REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO 157 OF 1992

IN THE MATTER OF THE ESTATE OF LUKA MODOLE (DECEASED)

RULING

1. On 10th December 2018 I gave directions to the effect that an application dated 27th July 2018 and a preliminary objection dated 31st October 2018 be disposed of simultaneously.

2. Before I start to consider the two processes on their merits, I shall first look go through the factual background to the dispute, as captured by the record before me, as a prelude to determining the issues at hand.

3. This cause relates to the estate of a person known as Luka Modole, who died on 15th January 1974. A letter from the Assistant Chief of Jivovoli Sub-Location, dated 2nd June 1992, indicates that he had been married to only one wife, identified as Tebla Vugutsa Modole. The said Tebla Vugutsa Modole then filed a petition in this cause on 4th June 1992 seeking representation to the estate of the deceased, in her capacity as his widow. She expressed the deceased to have been survived by her and two other individuals known as Solomon Chugali and Kefa Keyaniri, whose actual relationship with the deceased was not disclose in the petition. The deceased was expressed to have had died possessed of two assets, being Kak/Shamakhokho/607 and 678. A liability was indicated as Elijah G. Ashubwa, a purchaser. Letters of administration intestate were made to her on 28th August 1992 and a grant in that behalf issued on 8th September 1992. I shall accordingly hereafter refer to her as the administratrix. The same was confirmed in proceedings conducted on 29th April 1993, on an application dated 8th April 1993. A certificate of confirmation of grant was subsequently issued dated 29th April 1993. According to the distribution reflected in that certificate, Kak/Shamakhokho/607 devolved upon the purchaser, Elijah G. Ashubwa, while Kak/Shamakhokho/678 devolved upon the widow/administratrix, Tebla Vugutsa Modole.

4. All was quiet in the matter until 1st October 2018, when Gladys Muhonja Khiyaniri filed a summons, dated 27th October 2018, seeking a variety of orders, the principal order of which is revocation of the grant made to the administratrix on 28th August 1992. I shall hereafter refer to her as the applicant. Her case is that the grant was obtained secretly and certain facts were concealed from the court, such the names of some of the survivors of the deceased. She avers that she was a daughter-in-law of the deceased on account of being the widow of one of his sons known as Kefa Khiyaniri Modole. She complains that the said son, though listed in the petition as such, was not involved in the confirmation process and was disinherited. She further states that she had children with her late husband, who were grandchildren of the deceased. She accuses the administratrix of disposing estate property to the detriment of the heirs, particularly those of her late husband. She also complains about the devolution of Kak/Shamakhokho/607 to Elijah G. Ashubwa, who she describes as a stranger to the family.

5. To that application, the administratrix filed a reply, being an affidavit she swore on 16th October 2018. She acknowledges that the applicant had been married to her son, Kefa Khiyaniri, but avers that she had left him and their children, and that it was the administratrix who had raised Kefa Khayiniri's children. She asserts that her son lived the life of a bachelor after the applicant left him, and that he died and was buried like a bachelor. She asserts that she obtained her grant and had it confirmed during the life time of Kefa Khayiniri, who did not raise any objection at all at any stage of the succession cause. She mentions that the applicant had not disclosed that she had filed numerous suits seeking to recover the land, but to no avail. The suits mentioned include Hamisi PMCCC No. 46 of 2015, Kakamega CMCL&E No. 379 of 2018 and Hamisi PMCELC No. 9 of 2018. She states that the matter was being brought too late in the day after over twenty years after grant was made and confirmed. She says that the daughters of Kefa Khayiniri are married and settled with their husbands, while his son Shavasinya Khayiniri has been settled on a portion of the land.

6. The applicant then filed a response through an affidavit she swore on 27th October 2018. She states that she never deserted or was separated from her husband, Kefa Khayiniri, for all the while he was alive until he died in 1999. She asserts that she had a direct interest in the land for the benefit of her late husband's children who were grandchildren of the deceased. She avers that the fact of the marriage of her daughters did not disentitle them to inheritance. She states that the succession proceedings were initiated secretly and her husband did not attend court at confirmation of the grant, neither did he consent to the distribution. She concedes to filing the numerous suits against the administratrix but says that she withdrew some when she realized that some were filed at the wrong court. She has annexed to her affidavit an affidavit sworn by her brother, Ellam Indolaji Lugano, on 27th October 2018, to confirm that she was married to the late Kefa Khayiniri and was never separated from him prior to his demise.

7. The administratrix filed a reply through an affidavit she swore on 31st October 2018. She says that the Hamisi case in PMCELC No. 9 of

2018 was dismissed on 2nd August 2018 and that it was upon that dismissal that the applicant has now come into this cause. She reiterates that she inherited the subject property through a succession process during the applicant's late husband's lifetime, yet he did not raise any objection. She contends that after the applicant's late husband died in 1999 the applicant did not lay any claim to the property until recently. She further contends that the children of the applicant were all adults, were aware of the status of the property, yet they themselves did not raise any objection. She asserts that the applicant cannot purport to speak on behalf of her adult children. She further asserts that she had a superior claim to the property in law compared with the applicant and her children.

8. Contemporaneously with the affidavit, the administratrix filed a notice of the preliminary objection dated 31st October 2018. She says that the matters raised were *res judicata* to the extent that they touch on the same issues as those determined in Hamisi PMCELC No. 9 of 2018, the application offends section 26(1)(a)(b) of the Land Registration Act, and that the applicant's claims were statute-barred.

9. The directions I gave on 10th December 2018 included an order that the application and the preliminary objection be disposed of by way of written submissions. The parties have complied and have filed detailed written submissions, complete with the authorities that they propose to rely on.

10. I will first address myself to the preliminary objection. The position on preliminary objections is fairly well settled. As was stated in *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited* (1969) EA 696, a preliminary objection should be founded on a pure point of law, so that any objection that would depend on certain facts being placed before the court would not qualify to be a preliminary objection, as it would not be founded on a pure point of law, and it would require affidavits to place certain facts and documents before the court to determine the issues raised.

11. In the instant case, I am told that there were other causes or suits by the applicant over the same land, and, therefore, the matter was *res judicata*, that I have no jurisdiction and that the application was statute-barred. To determine those issues, the administratrix would have to have the pleadings, proceedings and determinations in those other suits placed before me so that I can assess whether or not the issues raised in the instant application were *res judicata* or that I lacked jurisdiction or the application was statute-barred. These are not matters that I can determine by merely looking at the application or the pleadings before me. Such pleadings, proceedings and determinations are matters of evidence. Therefore, the objection raised is not of the kind that can be determined without evidence, and it is, therefore, not a preliminary objection.

12. I will now turn to the application itself. It is premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, which provides as follows:

> *"76. Revocation or annulment of grant A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion— (a) that the proceedings to obtain the grant were defective in substance; (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case; (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently; (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either— (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or (ii) to proceed diligently with the administration of the estate; or (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or (e) that the grant has become useless and inoperative through subsequent circumstances."*

13. Under section 76, a grant of representation may be revoked on three general grounds. The first is where there were issues with the manner in which the grant was obtained. It must be demonstrated that the process was defective or deficient in some way. It may also be demonstrated that the process was fraudulent in that there was either misrepresentation of facts or concealment of important facts from the court. The second is whether the grant is obtained properly but there are challenges in the manner the grant-holder goes about the administration. It would mean maladministration generally, such as where the grant-holder fails to apply for confirmation of their grant within the period allowed in law or fails to proceed diligently with administration of the estate or fails to render accounts as and when required to. The third one is where the grant has become useless or inoperative due to subsequent events, such as the death of a sole administrator.

14. In the instant application, the principal ground for seeking revocation is that the administratrix obtained the grant through a fraudulent process. The applicant identifies several factors on the face of her summons. The first, she says, is that the grant was obtained secretly and there was concealment of facts, in that not all the beneficiaries were disclosed to the court, her consent or approval was not obtained despite her being a beneficiary and that administratix secretly registered the estate in her name yet she was only entitled to life interest.

15. The first issue to consider, and upon which I believe all the other issues turn, is the status of the applicant with regard to the estate of the deceased. She was not a child of the deceased. Her connection with him is that she married one of the sons of the deceased. That made her a daughter-in-law of the deceased. The question that arises is whether a daughter-in-law can be considered to be a survivor or heir to the estate of their parent-in-law.

16. The deceased herein died intestate in 1974. That was before the Law of Succession Act came into force. That would mean, by virtue of section 2(1)(2) of the Law of Succession Act, his estate fell for distribution in accordance with the relevant Luhya customary succession law, for the parties herein appear to be of Luhya ethnicity.

17. Under intestacy, whether statutory or founded on customary law, the heirs or survivors of a dead person should be his blood kin. The property should therefore devolve upon the blood relatives of the dead man. That would mean it should pass to his sons and daughters, and in the event any of the sons or daughters are dead, to the children of such dead sons or daughters of the deceased, meaning to his grandchildren. The only non-blood relative of the deceased who would be entitled to such estate would be the surviving spouse. Otherwise, to successfully

stake a claim to the estate of a dead person one has to demonstrate blood kinship to the departed. As such the applicant, being a daughter-in-law, is not a blood relative of the deceased, and she is not among those entitled in intestacy to a share in his estate.

18. According to Eugene Cotran, in *Restatement of African Law 2 Kenya II: Law of Succession*, Sweet & Maxwell, London, 1969, pages 45 to 48, inclusive, the person entitled under luhya law to the estate of a married man with children would be his widow and children. Daughters-in-law do not fall under the category of children, and they are not entitled to anything out of the estate of their father-in-law. If they have children with their late husbands, it would be their children, who are also grandchildren of the dead father-in-law, who would be entitled.

19. The position stated in the African customary law of intestacy is reflected in the provisions in Part V of the Law of Succession Act, which deal with intestacy. The persons said to be entitled under section 34 through to section 41 are the blood relatives of the deceased person, plus any surviving spouse.

20. The applicant herein, therefore, whether under customary law or under statute, is not a person who would be entitled to a share in the estate of the deceased. She cannot, therefore, assert that she was entitled to be consulted or notified or informed of the goings on in the estate. She has no legal standing to claim anything from the estate in her capacity as daughter-in-law.

21. From her affidavits it is plain that she is aware of that, but appears to argue that she claims on behalf of her late husband and again on behalf of her children. By claiming to be staking a claim of what should have devolved to her late husband, the applicant is in effect saying that she is claiming on behalf of her husband's estate. For her to claim on behalf of anybody's estate she must establish that she has the requisite authority to represent such estate, for, under section 45 of the Law of Succession Act, the property of a dead person can only be dealt with by a person who has the requisite authority to handle it. under that provision she can only do so if she has a grant of representation.

22. Handling the property of a dead person without authority amounts to intermeddling, which is outlawed by section 45 of the Law of Succession Act. For avoidance of doubt the said provisions states as follows:

> "*45. No intermeddling with property of deceased person*
>
> *(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose,*
>
> *take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*
>
> *(2) Any person who contravenes the provisions of this section shall—*
>
> *(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*
>
> *(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."*

23. Asserting the rights of a dead person to property, whether or not the same is property in the estate of another, has been held to amount to intermeddling with the estate of the deceased person. Filing suits to asserts such rights without such grant falls within intermeddling. See *Gitau and two others vs. Wandai and five others* [1989] KLR 231.

24. The applicant herein has not claimed to be administratrix of the estate of her late husband. She has not exhibited any grant of representation that she had previously obtained from any court of competent jurisdiction. She, therefore, has no legal standing to speak on behalf of her late husband or on behalf of his estate. She is an intermeddler to the extent that she claims to speak or act on behalf of a dead person regarding his property or estate without the requisite legal authorization to do so.

25. As to whether she can speak on behalf of her children, I do note that the said children are not minors. The administratrix has asserted that they are all adults, and the applicant has not refuted that. Indeed, she appears to concur that they were adult. That being the case, she cannot speak for them, unless they have appointed her as their attorney. No power of attorney has been shown to me. If the children were minors or underage, no doubt the position would be different for she would be entitled to represent them as their guardian.

26. The overview above, would establish that the applicant has no locus to mount the application herein on her own behalf or that of the estate of her late husband or on behalf of her adult children.

27. I note that the administratrix herein is the surviving widow of the deceased. Under section 66 of the Law of Succession Act, which provides for appointment of administrators in intestacy, and which should be read together with section 2(2) of the same Act, the law gives the surviving widow the prior right to administration of an estate over the children. She has the greatest stake in the estate. The court can only exercise discretion to appoint someone other than the widow where there exist compelling reasons. The only interest that can compete with that of a surviving widow, with respect to entitlement to appointment as administrator, would be that of a surviving co-wife. Section 66 says:

> "*66. Preference to be given to certain persons to administer where deceased died intestate*

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom

a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will."

While section 2(2) provides:

"2. Application of Act

(1) …

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act. (3) …

(4…"

28. Then there is Rule 7(7) of the Probate and Administration Rules, which requires consents of survivors to a petition for representation. Such consents or approval is only required with respect to applications by persons who have a lesser entitlement to a grant of representation. Rule 7(7) states as follows:

"Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that very person having a prior preference to a grant by virtue of that section has –

(a) renounced his right generally to apply for a grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him either to renounce such right or to apply for a grant."

29. The administratrix is the surviving spouse of the deceased. She had prior right to administration of the estate over her two children named in her petition. The deceased was apparently not a polygamist, so there is no co-widow to offer competing rights to administration or to enjoy equal rights with her over the same. Having a prior entitlement to administration would mean that Rule 7(7) did not apply to her. There was, therefore, no need for her to obtain consents or approvals from anyone, or to get anyone to renounce their right to administration, or to have citations issued to anyone. There was, therefore, nothing untoward in not having obtained any consents from the late husband of the applicant. There would have been absolutely no need for her to obtain the applicant's approval or consent given that the applicant did not even qualify, under section 66 of the Law of Succession Act, for any form of preference so far as appointment as administrator was concerned.

30. The other issue that the applicant raises is that not all the beneficiaries to the estate were shown or disclosed to the court. From the material disclosed by both the applicant and the administratrix, the deceased herein was survived by a widow and two sons. These were disclosed in the petition. It is only these two categories of survivors who have prior right to the estate. Grandchildren need not be disclosed for they are not entitled to the estate of their grandparent, for they are supposed to take through their own parents. Grandchildren are a factor only where their own parents are dead, whereupon they would come in by virtue of the principle of representation, to take the share that their dead parents would have taken as children of the deceased. In the instant case, the applicant has not demonstrated that there were other survivors of the deceased apart from the widow herein and the two sons disclosed in the petition. It would appear that the persons she alludes to as not being disclosed are herself and her children. I have held above that by virtue of her not being a blood relative of the deceased she was not one his survivors, and, therefore, there was no obligation in law for her to be disclosed as a beneficiary or survivor for she was not one. Regarding her children, I reiterate what I have stated above, grandchildren would only need to be disclosed where their own parents are dead. At the time the petition herein was being lodged in court the father of her children was alive, and, therefore, there was no need for their listing in the petition as survivors of the deceased.

31. For avoidance of doubt, it is important to cite the relevant provisions of the law on this. Section 51 of the Law of Succession Act provides

for applications for grants of representation. Sub-section (2) thereof is explicit on the information that ought to be disclosed in the application or petition. For purposes of this ruling, the relevant part is paragraph (g), which says:

> *"51. Application for grant*
>
> *(1) …*
>
> *(2) Every application shall include information as to—*
>
> *(a) …*
>
> *(b) …*
>
> *(c) …*
>
> *(d) …*
>
> *(e) …*
>
> *(f) …*
>
> *(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;*
>
> *(h) …*
>
> *(i) ..."*

32. I am alive to the fact that section 41 of the Law of Succession Act applies only to estates of persons who died after the Act came into force. However, the principles governing intestacy under statute and that under customary law are almost complementary, save only regarding gender imbalance. What is stated in section 41 should be of almost equal application to the customary law position. Section 41 states the position, *inter alia*, regarding the rights of children whose parents have died before inheriting their share of their own parents' estate, and it says as follows:

> *"41. Property devolving upon child to be held in trust*
>
> *Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate."*

33. From the two provisions above, it is clear to my mind that there was no obligation on the part of the administratrix, in her petition for representation lodged herein, to disclose either the applicant herein or her children.

34. The other arguments in the application turn on the confirmation application, the orders made on it, and the events that followed thereafter. I have perused the provision in section 76 of the Law of Succession Act. I am satisfied that a grant can only be revoked on the three general grounds listed in that provision. There is nothing in the other arguments advanced by the applicant in her application that would warrant revocation of the grant herein. If there were issues regarding the way the grant was confirmed, then the proper course of action ought not be revocation of the grant herein, but an application to review the orders made therein. Problems arising from the confirmation process do not fall under the purview of section 76, and a grant of representation cannot be revoked on the basis of the said law.

35. I need not say more. From what I have said so far, there is ample material upon which I should conclude that the summons dated 27th September 2018 has not disclosed sufficient merit to warrant revocation of the grant herein. The said summons qualifies for dismissal, and I hereby dismiss the same with costs. The conservatory orders that were made on 3rd October 2018, on the basis of the said application, are hereby discharged. It is so ordered. Any party aggrieved by the orders that I have made herein above is at liberty to move to court of Appeal appropriately in the next twenty eight (28) days of the date of this ruling.

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

W. MUSYOKA

JUDGE