



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 379 OF 2006

IN THE MATTER OF THE ESTATE OF NGONIOLE SHIKHOLE MAKAMU alias MAKAMU SHIKHOLE (DECEASED)

RULING

1. What is for determination is an application dated 17th September 2019. It is brought at the instance of Mildred Muhonja Kanji, a grandchild of the deceased, by his son the late John Kanji Makamu, who I shall refer to hereafter as the applicant. The application seeks a variety of orders. There are prayers for injunctions to restrain the administrator from transferring a number of parcels of land pending hearing and determination of the matter, and revocation of a grant that was made to the administratrix, on 21st July 2010, and cancellation of the certificate of confirmation of grant dated 22nd July 2010, and for a fresh grant to issue to the applicant.

2. The case by the applicant is that her father, the late John Kanji Makamu, was a son of the deceased herein, and the original administrator of the estate. When he died, the current administratrix, Oliva Khamali Makamu, was appointed to his place. The late administrator passed on before the grant made to him had been confirmed, and so the new administratrix moved for confirmation of her grant. She had the estate distributed between her, the surviving spouse of the deceased, and a non-relative known as Gilbert Lung'ya Mutanganyika. Her complaint is that the deceased had only two children, her late father and the administratrix, yet when the grant was confirmed, no share was apportioned to the estate of her late father, and his family, of one widow and 6 children, was disinherited. It is on that basis that she seeks that the whole process be reversed.

3. When the matter was first placed before the Judge on 18th September 2019, directions were given for service of the application. I have seen on record affidavits of service indicating that the other parties were served with notices when the matter was to come up in court. They never attended court, nor filed any responses to the application. I heard the application on 28th January 2021, the date having been given in open court on 7th December 2020, in the presence of the advocates for both sides.

4. I have gone through the record. The deceased died on 21st September 1998. He was the registered proprietor of Kakamega/Virhembe/571, since 17th June 1970. He was survived by his widow, Silica Maritsa Makamu, and his son, the late John Makamu, the father of the applicant. Representation in intestacy was made to the late John Kanji Makamu, on 27th September 2006, and a grant was issued, dated 9th October 2006.

5. The administratrix, Oliva Khamali Makamu, came into the picture through an application dated 18th October 2009, wherein she sought rectification of the grant, on the basis that the late John Kanji Makamu had died 3rd October 2008. She also sought confirmation of the grant, and proposed in her affidavit, in support of that application, that the estate be shared out between herself, as daughter of the deceased, with the surviving widow having a life interest, and the non-relative. That rectification application was placed before the Judge on 21st July 2010, the grant was confirmed, on the basis that there was no objection, and all the beneficiaries were in attendance. Although the record indicates that "all the beneficiaries" were present, the names of those in attendance were not recorded.

6. The proceedings of 21st July 2010, as recorded, were curious. The grant on record, as at that date, was held by a dead person. The court did not revoke that grant and make a fresh one to another administrator, which it could then have confirmed on 21st July 2010. Since no order had been made to revoke the earlier grant and appoint a fresh administrator, it would appear that the grant confirmed was that of the dead administrator, for that was the only grant on record. Secondly, the court did not allow the application dated 18th October 2009, as prayed, which would have had the effect of appointing a new administrator, and, therefore, the order of 21st July 2010 did not appoint any administrator. In fact, the orders, that the Judge made that day, did not make any reference to any application.

7. Even though no order was made allowing the application dated 18th October 2009, nor appointing the applicant in that application, Oliva Khamali Makamu, the administratrix, the court registry nevertheless proceeded to process a grant of letters of administration intestate, expressing that it had been made on 21st July 2010, the same was executed by the Judge on 26th July 2010. A certificate of confirmation of grant, dated 22nd July 2010, was also issued purporting to confirm that grant of 21st July 2010, never mind that the court had not made any grant of the said date.

8. More critical is the fact that the distribution that was purportedly allowed by the court on 21st July 2010, ostensibly founded on the application dated 18th October 2009, did not make provision for the late John Kanji Makamu. Other than the fact that he had died, it was not disclosed whether he died unmarried or childless. That disclosure ought to have been made, in compliance with the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, which require that the court be satisfied as to the ascertainment of the persons beneficially entitled to a share in the estate, and their respective shares. That was not addressed. It transpires, from the instant application, that the late administrator had indeed been survived by a widow and children. I have seen an affidavit that the administratrix swore in Kakamega HCSC No. 777 of 2010, which had been put together with this file, and which is still attached to this file, on 9th December 2013, where she acknowledges that the late administrator had children, and she intended to transfer half of Kakamega/Virhembe/571 to them. The non-disclosure of the survivors of the late administrator distorted the picture. It was a non-compliance with section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules. The distribution, that was ordered by the court on 21st July 2010, excluded them from benefit, and disinherited them.

9. I do not have to say more. I am persuaded that the administratrix herein obtained representation, if it can be said that she did, for no order exists, on the record, for her appointment as such, by deceit and concealment of information. She suppressed the existence of the family of her late brother, the late father of the applicant herein, and obtained a distribution of the estate which excluded them. The placing, before the court, of a suppressed list of survivors, and a proposal on distribution excluding them, amounted to maladministration. It means that the administratrix had failed to ascertain all the persons beneficially entitled to the estate and had failed to allocate, to all the persons beneficially entitled to a share in the estate, their due shares. A case has been made out for revocation of her grant, if at all any such grant exists, for appointment of fresh administrators and for the exercise of distribution of the estate to start afresh.

10. The final orders that I will make in the matter are as follows:

(a) That I declare that the alleged administratrix, Oliva Khamali Makamu, was not, at any time, appointed as administratrix of the estate herein, for no order was ever made appointing her as such;

(b) That as a consequence of (a) above, the grant of letters of administration dated 26th July 2010 was issued without any foundation, and it is hereby annulled;

(c) That as a consequence of (b) above, the court confirmed a non-existent grant on 21st July 2010, and the resultant confirmation orders were of no consequence;

(d) That as a consequence of (c) above, the certificate of confirmation of grant dated 22nd July 2010 is a nullity, and it is hereby cancelled;

(e) That as a consequence of (d) above, all transactions that were carried out on the basis of the certificate of confirmation of grant dated 22nd July 2010 were nullities, and they are hereby cancelled;

(f) That the land registrar responsible for Kakamega County shall cancel any subdivisions created out of Kakamega/Virhembe/571, and shall revert the registration to the status it was at as at 21st December 1998, when the deceased herein passed on;

(g) That I hereby appoint Mildred Muhonja Kanji and Oliva Khamali Makamu as administratrices of the estate of the deceased herein, and direct them, jointly and severally, to apply for confirmation of their grant;

(h) That I reiterate the order, that I had made herein on 28th January 2021, that the files in Kakamega HCSC No. 379 of 2006 and Kakamega HCSC No. 777 of 2010 be separated, to avoid confusion being created with respect to the estates of the two persons the subjects of the two causes;

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

(j) That any party aggrieved has leave of twenty-eight (28) days 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