REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 185 OF 2001

(CONSOLIDATED WITH HCSC NO. 221 OF 2012)

IN THE MATTER OF THE ESTATE OF IBRAHIM SAKWA AMBANI (DECEASED)

RULING

1. The proceedings herein relate to the estate of Ibrahim Sakwa Ambani, who died on 1st March 1998.

2. Representation to his estate was initiated in this cause vide a petition lodged herein on 26th April 2001, by Shem Agido Osege, in his capacity as buyer. I shall hereafter refer to him as the creditor. He expressed the deceased to have had been survived by his two widows, Arangi Injuri Sakwa and Najuma Makokha, and six (6) sons, being Omena Ambani Sakwa, Bainito Mohamed Sakwa, Issa Ndunde Sakwa, Boiti Sakwa, Ngala Sakwa and Ahmad Bremwamdon Kweyu. He was said to have had died possessed of a property known as East Wanga/Isongo/126.

3. The petition attracted an objection to the making of the grant by the sons of the deceased, Ahmed AB Kweyu and Issa Ndunde Sakwa, dated 18th May 2001 and received at the court registry on even date. They argued that they had a better claim to representation than the petitioner. They stated that although the petitioner had brought cases for specific performance the same had been dismissed, and accused him of trying to defraud the family by bringing various suits such as Kakamega CMCCC No. 825 of 1993 and Kakamega HCSC No. 227 of 2000. They said that the money he had paid to the deceased as purchase price had been refunded to him through Messrs. Azangalala & Company, Advocates. He responded to the objection, stating that he had cited the widows but they did not act, hence his petition. He argued that the sons were aware of the citation. He went on to narrate how he had bought a portion of the estate property from the deceased and how he had filed several suits in pursuit of the said parcel of land. The two objectors subsequently filed, on 26th July 2001, an answer to the petition and a petition by way of cross-application.

4. When the matter was placed before Waweru J. on 9th October 2001, it was ordered that, as the objectors were the sons of the deceased they had a superior right to administration over the petitioner, the grant of letters of administration intestate ought to be made to them. The petitioner was directed to prove his decree at the stage of confirmation of grant, while the objectors were directed to serve him with the application for confirmation of grant once they filed one. Letters of administration intestate were duly made to the objectors on 9th October 2001 and a grant duly issued thereafter dated 25th October 2001. I shall hereafter refer to the said objectors as the administrators.

5. The administrators filed herein, on 5th March 2002, a summons for confirmation of grant, of even date. They listed themselves as the survivors of the deceased, together with Ambani Omena Sakwa, Barton Mohamed Sakwa, Boit Mohamed Sakwa, Abubakary Ngani Sakwa, Arangi Injuri Sakwa and Najuma Makokha. They proposed equal distribution of the asset between the six sons, with each taking two (2) acres each.

6. Before the said application was heard, a beneficiary died, being Boit Mohamed Sakwa, and another summons was filed on 17th August 2010, of even date, by Issa Ndunde Sakwa, to essentially remove the name of the late Boit Mohamed Sakwa from the distribution scheme and to have his share divided between Issa Ndunde Sakwa and Omari Ndunde equally. However, the said application also sought confirmation of the grant and proposed a different mode of distribution.

7. On 18th May 2013, another summons for confirmation of grant dated 21st December 2012 was filed herein seeking confirmation of the grant made on 25th October 2001 to Issa Ndunde Sakwa. The scheme of distribution in the new application differed from that presented in the previous applications dated 5th March 2002 and 17th August 2010, in that the estate was proposed to be shared out between four individuals, being Issa Ndunde, taking 6 acres, Ambani Omena Sakwa taking 3 acres, Abubakar Ngani Sakwa and Makokha Boit daughter of Boit Mohamed Sakwa taking 1 acre each.

8. Yet another summons for confirmation of grant was lodged at the registry on 23rd January 2014 by Issa Ndunde Sakwa and Ahmad AB Kweyu, of even date, where the survivors of the deceased were listed as five, being Baton Mohamed, Ambani Omene Sakwa, Ahmad AB Sakwa, Issa Ndunde Sakwa and MM (minor). Two assets were said to be up for distribution, being East Wanga/Isongo/126 and East Wanga/Isongo/2184. East Wanga/Isongo/126 was to go to Ahmad AB Kweyu (2 ½ acres), Ambani Omene Sakwa (3 acres), Abubakary

Ngala Sakwa (2 ½ acres), MM (1 ½ acres) and Issa Ndunde Sakwa (3 acres). It was proposed that East Wanga/Isongo/2184 devolve upon Mohamed Hassan Baton to hold in trust for himself and his named siblings. East Wanga/Isongo/2184. The application dated 22nd January 2014 was allowed on 8th April 2014. The estate was distributed as proposed in the application dated 22nd January 2014, and a certificate of confirmation of grant was duly issued.

9. Then, on 13th April 2015, a summons was lodged at the registry, dated 31st March 2015, at the behest of Shem Agido Were, the creditor, seeking revocation of the grant issued in the cause. His case was that he had bought a portion of the estate property, measuring 4 acres. He stated that he had paid the full purchase price, but the deceased died before the property was excised and transferred to his name. Thereafter, the family of the deceased was not willing to initiate a probate cause to facilitate succession to his estate. Whereupon he caused citations to issue to the widows out of HCSC No. 227 of 2000. When the widows failed to act he initiated the instant cause, but the court directed that the grant be made to the sons, who had objected to his petition. He argued that the administrators failed to abide by the directions of the court of 9th October 2001, that he be served with the confirmation application once one was filed. He said that he came to learn that the grant had been confirmed without his input.

10. While the instant cause was still pending, another cause was initiated with respect to the same estate, in HCSC No. 221 of 2012, by Baton Mohamed, in his capacity as son of the deceased. He listed the survivors of the deceased as himself, a widow known as MM, and a buyer known as Joseph Nanzala Munyendo. He said that the deceased had died possessed of a property known as East Wanga/Isongo/2184. Letter of administration intestate were made to him on 28th November 2012 and a grant was issued to him dated 7th November 2012. He sought confirmation of his grant through a summons dated 4th January 2013, where he proposed distribution of the property between himself and Joseph Nanzala Munyendo, the alleged buyer. The grant was confirmed on 17th July 2013 and a certificate of confirmation of grant was issued, dated 29th July 2013, distributing East Wanga/Isongo/2184 between the administrator (1.47 acres) and Joseph Nanzala Munyendo (1 acre).

11. The events of 17th July 2013 provoked the filing of a summons for revocation of the grant in that cause. The summons was dated 2nd September 2013, and was brought at the instance Zainabu Malwasa Mohamed, a daughter of the deceased. She complained that the deceased was their father, yet the administrator had proceeded to obtain representation and distribution of the property without involving her. She also complained that he had sold part of the estate to Joseph Nanzala Munyendo without her consent.

12. On 10th October 2013 a consent was filed in HCSC No. 221 of 2012, whose effect was to have the two succession causes consolidated, with HCSC No. 185 of 2001 being the lead file, the grant in the two causes were revoked, Issa Ndunde Sakwa and Ahmad AB Kweyu were appointed the joint administrators of the estate and a grant was to issue to them out of HCSC No. 185 of 2001, the registration of East Wanga/Isongo/2184 was to be cancelled and the ownership restored to the name of the deceased, and the new administrators were to apply for confirmation of grant within twenty-one days. The consent was placed before the Deputy Registrar, on 27th December 2013, and the same was adopted as an order of the court.

13. It would appear from the narrative of the events that the application for confirmation of grant dated 22nd January 2014 was filed on the strength of the said of the said consent order, which was apparently recorded in the lead file in HCSC No. 221 of 2012 rather than in the file in HCSC No. 185 of 2000. The grant that was confirmed was the one made after the consolidation. It was the same grant that was sought to be revoked through the application dated 31st March 2015.

14. The handling of the file after the consolidation, as evidenced by paragraph 13 above, has been haphazard. Although the lead file should be that in HCSC No. 185 of 2001, the clerks have been filing documents and minuting appearances in HCSC No. 221 of 2012 instead of HCSC No. 185 of 2001. This has created confusion. For example, there are two sets of directions on the disposal of the application dated 31st March 2015. One set is in HCSC No. 185 of 2000, by Njagi J., on 4th April 2017, to the effect that the said application be disposed of by way of oral or *viva voce* evidence. The directions were made in the presence of Mr. Mango and Mr. Shivega for the parties. It was Mr. Mango who had asked for the directions in the terms given by Njagi J. The other set of directions were given by me on 27th November 2018 in minutes recorded in HCSC No. 221 of 2012, in the presence of Mr. Mango and Miss Masakhwe, for disposal of the application by way of written submissions. The terms were proposed by Mr Mango. Curiously, Mr. Mango did not bring to my attention the fact that he had procured the making of contrary directions earlier on 4th April 2017 in the other file.

15. I have carefully considered the directions that I made on 27th November 2018 as against those that Njagi J. made on 4th April 2017. I believe the directions by Njagi J. were more appropriate. The application for disposal is that for revocation of grant. The applicant alleged that he had bought land from the deceased. He had attached no documents to support his case, yet under the Law of Contract Act, Cap 3, Laws of Kenya, a contract to dispose of land must be evidenced by some memorandum in writing. He also said he had a decree of a competent court to his favour against the estate. How would the applicant have established his case without any supporting documents if the matter were to be disposed of by way of written submissions? It would appear to me that Mr. Mango had not properly evaluated his client's application before he chose to vary the directions that Njagi J. had given on 4th April 2017.

16. The other issue that has exercised my mind is the adoption, by the Deputy Registrar, of the consent comprised in the letter of 27th September 2013. Adoption, by a judicial officer, of a consent arrived at by the parties is a judicial function, it is not an administrative function. The adoption of a consent, therefore, must be by the judicial officer with the jurisdiction to make the orders the subject of the consent. The adoption of a consent makes it an order of the court, and for it to have the strength of such an order, it must be done by the judicial officer who would in the first place have the jurisdiction to make the order sought to be made by consent. The order proposed in a consent in effect becomes the order of the judicial officer adopting or recording the consent.

17. The Deputy Registrar acts as an administrative officer within the scheme of things at the High Court. He or she handles the administrative functions, or the administrative side of things, at the High Court. He or she has a limited judicial mandate with respect to High Court judicial functions. The principal judicial functions remain the preserve of the Judge of the High Court of Kenya, who cannot delegate them to the Deputy Registrar. It would appear to me that where a Deputy Registrar purports to adopt a consent which results in the making of

court orders that he or she would not have had the power or jurisdiction to make in the first place would result in a consent order that is invalid or null and void.

18. The question that I am asking myself in the instant case is whether the Deputy Registrar could legitimately adopt the consent comprised in the letter dated 27th September 2013, so as to record the orders that she purported to make on 27th December 2013. I think not. The orders proposed by consent in the said letter were for consolidation of two High Court succession causes, revocation of grants of representation that had been made in the two High Court causes, appointment of administrators from a High Court cause, cancellation of registration of title to land and restoration of the name of the deceased in the register, and directions to administrators to file an application for confirmation of their grant. A Deputy Registrar does not occupy the office of a Judge of the High Court. The practice in the Kenyan judiciary is that the position of Deputy Registrar is occupied by a magistrate. As stated above, the role of the Deputy Registrar at the High Court is largely administrative. He or she would have no power or jurisdiction to exercise the powers or jurisdiction that is reserved for the Judge of the High Court. That would mean that he or she cannot substitute the Judge by granting orders that only the Judge of the High Court has jurisdiction to grant.

19. In the context of the instant cause it meant that all the orders that were proposed in the consent letter of 27th September 2013 could only issue from a Judge and not a Deputy Registrar, for the Deputy Registrar has no power, in a probate cause pending at the High Court, to order consolidation of causes, to appoint administrators, to revoke grants made by a Judge, to cancel titles and order restoration of the name of the original proprietor of the subject land, and to direct an administrator to file for confirmation of his grant. By adopting the consent comprised in the consent letter of 27th September 2013, the Deputy Registrar purported to make the orders that were proposed in that consent letter, yet she had no power or jurisdiction to make any such orders and to give any such directions. Orders made without jurisdiction are of no effect. The purported adoption by the Deputy Registrar, on 27th December 2013, of the consent orders proposed in the letter of 27th September 2013, resulted in the making of orders that were of no effect at all, to the extent that the said orders were made without jurisdiction. All the proceedings that were conducted on the strength of those orders were equally null and void.

20. The next issue for me to consider is the case of Shem Agido Osege, the claimant against the estate of the deceased. He had caused citations to issue in 2000 against the survivors of the deceased, after they failed to seek representation to the estate of the deceased, so that he could place his claim with the administrators. When they failed to respond to the citations, he initiated this cause. The sons of the deceased, who were eventually appointed administrators, did not initiate the cause, they only came in to ride on his petition as objectors, whereupon Waweru J. appointed them administrators.

21. The issue is not some much about how the sons of the deceased got appointed administrators but the directions that Waweru J. gave them after their appointment. This is what Waweru J. ordered on 9th October 2001:

> *"The objectors being the sons of the deceased, have much greater priority to administer the estate of the deceased than the petitioner who admits that he is not related to the deceased. I will therefore order that a grant of representation do issue jointly to the two objectors. The petitioner is at liberty now to enforce any decree he may have against the deceased through the administrators. He can do so at the confirmation stage of these proceedings. Towards this end the objectors are hereby ordered to serve upon him their application for confirmation of grant once they file one. "*

22. The directions by Waweru J was very clear, that he would not appoint the creditor administrator, instead he shall appoint the sons of the administrators into that office, but the said sons shall have to serve the creditor with their summons for confirmation of grant once they filed one, so that he could prove his claim in those proceedings.

23. Did the administrators comply with the said directions of 9th October 2001? They filed three confirmation applications, before the purported consolidation of the two causes, through the ineffectual order of the Deputy Registrar of 27th December 2013. I have closely perused through the record in HCSC No. 185 of 2001 and I have found no indication whatsoever that the administrators made any attempt to serve the said applications on the creditor as had been directed by Waweru J. There are no affidavits of service on record with regard to the three applications. The creditor, no doubt on account of the lack of service, did not file any affidavits of protest to the said applications in an effort to prove his claim. Although the administrators were well aware of his claim from his filings at the objection stage, they did not provide for him in the distributions that they proposed in the three applications. Indeed, knowing that there was a declared claimant to a share in the estate should have prompted them to serve him with the applications so that he could raise his protest, for the court to deal with the dispute with finality. One can only conclude that there was a desire on the part of the administrators to ignore or disregard or disobey express court orders. Even after the ill-fated adoption of the consent, the administrators once again proceeded as if Waweru J had not given any orders or directions with regard to how the creditor's claim was to be handled. This clearly reeks of dishonesty and sheer fraud.

24. Enough said on that subject. What should be the way forward? A court order cannot be ignored. It has to be given effect. Whether or not the creditor has a valid claim against the estate can only be determined in a confirmation application. As stated above the proceedings of 8th April 2014 were illegitimate so long as they were mounted on orders that were made without jurisdiction.

25. The orders that I shall finally make are as follows:

> **(a) That the consent orders that were recorded on 27th December 2013 were null and void, for the reasons given above, and so were all the proceedings conducted and processes undertaken on the basis of the said orders, including the purported confirmation of the grant on 8th April 2014;**
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> **(b) That I hereby confirm the consolidation of the two causes herein, with the lead file being HCSC No. 185 of 2001;**
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> **(c) That I hereby confirm Issa Ndunde Sakwa and Ahmad AB Kweyu as administrators of the estate of the deceased, all previous grants of representation intestate issued to them are hereby revoked, and a fresh grant shall issue to them from the**

consolidated cause;

(d) That the said Issa Ndunde Sakwa and Ahmad AB Kweyu shall apply for confirmation of their grant within the next thirty (30) days of the delivery of this ruling;

(e) That the said Issa Ndunde Sakwa and Ahmad AB Kweyu shall serve Shem Agido Osege with the confirmation application to be filed under (d) above, as had been ordered by Waweru J. on 9th October 2001;

(f) That the said Shem Agido Osege shall, if so minded, file an affidavit of protest to the said application, within twenty-one (21) days of service, stating his case, and he shall serve his protest on the administrators;

(g) That the matter shall thereafter be mentioned for directions on a date that shall be given at the delivery of this my ruling;

(h) That Shem Agido Osege shall have the costs of the application; and

(i) That should any party be aggrieved by these orders, there is liberty to move the Court of Appeal appropriately, within twenty-eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26th DAY OF July, 2019

W. MUSYOKA

JUDGE