



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE 556 Of 2004

IN THE MATTER OF THE ESTATE OF LYDIA KHAMALISHI (Deceased)

B E T W E E N:

REUBEN BURUDI SATIACitor/ Petitioner/Applicant

AND

1. AYUB CHEMANGA

2. EDWARD MUHANGA

3. MARK MMASI

4. JAIRUS WACHIYA

5. DAVID MUSWACHI.....Respondents/Citees

R U L I N G

1. The Court has before it an application for Confirmation of a grant of Letters of Administration. The Application is part of a composite application brought by a Notice of Motion dated 1st December 2017 and filed on 5th February 2018.

2. The Application seeks the following Orders:

“1. THAT the orders made on 24-5-2017 in these proceedings be reviewed and/or set aside.

2. THAT the application dated 30-3-2012 for confirmation of grant herein be considered as presented.

3. *THAT any other further orders be made as the Honourable court may deem just and expedient”.*

4. The Application is based on the following grounds:

“(a) THAT the order sought to be reviewed or set aside is identical to the one made by the court on 25-5-2007.

(b) THAT based on the order made on 24-5-2007 aforementioned, the Applicant duly filed an application for the administration of the estate of the late LYDIA KHAMALISHI in an application for the administration of the estate of the late LYDIA KHAMALISHI in which all the Respondents were named as heirs and the Applicant named as the liability.

(c) THAT since the order of 17-3-2016 was made, the Respondents have refused, neglected and failed to comply though duly served.

(d) THAT based on this application is made in good faith and meant to save time and costs.

(e) THAT it may not be appropriate to file succession case for the deceased twice.

6. The Application is supported by the Affidavit of the Applicant, a Reuben BurudiSatia. The Deponent tells the Court that he started these proceedings by way of a citation. As a consequence on 18th March 2008 Hon Mr Justice F. Ochieng appointed the Applicant to be the sole

administrator of the Estate of the Deceased. The Applicant makes clear throughout that he was not an heir or dependant but a liability on the Estate as a buyer.

7. The Matter has been heard previously, on Hon Lady Justice Sitati when, the Learned Judge heard the evidence of DW1 who informed the Court that the genuine beneficiaries of the Estate are:

- (1) Jairus Michael Wahiya
- (2) SimionMunamiWachiya
- (3) David Muswachi Santo
- (4) Laban SautoMuswachi
- (5) RodahyMukasia (Deceased) and
- (6) Edna Khavali

8. Prior to the Order of 25th May 2017, Hon Lady Justice Ruth Sitati heard oral evidence and delivered a Ruling. Her decision was clear. From paragraph 14 onwards the Learned Judge said, *"It comes out clearly that the citor herein is not a dependant within the definition above stated. Since he bought a piece of the deceased's land he remains a liability to the deceased's estate and should be included in the distribution of the deceased's estate... Having stated the above this Court cannot confirm the grant issued to the citor as the citees have not renounced their rights under the Act. It is therefore ordered that the citees take out letters of administration for the deceased's estate herein and include the citor as a liability to the said estate. This should be done within the next thirty (30) days and thereafter the same to be confirmed as required by law...The citor is also at liberty to move the civil Court to recover the money he paid to the citees. Costs are awarded to the citor"*. That Ruling was delivered on 17th March 2016 by Lady Justice Sitati.

9. The Application is grounded on the assertion that the Order was served on the Respondents and has not been complied with. On 24th May 2017, the application came before Hon. Mr Justice Mwita, upon noting that the citees had not complied with the earlier Orders, the Court Ordered that:

(1) The citees have fifteen (15) days from today to file and serve the succession papers failing which the citor herein Reuben BurudiSatia is granted leave to do so."

10. It is important to look at the sequence of Orders to understand the issues now before the Court:

(i) On 27th June 2016 Lady Justice Sitati made orders that:

- 1) Citees given a further 30 days from today to file the papers i/d .. at liberty to apply.
- 2) Mention on 05/09/2016 for further orders."

(ii) On 24th May 2017, Hon Lady Justice Sitati made the following order:

- 1) The Citees have 15 days from today to file and serve the succession papers failing which the citor herein Reuben Burundi Satia is granted leave to do so.

(iii) On 22nd May 2019 Hon Justice Njagi ordered that: *"In the foregoing the orders made by Justice Sitati dated 24/5/17 are hereby reviewed to provide that incase the citees/respondents failed to comply with the order the citor/applicant do proceed with this succession cause. As the citees/respondents failed to comply with the order the citor/applicant is hereby given leave to proceed with the succession cause and to fix for hearing the application for summons for confirmation of granted dated 30/3/12. The citor to serve the hearing date on the respondents."*

10. The Citor did not file a succession case. Instead he relies upon the letters of administration issued on 7th May 2008, [which were revoked]. The above shows that Justice Njagi did not review the decision of Hon Lady Justice Sitati but instead unilaterally changed the nature of the proceedings which are governed by the Law of Succession Act and the Probate and Administration Rules into a general civil application governed by the Civil Procedure Rules 2010.

11. Thereafter, the Applicant/Citor filed the Application dated 1st December 2017. From the foregoing it is clear that that Applicant's case is based on two principal assertion. Firstly, he states on oath and also in legal submissions that he purchased a 2 acre portion of land belonging to the Deceased. The land is known as E. Kabras/Chemuche/391. The Applicant states that he purchased the land from one of the sons of the Deceased, one Jairus Micah Wachiya. He says he took possession of the land in 2001 and has settled there since.

11. Throughout the proceedings, the Citees who are the sons and heirs of the Deceased have repeatedly objected to the Appointment of the Applicant. On 25th January 2016, the heirs objected to the grant for the following reasons:

“2. That the plaintiff herein is a stranger to the defendant

3. That the Plaintiff herein was unable to prove how he came to the succession of the above estate

4. That the Plaintiff herein is not part of family members nor a buyer of the aforesaid estate

5. That it is the duty of the family of the deceased to appoint the administrator of the estate not the plaintiff herein

6. That the advocate to the plaintiff failed to amend the plaint of the said suit, to the estate to prove who was right person to be in suit in this case

7. The defendants herein one of them is a brother who had a case of obtaining money in false pretence CR 02/2007 before Kakamega Chief Magistrate Court

8. That the Plaintiff's claim was about money not land how comes he filed a suit on the land of estate of the deceased and yet he is not a party to the family.

9. That the forementioned family in the affidavit of beneficiaries are the sons of the deceased...”

The Court gave effect to those objections through the order of [24th] March 2016.

12. In his Affidavit of Protest to the Mode of distribution, David Muswachi deponed that the Applicant is a stranger to the objectors and not a family member. The Applicant's actions are mischievous and he intends to grab the land parcel from the respondents he said.

13. In response the Applicant/Citor stated that between 4th July 2000 and 6th August 2001 he purchased a portion of land measuring two (2) acres out of the parcel of land known as E.Kabras/Chemuche/391 from Jairus Micah Wachiya the 4th Respondent. He stated on oath that he settled the whole of the purchase price and took possession in 2001. The Applicant states that he repeatedly requested the Respondents to file a succession case so that he could get the title to the land he purchased. He then, in 2001 commenced the criminal process. Jairus was arrested and charged. He was tried in Criminal Case No 2007/2001. In the criminal case he was arguing that he had not received what he had paid for, namely the land. Now he is saying he has taken possession and has been occupying the land.

14. The Submissions filed by the Applicant entitled “Petitioner's Submissions” state that “This case then proceeded by way of adducing viva voce evidence where parties testified. When the case was being heard the Plaintiff stressed the fact that the succession case had been filed by a stranger. They, however, admitted that they had actually been served with citation proceedings and that they had not responded to them. The Plaintiff did not, however deny the fact that the Petitioner had purchased a portion measuring two (2) acres out of the suit parcel of land forming part of the share of JIRUS MICHAEL WACHIYA, and that the Petitioner had taken possession thereof. Even in their submission the Plaintiff do not dispute that the Petitioner had bought this land and taken possession as stated by the Petitioner”. In order to understand that extract it is important to bear in mind that Hon Justice Njagi unilaterally directed that the Civil Procedure Rules would apply to this matter rather than the Law of Succession Act and the Probate and Administration Rules.

15. From the foregoing it is clear that the Petitioner proved his claim that he is entitled to a share of the parcel of land known as /Kabras/Chemuche/391 measuring two acres out of the share of JAIRUS MICHAEL MACHIYA. The Applicant produced witnesses to say that he paid KShs.58,000/= (KShs. Fifty Eight Thousand) per acre and that there was a sale agreement drawn up but Jairus stole it from the DO's Office. The D.O.'s position on that allegation has not been put before this Court clearly.

16. As stated above, Jairus was charged and convicted of the offence of obtaining money by false pretences. The Learned Trial Court (Mogambi SRM) gave his reasons as “because he was given the agreed sum of money for sale of land but never transferred the title of the said land to the complainant.”. It is unclear from the documents exhibited, whether the Trial Court heard evidence from either the DO, his clerk or anyone from the Land Control Board. Jairus was sentenced to two years imprisonment. In the meantime, the Applicant obtained grant of letters of administration appointing him as the sole administrator over the entire estate. He then filed a grant for confirmation of the grant whereby the sons of the Deceased would share 19 acres and he would receive 2 acres.

17. Therefore, this Court has before it a scenario where the Applicant is putting forward two versions of events. On the one hand he is saying on oath in these proceedings that (1) he purchased 2 acres of land from the Fourth Respondent Jairus and (2) he entered into occupation immediately and would now like to have the title deeds for the land he purchased. His explanation for the lack of evidence comes from the criminal proceedings. In the criminal proceedings, the Applicant gave evidence that he paid the Fourth Respondent for the land but he got nothing in return. He further gave evidence that there was an agreement of sale but it was stolen by the Fourth Respondent from the DO's Office.

18. When the matter came before Hon Lady Justice Sitati, she heard the evidence and declined to allow the Applicant to petition to become an administrator. She required the Respondents/ Heirs of the Deceased to do so. For reasons which are not clear they did not do so. Similarly, the Learned Judge – on the basis that the Applicant had not received the land – directed him to pursue repayment of his monies in civil proceedings. Both from the evidence and that direction, it is clear that such monies as were paid, were paid to the Fourth Respondent (Jairus) personally and not as an administrator or representative of the Estate/Beneficiaries. It is also clear that the Applicant was fully aware that the family had not petitioned nor been granted Letters of Administration. In the circumstances, any dealing with the property was intermeddling contrary to Section 82 of the Law of Succession Act.

19. In relation to the participation of the Respondents, it is noteworthy that the Respondents have repeatedly not been served with Applications and Notices. The reasons for that omission are not clear from the record. It is also notable that the Applicant first wanted his

share from the whole of the land, he now says that he is seeking his share out of the share of Jairus. However, in the absence of a confirmed grant, Jairus has never had a legal title which he could pass on to any person. The Applicant knew that, and therefore that he did not gain good title. His occupation into the land amounts to intermeddling in the Estate (S. 45 Law of Succession Act). The maxim ex turpi causa non oritur applies to this application. There is no completed sale. The Applicant cannot demand such, not the right to be appointed an administrator. If he is a creditor, the person who owes him money is Jairus and not the Estate of the Deceased.

20. In relation to the prayers in the Application, Prayer 1 appears to be spent. That leaves the prayer for confirmation of grant. Hon Mr Justice Njagi gave directions for the hearing of the protest by viva voce evidence. Unfortunately, those directions were superseded by the Covid-19 protocols and the protest does not appear to have been heard. However, when the matter was mentioned on 16th November 2020 Counsel submitted that they served the Mention Notice, only on the Protestors who were absent on the previous occasion – as directed. However, in relation to the Hearing on 17th September 2020, not all the Respondents were served. The Affidavits of service demonstrate that generally only 2 out of the 5 Respondents were served at any time. They were not present in Court and Counsel therefore made the submission that the application is not opposed. However, it is clear from the Affidavits filed, in particular by the First Respondent, that the application is opposed. For the Hearing on 17th September 2020, only Jairus and Edward were present. For the next mention (16th November 2020) only Mark and David were served. It seems neither the 1st Respondent/Protestor, nor anyone on his behalf was served with a Notice, thereby effectively excluding him/his interest from being taken into account.

21. In substance, the Applicant, having been successful in setting aside the Order of 24th May 2017 now wishes to side step the Order of Justice Njagi of 3rd March 2020 for viva voce evidence. It is clear to this Court that the Applicant does not come to this Court with clean hands. He cannot be considered to be a fit and proper person to be an administrator.

22. It is clear to this Court, that there are members of the family of the Deceased who have first priority to petition. They have not done so. They have not been able to put themselves forward. The Applicant wishes to be the administrator of the entire estate. However, it is clear from the foregoing that he does not come to the Court with clean hands. He was directed by the Order of Hon Lady Justice Sitati to file a petition. He did not do so. Grounds (d) and (e) of the Application demonstrate his reluctance to do so.

23. This Application may save costs but is also has the effect of circumventing the laid down law and rules of procedure applicable to succession matters. In particular, the matters the Court must take into consideration when deciding to issue a grant are

- (1) The relationship with the Deceased and priority to petition
- (2) Placing the full facts before the Court in an affidavit
- (3) Identifying the assets of the Estate
- (4) Giving the wider family and interested parties an opportunity to participate through the Gazette Notice
- (5) Evaluating who would be the best administrator.

In the view of this Court a creditor as sole administrator is contrary to good sense and practice.

24. This Court is cognizant of the fact that this is a very old case and a final resolution is imperative. In the circumstances, it is orders as follows:

- (1) The Public Trustee is appointed sole administrator of the Estate;
- (2) Any grant appointing the Applicant that has not previously be revoked, be and is hereby revoked;
- (3) Hearing of the protest against distribution is deferred pending the Public Trustee's inquiry into the Estate.
- (4) List for Mention after 60 days when the Public Trustee will report to the Court;
- (5) Mention on a date to be given in Court

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED at KAKAMEGA on this the 8th day of February 2021

Delivered virtually In the Presence of:

Court Assistant: Fred Owegi

