



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO 888 OF 2010

IN THE MATTER OF THE ESTATE OF PHILIP MALANGA CHIVULI alias MALANGA CHIBULI (DECEASED)

JUDGMENT

1. The deceased herein died on 2nd January 2004. A letter from the Office of the Chief of Shivanga Location, dated 5th December 2010, indicates that he was survived by a widow, Recho Kwasima Malanya, and five sons, Charles Malanga Chivuli, David Lianda Malanga, Jeremiah Malanga, Peter Mwombe and Joel Shitanda Malanga. The letter also mentions Francis Odhiambo Karakacha as what he calls an interested buyer.
2. The petition herein was lodged by Charles Malanga Chivuli, in his capacity as son of the deceased, and he listed the persons listed in the Chief's letter save for the interested buyer. He has also listed N/Kabras/Malava/1261 as the property that the deceased died possessed of. Letters of administration intestate were made to the petitioner on 9th April 2011, and a grant was issued to him on 14th April 2011.
3. The application the subject of this judgement is the summons for confirmation of grant dated 29th April 2011. It is brought at the instance of the administrator, Charles Malanga Chivuli. he has identified himself and his four brothers as the survivors of the deceased together with the deceased's widow and the alleged interested buyer, Francis Odhiambo Karakacha. he proposes that the whole estate be upon himself absolutely.
4. The first reaction to the application appears to have been a Motion dated 24th October 2011, filed at the instance of Adriane Musonye Shibisi, seeking revocation of the grant and a declaration that he was a liability to the estate having had bought a portion of N/Kabras/Malava/1261. In his supporting affidavit he alleged that he had bought four acres out of the property from the deceased on 6th August 2003 for Kshs. 280, 000.00, paid the full purchase price and had taken possession. He fears that his interest was not being taken care of by the administrator.
5. The administrator responded to that application, vide an affidavit sworn on an unknown date in 2011 but filed on 23rd November 2011, by asserting that he was unaware of the alleged transaction between the deceased and Adriane Musonye Shibisi. He complained that although the transaction allegedly took place in 2003, Adriane Musonye Shibisi did not bring it to the administrator, although he knew all along that he was the administrator of the estate. He also alleged that the deceased was too ill in 2003 to have had entered into any valid transaction with anyone.
6. Adriane Musonye Shibisi swore a further affidavit on 11th July 2012, and filed it on 11th July 2012, in response. The affidavit principally introduces into the record copies of the documents that allegedly supported the transaction. There is a handwritten sale agreement purportedly executed on 7th May 2003 between Adriane Musonye Shibisi and the deceased, in the presence of witnesses, who, apparently, included the sons of the deceased. There is another document dated 6th August 2003 signed by Adriane Musonye Shibisi and the deceased, in the presence of witnesses, essentially to confirm payment of the full purchase price. The third document is a handwritten agreement, dated 7th August 2003, for an additional portion.
7. The administrator reacted to the further affidavit by filing a Motion dated 31st July 2012, where he sought restraining orders against Adriane Musonye Shibisi, with regard to N/Kabras/Malava/1261. He alleged that Adriane Musonye Shibisi had forcefully entered the said land and cultivated thereon a portion measuring four acres.
8. Adriane Musonye Shibisi filed another application on 10th May 2013, dated 8th May 2013, seeking conservatory orders, ostensibly pending disposal of the revocation application. The application elicited a response to it by the administrator, through an affidavit sworn on 23rd May 2013, where he said that Adriane Musonye Shibisi had forcefully entered the land erected illegal structures after the deceased died.
9. On 27th February 2014 a ruling was delivered by Chitembwe J on the application dated 8th May 2013, wherein the court ordered maintenance of status quo, pending hearing and determination of the cause, with a direction that Adriane Musonye Shibisi not to put up new structures on the subject land until his claim was determined by the court.

10. On 5th February 2025 the revocation application dated 24th November 2011 was withdrawn, at the instance of the applicant, to pave way for the confirmation application. The fate of the pending confirmation application was not alluded to.

11. On 6th November 2011 a summons for confirmation of grant dated 4th November 2015 was lodged at the registry by the administrator. The administrator the five sons as having survived the deceased. He also stated that he had been survived by three dependants, being Enock Yuka Musotsi, Francis Odhiambo Karakacha and Tom Shango Kubuyo. He proposed an uneven distribution, under which he awarded himself 2.1 hectares, David Lianda 0.4 hectare, Jeremiah Malanga 1.34 hectares, Peter Mwombe 1.2 hectares and Joel Shitanda 1.45 hectares. the three alleged dependants were also allocated portions of the land, being Francis Karakacha 0.44 hectares, Tom Shango 0.10 hectares and Enock Yuka 0.56 hectare. There is a consent to the proposed distribution signed by the survivors and the alleged dependants.

12. Adriane Musonye Shibisi filed an affidavit of protest to the proposed distribution, and I shall for that reason refer to him as the protestor. He states that he had bought four acres of N/Kabras/Malava/1261 from the deceased, and paid the full purchase price between May 2003 and August 2003. He had allegedly taken possession of the four acres. He has attached to his affidavit copies of the sale agreement allegedly signed by the deceased and witnessed by the widow and four of the sons of the deceased. He avers that Enock Yuka Musotsi, Francis Odhiambo Karakacha and Tom Shango Kubuyo were persons who had bought portions of the land from the sons of the deceased.

13. The oral hearing of the application happened on 28th June 2018. The first on the stand was the administrator. He stated that the deceased had been survived by five children, the five sons named in the Chief's letter. He also stated that his mother was also alive. He stated that the estate be distributed as per his application, save that provision be made Alfayo Malanga and Dr. Malanga, who claimed were grandchildren of the deceased by one of his deceased sister. He disclosed that the deceased had six daughters. He named two as unmarried, that is to say Maria Malanga and Navova Malanga. He denied knowing the protestor, saying that he never bought the four acres from the estate property as alleged. On cross-examination, he stated that he was not aware of the alleged sale, nor that his siblings had been privy to the same. He denied that the protestor had at any time taken possession of the subject property.

14. The protestor testified next. He explained how he had bought the subject property with the deceased, and executed documents that were witnessed by the deceased's wife and his sons. He presented documents that had been executed in May, August and September 2003 as evidence of the transactions. He alleged that he took possession immediately, and he put up a house on the land sometime in October 2003 he said he was chased out of the land in 2010, his house was demolished and his trees cut down. He called a witness, Gabriel Mukhola, who testified that he was party to the sale transaction as a witness.

15. At the end of the oral hearing, the parties were directed to file written submissions. There has been complied. I have read through the written submission and noted the arguments made. Unhelpfully, none of them cited any case law.

16. What is before me is a confirmation premised on section 71 of the Law of Succession Act, Cap 160, Laws of Kenya. An application for confirmation of a grant in intestacy serves two purposes. The first one is confirmation of the administrators, in terms of determining whether or not they would continue in office. They would not be confirmed if it is established that their appointment had issues, or where they had failed in their duties. Secondly, the court distributes the estate upon being satisfied that the administrators had ascertained the assets and the persons beneficially entitled and the mode they proposed to have the assets distributed amongst all the persons identified as beneficially entitled. In this case, the issue of confirmation of the administrators does not appear to have been raised. No questions have arisen as to improprieties in the manner of their appointment, nor have any allegations of maladministration been made. It would appear that the only issue for me to determine is with regard to distribution.

17. For the purpose of distribution, what is critical is whether the assets and beneficiaries have been ascertained. In this case, quite clear that the deceased was survived by more than the five sons disclosed by the administrator. The deceased apparently had daughters. The administrator did not disclose them in his petition, nor in the application for confirmation of grant. The issue of the daughters only came up at the hearing. Their identities were not disclosed, save for the two who are unmarried. Consequently, it cannot be said that the administrator has complied with the requirements of section 71, with regard to ascertainment of all the persons beneficially entitled to the estate, and identification of the shares to which each one of them was entitled. The grant cannot be confirmed in the circumstances.

18. The other issue is that even amongst the five sons that the administrator believes to be the persons rightfully entitled to a share in the estate, the distribution is uneven or unequal. It does not confirm with Part V of the Act which envisages equal distribution. Moreover, the widow of the deceased has priority over the children with respect to distribution. According to section 35, she is entitled to hold life interest in the estate property. The children can only access the estate absolutely upon termination of the life interest, according to section 35(5) of the Act. The administrator testified that the widow of the deceased was still alive, he had not allocated any property to her, which was contrary to section 35 of the Act.

19. Regarding the assets, it is plain that the deceased died possessed of only one asset. The protestor claims that he had acquired four acres out of it. he has produced documents to support the transactions. The administrator has named so three individuals as dependants of the deceased, he has not explained how these three are related to the deceased. A dependant is defined in section 29 of the Act. He has not sought to bring the three within the definition in section 29. He has not demonstrated that the three had moved this court under section 26 of the Act for reasonable provision, whereupon the court had declared them dependants of the deceased. It is alleged by the protestor that the three had bought estate property from the sons of the deceased. The administrator has not denied it. If it turns out that that is the case, then sections 45 and 82(ii) of the Act has been violated, to the extent that the sons purported to sell property being to their father after his death and before confirmation of the grant.

20. Regarding the alleged sale to the protestor I shall not go into the merits of the case. As a High Court Judge I have no jurisdiction to determine questions of ownership of land as between the estate and the protestor. That jurisdiction was taken away by Article 162(2) of the Constitution, and vested in the Environment and Land Court. The protestor should place his claim to the four acres out of N/Kabras/Malava/1261 before the right forum.

21. The application before me cannot be determined at this stage for the foregoing reasons. Section 71 allows me to postpone the

confirmation to allow reconsideration. I shall accordingly make the following orders -

22. I shall accordingly make the following final orders -

(a) That administrator shall file a further affidavit in which he shall disclose all the daughters of the deceased, and for any of the daughters who are dead he shall disclose the names of the children that survived them;

(b) That the protestor shall pursue his claim against the estate in proceedings to be initiated at the Environment and Land Court;

(c) That in the meantime the four acres that the protestor allegedly purchased from the deceased shall be excised and removed from the schedule of assets to be distributed to await the outcome of the proceedings to be filed in (b) above; and

(d) That the matter shall be mentioned after thirty (30) days on a date to be given at the delivery of this judgement for compliance with (a) above, and for further directions.

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

W. MUSYOKA

JUDGE