



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 882 OF 2012

IN THE MATTER OF THE ESTATE OF REMKUWI ONGOMA (DECEASED)

RULING

1. The cause herein relates to the estate of Remkuwi Ongoma, the deceased, who died, allegedly, on 16th August 1970 at the age of thirty years old, according to the certificate of death on record. Representation to his estate was sought in this cause by Emmanuel Wanzabasi Musia, and a grant was duly issued on 30th January 2013. The same was obtained on the basis of a letter dated 3rd August 2012 from the Assistant Chief of Shianda Sub-Location, which had indicated that the deceased had died without a family, and was survived by his only brother, Immanuel Wanzabasi Musa.
2. There is another cause relating to the same estate that was initiated in Kakamega HCSC No. 903 of 2012 by Renikiwu Mbundu in his alleged capacity as son of the deceased. There is a certificate of death on record in that cause which indicates that the deceased, his name is given as Renikiwu Mbundu, died on 20th May 1973 at the age of twenty three. The Chief's letter in that cause issued from the office of the Assistant Chief of Eluche Sub-Location on 7th August 2012. The chief indicated that the deceased had been survived by David Jakongo Murunga and Emmanuel Wanzabasi Imbundu, their relationship with the deceased is not disclosed. A grant was not made in that cause following orders that had been made in the instant cause relating to that cause.
3. The orders alluded to in paragraph 2 were made on 8th May 2014. The court required that the files in the two causes be put together, but no order of consolidation was made. Anyhow, the parties entered into a consent on 20th November 2014 in open court. They agreed that a revocation application dated 30th July 2013 filed by David Jakongo Murunga be marked as withdrawn. It was also agreed that the David Jakongo Murunga and the administrator herein be made joint administrators of the estate, and that the two new administrators be at liberty to apply for confirmation. A joint grant to the two was then made to the parties on 27th November 2014.
4. An application was filed herein on 22nd February 2015 dated 17th November 2015, by Emmanuel Wanzabasi Musa, seeking confirmation of the joint grant. The applicant listed himself as the sole survivor of the deceased and proposed distribution of the entire estate to four individuals that he described as purchasers, that is to say Leo Okusumba Okech, Asman Idi Were, Tom Wesonga Mukhwaya and David Chagongo Murunga. The application was urged on 27th October 2016 by Mr. Ombito, counsel for Emmanuel Wanzabasi Musa, and in the absence of the joint administrators. The application was allowed. A certificate of confirmation of grant was duly issued, dated 27th October 2016, distributing the estate equally between Leo Okusumba Okech, Asman Idi Were, Tom Wesonga Mukhwaya and David Chagongo Murunga
5. It is the proceedings of 27th October 2016 that prompted the filing of the application that I am now tasked with determining, the Motion dated 4th September 2017, brought at the instance of David Jakongo Murunga. He seeks review of the orders that were made that day, and prays that that confirmation application be heard afresh after he has been granted a chance to file an affidavit of protest. He says in his supporting affidavit that he was never served with the confirmation application, was unaware that the application was due for hearing on 27th October 2016 and never signed the consents to distribution. He says that the signature in the consent document purported to be his was not his. He asserts that he was not a purchaser as alleged in the confirmation application, but a beneficiary. He concedes that the rest of the individuals named in the application were indeed purchasers. He asserts that he was entitled to half share of the estate, and that the distribution was unfair and oppressive.
6. When the matter was first placed before me on 19th July 2018, both joint administrators were before me. I directed that Emmanuel Wanzabasi be served with the Motion dated 4th September 2018, and he was served in open court. I further directed him to file a response to the application within twenty one days. It would appear that Emmanuel Wanzabasi Musa never filed a reply as I have not seen any in the file of papers before me.
7. The application was argued orally before me on 8th November 2018. Both administrators were in attendance. David Jakongo Murunga described Emmanuel Wanzabasi Musa as his uncle, being his brother's brother. He told me that he was not party to the confirmation application and did not sign any papers. Emmanuel Wanzabasi Musa on his part told the court that he and David Jakongo Murunga had sat and agreed on the confirmation. He said that he signed on the documents on behalf of David Jakongo Murunga as David Jakongo Murunga was away in Uganda. In response, David Jakongo Murunga asserted that he did not attend court at the confirmation hearing, and that

Emmanuel Wanzabasi Musa did everything secretly.

8. The application before me is for review of the confirmation orders made on 27th October 2016. Review is allowed under the Civil Procedure Rules, made under the Civil Procedure Act, Cap 21, Laws of Kenya, and imported into probate practice through Rule 63 of the Probate and Administration Rules. The court can also review its orders in exercise of its inherent powers saved under Rule 73 of the Probate and Administration Rules. Review of court orders is obtained on three general grounds – an error or mistake on the face of the record, discovery of important evidence that was not available at the hearing and any other sufficient reason.

9. David Jakongo Murunga is one of the joint administrators of the estate of the deceased. The application for confirmation of grant was brought at the instance of Emmanuel Wanzabasi Musa. I note that David Jakongo Murunga is alleged to have had consented to the distribution proposed by signing some document that is on record. He denies signing the alleged consent, and Emmanuel Wanzabasi Musa concedes that David Jakongo Murunga did not indeed sign the document and that the signature on the document was in fact his, but appended for David Jakongo Murunga with David's consent. I have looked at the consent document afresh, it does not say that Emmanuel Wanzabasi Musa signed for and with the instructions of David Jakongo Murunga. That can only mean that the signature was affixed without the authority of David Jakongo Murunga, and in criminal law it would be said to be a forged signature.

10. The fact that the signature on the consent form annexed to the confirmation application purported to be that of David Jakongo Murunga when it was not can pass for an error on the face of the record. The court granted orders on the basis of that erroneous signature believing it to be genuine. It can also pass for any other sufficient reason, the fact that the court was misled to rely on a false or forged signature to grant orders.

11. I am persuaded that a case has been made out for review of the orders made on 27th October 2016. I believe that Emmanuel Wanzabasi Musa moved with stealth in that case without notice to David Jakongo Murunga. The orders obtained on the basis of the document where he had appended a false signature cannot possibly stand.

12. The orders that I am moved to make in the circumstances are as follows:

- (a) That this cause and HCSC No. 903 of 2012 are hereby consolidated, with the HCSC No. 882 of 2012 being the lead file;**
- (b) That I hereby vacate the orders made on 27th October 2016 confirming the grant made on 20th November 2014;**
- (c) That as a consequence of (b) above the certificate of confirmation of that grant issued on 27th October 2016 is hereby cancelled and any transactions made on its basis are hereby nullified;**
- (d) That the confirmation application dated 17th November 2015 shall be heard afresh;**
- (e) That David Jakongo Murunga is hereby granted twenty-one days to file an affidavit of protest to the said application;**
- (f) That the matter shall be mentioned after twenty-one days for directions on disposal;**
- (g) That a date for mention for directions shall be given in open court at the delivery of this ruling;**
- (h) That each party shall bear their own costs; and**
- (i) That any party aggrieved by these orders has twenty-eight (28) days to move the Court of Appeal appropriately.**

13. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF JUNE 2019

W MUSYOKA

JUDGE