REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 689 OF 2013

IN THE MATTER OF THE ESTATE OF GAITANO ATSIANZALE alias ATSIANZALE SHIKOMONGOMA (DECEASED)

RULING

1. The cause herein was published in the special issue of the *Kenya Gazette* of 11th October 2013. From the record before me, it would appear that no grant of letters of administration intestate was processed thereafter.

2. What I am invited to consider is a Motion, dated 26th January 2021, which seeks joinder of Jacob Anzimba Makani, as an interested party. I shall refer to him as the applicant. His case is that the asset listed as making up the estate of the deceased, variously referred to as Isukha/Mugomari/1093 and Kakamega/Mugomari/1093, had been bought fraudulently by the deceased, who was his uncle, from his father, Peter Makani Ingavi, by taking advantage of the weakened state of health of his father due to illness. He alleges that his father was forced to sign the transfer form, and that the sale agreement was not signed by a witness for his father.

3. The petitioner, Alphonce Machika Atsianzale, has responded to the application. His case is that there was a valid sale agreement between his deceased father and the deceased father of the applicant. He avers that the sale agreement executed by both sides, and there was evaluable consideration given for the land, in 1996. Transfer forms were executed in 1997 and a title deed was issued in 1998. He argues that the issue raised turns on ownership, and this court had no jurisdiction, and that the applicant was better off before the Environment and Land Court.

4. Application was argued orally on 26th April 2021. The applicant argued that the said estate asset belonged to his father, and he did not know how it came to be registered in the name of the deceased. Mr. Osango argued the case for the petitioner. He submitted that the dispute was over ownership of that property, which was not suitable for determination in succession proceedings. He cited decisions in *In re Estate of James Muiruri Kamau (Deceased)* [2018] eKLR (Ndung'u J) and *In re Estate of Richard Karanja Javan* [2014] eKLR (Musyoka J). He asserted that the applicant ought to have filed a substitutive suit to establish his claim.

5. Let me start by stating that there is no provision for joinder of parties to a succession cause, in the Law of Succession Act, Cap 160, Laws of Kenya, and the Probate and Administration Rules, unlike in the Civil Procedure Act, Cap 21, Laws of Kenya, and the Civil Procedure Rules. Provisions of the Civil Procedure Rules are imported into probate and succession practice through Rule 63 of the Probate and Administration Rules. I have considered Rule 63, and noted that the same does not import any of the provisions of the Civil Procedure Act and the Civil Procedure Rules relating to joinder of parties and third party proceedings. The probate court has inherent power to make orders in the interests of justice and to prevent miscarriage of justice. That can be done under section 47 of the Law of Succession Act or Rule 73 of the probate and Administration Rules. In probate proceedings, a party who wishes to advance a case, such as that the applicant is urging here, brings an affidavit of protest at confirmation of the grant. Under Rule 15 a party who wishes to participate in confirmation proceedings files a caveat, so that the court can notify him of the same once a confirmation application is mounted. That is what the applicant herein should have done, instead of filing an application that is not provided for under the Act and the Rules.

6. Succession proceedings are not suits as understood with respect to suits filed under the Civil Procedure Act and the Rules. There are no parties, strictly speaking, to a succession cause. A succession cause is not a cause initiated by one party against another, but a cause initiated by the petitioner in the estate of a dead person. It is not designed to be contentious, and it is on that basis that it not envisaged that a situation should arise where parties have to be joined or added to the cause.

7. The issues raised by the applicant relate to whether or not Isukha/Mugomari/1093 is an asset in the estate, and that is matter that should arise at confirmation of grant, as I have mentioned above. The applicant should wait patiently for the petitioner herein to mount an application for confirmation of his grant, should one be eventually made to him. Rule 40(6) of the Probate and Administration Rules envisages the filing of an objection, by way of an affidavit of protest, to confirmation of the grant. The application is, for all practical purposes, premature.

8. I agree with Mr. Osango, the issues that are raised in the Motion are not for consideration in succession proceedings. The courts, in *In re Estate of James Muiruri Kamau (Deceased)* [2018] eKLR (Ndung'u J), *In re Estate of Richard Karanja Javan* [2014] eKLR (Musyoka J), *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR (Gikonyo J), *In re Estate of Stone Kathuli Muinde (Deceased)* [2016] (Musyoka J) and *In re Estate of Kimani Kinuthia (Deceased)* [2008] eKLR (Ibrahim J), among others, have stated that succession causes are not suitable

for determination of highly contested issues, such as those turning on ownership of land, as between the estate and third parties. They have counselled that such disputes ought to be placed before another court in separate proceedings. That is what the applicant should have done, sued the petitioner herein in an another court in a separate suit, asking the court to make a determination as to the ownership of Isukha/Mugomari/1093 as between the estate herein and that of his late father. The second reason why the matter cannot be handled by the High Court, as submitted by Mr. Osango, is that the High Court no longer has jurisdiction, by virtue of Articles 162(2) and 165(5) of the Constitution, over ownership of land. The court that is now vested with that jurisdiction is the Environment and Land Court, and that is where the applicant should be arguing his case. It would serve little purpose to join him to these proceedings for that reason. In any case, he does not even need to be joined, he can still mount his protest under Rule 40(6) without any leave or joinder order, which, I reiterate, would still be futile, for the High Court would still not pronounce on the ownership of the disputed land, for the reasons given above.

9. The cause herein was gazetted in 2013. Yet no grant has been processed and issued since then. It would appear that that was not done because a summons was filed herein on 23rd December 2013, by Benard Atsianzale Shiakomangoma, founded on section 76 of the Law of Succession Act. That summons is still pending. The application was filed by the firm of Messrs. Sing'oei Murkomen and Sigei Associates Advocates. The Deputy Registrar wrote to the said law firm, with respect to the matter, and the firm wrote back, a letter dated 20th November 2018, saying that they do not act for any of the parties before the court, and renouncing any document on the record purporting to have been filed by them. It is this application which has delayed the matter, yet it would appear no one is ready to prosecute it, for the advocates who filed it have renounced it.

10. The application dated 20th December 2013 is founded on section 76 of the Law of Succession Act and Rule 44 of the probate and Administration Rules. These two provisions deal with revocation of grants. For these two provisions to be invoked, there ought to be a grant on record, which is sought to be revoked. No grant was ever made in this matter. The cause was gazetted, and before a grant was processed, the application was filed. There is no grant that is capable of being revoked, and, therefore, there can be no basis for mounting an application on section 76 and Rule 44. Such application would be premature. It would be founded on the wrong provisions of the law. It would be misconceived, incompetent and bad in law, and available for striking out.

11. The intervention that the law allows, at the stage of gazettement of a succession cause, is the filing of objection proceedings, taking the form of a notice of objection, an answer to petition and an application by way of cross-application. All that is in sections 68 and 69 of the Law of Succession Act, and Rule 17 of the Probate and Administration Rules. That is the nature of objection that the applicants ought to have brought, instead of filing the sterile application dated 20th December 2013.

12. The applicant seeks to be joined to the cause as an interested party. I reiterate, that there is no provision in the probate and succession proceedings for joinder of parties as third parties. The applicant in the application dated 20th December 2013 claims as a son of the deceased. As a child of the deceased, he does not required orders to have him joined as a party to a cause in the matter of the estate of his father. All he needs to do is to intervene directly through the processes provided for in the Law of Succession Act and the Probate and Administration Rules, either by way of initiating objection proceedings after gazettement, or by filing an affidavit of protest at the stage of the confirmation of the grant. The application for joinder, for a child of the deceased, is unnecessary, a waste of judicial time, and serves to do no more than delay the proceedings.

13. The cause herein was gazetted on 11th October 2013. The window for filing objections, according to section 67 of the Law of Succession Act, is a maximum of 30 days. 30 days expired on 11th November 2013. The application that has delayed these proceedings was filed on 23rd December 2013, which was long after the 30 days for filing such interventions had expired. I just wonder what the Deputy Registrar was doing, by failing to process the grant of letters of administration intestate after the 30 days expired on 11th November 2013. There can be no valid objection filed after expiration of the 30 days, unless the court extended time. There is, therefore, no reason at all why the court did not process a grant after 11th November 2013. A valid objection would have been one filed between 11th October 2013 and 11th November 2013.

14. In view of everything that I have said above, the final orders that I feel should be made are as follows:

a) That the Motion, dated 26th January 2021 is unmerited for the reasons that I have given above, and I do hereby dismiss the same;

b) That, although the application dated 20th December 2013, is not before me for determination, I have considered it with a view to giving directions on its disposal, so as to move the matter forward;

c) That I have found the said application, dated 20th December 2013, to be misconceived, incompetent and bad in law, and I hereby strike it out;

d) That I direct the Deputy Registrar to process a grant of letters of administration intestate in terms Gazette Notice No. 13784 of 11th October 2013;

e) That the administrator, to be appointed under (d), above, shall move the court with dispatch, to have his grant confirmed, and, at any rate, within 45 days from the date of the issuance of the grant;

f) That the applicant in the application dated 20th December 2013, and any other person beneficially entitled or interested in the estate herein, shall be at liberty to file, upon the confirmation application in (e), above, being filed, an affidavit or affidavits of protest, in terms of Rule 40(6) of the Probate and Administration Rules;

g) That in the event of any person being aggrieved by the orders made in this ruling, there is leave of 28 days, to

move the Court of Appeal, appropriately; and

h) That each party shall bear their own costs.

15. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF September, 2021

W. MUSYOKA

JUDGE