



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO 616A OF 2009

IN THE MATTER OF THE ESTATE OF MARIMU LESHEKA ALIAS MARIKU MALIMU LESEGA (DECEASED)

JUDGMENT

1. The deceased herein died on 5th October 1984. A letter from the Office of the Chief of Shibuye Location, dated 30th July 2007, indicates that he was survived by seven individuals, being Daniel Bernet, Wilson Lwigado, James Sunguti, Laban Litali, Moses Achebi, Isaac Muyeshi and Norah Luseka. The Lwandega African Devine Church (ADC) is indicated as an interested party. Representation to the estate was initiated in this cause on 2nd August 2007 by Daniel Bernet and Wilson Lwigado. In their petition they listed themselves and the other individuals listed in the aforementioned Chief's letter as the survivors of the deceased. They also listed Isukha/Shinyalu/441 and 467 as the assets that he died possessed of. They also listed the African Divine Church as a liability. Letters of administration intestate were made to the petitioners on 19th November 2007, and a grant was accordingly issued to them on 21st November 2007. The grant has not been confirmed.

2. The application the subject of this judgement is the summons for revocation of grant dated 25th November 2008. It is brought at the instance of Moses Achebi and Isaac Muyeshi. They aver that the process of obtaining the grant was defective in substance as fraud and misrepresentation were employed. They aver in their affidavit in support that the deceased had married twice and had children from both wives. They listed the members of the first house as Zipporah Imbala (deceased), Gabriel Omar (deceased and survived by a widow and children), Daniel Bernet, Sifu Malimo, Martha Ivesa, Dorcas Khatioli, Agnes Mulei and Jehipher Khasoa. The second house is said to comprise of Loise Musavi Malimo, Wilson Lwigado, Laban Lutiali, James Sunguti, Moses Achebi, Isaac Muyeshi, Isabella Anjeli, Sussy Khabakali, Janet Shichei, Sheba Kalar (deceased) and Nathan Luseka (deceased). The rest of the details given in the application are not relevant for the purpose of the application, but would be relevant at distribution.

3. The administrators swore a joint affidavit in reply. They confirm that the deceased was a polygamist who had married twice. They also claim that the deceased had left a written will distributing his property. The two state that they were the eldest sons from each house and that they represented each of the houses. They plead that the court should allow them to continue to administer the estate.

4. Directions were given on 8th July 2009 for the disposal of the application orally. The oral hearing commenced on 21st February 2012. Moses Achebi Malimo was the first on the stand. He told the court that the administrators had not consulted their siblings before the applied for representation. He stated that the administrators had not disclosed some of the beneficiaries, especially their sisters and sisters-in-law. Isaac Muyeshi testified next. Wilson Lwigado followed. He stated that prior to filing the petition they had consulted their siblings. He stated that the deceased also had daughters. He claimed that deceased had made a will and had distributed his property before he died. Nathan Mwori Lusuli also testified.

5. Although the court directed at the end of the oral hearing that the parties should file written submissions, none of them filed any.

6. The law on revocation of grants of representation is set out in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The provisions identify three general circumstances under which a grant may be revoked. The first relates to problems with the process of obtaining the grant. A grant will be revoked if the process was defective, or the applicants used fraud or concealed or misrepresented facts to obtain the grant. The second is where the grant is obtained procedurally, but the administrators encounter difficulties with administration. Such would be the case where they fail to apply for confirmation of grant within the stipulated period in law, where they fail to proceed diligently with administration of the estate, and where they fail to render accounts as and when required to. The third applies to situations where the grant has become useless or inoperative on account of certain circumstances, such as where a sole administrator dies. Under section 76, the court is granted discretion. It may or may not revoke a grant after a case has been made out.

7. In the instant case, although the administrators claim that they had consulted their siblings before they moved the court for representation they have not presented any evidence of such consultations. I have perused through the record and I have not come across any consents by the applicants to the administrators petitioning, yet that is what is required by Rule 7(7) of the Probate and Administration Rules. It also emerges that the administrators did not list all the persons who had survived the deceased and therefore beneficially entitled to the estate. Such persons included children of the dead children of the deceased, as well as the daughters of the deceased. All those persons should have

been disclosed, in obedience to the requirements of section 51(2)(g) of the Law of Succession Act and Rule 7(1)(e)(i) of the Probate and Administration Rules. There is no doubt that a case had been made out by the applicants for revocation of the grant made on 19th November 2007 and issued on 21st November 2007.

8. The hearing turned on many other issues relating to the assets that make up the estate. Those issues are not relevant for the purpose of determination of an application for revocation of grant, but are relevant for an application for confirmation of grant. The applicants should hold their horses so far as those issues are concerned, and should raise them when a confirmation application is mounted. I shall therefore not advert to those issues at all.

9. Although the cause was commenced in 2007, the deceased had died in 1984. That is a long time ago. The estate should be distributed as soon as possible so that the survivors can move on with their lives. I shall therefore exercise my discretion over the matter in such a way as not to delay distribution.

10. I shall accordingly make the following final orders:-

a. That I shall not revoke the grant on record, instead I shall direct the administrators to include in the schedule of survivors of the deceased at the confirmation of the grant all those children of the deceased, whether dead or alive, that they had omitted in their petition;

b. That I direct the administrators to file within thirty (30) days an application for the confirmation of their grant in which they shall list all the persons that I have referred to in paragraph 7 of this judgment and order (a) above;

c. That this cause shall be mentioned after thirty (30) days on a date to be assigned at the delivery of this judgement to confirm compliance with order (b) above;

d. That any survivor who shall not agree with the proposals that the administrators shall make in their application to be filed under order (b) shall be at liberty to file an affidavit or affidavits of protest;

e. That each party shall bear their own costs; and

f. 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