



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
SUCCESSION CAUSE NO: 835 OF 2002
CONSOLIDATED WITH SUCC CAUSE 2091 OF 1996
IN THE MATTER OF THE ESTATE OF JOSEPH KIMANI MUTE (DECEASED)

RULING

The two causes the subject of this ruling relate to the estate of two different persons. The earlier cause is HCSC No. 2091 of 1996. It relates to the estate of Tiras Muti Kimani. The later cause is HCSC No. 835 of 2002 in respect of the estate of Joseph Kimani Mute.

The link between the two is that Tiras Muti Kimani is the father of Joseph Kimani Mute. Tiras died testate on 5th May 1995 and was survived by Joseph Kimani, among others. Joseph Kimani was a beneficiary under the will of Tiras. Joseph died on 9th December 2001 and HCSC No. 835 of 2002 was filed to facilitate succession to the property that Tiras had willed to Joseph and which was the subject of HCSC No. 2091 of 1996.

The applications that I am required to determine are two, one filed in HCSC No. 2091 of 1996 and the other in HCSC No. 835 of 2002. They are both dated 8th November 2010, and they both seek revocation of the grants made in the two causes. The applicants in the two applications are common. The applicants complain that they were not provided for in the will of Tiras, that the estate of Tiras has been distributed without going through the confirmation process, that the applicants lost the opportunity to prosecute an application under **Section 26** as a result, and that the assets in the estate of Joseph were acquired through the flawed process alluded to earlier and ought not be distributed before the issues in the estate of Tiras are sorted out.

From the applications and the affidavits in support it is clear that the applicants are complaining that the executrix of the will of the deceased distributed the estate directly without going through the confirmation process, and the assets were transferred to the names of the beneficiaries named in the will of the deceased. Their case is that, they too were children of the deceased, yet they were not provided for and they had desired to file and prosecute an application under **Section 26** of the Law of Succession Act for reasonable provision. They argue that that they lost that opportunity when the assets were distributed directly to the beneficiaries without going through the usual court process of confirmation of the grant. They would like the grant revoked so that they can be availed of that opportunity. Their problem with the estate of Joseph Kimani Muti is that the assets which make up that estate formed part of the estate of Tiras Muti and that the distribution of the estate of Joseph Kimani Muti should await the determination of the outstanding issues in the estate of Tiras Muti.

I have perused the record in HCSC No. 2091 of 1996. The last entry in that record before the application dated 8th November 2010 was filed on 28th May 1997 was the making of the grant of probate. There is

nothing whatsoever on record to show that the said grant made on 28th May 1997 was ever confirmed. There is record from the annexures to the affidavit which supports the application of 8th November 2010 showing that there were transfers or transmission of property from Tiras Muti Kimani to the beneficiaries named in the will. This suggests that the transfer were done before grant was confirmed.

Confirmation of grants of representation is a mandatory process.

Section 71(1) of the Law of Succession Act provides:-

“After expiry of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower distribution of any capital assets”

This provision is couched in mandatory language. There is no exception. Before distribution of capital assets there must a confirmation application made under **Section 71** of the Law of Succession Act. This means that capital assets ought not be distributed before the grant is confirmed.

The will of the deceased, made on 1st July 1984, identified four groups of assets:-

1. Eight parcels of agricultural land
2. Nine plots of land
3. Four plots in commercial centres
4. Shares in various limited liability companies.

The estate of the deceased therefore comprises of capital assets. Before the assets could be distributed confirmation of grant ought to have been sought. If distribution happened without the confirmation of the grant it follows that the said distribution and the subsequent transfers or transmissions to the beneficiaries were null and void. The estate of Joseph Kimani Mute could not as a consequence have acquired any assets from that flawed process.

The complaint relates to the confirmation process and not the grant making process. There is therefore no good reason why the grants in both causes ought to be revoked. It would be prudent instead to nullify all transactions which resulted in the transfer of the assets of the deceased in HCSC No. 2091 of 1996 without the grant being confirmed.

I note that the applicants are asking that after the grant is revoked a fresh one be issued to the first three of them. That is not feasible. The estate of Tiras Muti is subject to a will. Where a person dies testate and had appointed an executor, distribution of the estate is committed to the executor, unless the executor dies or renounces probate, in which event **Sections 64 to 66** of the Law of Succession Act apply. In the first instance the grant shall be made to universal legatee or beneficiary, or any one of the other beneficiaries under the will. These take priority over persons who are entitled to administrator of the estate in intestacy who have not been named as beneficiaries under the will. In this case the applicants are not beneficiaries under the will and therefore they do not enjoy priority in an administration over the persons named in the will as beneficiaries.

After taking everything into account, I will make the following final orders:-

1. That the application dated 8th November 2010 in HCSC

No. 2091 of 1996 is allowed in terms of prayers (b) and (c).

2. That the application dated 8th November 2010 in HCSC

No. 835 of 2002 is granted in terms of prayer (b).

3. That the administrators/executors in respect of the grant in

HCSC No. 2091 of 1996 are hereby directed to render an account within 30 days of the state of the estate as at 27th June 2013, in terms of an inventory of the assets and liabilities, and their dealings with the estate from the date of the deceased's death till 27th June 2013.

4. That the matter shall be mentioned on 29th July 2013 for compliance and for further orders.

DATED, SIGNED and DELIVERED AT NAIROBI THIS 27th DAY OF June 2013.

W.M. Musyoka

JUDGE