



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 557 OF 2002

IN THE MATTER OF THE ESTATE OF JOSEPH SHIKUNDI MURWA (DECEASED)

RULING

1. The application for determination is dated 8th August 2021. It seeks revocation of grant, the removal of the name of Kenneth Kilunzu Imbafu from the proceedings, and orders to stop him from entering or intermeddling with the estate.
2. The application is at the instance of Alex Ikumiru Mambiri, a son of the deceased herein. He avers that the deceased had only one wife, and was survived by four sons and a daughter, and some grandchildren. He possessed Kakamega/Shinyalu/881 and 965 and Kakamega Shiakungu/183. He asserts that the administrator, Kenneth Kilunzu Imbafu, was a stranger to the estate. He never bought any land from the estate. He says he never notified them of the succession proceedings, and he only discovered the same when he went to the lands office to process title deeds, only to discover that Kakamega/Shinyalu/881 was registered in the name of the administrator. The administrator is accused of concealing facts, non-disclosure and fraud.
3. The applicant has attached to his affidavit, a letter from the Chief of Shing'ondo Sub-Location, to disclose the *bona fide* survivors of the deceased; and certificates of official searches of Kakamega/Shinyalu/881 and 965, and Kakamega Shiakungu/183.
4. I was informed on 30th September 2021, that the application had been served, and indeed there is an affidavit of service, showing service sometime in July 2021. As at 30th September 2021, there were no replies, so I did not give directions. Instead, I opted to go through the record and rule on the matter based on what is in there.
5. The administrator sought representation as a citor. There is no evidence of citation proceedings in this file, and I presume the same were, if indeed they were, conducted in a separate cause. Details of that separate citation cause are not disclosed.
6. In the petition, the administrator only listed two persons as survivors of the deceased, being Mourice Otunga and Moto Shikundi. He only listed one asset, Kakamega/Shinyalu/881. Similarly, at confirmation of grant, he listed Mourice Otunga and Moto Shikundi as the sole survivors of the deceased, and Kakamega/Shinyalu/881 as the sole asset of the estate, which he had devolved to himself. A certificate of confirmation issued in those terms, dated 28th March 2012.
7. I cannot tell whether or not there was concealment of matter from court or misrepresentation or failure to involve the family, without sight of the citation proceedings. I have not seen the citation file. The proceedings were by an alleged creditor, pursuing land that his late father had allegedly bought from the deceased. There is no evidence that the applicant was aware of the other parcels of land owned by the deceased, or of the other survivors of the deceased. Prior to confirmation, orders were made on 21st October 2004, 1st April 2009, 20th December 2010, 8th March 2011, 12th April 2011 and 6th July 2011, for service of the application on a citee and other beneficiaries. The administrator, at one point, pleaded that he did not know who the other beneficiaries were. The record of 19th March 2012, when the grant was confirmed, is silent on whether the other beneficiaries were present or had been served. I have seen two affidavits of service on the record, dated 19th March 2012 and 26th June 2011. They only relate to service on Maurice Shikundi and Moto Shikundi. I shall presume that the administrator was a "creditor," who had no direct access to the inner family of the deceased, and, therefore, lacked appropriate information on the assets of the estate and the survivors of the deceased.
8. Due to the non-disclosure of two assets and of a majority of the survivors of the deceased, the confirmation proceedings conducted on 19th March 2012 was not complete a distribution of the estate. That can only happen when all the assets are distributed, in a process that involves all who are entitled. The two assets remain undistributed.
9. A case is made out for inclusion of the said assets and the survivors in the cause to facilitate distribution, and for the winding up of administration through distribution. However, I am not persuaded that there should be revocation of the grant, for the administrator was not in court, and did not make his representations, with regard to how he obtained administration. Additional administrators could be appointed to work with him.
10. The administrator is in office duly appointed by the court. No evidence has been tabled to demonstrate that he has interfered or

intermeddled with the estate. He came in as a creditor, to secure the interest that he had allegedly bought. Whether or not he bought an estate asset is not something that I am prepared to deal with herein, in view of Articles 162(2) and 165(5) of the Constitution, section 13 of the Environment and Land Court Act, No. 19 of 2011, sections 2 and 101 of Land Registration Act, No. 3 of 2012, sections 2 and 150 of Land Act, No. 6 of 2012, and Rule 41(3) of the Probate and Administration Rules. The jurisdiction to audit sales of land, to determine their validity, lies with another court, in separate proceedings, and that is where the applicant should take his dispute with the administrator over Kakamega/Shinyalu/881.

11. The final orders, in view of everything that I have said above, are: -

- (a) That I hereby appoint Alex Ikumiru Mambiri an administrator of the estate herein, in addition to Kenneth Kilunzu Imbafu, and the grant made on 14th March 2003, and issued on 18th March 2003, shall be amended accordingly;
- (b) That the new administrators shall file a summons for confirmation of the grant to be issued under (a), above, to distribute Kakamega/Shinyalu/965 and Kakamega Shiakungu/183, in a process that shall involve all the persons listed in the letter of the Chief of Shing'odo Sub-Location;
- (c) That upon confirmation, in terms of (b), above, the certificate of confirmation of grant, dated 28th March 2012 shall be amended accordingly, with respect to distribution of Kakamega/Shinyalu/965 and Kakamega /Shiakungu/183;
- (d) That since the ownership of Kakamega/Shinyalu/881 is disputed, I shall not interfere with its devolution on 19th March 2012 to the administrator, neither should it be included in the distribution to be done under (b) above;
- (e) That whether Kakamega/Shinyalu/881 is part of the estate herein or the property of Kenneth Kilunzu Imbafu or of the estate of his father, should be determined in separate proceedings, to be initiated in terms of paragraph 10 of this ruling;
- (f) That whether Kakamega/Shinyalu/881 will eventually be distributed as an asset in the estate will depend on the outcome of the proceedings to be mounted under (e) above;
- (g) That in the meantime, a conservatory order hereby issues, to stop Kenneth Kilunzu Imbafu from selling, parting with possession, sub-dividing, transferring, or in any other manner, interfering with the *status quo* relating to Kakamega/Shinyalu/881, pending determination of any proceedings that the applicant herein or Kenneth Kilunzu Imbafu, may be minded to initiate under paragraphs 10 and (e), above;
- (h) That any suit, under paragraphs 10 and (e), above, shall be initiated in the next 365 days, in default of which the conservatory orders in (g), above, shall lapse;
- (i) That each party shall bear their own costs; and
- (j) That any party aggrieved has leave, of 28 days, to move the Court of Appeal, appropriately.

12. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8TH DAY OF FEBRUARY 2022

W MUSYOKA

JUDGE

MR. ERICK ZALO, COURT ASSISTANT.

MR. GABRIEL FWAYA, ADVOCATE, FOR THE APPLICANT.

MR. KHAYUMBI, INSTRUCTED BY MESSRS. JI KHAYUMBI & CO., ADVOCATES, FOR THE ADMINISTRATOR.