



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 469 OF 2003

IN THE MATTER OF THE ESTATE OF ELIJAH KHASABULI MULOKHA (DECEASED)

JUDGMENT

1. What is for determination is the summons for confirmation of grant, dated 14th May 2014, filed at the instance of Simon Mulokha Khasabuli. He is the administrator of the estate, by virtue of letters of administration intestate made to him on 31st October 2013, and a grant issued to him, dated 12th November 2013. I shall refer to him, henceforth, as such. He proposes distribution of the estate between himself and two other individuals, being Paul Kundu Khasabuli and Pius Kenyatta Khasabuli, at diverse proportions. The persons taking a share in the estate, according to the application, are all sons of the deceased herein.
2. There is a reply to the application, by Terypher Amimo Lutunya, vide an affidavit of protest, sworn on 10th December 2014. I shall refer to her as the hereafter protestor. She avers to be the widow and the administratrix of the estate of Daniel Litunya Akaka, the original petitioner in the matter. After the said petitioner died, on 8th November 2013, she obtained representation to his estate, vide a limited grant *ad litem*, made on 8th November 2013, and issued on 26th February 2014, in Kakamega Probate & Administration Cause No. 8 of 2014. Her case is that prior to his death, her late husband, had bought 2 acres out of North/Kabras/Matsakha/454, from the administrator, in an agreement entered into on 15th March 1992. She avers that at the time of sale, the said property was registered in the name of Elijah Khasabuli Mulokha, the deceased herein, who was the father of the administrator herein, Simon Khasabuli Mulokha. She avers that the administrator herein had undertaken to take out representation to the estate of the late Elijah Khasabuli Mulokha, the deceased, to facilitate subdivision of North/Kabras/Matsakha/454, for excision of the 2 acres to be transferred to her late husband. The administrator delayed in doing so, which forced her late husband to have him cited in Kakamega HCSC No. 32 of 2002. He did not harken to the citation, forcing the court to allow the late husband to initiate this succession cause. She avers that she had filed an application, dated 14th August 2014, to take over as administratrix in the place of her late husband, only to discover that the administrator had already obtained representation to the estate, and had mounted an application for confirmation of grant, in which he had not made provision of the 2 acres that he had sold to her husband. She does not agree with the distribution proposed. She asks the court to disregard the proposals, and make provision for the 2 acres bought by her late husband. She urges that the estate be shared out between the three sons of the deceased – Simon Mulokha Khasabuli, Paul Kundu Khasabuli and Pius Kenyatta Khasabuli - after provision is made in favour of her late husband.
3. The matter was heard orally. The protestor was the first to give evidence. She reiterated that her late husband had bought 2 acres from the administrator, out of North/Kabras/Matsakha/454. The total purchase price was paid, and they were shown the boundaries. They then put up a home on the land. They lived on the land thereafter. She produced a copy of the land sale agreement dated 15th March 1992, and of an acknowledgement dated 28th May 1993. She stated that the land was in the name of the deceased at the time, and the administrator sold to them the portion that had been assigned to him.
4. The protestor's witness was Jafether Osanya Simiyu. He stated that he was aware that the late husband of the protestor bought 2 acres out of North/Kabras/Matsakha/454 from the administrator. He built on the land, and his family used the land to date.
5. The administrator did not attend court to give his version of the matter, and his case was marked as closed.
6. This matter is in the estate of Elijah Khasabuli Mulokha, who died on 5th July 1981. The protestor alleges that her late husband bought 2 acres of land from the administrator of the estate herein in 1992. There are several things to be pointed out here. Firstly, the sale took place in 1992, the deceased had died in 1981. The late husband of the deceased did not transact with the deceased, as he was dead at the time, and, therefore, there cannot be any claim against the estate of the deceased. The deceased was not indebted to the late husband of the protestor, as at 1981, when he was dying. Consequently, a transaction that was entered into after his death cannot bind his estate, as the claimant cannot claim to be a creditor of the deceased, so long as he did not transact with the deceased.
7. The second thing is that as at the time the sale was happening in 1992, the person who was purporting to sell the 2 acres had not been granted representation to the estate, for representation was not obtained until 31st October 2013. As at 1992, when the sale was happening, North/Kabras/Matsakha/454 had not vested in the administrator, under section 79 of the Law of Succession Act, and, therefore, the administrator did not have the power to sell the said property. He had no land to sell, for it did not belong to him, and he had not yet obtained authority to deal with it. If anything, he and the late husband of the protestor were engaged in unlawful activity, for under section 45 of the Law of Succession Act, Cap 160, Laws of Kenya, dealing with an estate asset without authority, which comes from a grant of representation,

in this case of letters of administration, amounts to a crime, known as intermeddling. A transaction founded on criminality cannot possibly be sanctioned by the law. It is an illegality, which cannot possibly be enforced as against the estate, in the manner that the protestor seeks in these protest proceedings.

8. Clearly, the protestor has no claim against the estate, for she never dealt with the deceased during his lifetime, and the person who sold the land to them had not been granted representation at the material time. The administrator could not and did not bind the estate. The late husband of the protestor was, therefore, not a creditor of the estate. He can only look up to the administrator for his 2 acres, once the administrator gets his share of the land after confirmation of the grant. The protest is, therefore, not merited.

9. I note that all the three sons of the deceased have executed the consent on distribution in Form 37, in support of the distribution proposed. None of them have filed any objection or protest. I note too that the deceased died on 5th July 1981, after the Act had commenced on 1st July 1981. There is an obligation, under the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, for the court to be satisfied as to whether all the persons beneficially entitled to a share in the estate have been ascertained. The administrator disclosed only three sons, there is silence as to whether the deceased had any female children. Such children would be entitled to a share in the estate, by virtue of sections 35(5) and 38 of the Law of Succession Act. Secondly, he disclosed that there was surviving spouse, a widow. However, when he proposed distribution, he did not provide for her, and there was no disclosure as to whether she had passed on as at the date of the filing of the summons for confirmation of grant. If there is a surviving spouse, her interest would supersede that of the children, by virtue of section 35(1), for she would have a life interest in the property to be distributed. The children cannot take property and leave out the surviving spouse. The converse should be the case, that the surviving spouse takes a life interest in the net intestate estate, and the share intended to go to the children gets suspended until after the life interest terminates. So the surviving spouse cannot be ignored, and the property distributed as if he or she did not exist.

10. I believe that I have said enough. Before I can make final orders on the summons for confirmation of the grant herein, dated 14th May 2014, the administrator will have to do more. Consequently, I will make the following orders, at this juncture:

(a) That I have found no merit in the objection by the protestor to the confirmation of the grant herein, comprised in the affidavit of protest, sworn on 10th December 2014, by the protestor, and I hereby dismiss the said protest;

(b) That I hereby postpone the application for confirmation of grant, under section 71(2)(d) of the Law of Succession Act, to enable the administrator provide more information on the items mentioned here below;

(c) That the administrator shall file a further affidavit in which he shall disclose whether the deceased had been survived by daughters, giving particulars of such daughters, if any; and also disclose whether the widow of the deceased is still alive, and if not provide proof of when she died;

(d) That the administrator shall serve the application herein on all the daughters, if any, identified in (c) above, and shall cause them to attend court on the date that shall be identified for mention at the delivery of this judgment;

(e) That the administrator, in the affidavit to be filed under (c) above, shall propose distribution of the estate amongst all the children of the deceased, including any daughters, if any, unless there is waiver or renunciation of interest by any of them, in complete compliance with Part V of the Law of Succession Act, Section 71 of the Act and Rule 40(8) of the Probate and Administration Rules;

(f) That the matter shall be mentioned on a date to be appointed at the delivery of this judgment, for compliance and further orders, and the grant shall only be confirmed on full compliance with the above;

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

(h) That any party aggrieved shall be have twenty-eight (28) days leave to move the Court of Appeal, appropriately, on appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF June 2021

W. MUSYOKA

JUDGE