



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 377 OF 2006

IN THE MATTER OF THE ESTATE OF SAMUEL AMALEMBA SHIVACHI (DECEASED)

RULING

1. The deceased herein died on 19th September 2003. Representation to his estate was sought in this cause vide a petition lodged herein by Johnah Shivachi Amalemba, in his capacity as son of the deceased. A grant of letters of administration intestate was made to him on 11th January 2007. The said grant was confirmed on 29th May 2008. There is a certificate of confirmation of grant on record dated 12th June 2008. Two assets of the deceased's estate were distributed, so that Kakamega/Iguhu/1149 was shared out between Johnah Shivachi Amalemba, Patrick M. Ongaya, Simeon Shivachi Shigali, Alister Amalemba and Calistus Amalemba, and Kakamega/Iguhu/1752 was shared out between Johnah Shivachi Amalemba and Akiff Shitsukane at divers proportions.
2. The initial administrator died on 13th December 2012, and was replaced by his widow, Margaret Mwarisi Johnah. A fresh grant of letters of administration intestate was issued to her, dated 21st May 2013. The certificate of confirmation of grant was amended on 21st May 2013 where the name of the dead administrator was replaced with that of the new administrator.
3. A summons for revocation of grant dated 28th October, 2013 was lodged herein on even date. It was filed at the instance of Alistair Amalemba Masinjira and Bavon Shikali Amalemba. They seek that the grant made to Margaret Mwarisi Johnah be revoked and that the trust vested in her for the benefit of Alister Amalemba and Calistus Amalemba be removed. The administrator is the mother of the applicants and they argue that she is not administering the estate diligently and that she is disposing of the estate's assets without considering the interest of the other beneficiaries. They seek that the estate be distributed afresh where the interests of all the beneficiaries are considered.
4. The administrator responded to the application vide her affidavit sworn on 14th April 2014. The administrator states that she is a daughter-in-law of the deceased by dint of being the widow of his late son, Johnah Shivachi Amalemba. She avers that her mother-in-law, the wife of the deceased herein, was also deceased. The deceased was said to have had two sons, Johnah Shivachi and Isaac Masinjira, both deceased. She states that the persons who now survive the deceased are herself and the deceased's grandchildren. She names the children sired by the two late sons of the deceased to be as follows: the children of Johnah Shivachi – Maureen Lidembekho and Bavon Shikali, the applicant herein, and the children of Isaac Masinjira – Alistair Amalemba, the other applicant, Calistus Amalemba, Ackiff Shitsukane and Viona Mmbone. She states that the land was to be shared equally between the two sons of the deceased after deducting the portions thereof sold by the deceased, his wife and the sons. She asserts that that was done at the confirmation of the grant. She avers that at confirmation the applicants herein were minors and it was for that reason that she took up administration and was entrusted with holding the property for them until they attained majority age. She states that Bavon Shikali was her stepson and that she was going to share out what was due to her husband between the said Bavon Shikali, herself and her daughter Maureen Lidembekho. She says that Alistair Amalemba Masinjira has attained majority age and she has no objection to him getting his full share together with his siblings, save for Ackiff Shitsukane who was still a minor, whose interest should remain in trust until he comes of age. She states that the distribution allowed by the court should stand, save that the trusts should be terminated. She accuses the applicants of delaying finalization of the transmissions to the named beneficiaries by filing multiple applications and cautions against the title. She urges that the application be dismissed.
5. The reply elicited a response from Bavon Shikali Amalemba, who swore a supplementary affidavit on 27th October 2014. He complains that the administrator had included in her reply Calistus Amalemba who was not a member of the family of the deceased, while omitting Edwin Masinjira, who was a dependant of the estate. He asserts that the deceased had sold land to Simeon Shivachi Shigali and to no one else. He asserts that the deceased's wife had not sold any of the estate's lands, but concedes that the deceased's sons, Isaac Masinjira and Johnah Shivachi Amalemba, had sold portions of the land for various reasons. He asserts that he and his co-applicant were not minors as at the time the grant was confirmed. He asserts further that as adults they should be given their share of the estate. He states that Maureen Lidembekho was not his sister and claims that his sister Sylvia Mmbone had been left out.
6. The application dated 28th October 2013 was amended on 23rd November 2016 to include prayers that the grant made to Johnah Shivachi Amalemba, and confirmed on 29th May 2008, be annulled or revoked, and that the trusts vested in the said Johnah Shivachi Amalemba for Alistair Amalemba Masinjira and Akiff Shitsukane be removed. The applicants also pray that they be appointed administrators following revocation of the grant. It is argued that the administrators had failed to apply the laws that apply in distribution of the estate of a polygamist.

They state that the grant was obtained fraudulently or on the basis of falsehoods or had become useless or inoperative. The amended summons is supported by an affidavit sworn by Bavon Shikali Amalemba on 23rd November 2016. He points out falsehoods that he alleges were made at the making and confirmation of the grant made to his father, Johnah Shivachi Amalemba. He says that contrary to what is reflected in the documents lodged in court by his father, Patrick Ongaya, Calistus Amalemba and Simeon Shivachi Shigali were not beneficiaries of the estate. He goes on to state that the current administrator, his stepmother, Margaret Shivachi Amalemba, took over administration of the estate without first consulting the other family members. He asserts that the current administrator did not have any children with his father.

7. In response to that the amendment the administrator swore a supplementary affidavit on 13th December 2016. She says that the initial administrator had not relied on falsehoods to obtain representation to the estate. She asserts that part of the estate was sold by the deceased, the initial administrator, his brother and their mother hence the need to list the buyers as survivors of the deceased.

8. Directions were given on 16th February 2017 that the revocation application be disposed of by way of written submissions. There has been compliance, for the parties have filed their respective written submissions, which I have read through and noted the arguments advanced.

9. Revocation of grants of representation is provided for under section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. There are three general reasons for revocation of a grant. The first is where there were problems with the manner the grant was obtained. A grant will be revoked if the process was defective or was attended by fraud or misrepresentation or concealment of facts. The second general ground revolves around administration of the estate after a grant was properly made. A grant is liable to revocation should the administrator fail to apply for confirmation of their within the period allowed in law or fail to proceed diligently with administration of the estate or where there is failure to render accounts as and when required to. The last general ground is where the grant has become useless or inoperative on account of subsequent circumstances, such as where the grant holders all die thereby making their grant ineffective.

10. The application before me appears to me to be founded on the first general ground, that the process of obtaining grant herein had been attended by various difficulties. Issues relating to confirmation of the grant were raised, but these appear to me to be secondary. In any event, difficulties with the conformation process is not one of the grounds listed in section 76 for revocation of a grant. The only thing about confirmation that exposes a grant to revocation is where the administrator fails to apply for confirmation within the time stipulated in law. A person who is aggrieved by orders made at confirmation of grant has the reliefs of either review or appeal, but not revocation of the grant.

11. The application on record seeks for revocation of two grants, that made to the initial administrator on 11th January 2007 and that made to the current administrator on 21st May 2013. It must be pointed out that there is only one grant available for revocation. The grant made on 11th January 2007 became useless, inoperative and ineffective on 13th December 2012 when the initial administrator died. The grant ceased to exist on 21st May 2013 when the current administrator substituted the dead administrator. The grant dated 11th January 2007 is therefore not available for revocation, and the amendment of the application dated 28th October 2013 on 23rd November 2016 was needless and an exercise in futility. The grant that is available for distribution is that dated 21st May 2013.

12. The applicants argue that the process of initiating this cause and of obtaining representation herein was defective to the extent that the same was founded on falsehoods. It is averred that Patrick Ongaya, Calistus Amalemba and Simeon Shivachi Shigali were stated to be survivors of the deceased, yet they were not family members. The current administrator has not categorically denied the fact, neither has she made an effort to explain how Patrick Ongaya, Calistus Amalemba and Simeon Shivachi Shigali were related to the deceased.

13. I have perused through the record before me. I have not been able to trace the affidavit that the petitioner swore in support of his petition for administration, and therefore I cannot tell who he listed as the survivors of the deceased. I have, though, seen the affidavit that the initial administrator swore on 4th June 2007 in support of the application for confirmation of his grant. The persons listed there as survivors of the deceased are Johnah Shivachi Amalemba, Patrick M. Ongaya, Alister Amalemba, Calistus Amalemba and Ackiff Shitsukane. It is not indicated how these five individuals are related to the deceased. It is not stated whether they were sons of the deceased or his grandchildren. The estate was eventually distributed amongst them.

14. From the averments on record it would appear that the deceased had two sons, one of whom was deceased as at the date representation was being sought. The then deceased son of the deceased, Isaac Masinjira, had been survived by children, identified in these proceedings as Alistair Amalemba, Calistus Amalemba, Ackiff Shitsukane and Viona Mmbone. All four children of Isaac Masinjira were listed at confirmation save for Viona Mmbone, and were allotted shares at distribution as per the certificate of confirmation of grant on record, save for Viona Mmbone. The distribution appears to have been done equally as between the two sons of the deceased. The two non-son survivors of the deceased were allocated 7.8 acres as between the two of them. It is alleged that they bought land from the deceased, his wife and his sons.

15. From what is before me, I am unable to find fault with the current administrator. She did not initiate the cause herein nor obtain the original grant. She came in lately as a substitute to the original grantee. It cannot therefore be said that she obtained her grant through a defective process or that she misled the court in any way. I am therefore not convinced that I should revoke her grant.

16. I note that concern is more with the distribution of the estate of the deceased. It would appear that there are persons who benefited from the estate who were not survivors of the deceased in terms of being his family members. It is said that the said deceased, his wife and sons had sold portions of the estate to some people. The deponents of the various affidavits sworn with respect to the revocation application have not identified the persons who sold the lands to the non-family members listed in the certificate of confirmation of grant. I have looked through the record and there is no explanation in the confirmation application as to why estate property was being allocated to non-family members.

17. I have noted too that there could be some dispute as to who the survivors of the deceased are. Calistus Amalemba is, for example, denounced as survivor of the deceased. I note that although Viona Mmbone is listed as child of one of the sons of the deceased she was not allocated anything out of the estate, and there is no evidence that she had renounced her interest. It is also alleged that some members of the

family, such as Edwin Masinjira and Sylvia Mmbone, have been excluded altogether. It is also alleged that Maureen Lidembekho is not a grandchild of the deceased.

18. I am persuaded that there could be issues with the manner the estate has been distributed. The administrator needs to be accountable to the persons entitled to a share in the estate. There should a full disclosure of all the persons who have survived the deceased and who are therefore entitled to a share in the estate. If there are creditors of the estate and purchasers of estate assets who should settled out of the estate, there ought to be disclosure of who these persons are and how they acquired the interest they claim from the estate. Accountability would require that the administrators ought to avail documents to support any transactions that might have been entered into by the deceased or the administrators on behalf of the estate with such persons.

19. The deceased herein died intestate. According to section 80(2) of the Law of Succession Act, a grant of letters of administration only becomes effective from the date of its making. This would mean that the administrator does not assume office until the court appoints him administrator and makes a grant to him. According to section 79 of the Law of Succession Act, the property of the deceased vests in the administrators to whom representation has been granted. Upon being appointed the administrator exercises the powers set out in section 82 of the Law of Succession Act, and incurs the duties set out in section 83 of the Act. It is important to point out that section 45 of the Act criminalizes handling of estate property by persons to whom administration has not been committed by the court. Then there is also section 82(b) (ii) of the Act, which provides that immovable property of the estate ought not to be sold before the grant is confirmed.

20. Looking globally at the facts set out herein, it would appear to me that the assets of the estate have been handled by individuals who had no authority to handle it as administration had not been committed to them and the property had not vested in them, and they could not have handled it without intermeddling with it. The estate vested in the deceased during his lifetime and he had therefore authority to sell any part thereof. Any person who entered into a valid land sale agreement with him should be settled from the estate. Administration with regard to the estate herein has been committed to only two individuals, Johnah Shivachi Amalemba and upon his death his wife, Margaret Mwarisi Johnah. The estate vested only in these individuals, and they were the only ones who could deal with it as the deceased himself would have had he been alive. Even then, the administrators would have had no authority to sell any of the estate's assets prior to confirmation of the grant. Any sales of land by any person other than the deceased himself or the administrators upon his death are suspect, and the same would apply to any sales by the administrators before the grant was confirmed.

21. In the end the orders that commend themselves to me, in the interests of justice, are as follows –

(a) That I shall not revoke the grant on record; instead I shall set aside the orders that were made herein on 29th May 2008 confirming the grant herein and cancel the certificate of confirmation of grant issued on the basis of the said confirmation orders;

(b) That any and all transactions carried out on the basis of the confirmation orders that I have set aside and the certificate of confirmation of grant that I have cancelled in (b) are hereby nullified;

(c) That the administrator shall file a fresh application for confirmation of her grant, within thirty (30) days of date of this ruling, in which application she shall (i) make a full disclosure of all the assets of the estate, (ii) shall disclose all the survivors of the deceased, (iii) shall list all the assets of the estate, (iv) shall disclose all the debts of the estate, giving details of how they were incurred supported by relevant documents, and (v) shall allocate shares of the assets of the estate to all the persons entitled;

(d) That the confirmation application shall be served on all the survivors of the deceased, including the applicants herein, who, if they shall be opposed to the proposals made in the confirmation application, file their affidavits of protest thereto within thirty (30) days of being served with the confirmation application;

(e) That the administrator shall prepare and place before court a true and accurate account of her administration of the estate from the date of her appointment on 21st May 2013 up to the date of the said account;

(f) That the matter shall thereafter be mentioned after expiry of thirty (30) days for compliance and for further directions, the date shall be given at the delivery of this ruling;

(g) That each party shall bear their own costs; and

(h) That any party aggrieved by the orders made herein shall be at liberty to move the Court of Appeal within twenty-eight (28) days of date hereof for a second opinion.

DATED, SIGNED and DELIVERED at KAKAMEGA this 25TH DAY OF SEPTEMBER, 2018

W. MUSYOKA

JUDGE