



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 46 OF 1995**

**IN THE MATTER OF THE ESTATE OF TOMAS AVURUKWA (DECEASED)**

**RULING**

1. I am tasked with determining two applications, dated 26<sup>th</sup> August 2016 and 4<sup>th</sup> October 2016.
2. The application dated 26<sup>th</sup> August 2016 is a Motion premised on rule 73 of the Probate and Administration Rules. It seeks removal of a restriction placed against Nyang'ori/Hamisi B/205 by Frederick Oliaka. It is brought at the instance of John Mukhunzi Avurukwa, who is the administrator of the estate. He avers that the grant herein was confirmed in 2014 and the parcel of land shared out amongst several individuals. He states that there are no pending disputes on distribution, but complains that he is unable to distribute the property on account of a restriction placed against the title. Attached to the affidavit in support are several documents. There is copy of official search dated 5<sup>th</sup> June 2014 which indicates that a restriction was placed therein on 14<sup>th</sup> November 1995 to bar dealings on the parcel until the succession cause was finalized. There is also copy of certificate of confirmation of grant dated 27<sup>th</sup> November 2014 which indicates that the subject property was to be shared by five individuals in stated proportions.
3. It is opposed by Frederick Aliaka through an affidavit sworn on 4<sup>th</sup> October 2016. He avers that the applicant was not a member of the family of the deceased and was not entitled to the estate. He states that the proceedings relating to the estate proceeded without notice to the actual survivors of the deceased. He calls for a distribution of the estate in a manner that is fair to all the beneficiaries.
4. The application dated 4<sup>th</sup> October 2016 is premised on sections 26, 28, 29, 45, 47 and 73 of the Law of Succession Act, Cap 160, Laws of Kenya. It seeks orders to restrain the administrator from dealing with the subject property pending the hearing and determination of the application. It also seeks the dissolution of the trust created in the names of Jacob Mukhunzi, Fred Shamwama, Tom Shialaka, George Avudu and Collins Vwamu. It is brought at the instance of Frederick Aliaka, who claims to be one of the beneficiaries of the estate of the deceased. He states that a section of the family of the deceased was excluded at confirmation of grant and was therefore not given a share in the estate. He asserts that if the orders sought in the application dated 26<sup>th</sup> August 2016 are granted then some family members would be disadvantaged. He says that the estate ought to be preserved pending the hearing and determination of the instant application which he says is for revocation of the grant.
5. There is opposition to the application through two affidavits of the administrator sworn on 24<sup>th</sup> October 2016. He asserts that the deceased was his father, who was survived by three sons, being himself, Hezron Aliaka and Jacob Aliaka. He asserts that the estate was shared out amongst the families of the three sons of the deceased. He states that Hezron Aliaka is the father of the applicant herein, Frederick Aliaka. There are other two affidavits on record. There is one by Rita Mukonochi Aliaka, a widow of Hezron Aliaka.

She alleges that she was chased away from court when the matter came up for confirmation of grant and therefore she did not participate in the distribution of the estate. Deinah Inyangu swore her affidavit on 7<sup>th</sup> November 2016. She claims to be a daughter of the deceased. She alleges that the deceased had three wives and several children, most of whom have not been provided for in these proceedings. She supports the application dated 4<sup>th</sup> October 2016. She suggests that the administrator was not even a child of the deceased.

6. Directions were given on 22<sup>nd</sup> February 2016 that the applications would be disposed of by way of written submissions. There has been compliance with the directions for both sides have filed their detailed written submissions. I have read through them and noted the arguments advanced.

7. The application dated 4<sup>th</sup> October 2016 is no doubt a reaction to that dated 26<sup>th</sup> August 2016. It appears to have been drafted in haste for it is poorly conceived. It is headed summons for rectification of grant yet nothing in its body nor in the affidavit sworn in support dwell on rectification of the grant. Indeed, there is nothing in it about rectifying a grant. In any event, the applicant is not administrator of the estate of the deceased, yet Rule 43(1) of the Probate and Administration Rules, which provides the procedure for rectification of grants, is specific that an application in that behalf can only be brought at the behest of a grant holder. The application is also mounted on the provisions in Part III of the Law of Succession Act, specifically sections 26, 28 and 29, which deal with reasonable provision. Curiously there is nothing in the body of the application, and the affidavit in support, which address reasonable provision.

8. It seeks restraining orders in two prayers, to bar the administrator from handling estate property. The restraining orders are sought on a temporary basis, pending hearing and determination of the instant application which is described in one of the prayers, and also in the affidavit, as seeking revocation of the grant. Interestingly, the application has no prayers for revocation of the grant, and clearly a secondary restraining prayer riding on a non-existent primary prayer for revocation of grant cannot possibly be available for granting. In any case, the estate of the deceased vests in the administrator, by virtue of section 79 of the Law of Succession Act, and injunctive relief cannot be available to restrain a legal owner of property from exercising rights of ownership over the property that vests in them.

9. My attention has been drawn to the fact that the issue as to who were entitled to inherit the estate of the deceased was dealt with early in the cause by Tanui J, in objection proceedings mounted by the administrator herein. Tanui J delivered a ruling herein thereon on 19<sup>th</sup> March 1998. The court made a finding that it was the three sons of the deceased who were entitled to inherit from the estate of the deceased. The three sons were identified as Hezron Aluga, Jacob and John Mukhunzi, the same persons that the administrator herein has been urging were the survivors of the deceased. The question as to who the rightful survivors or heirs of the deceased were was therefore determined a long time ago. It is now water under the bridge. It has not been demonstrated that the findings by Tanui J were ever challenged on appeal and set aside. The issues the applicant raises around certain persons being excluded from benefit are matters that are obviously *res judicata*.

10. I believe that I have said enough about the application dated 4<sup>th</sup> October 2016.

11. The application dated 26<sup>th</sup> August 2016 is by the administrator seeking the removal of a restriction against the title so as to facilitate distribution. The caution had been registered in 1995 by Rodah Monyani Avurukwa, the petitioner who initiated this cause. In the ruling of 19<sup>th</sup> March 1998, the court held that the said petitioner was not a wife of the deceased as at the time of his death and therefore she was not entitled to his estate. That laid to rest her claim to the estate. There can be no reason at all for the restriction to remain in place. Although the application talks of a restriction filed by Fredrick Oliaka, a copy of such a restriction has not been placed before me.

12. The orders that I shall make in the circumstances are as follows -.

**(a) That the application dated 26<sup>th</sup> August 2016 is allowed in terms of prayers 1 and 2 thereof;**

**(b) That the application dated 4<sup>th</sup> October 2016 is hereby dismissed;**

**(c) That Frederick Oliaka alias Frederick Shamwama Aliaka shall bear the costs of both applications; and**

**(d) That any party aggrieved by the orders made herein has the liberty to challenge the same at the Court of Appeal within twenty-eight (28) days of date hereof.**

**DATED, SIGNED and DELIVERED at KAKAMEGA this 27<sup>th</sup> DAY OF September, 2018.**

**W. MUSYOKA**

**JUDGE**