements on the matter of distribution. A protest was filed by one of the alleged buyers, and so were two witness statements. The application was eventually heard on 21st November 2019. The protestor testified first, and called two other individuals as his witnesses. Fredrick Mutachi Timona, purporting to be an administrator of the estate, testified on 29th July 2020, and called one witness.

9. The application that I am called upon to determine is that dated 27th July 2015. Let me begin by saying that these proceedings are a classic example of a complete and total wastage of judicial time and that of the parties. The application, that I should be determining, was dead, as they say, on arrival. It seeks to confirm a grant that does not exist. The application ought not to have been filed in the first place. The applicant, Thomas Timona, ought to have had acquainted himself with the matter before he mounted that perfectly useless application.

10. From my recital above, the court, on 15th April 2004, had granted representation of the intestate estate herein, to Fredrick Mutachi Timona and Susana Khakasa Timona. That grant of 15th April 2004 was confirmed on 28th April 2010. The said grant was then revoked on 23rd February 2012, on the basis of an application dated 21st February 2012, and it was ordered that a fresh grant issues under prayer (iv) of that application. In the first place that application had not sought revocation of any grant, but rather the rectification of the certificate of confirmation of grant on record. The application did not seek appointment of fresh administrators, since it did not seek revocation of grant in the first place, prayer (iv) of the said application could not be the basis for appointment of an administrator.

11. For avoidance of doubt, the prayers made in the Motion, dated 21st February 2012, stated as follows:

“(i) That this application be certified as urgent and be heard *ex parte* in the first instance.

(ii) That the Honourable court be pleased to enjoin the interested party/applicant as a party in this cause.

(iii) That the caution placed on land parcel number NORTH KABRAS/MALAVA/1842 be preserved.

(iv) That the Honourable court be pleased to rectify the certificate of confirmation of grant herein and replace the name of FREDRICK MUTACHI TIMONA with the names of the interested party/Applicant since he bought the portion allocated to Fredrick Mutachi Timona from him through a land sale agreement.

(v) That the costs of this application be provided for.”

12. Clearly, a fresh grant could not possibly issue under prayer (iv) of the application, and the position then was that the grant of 15th April 2004 was revoked, but no fresh administrators were appointed. From the orders of 23rd February 2012, the grant of 15th April 2004 ceased to exist. Fredrick Mutachi Timona ceased to be an administrator under it, and therefore, in the circumstances, there could be no basis at all for an application for confirmation of that grant to be made, because that grant no longer existed as at the date the application dated 27th July 2015 was filed.

13. Although no grant was made on 23rd February 2012, in view of the wording of prayer (iv), of the application dated 21st February 2012, the court, with respect, was still of the illusion that a grant had in fact been made on 23rd February 2012. When an application was mounted, dated 22nd May 2012, for revocation of the purported grant of 23rd February 2012, the court entertained that application, and granted it on 4th July 2012, in the following terms:

“... *The grant issued by this court on 23rd February 2012 is hereby revoked. Plot number N. KABRAS/MALAVA/1842 to revert back to the names of the deceased TIMONA LUMUNYASI KALUKHANA.*”

14. There was a reiteration of the order of 4th July 2012, by the court, on 2nd April 2014, when the application dated 4th November 2013, which sought removal of Fredrick Mutachi Timona as administrator, was placed before the court for directions. The court said as follows in its directions:

“... *Since the grant was revoked, this matter shall be heard by way of oral evidence. The objector shall be the plaintiffs. While the 2nd petitioner shall be def. ...*”

15. I have closely and scrupulously perused through the record, and I have not come across any order, after 23rd February 2012, appointing administrators after the court revoked the grant of 15th April 2004. As it is, the estate has been without administrators since 23rd February 2012. There can possibly be no confirmation where there is no grant of representation or administrator in office, for confirmation is of the grant and of the administrators. I believe that alone should dispose of the matter.

16. The only other issue that I would like to address relates to who can mount the application for confirmation of grant. The applicant in the application dated 27th July 2015 is Thomas Timona. He never was administrator of the estate at any time. He purports to bring that application on behalf of the administrator. He is asking the court to confirm a grant that he does not hold, and which he claims is held by another.

17. The law on confirmation of grants is in section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, and Rule 40 of the Probate and Administration Rules. Both are specific that such application should be at the instance of “the holder” of the grant.

18. Section 71(1) states as follows:

“After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.”

19. Rule 40(1) says:

“Where the holder of a grant which has not been confirmed seeks confirmation of the grant shall apply for such confirmation by summons in Form 108 in the cause in which the grant was issued, supported by an affidavit in Form 8 or 9 exhibiting the grant ...”

20. Section 76(d) (i) is also relevant, it provides that a grant is liable to revocation, where the person, to whom the same was made, has failed to apply for confirmation of grant. The provision reads:

“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) ...

(b) ...

(c) ...

(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 has ordered or allowed; or

(ii) ...”

21. From the language of these provisions, it should be clear, beyond peradventure, that an application for confirmation of grant should be brought by the administrator or executor, that is to say the person to whom representation was granted by the court. Thomas Timona was not an administrator of the estate at any time, and, even if the grant of 15th April 2004 was still valid and subsisting, he would have no standing to bring an application under section 71 of the Law of Succession Act and Rule 40 of the Probate and Administration Rules. The application dated 27th July 2015 would be incompetent under that score.

22. One of the reasons why the application for confirmation ought to be mounted by the grant-holder lies with section 83 of the Law of Succession Act. The provision is on the duties of personal representatives. One of the duties is that the grant holder should render accounts within six months of their appointment or their administration of the estate. The requirement to render accounts within six months in section 83, appears to coincide with the requirement under section 71, that an application for confirmation be made after that period. That would suggest that an administrator seeking confirmation of their grant, which essentially translates to obtaining approval from the court to distribute the estate on the terms that he proposes or that the court orders, and the approval of the administrator by the court to carry on with administration until completion, must also render an account of his administration of the estate in terms of section 83(e), which requires production of full and accurate inventories of the assets and liabilities of the deceased, and a full and accurate account of all dealings with the estate. The account, no doubt, captures the essence of section 71(2) (a), with respect to satisfying the court that the grant holder had been administering the estate in accordance with the law. Ideally, only the grant holder can render an account on his dealings with the estate, no one else can do so on his behalf. The exercise of the duties of the office of administrator of an estate is personal, and even where delegation is allowed, the same does not extend to delegating the duty to render accounts and to apply for confirmation of grant and to distribute the estate. The court confirms the administrator as such, under section 71(2) (a), to complete administration of the estate, if he had been administering the same in accordance with the law, and if he will continue to do so upon being confirmed. To exercise that discretion, for the purpose of confirming administrators, the court should have before it the sort of accounts envisaged in sections 76(d) (ii) (iii) and 83(e) (f).

23. Section 71(2)(a) states:

“The court to which application is made, or to which any dispute in respect thereof is referred, may –

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant, or

(b) ...”

24. Section 76 (d)(ii)(iii) provides as follows:

““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 –

(e) ...

(f) ...

(g) ...

(h) *That the person to whom the grant was made has failed after due notice and without reasonable cause either –*

(i) ...

(ii) *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 such inventory or account which is false in any material particular ...”*

25. Section 83 (e)(f) reads as follows:

“Personal representatives shall have the following duties –

(a) ...

(b) ...

(c) ...

(d) ...

(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;*

26. For the reasons that I have given above, in particular that there is no grant on record that is capable of being confirmed, I have no option but to strike out the application dated 27th July 2015. The parties ought to have administrators appointed first, before they apply for distribution of the estate. I shall allocate, at the delivery of this ruling, a date for appointment of administrators of the estate. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20th DAY OF November 2020

W MUSYOKA

JUDGE