



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 178 OF 2013

IN THE MATTER OF THE ESTATE OF ABISAI LWANE KISAGA (DECEASED)

RULING

1. Liwane Kisaga Jafeza *alias* Abisai Lwane Kisaga (the deceased) died intestate on 9th June 2008 and thereafter, both Hussein Lwane, hereinafter referred to as the applicant, and Abisai Lwane, herein referred to as the respondent, petitioned for grant of letters of administration intestate in Hamisi PM CSC No. 2 of 2012. Representation was accordingly made to them on 6th June 2012.
2. The two administrators applied for confirmation of the said grant, and their application was allowed on 12th March 2013. They had listed the beneficiaries as Javan Lwane – son, Abisai Lwane – son, Nancy Kadeyitsa Imbugua and Hussein Lwane – son. The certificate for confirmation of grant issued thereafter listed Kakamega/Kedoli/471, measuring about 1.5 hectares as shared out amongst the survivors of the deceased and beneficiaries of the estate as ‘shown on the ground.’
3. Soon thereafter, the applicant filed herein an application herein on 21st March 2013, seeking, *inter alia*, that the certificate of confirmation of grant issued by the lower court be cancelled or annulled, and that an interim order of injunction issue to restrain the respondent from subdividing, alienating, transferring, cultivating, developing and or doing anything whatsoever on land parcel No. Kakamega/Kedoli/471. The applicant raised the following grounds, *inter alia*: -
 - (a) That he has been in peaceful, uninterrupted occupation of land parcel number Kakamega/Kedoli/471 for over 50 years with the same having been bequeathed to him by the deceased with the respondent having been bequeathed some other property,
 - (b) That the respondent failed to disclose material facts to the lower court regarding the estate of the deceased including the current beneficiary, and
 - (c) That the Hamisi succession cause was confirmed without taking into account his interests as the only occupier of the land.
4. In his replying affidavit, the respondent stated that the deceased had four sons namely Javan Lihambe Lwane, Abisai Lwan, Ellam Mwanuli and Noah Hussein Lwane and that the deceased had only one known parcel of land, that is Kakamega/Kedoli/471 which was family land. He stated that the applicant was uncooperative with respect to signing of relevant forms to enable smooth running and subdivision of the said Kakamega/Kedoli/471 in as much as the applicant was a co-petitioner in the succession proceedings in Hamisi. He added that Nancy Kadeyitsa Imbuga was the widow of their late brother, Ellam Mwanuli, and was thus standing in his place as a beneficiary of the estate. He concluded by stating that all brothers deserved a share of the Kakamega/Kedoli/471 land and that the applicant needed to be cooperative as there were no chances of him suffering irreparably.
5. In a ruling delivered by this court on 8th May 2013, an interim order of injunction was issued against the respondent restraining him from subdividing, alienating, transferring, cultivating, developing or doing anything whatsoever on Kakamega/Kedoli/471 and a stay of execution was issued stopping further proceedings in Hamisi PM CSC No. 2 of 2012. The court further stated that the issue of annulment of the certificate of confirmation of grant would be determined later in this matter. On 7th December 2016, the said application of 21st March 2013 was dismissed by the court for non-attendance by the applicant with costs to the respondent.
6. On 1st November 2017, one Margaret Vunoro filed an application dated 31st October 2017, seeking to substitute the respondent in this cause for reasons that the respondent had died on 26th January 2017 before conclusion of the matter and she also sought to file a bill of costs for taxation against the applicant with regard to costs awarded by the court to the respondent. She annexed a copy of limited grant of letters of administration *ad litem*, which had made her personal representative of the respondent for purposes of prosecuting the cause.
7. In his reply, the applicant did not oppose the substitution of Margaret Vunoro in place of the respondent. He, instead, sought reinstatement of his application dated 21st March 2013, vide an application dated 7th March 2018, which had been dismissed by the court for non-attendance. He stated that the non-attendance was occasioned by factors beyond his control, including the demise of David Amusavi Kahi, the advocate in conduct of the matter for him.

14. Margaret Vunoro in her response to the application dated 7th March 2018 argued that the same was brought under Order 12 Rule 7 of the Civil Procedure Rules, which is inconsistent with the Probate and Administration Rules, and especially Rule 63, that denotes the application of Civil Procedure Rules and High Court (Practice and Procedure) Rules.

15. Rule 63 of the Probate and Administration Rules provides as follows: -

‘63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

(2) ...’

16. Order 12 Rule 7 of the Civil Procedure Rules, 2010 provides as follows: -

‘Setting aside judgment or dismissal [Order 12, rule 7.]

Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.’

17. Section 47 of the Law of Succession Act provides as follows: -

‘47. Jurisdiction of High Court

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient ...’

18. Rule 73 of the Probate and Administration Rules provides as follows:

‘73. Saving of inherent powers of court Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.’

19. The said application is also brought under Article 159(2) of the Constitution of Kenya which provides that: -

‘(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.’

20. In the case of *Wangari Gichuki vs. Daniel Wanjigo Muchemi* [2014] eKLR, it was held that:

*‘...The application is not properly drawn nor is it brought under the right provisions of the Law of Succession Act and Rules under Probate and Administration Rules. The court in succession matters however under Section 47 of the Law of Succession Act has jurisdiction to entertain any dispute under the Law of Succession Act without due regard to technicalities. I agree with Hon. Mr. Justice Lenaola in *Re Estate of Isaka Muthembwa Kithome* (supra) where he stated that Forms are a technical matter and that failure to follow a format should not stop the court from dealing with any clear issue regarding the estate. I hold that the failure of the applicant herein to follow the right form and refer to the correct section and Rules cannot be a basis to deny her a hearing and determination of her application on merits.’*

I note the objection raised in this cause is want of form and reference to correct provision of the law which can be amended to correct the errors and this being a matter concerning the interest of a beneficiary the want of form and failure to quote the correct provision of the Law of Succession Act or Rules cannot be a basis for striking out an application seeking preservation of the estate of the deceased from intermeddlers.

Section 73 of the Probate and Administration Rules provides: -

“Nothing in these rules shall in any way affect the inherent power of the court to make such orders as may be necessary for the end of justice or to prevent abuse of the process of the court.”

Further Article 159(2)(d) of the Constitution enjoins this court to administer justice without due regard to technicalities. ‘

21. However, this court *In re Estate of Grace Nyambura Waweru (Deceased)* [2017] eKLR, calls for caution when parties omit statutory provisions and procedural rules in their pleadings by stating:

‘...The objectors in this case have relied on Section 73 of the Probate and Administration rules and Article 159 of the Constitution besieging the court to apply its discretion and disregard of technicalities in allowing the objection. Section 73 and Article 159 is not an escape route for the indolent and a savior to all manner of omissions and commissions including disobedience to substantive statutory provisions. If courts were to allow every such omission and commission in the name of Article 159 of the Constitution, then statutory provisions and procedural rules will be rendered obsolete and or irrelevant.’

22. This court, in the case of *Samuel Kamiri Crispoh vs. John Njeru Kahihu* [2015] eKLR in allowing the application before it, cited Rule 49 of the Probate and Administration Rules which states that:

‘A person desiring to make an application to court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.’

23. Based on the above statutory provisions of the Constitution of Kenya, statutes, rules and authorities, I find that the application dated 7th March 2018 is properly before the court. Further, looking at the reasons given by the applicant, I find them sufficient for the purpose of reinstatement of the application dated 21st March 2013 and the same be determined on merit.

24. The said application revolves around Kakamega/Kedoli/471, the only property of the estate and if or how the same can be distributed amongst the beneficiaries. I find that it would be in the interests of justice and expeditious disposal of two causes, that the issue of annulment of the certificate of confirmation of grant is determined.

25. In the end I do hereby make the following final orders: -

- (a) That the Chamber Summons dated 21st March 2013 is hereby reinstated and the same shall be heard and determined on its merits;**
- (b) That the respondent, Abisai Lwane, now deceased, is hereby substituted with Margaret Vunoro, as such;**
- (c) That the matter be given a date at the delivery of this ruling for mention for purposes of taking directions; and**
- (d) That costs shall be in the cause.**

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10th DAY OF April, 2019

W. MUSYOKA

JUDGE