



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO 219 OF 2001

IN THE MATTER OF THE ESTATE OF HERMAN MUSOTSI LUNDIANI (DECEASED)

JUDGMENT

1. The deceased herein died on 21st April 1998. A letter from the Office of the Chief of Lugari Location, dated 23rd March 2001, indicates that he was survived by a widow, Fanice Kanaita Herman, and four sons and a brother. The sons were listed as James Luseno Emani, Anthony Shichenje, Josphat Aronya and Theodorus Muyale; while the brother was said to be Jamin Siah Inyumbila. The petition herein was lodged by the widow and one of the sons, James Luseno Emani, and they listed the persons named in the Chief's letter as the survivors of the deceased. They also listed Kakamega/Lugari/1536 as the property that he had died possessed of. Letters of administration intestate were made to the two on 17th July 2013 and a grant thereof was issued to them dated 6th August 2013.

2. On 18th May 2014 an application dated 18th March 2014 was lodged herein by David Busolo Lundiani and Japheth Muyale Siah. They averred that they were a brother and nephew of the deceased, respectively. They stated that Kakamega/Lugari/1536 was family land which had belonged to their late father and which he had entrusted on the deceased in trust for himself and his two brothers, Jamin Siah Inyumbila and David Busolo Lundiani, to be shared between the three brothers. They aver that the administrators were abusing the grant in an effort to have the land shared out amongst themselves and the other children of the deceased to the exclusion of the deceased's siblings. They particulars aver that David Busolo had not been listed as a survivor of the deceased.

3. I have carefully perused through the record and I have been unable to find any response by the administrators to the application for revocation of grant. The summons was placed before the court on 3rd July 2014 when it was directed that it be disposed of by way of oral evidence. It was also directed that the same be served on the administrators. The matter was listed for hearing on 4th November 2015, 23rd February 2016 and 9th November 2016, and on all those occasions it did not proceed on account of lack of service on the administrators.

4. The matter was placed before me for the first time on 11th July 2018. David Busolo, one of the applicants, was in attendance, but the administrators were absent. He insisted that he had served. I was not satisfied with the service and I gave him another date for hearing, 25th October 2018, and directed him to serve. Come 25th October 2018, the applicant turned up with an affidavit of service indicating that the widow of the deceased had been served with notice of the hearing. I perused the hearing notice lodged in court on 11th October 2018 and was satisfied that there had been proper service, and allowed the applicant to proceed with his case. The administrators were not in court, and therefore only David Busolo Lundiani was available to testify. He gave sworn testimony, which largely mirrored the averments made in his joint affidavit in support of the application.

5. The application I am called upon to determine is unopposed, for it was not responded to by the administrators. The administrators did not attend court either to state their case. It is for revocation of grant. The applicants argue that the property listed as making up the estate was family land; to which they were also entitled. They complain that the administrators are proceeding in a manner suggesting that they intended to exclude them from the distribution of the land.

6. I note from the Chief's letter and the petition that one of the brothers of the deceased is listed as a beneficiary. That would suggest that he is entitled to a share in the property. The brother listed is Jamin Siah Inyumbila. David Busolo is not listed. I do not know whether he is also entitled to a share, but those are issues that ought to be dealt with at the distribution of the estate. If he is entitled I cannot tell, it is the administrators who would have shed light on the matter but they appear to have elected to stay away.

7. The deceased died a long time ago. His estate has not been distributed to date. I note too that this cause has been pending for a long time. The grant on record has not been confirmed. I am not persuaded that the grant ought to be revoked. The estate relates to the estate of the deceased. In law, section 35 of the Law of Succession Act, Cap 160, Laws of Kenya, the deceased was survived by a widow and children, and by virtue of section 66 of the Law of Succession Act, it is the widow and the children who have a prior right to administration over the deceased's siblings. I do not therefore think a case has been made out for revocation of the grant.

8. It could be that the brothers of the deceased do have a legitimate claim to the estate. The ideal thing would have been for them to wait for the administrators to file an application for confirmation of grant whereupon they would have filed affidavits in protest to stake their claim. I shall give them the benefit of the doubt on the basis that confirmation could be sought without notice to them.

9. I shall dispose of the said application the following terms -

- (a) That I hereby decline to revoke the letters of administration intestate made to the administrators on 17th July 2013 and issued on 6th August 2013;**
- (b) That I hereby appoint David Busolo Lundiani as an additional administrator to those appointed in 2013;**
- (c) That the grant on record shall be amended to conform with (b) above;**
- (d) That administrators shall jointly or severally apply in the next thirty (30) days of this judgement for confirmation of their grant;**
- (e) That any administrator, or any of the survivors of the deceased, who shall not agree with the proposals made in the application or applications filed under (d) above shall be at liberty to file affidavits of protests making counterproposals for compliance.**
- (f) That the matter shall be mentioned after thirty (30) days, on a date to be fixed in open court at the delivery of this ruling or by the Deputy Registrar, whichever shall be appropriate;**
- (g) That each party shall bear their own costs; and**
- (h) That any party aggrieved by the orders that I have made herein above shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.**

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF APRIL, 2019

W. MUSYOKA

JUDGE