



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 404 OF 2015

IN THE MATTER OF THE ESTATE OF WYCLIFFE AKHABALE OLUANDA (DECEASED)

RULING

1. The deceased herein, Wycliffe Akhabale Oluanda, died on 2nd August 1997. According to the Chief and Assistant Chief of Eshikalame Location and Sub-Location, respectively, the heirs to his estate were his widow, Emily Achero Akhabale, and his sons, Ibrahim Olwanda Akhabale, Fredrick Mukunzi Akhabale, Godfrey Mung'oni Akhabale, Alan O. Akhabale and George Akhabale.
2. Representation to his intestate estate was sought by Emely Achero Akhabale, in her capacity as widow, in a petition that was filed herein on 24th June 2016. According to the petition, the survivors are listed as Emely Achero Akhabale, Ibrahim Olwanda Akhabale, Fredrick Mukunzi Akhabale, Godfrey Mung'oni Akhabale, Alan O. Akhabale and George Akhabale. The estate was said to have had comprised of an asset known as South Wanga/Shikalame/762. Letters of administration intestate were made to her on 5th July 2016, and a grant was duly issued on 8th July 2016. I shall hereafter refer to her as the administratrix. The said grant was confirmed on 10th July 2017, on an application dated 17th February 2017. The estate was distributed equally between Emely Achero Akhabale, Ibrahim Olwanda Akhabale, Fredrick Mukunzi Akhabale, Godfrey Mung'oni Akhabale, Alan O. Akhabale and George Akhabale.
3. Hellena Anabaka Ngesa, hereafter referred to as the applicant, filed an application on 26th July 2019, dated 25th July 2019, seeking revocation of the grant made on 5th July 2016, and confirmed on 10th July 2017, on grounds that the said grant had been confirmed without the knowledge of the daughters of the late Mohamed Shiundu, purported to have been the registered owner of South Wanga/Shikalame/762. It is alleged that he sold the land to Wellington Andabwa Munai, who later relinquished ownership of the land to the children of the late Mohamed Shiundu. It is asserted that the family of the late Mohamed Shiundu had always been in possession of the said property. It is argued that the grant had been obtained on the basis of false information. A copy of the title deed for South Wanga/Shikalame/762 is attached to show the registered owner to be one Wellington Andabwa Munai since 23rd March 1998. .
4. The response to that application is vide an affidavit sworn by the administratrix on 18th October 2019. She concedes that South Wanga/Shikalame/762 was at one point registered in the name of Mohamed Shiundu Masoko. She avers that the deceased herein had sued the said Mohamed Shiundu Masoko in Kakamega CMCCC No. 787 of 1996, seeking to recover the said property. The dispute was referred to the Mumias Land Disputes Tribunal, under the provisions of the now repealed Land Disputes Tribunal Act, No. 18 of 1990, Laws of Kenya. The said tribunal was said to have awarded the property to the deceased on 23rd December 1996. The decision of the tribunal was subsequently made a decision of the court in Kakamega CMC Miscellaneous Application No. 5 of 1997. The deceased then embarked on having the decree implemented, but died before that could happen. The family of the deceased was advised, in Kakamega CMC Miscellaneous Application No. 5 of 1997 to initiate succession proceedings in respect of the estate of the deceased, where they obtained a stay order. It is averred that in view of the decision by the tribunal, the transfer to Wellington Andabwa Munai was a nullity. The administratrix avers that the court was in order to distribute the property as an asset in the estate of the deceased. She asserts that her family had always utilized South Wanga/Shikalame/762 to the exclusion of the family of Mohamed Shiundu Masoko and Wellington Andabwa Munai, who have neither occupied it nor used it.
5. The administratrix has attached several documents to her affidavit to support her case. There is a copy of the proceedings of the tribunal in Mumias Land Case No. 14 of 1996 (Kakamega CMCCC No. 787 of 1996), which was a suit between Wycliffe Akhabale Oluande, as plaintiff, and Mohamed Shiundu, as defendant. The tribunal awarded the land to the deceased, and ordered Mohamed Shiundu to vacate the same. There is a copy of the order extracted from the proceedings of 28th January 1997, in Kakamega CMC Miscellaneous Application No. 5 of 1997, where the decision of the tribunal of 28th January 1997 was adopted as an order of the court. There is copy of a transfer of land, in Form RL 1, dated February 1997, which is unsigned, to support the argument that the deceased had initiated the process of having the property transferred from the name of Mohamed Shiundu Masoko to his name.
6. Hellen Ngesa filed another application on 26th March 2020, dated 20th March 2020, seeking to have the administratrix barred from utilizing South Wanga/Shikalame/762, pending the hearing and disposal of the revocation application dated 25th July 2019. She avers that the land in question belonged to her late father, and that the administratrix had invaded the same and was utilizing it. It is averred, by the applicant, that her father had sold the property to Wellington Andabwa Munai, who later relinquished it to her family. She asserts that her

family had always been in possession of the land. She has attached court records to support her case. One is a title deed for the said property, showing that it was registered in the name of Wellington Andabwa Munai, on 23rd March 1998. There is copy of a letter dated 9th May 2019, proposing a consent in Butere ELC No. 34 of 2018, between the applicant herein and Wellington Andabwa Munai. Finally, there is an order in Butere ELC No. 34 of 2018, where an order of specific performance was made for transfer of South Wanga/Shikalame/762 to one Tony Francis Khata Mumali, among other orders.

7. The response by the administratrix, to that application, is vide her affidavit sworn on 27th April 2020, where she deposes that her family had always been in occupation of South Wanga/Shikalame/762 to the exclusion of the families of both the applicant.

8. The applicant filed a further affidavit, sworn on 1st October 2020, which is word for word a replica of her affidavit in support of her application dated 20th March 2020, which she swore on 19th March 2020. The only difference is the pictures attached as evidence of the trespass by the administratrix. Directions were taken on 9th December 2019 and 20th July 2020, for disposal of the applications dated 25th July 2019 and 20th March 2020 by way of written submissions. Both sides complied with the said directions, by filing their respective written submissions. I have read through the same and noted the arguments made in them.

9. It is not in dispute that South Wanga/Shikalame/762 is a property that was registered in the name of Wellington Andabwa Munai as from 23rd March 1998. The grant held by the administratrix was confirmed on 10th July 2012. The administratrix did not, at that time, demonstrate that the property was registered in the name of the deceased. Technically, the property belonged, and still belongs, to the person whose name appeared in the title deed, Wellington Andabwa Munai, and, therefore, the court was in fact distributing an asset that did not belong to the deceased. The administratrix cannot possibly have the same transmitted to the beneficiaries so long as there is no title document, issued by the lands authorities, in the name of the deceased.

10. I note that the administratrix has placed on record documents showing that the deceased and Mohamed Shiundu, litigated on the land which culminated in victory against the said Mohamed Shiundu. She holds a decree issued by the court in favour of the deceased, issued in Kakamega CMC Miscellaneous Application No. 5 of 1997 on 28th January 1997. However, it would appear that the deceased died before he could execute the decree, and his family did not move quickly enough to execute the same. Instead, Wellington Andabwa Munai got himself registered as proprietor of that property on 23rd March 1998, and was issued with a title deed on 31st March 1998, despite the court order of 28th January 1997. Technically, the person holding the title deed is the owner of the property, and the position can only be reversed by a court nullifying the title deed. The holder of the title deed has an upper hand over the holder of the court decree, until the court nullifies the title deed. What the administratrix should have done was to have the lands authorities transfer the land to the estate using the court decree, what is known as perfecting the title. The court decree alone is not evidence of ownership. The administratrix should have taken the further step of having that property transferred to the name of the deceased or hers as administratrix using the decree. It was premature for her to move to have the probate court confirm her grant and distribute the property when the registration details with the lands authorities still reflected the name of another. I repeat, technically, the property does not belong to the deceased, but to the registered proprietor. So long as that position obtains, the administratrix will never get the lands authorities honour the certificate of confirmation of grant dated 10th October 2017.

11. The failure by the administratrix has created the untidy situation where she holds a court decree in favour of the estate, but the property is registered in the name of another. To compound the situation, the same land has been subjected to other court proceedings in Butere ELC No. 34 of 2018, where an order was made by consent on 23rd May 2019, to have the same property transferred to Tony Francis Khata Mumali. This creates a murky situation where two court orders, issued in separate court proceedings, award the same land different persons. That situation should not be allowed. I believe that the court, in Butere ELC No. 34 of 2018, was not informed of the decree/order in Kakamega CMC Miscellaneous Application No. 5 of 1997, of 28th January 1997, for if the said court were aware of the latter order it would not have made the order of 23rd May 2019.

12. Let me not go beyond what I have said in the foregoing paragraph for I, sitting as the High Court, in a probate matter, have no jurisdiction to address questions that revolve around ownership, occupation and use of land, for that jurisdiction now vests with the Environment and Land Court. Whether the order, that should hold sway, is that made on 28th January 1997 in Kakamega CMC Miscellaneous Application No. 5 of 1997 or that made in Butere ELC No. 34 of 2018, on 23rd May 2019, are questions for the Environment and Land Court to grapple with. So should be the question as to whether South Wanga/Shikalame/762 should have been registered in the name of Wellington Andabwa Munai in 1998 after the deceased had died in 1997, after the said Wellington Andabwa Munai had lost a land ownership dispute with the deceased before the land tribunal.

13. As it is, the grant herein ought not to have been confirmed, for the property in question was not registered in the name of the deceased. The administratrix ought to have had the title perfected first before she presented the property to the probate court for distribution. The probate court ended up distributing a property did not belong to the estate legally. The estate is a beneficial owner, otherwise legal ownership lies elsewhere. The estate of a deceased person, according to section 3 of the Law of Succession Act, Cap 160, Laws of Kenya, is the free property of the deceased. South Wanga/Shikalame/762 is not a free asset of the estate, it is not registered in the name of the deceased. During his lifetime, he could not dispose of it as he pleased before he had it transferred to his name. At the time of the confirmation of the grant the said property was still not in the name of the deceased, nor that of the administratrix, it was in the name of another person. The administratrix could not deal with it as if it belonged to the estate, since it was not in the name of the deceased. The property was simply not free property, and was not available for distribution as part of the estate of the deceased, until such time that it was perfected by being registered in the name of the deceased, or that of the administratrix. The confirmation of the grant, to distribute, it was, therefore, done in error.

14. In view of the above, I am persuaded that there is a case for issuance of orders to conserve or preserve the property. Of course, since the property is not in the name of the deceased, I do not see how the administratrix can get the lands authorities to have it transmitted to the beneficiaries named in the certificate of confirmation of grant dated 10th October 2017.

15. The directions given in this matter were for the parties to file written submissions on the two applications, for revocation application as

well as the one for preservation. It would appear that the parties chose to file written submissions on the application for preservation of the property, and did not submit on the revocation application. I shall, nevertheless, proceed to consider the revocation application as well.

16. Revocation of grants is provided for under section 76 of the Law of Succession Act, on three general grounds. The first is where the grant was obtained through a defective process or a process marred by fraud and misrepresentation. The second general ground is where the administrator, upon properly obtaining the grant, faces challenges with the manner in which he manages the estate. The law is specific that a grant would be revoked where he fails to apply for confirmation of his grant within the period allowed in law, or fails to diligently administer the estate, or fails to render accounts as and when required to. The last general ground is where the grant becomes useless or inoperative, on account of changed circumstances.

17. In the instant case, the applicant appears to ground her claim on the first general ground, that the grant was obtained through a defective process, or through fraud or misrepresentation. She argues that her family was not notified of the process of obtaining the grant.

18. From the record before me, it is clear that the family of the applicant was not related to that of the deceased. The applicant was not a child of the deceased, nor a spouse or sibling of the deceased, and, therefore, she was not one of the persons that section 51 of the Law of Succession Act require to be listed in the application for grant, and section 66 of the Law of Succession Act and Rules 7(7) and 26 of the Probate and Administration Rules require to be notified of the process. The administratrix cannot be faulted for not informing the applicant and her siblings of the process, for she was not obliged in law to do so. There cannot be any merit in the revocation application on that score.

19. The other argument appears to be that the administratrix listed a property that did not belong to the estate as an asset of the estate, and did not disclose that that property in fact belonged to the family of the applicant. The fact that a petitioner lists in her petition a property that does not belong to the estate is not a sufficient reason upon which the court may exercise discretion to revoke a grant. The reason for this is that the administrator once appointed has a duty to ascertain the assets of the estate, and, therefore, the mere fact of listing the wrong asset is not fatal to the grant, since there is opportunity for the administrator to ascertain the assets. In this case, the administratrix holds a decree/order of a court awarding the land in question to the deceased. It cannot be said that the administratrix misled the court in any way. The only challenge she has is that, despite her having a decree in favour of the deceased, the property in question was subsequently registered in the name of another. Her listing of the property was not misguided, the only problem is that she failed to take steps to perfect the title after she was appointed administratrix, to make the property amicable to distribution.

20. The applicant, in a roundabout way, also appears to be challenging the confirmation process, saying that the administratrix presented a property for distribution which did not belong to the estate of the deceased, but rather to the family of the applicant. I have dealt with this matter above. The administratrix was misguided, in presenting for distribution, a property that was not yet registered in the name of the deceased. I do not find that she sought to mislead the court, the property had been awarded to the deceased in court proceedings. There was a basis for her actions, misguided as they were. Secondly, contrary to what the applicant asserts, there is no evidence that the property belonged to her family. The title deed placed on record shows that the same was registered, not in the name of her late father, Mohamed Shiundu but rather in the name of Wellington Andabwa Munai. The proceedings in Butere ELC No. 34 of 2018 do not help her either, since the order she relies on does not award the land to her or to her family. She has also presented no proof that the registered proprietor of the property ever relinquished his proprietorship to her family.

21. Overall, I am not persuaded that there is a case for revocation of the grant made to the administratrix on 5th July 2016.

22. In the end, I shall dispose of the applications dated 25th July 2019 and 20th March 2020 as follows:

- a. That the prayer for revocation of the grant made on 5th July 2016, to Emely Achero Akhabale, is hereby disallowed;**
- b. That I, instead, hereby review the confirmation orders made on 10th July 2017, by setting them aside, and ordering cancellation of the certificate of confirmation of grant, dated 10th October 2017;**
- c. That the administratrix shall take steps, if she is so minded, to perfect the title to South Wanga/Shikalame/762, before she presents the said property for distribution afresh;**
- d. That any party, aggrieved by the orders made herein, is at liberty to move the Court of Appeal appropriately, within twenty-eight days; and**
- e. That each party shall bear their own costs.**

23. It is so ordered.

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

W MUSYOKA

JUDGE