



REPUBLIC OF KENYA



In re Estate of Emmanuel Lukakha Murombi (Deceased) (Succession Cause 108 of 2008) [2023] KEHC 3718 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEHC 3718 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 108 OF 2008**

WM MUSYOKA, J

MAY 4, 2023

**IN THE MATTER OF THE ESTATE OF EMMANUEL LUKAKHA MUROMBI
(DECEASED)**

RULING

1. The application, the subject of this ruling, is the summons for confirmation of grant, dated 2nd July 2019. It seeks confirmation of a grant made herein on 3rd November 2008, to Benard Lukakha Murombi, who I shall refer to hereafter as the administrator and the applicant.
2. The deceased died on 23rd September 1986. The heirs are all said to be children, 17 of them, said to be the late Francis Ouma Lukakha, Ephrem Onyango Lukakha, Fredrick Okumu Lukakha, Kizito Noel Lukakha, Chrispinus Nyongesa Lukakha, Stephen Ochieng Lukakha, Humphreys Opiyo Lukakha, Constant Moses Lukakha, John Okello Lukakha, Benard Lukakha Murombi, Antony Odhiambo Lukakha, the late Joseph Wafubwa Lukakha, Baslisa Anyango Lukakha, Praxides Achieng Lukakha, the late Consepta Apondi Lukakha, the late Cleopha Marama Lukakha and the late George Otieno. It is indicated that Eugene Owara Okhoba had purchased Plot No. 12 Nyapera. The applicant proposes a distribution, which he does not quite explain, where the estate appears to be distributed equally, except that daughters get lesser shares.
3. Basilisa Anyango Lukakha and Praxides Achieng swore an affidavit on 24th September 2019. They are daughters of the deceased. They appear to agree with the applicant on the assets listed and the survivors. They only appear to disagree on distribution, for they have come up with their own proposals.
4. Chrispinus Nyongesa Lukakha and Stephen Ochieng Lukakha swore an affidavit on 15th October 2019. They disclose that the deceased died a polygamist, as he had married 4 wives, whose names are disclosed, and they have grouped the children according to their mothers or the houses. They have also proposed distribution, which departs slightly from that made by the applicant.
5. The applicant responded to those affidavits, by his own, sworn on 20th September 2021. He avers that the deceased had offered Marachi/Elukhari/379 as security to Barclays Bank Kenya Limited, and the family had to sell part of the property to settle that loan. He states that a section of the family agreed that



he, the applicant, would sell his own property, Marachi/Elukhari/3149, on condition that he would be compensated from the estate asset at confirmation. He also gave out other moneys for the same purpose, to be recovered at confirmation. He explains that that was why he was entitled to a little bit more than the rest. On the daughters, he avers that they had initially indicated that they were not interested in a share in the estate, but appear to have now changed their minds. He states that Plot No. 12 Nyapera was sold by Francis and Ephraim to Eugene Owara, where he had put up a permanent house, and he was ready to surrender the entire plot, provided the estate paid to him the value of the property. He states that the family was unable to refund or reimburse him, hence the applicant was authorized by the family to surrender the entire plot to him.

6. The application is opposed by Basilisa Anyango Lukakha, who swore an affidavit of protest, on 12th November 2021. She avers that she had filed a summons for revocation of grant, dated 8th October 2012, which was determined on 10th June 2019, when it was allowed. She asserts that the summons for confirmation of grant was premature, as there is no grant in place available for confirmation. On Eugene Owara Okhoba, it is averred that he was not a relative of the deceased, but a purchaser, whose name had been struck out of the proceedings, on 10th June 2019, when the revocation application was allowed. It is averred that the deceased had married 4 times, and, therefore, he died a polygamist. His wives were the late Dolphina Agutu, the late Leonida Okwaro, the late Marceline Adikinyi and the late Phelista Juma. The late wives represent the 4 households of the deceased. The 1st house comprises of the following children, the late Francis, Ephraim, Fredrick, Kizito, Concepta, Basilisa and Praxides. The 2nd house has the late Cleophas. The 3rd house comprised of Chrispinus, Stephen, Humphrey, Constant and Joseph. The 4th house has Benard, Antony, the late Joseph and the late George. Some of the dead children of the deceased were survived by children of their own. The late Francis had 2 wives, Mathilda Auma and Alice Nanzala, and son, Sunset Odhiambo, from an unknown woman. The late Concepta Apondi Lukakha was survived by 1 child, Derrick Makokha. The late Cleophas Marama Lukakha did not have offspring. The late Joseph Wafubwa has Eugene Wafubwa and Stephen Odhiambo. The children of the late George are Cleophas Otieno, Bonface Otieno and Nicholas Otieno. She avers that the estate comprised of Marachi/Elukhari/379 and Plot No. 12 Nyapera. She argues that some of the beneficiaries were left out of the distribution of the 2 assets. As the initial grant was revoked, she proposes that fresh administrators be appointed, and puts forward the names of Chrispinus Nyongesa Lukakha, Stephen Ochieng Lukakha and Ephraim Onyango Lukakha.
7. The protest provoked a response from the applicant. He explains that he had initially left out the daughters, as they had indicated that they were not interested in taking a share in the estate. On whether he still had a grant available for confirmation, he states that the order of 10th June 2019 directed him to file a summons for confirmation of grant, to include the daughters, and that that was what he has done by the instant application. He asserts that what was revoked was the certificate of confirmation of grant, and not the grant itself. On Plot No. 12 Nyapera, he avers that the same was sold by some of the sons to Eugene Owara Okhoba. .
8. The application was canvassed by way of written submissions. All the parties have filed their respective written submissions, which I have read through, and noted the arguments made.
9. I will deal with the preliminary issue first, as its determination may have profound effect on the entire application. I am talking about whether or not there is a grant in existence, capable of being confirmed.
10. As recited above, the applicant initiated this cause, as petitioner, on 8th July 2008. The grant was made to him on 3rd November 2008. It was confirmed on 11th May 2010, and a certificate of confirmation of grant was duly issued, bearing an even date. The protestor and another then brought an application, dated 8th October 2012, seeking revocation of the grant made in 2008 and confirmed in 2010. Their



complaint was that they were daughters of the deceased, and they had been excluded from the process. That application was resolved, on 10th June 2019, when the applicant conceded to it, and the court allowed it.

11. The handwritten record reflects the proceedings of that day as follows:

“ 10/6/2019

Coram.

Before Hon. Kiarie W. Kiarie – Judge

Appearance

Mr. Fwaya for objector.

Mr. Fwaya: We did not take directions on how to proceed after the reconstruction. Our application is dated 8.10.2012 I propose that we put in written submissions.

I am aware that he has not filed any response.

Petitioner: I have no objection to the application. The applicants are my sisters.

Ct: The application dated 8.10.2012 is hereby allowed and the confirmation revoked.

The petitioner to include the objectors as heirs within 30 days.”

12. So, what do I make of that order? The relevant prayer in the revocation application, dated 8th October 2012, is in (c), and it reads that “That the grant of letters of administration grant dated 3.11.2008 to Benard Lukakha Murombi and confirmed on 11.5.2010 or any other in this cause be and is hereby revoked.” That was the main prayer in the revocation application, and that was what the applicant was conceding to. Prayer (c) is straightforward. It is about revocation of the grant. It has nothing to do with confirmation. It talks of the grant made on 3rd November 2008, and confirmed on 5th May 2010, being revoked. The prayer was not targeting confirmation, but the grant and the processes that were based on it. The orders of 10th June 2019 granted prayer (c) of the application, dated 8th October 2012, which meant that the grant made on 3rd November 2008, and confirmed on 11th May 2010, was revoked. The effect of that order was to revoke the grant, and by it the applicant ceased to be an administrator, and he could not, therefore, file a summons for confirmation of grant thereafter, as he did not hold any grant. According to section 71 of the *Law of Succession Act* and Rule 40 of the Probate and Administration Rules, a summons for confirmation of grant can only be made by a grant-holder. The applicant herein does not hold one, and did not hold one on 2nd July 2019, and, therefore, the summons dated 2nd July 2019 was filed in abuse of office, and pends only for the purpose of being struck out.

13. For avoidance of doubt, the relevant portions of section 71(1) and Rule 40(1) say:

“71. Confirmation of grants

(1) After the expiration 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 the distribution of any capital assets.

(2) ...”



(1) After the expiration 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 the distribution of any capital assets.

(2) ...”

“40. Application for confirmation of grant

(1) Where the holder of a grant which has not been confirmed seeks confirmation of the grant he shall apply for such confirmation by summons in Form 108 in the cause in which the grant was issued, supported by an affidavit in Form 8 or 9 ...

(2) ...”

(1) Where the holder of a grant which has not been confirmed seeks confirmation of the grant he shall apply for such confirmation by summons in Form 108 in the cause in which the grant was issued, supported by an affidavit in Form 8 or 9 ...

(2) ...”

14. The applicant asserts that the court directed him to file a summons for confirmation of grant, and in it include the daughters of the deceased. I see nothing of that sort in the order of 10th June 2019, both the handwritten order and the typed one. The primary order is that one saying “... The application dated 8.10.2012 is hereby allowed...” The other 2 orders are incidental, supplementary and secondary, that is those relating to the confirmation being revoked and the petitioner including the daughters. The subsequent orders merely ride on the primary order. It is instructive that, in the secondary order, directing the applicant to include the daughters, refers to him as petitioner, and not administrator. He had ceased to be an administrator, following the making of the primary order, and reverted to his original position, of petitioner, and the inclusion being referred to was in his petition of 8th July 2008.
15. There is no need to consider the confirmation application on its merits, as it was filed in abuse of court process. I hereby strike it out. Let the parties agree on the persons to be appointed administrators, after which the new administrators shall file for confirmation of their grant. Each party shall bear their own costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 4TH DAY OF MAY 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Benard Lukakha Murombi, the applicant, in person.

Mr. Fwaya, Advocate for the protestor.

