



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 955 OF 2007**

**IN THE MATTER OF THE ESTATE OF PETRO AMBUNYA KUSUL, DECEASED**

**JUDGMENT**

1. The deceased herein died on 2<sup>nd</sup> August 1986. There is a letter on record from the Chief of Butso Central Location, dated 7<sup>th</sup> November 2007, wherein it is indicated that he had been survived by six individuals, said to be David Shikuku, Morrice Ambunya, Joseph Odenyi Ambunya, Simon Murunga and Stanley Kiriza Muhindi. It is indicated that David Shikuku was a son of the deceased, but his relationship with the rest of the individuals is not stated.

2. Representation to the estate was sought by David Shikuku, in his capacity as a son of the deceased, through a petition that he lodged herein on 23<sup>rd</sup> November 2007. The other survivors of the deceased were the other individuals in the Chief's letter, but their connection with the deceased was not mentioned. He was expressed to have died possessed of a property known as Butso/Shikoti/2156. A grant was made on 12<sup>th</sup> February 2009, and issued on 16<sup>th</sup> February 2009. The said grant was confirmed on 30<sup>th</sup> June 2011. The property was distributed amongst four individuals in varying proportions. The individuals were David Shikuku, Morris Ambunya, Joseph Odenyi Ambunya and Simon Murunga. A certificate of confirmation of grant in those terms was duly issued dated 30<sup>th</sup> June 2011.

3. What I am called upon to determine is a summons for revocation of grant dated 15<sup>th</sup> July 2014. It is brought at the instance of Marcella Aywa Katheriner. She claims to have the authority of Aziza Oyiela Idiris, Agnes Atieno Ambunya, Magdalena Olale and Pamela Kadogo. She avers that she and her co-applicants were daughters of the deceased, and that David Shikuku, Morris Ambunya and Joseph Odenyi Ambunya were their brothers. She says that Simon Murunga was a grandson of the deceased being a son of David Shikuku. She claims that the applicants were entitled to an equal share of their deceased father's estate. She complains that the cause was initiated without them being enlisted as survivors of the deceased. She states that the same was initiated without their consent, knowledge or participation. She adds that at confirmation the land was shared out amongst the sons excluding the daughters. She also mentions that in 1999 a portion of the land was sold to Stanley Kiriza Muhindi, who immediately took possession thereof and who had been in occupation thereof as at the date of the swearing of the davit in support of the application. She complains that the interests of the daughters in the estate had been concealed deliberately from the court. She would like the confirmation proceedings reversed to allow for re-distribution of the property.

4. There are several affidavits of service on record which indicate that the process was served on the administrator, and that on the various occasions that the matter came up before court court process had been served on him. The record also reflects that he did attend court on divers dates. From the record before me it would appear that he did not file a response to the application.

5. The matter came up for hearing on 10<sup>th</sup> July 2018. The administrator was not in court. There is an affidavit of service on record sworn on 28<sup>th</sup> May 2018 which indicates that he had been served with notice of the hearing on 4<sup>th</sup> April 2018. The matter proceeded. The application was disposed of by way of *viva voce* evidence. Five individuals testified, being Marcella Aywa Katheriner, Aziza Oyiela Idiris, Agnes Atieno Ambunya, Magdalena Olale and Pamela Kadogo. They breathed life to the averments made in the application. They were not cross-examined.

6. As the administrator did not file a reply to the application, the same is not opposed. The five applicants gave oral evidence, and were not cross-examined. Their oral evidence was therefore not controverted. I shall therefore making a finding of fact that the five were in fact daughters of the deceased. I shall also find that they were not consulted nor involved in the process of obtaining the grant and during its confirmation. I shall find as a fact that the estate was distributed amongst the male relatives of the deceased. I shall find that a portion of the estate property was sold after the deceased died and before representation had been obtained.

7. The Law of Succession Act, Cap 160, Laws of Kenya, is often described as a piece of legislation that was enacted way ahead of its time. In most of its provisions it makes no distinction between male and female, and generally treats the two genders evenly. It ousted the application of customary law through its section 2(1). It envisages in its Part V, in cases where the deceased person died intestate, that the estate would be available to both the male and female children of the deceased, regardless of their ages and marital status. Each and every child of the deceased ought to be provided for out of the estate unless and until such child opts out by way of disclaimer or renunciation of right to inherit.

8. I have taken time to peruse through the record before me, and it is quite clear that the applicants, that is to say the daughters of the

deceased, were not disclosed to the court. They were not so disclosed in the letter that the Chief wrote to court to introduce to the court the members of the family of the deceased, neither were they disclosed in the affidavit that the administrator swore in support of his petition. That amounted to concealment of matter from the court. It was a misrepresentation of facts to suit the ends of a particular side or party. Such misrepresentation of facts was fraudulent if it was designed to advantage a certain section of the family of the deceased. The grant was therefore obtained through a defective and fraudulent process, and ran afoul of section 76 of the Law of Succession Act. It is therefore available for revocation.

9. It emerged that a portion of the estate was allegedly sold to Stanley Kiriza Muhindi. This is said to have happened in 1999. The alleged sale happened before grant was made in 2009. The deceased had died in 1989. The law is very clear, by virtue of section 45 of the Law of Succession Act, that no one can lawfully handle estate property unless they have obtained representation to the estate or the law allows them to in some way. Chiefs are allowed, for example, to take steps to secure the estate pending the application for grant. Section 45 makes it a criminal offence for anyone to handle estate property before they obtain authority to handle it. That authority comes from a grant of representation. The mere fact that the handler was surviving spouse or child of the dead owner does not clothe such person with any authority to handle such property. Handling including selling it or leasing it or making a gift of it or taking possession of it, among others.

10. I have seen copy of a sale agreement executed between the said Stanley Kiriza Muhindi and the person who sold it to him, one Leonorah Aloo. The agreement is dated 21<sup>st</sup> January 1998. It was professionally drawn by a firm of advocates, Messrs Saisi & Company Advocates. One of the clauses of the agreement is very that the property was registered in the names of Peter Ambunya Kusul, deceased. Whoever sold the property had not obtained representation to the estate of the deceased, and they acted contrary to section 45 of the Law of Succession Act. Their conduct amounted to intermeddling with property of the estate, and was criminal in nature. The transaction was a criminal activity for which both the seller and the buyer exposed themselves to possible criminal prosecution. The property had not vested in the sellers, by virtue of section 79 of the Law of Succession Act, as at the time of the alleged sale, and therefore they did not, and could not, pass any title to the alleged buyer. The buyer has no claim against the estate, and he is not protected by section 93 of the Law of Succession Act, as he transacted while well aware that the property belonged to a dead person and he was represented by counsel who must have had conducted due diligence before the buyer put his pen on the agreement.

11. I need not say more. I am persuaded that the applicants have made out a case under section 76 of the Law of Succession Act for revocation of the grant herein, on grounds that their names were concealed from the court and that they were excluded from the process of the distribution of the estate. The orders that I shall make in the circumstances are: -

- (a) That the grant herein on 12<sup>th</sup> February 2009 and issued on 19<sup>th</sup> February 2009 to David Shikuku Ambunya is hereby revoked;
- (b) That the orders made herein on 30<sup>th</sup> June 2011 confirming the said grant are hereby set aside, and the certificate of confirmation of grant issued on the strength of the said orders is hereby cancelled;
- (c) That all transactions carried out on the basis of the confirmation orders and the certificate based on the said orders are hereby nullified;
- (d) That I hereby appoint David Shikuku Ambunya and Marcella Aywa Katheriner administrators of the estate of the deceased, and a fresh grant of letters of administration intestate shall issue to them accordingly;
- (e) That the new administrators shall apply for confirmation of their grant within thirty days of date hereof, and the matter shall be mentioned thereafter on a date to be given at the delivery of the judgment for compliance;
- (f) That should the administrators be unable to agree on the filing of the application referred to above, either one or each of them shall be at liberty to file;
- (g) That any daughter of the deceased not interested in a share of the estate shall file an affidavit in the application disclaiming or renouncing their share thereof;
- (h) That any person who shall not be in agreement with the proposals made in the application shall lodge affidavits in protest in accordance with the prescribed procedure; and
- (i) That there shall be no order as to costs.

12. It is so ordered.

**PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 10<sup>th</sup> DAY OF April, 2019**

**W. MUSYOKA**

**JUDGE**