

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 469 OF 2004

IN THE MATTER OF THE ESTATE OF MUKANDA RAPANDO (DECEASED)

RULING

1. The Motion, dated 18th January 2021, seeks substitution of beneficiaries who have died. The grant was confirmed in 2008, and a certificate of confirmation of grant was issued in 2009. Some of the beneficiaries, under the distribution that the court ordered in 2008, are alleged to have died, and the applicant now seeks that the certificate of confirmation of grant dated 28th January 2009, be amended to remove their names and substitute them with those of their alleged children.

2. I have a problem with the application, dated 18th January 2021. The grant was confirmed in 2008. It is now more than 10 years since then, and no explanation has been given as to why the property was not transmitted to the beneficiaries named in the certificate issued in January 2009. Land legislation is very clear that once a grant is confirmed, and a certificate of confirmation of grant issued, the administrator ought to take that certificate and present it to the land registrar, so that he can give effect to it. The applicants are obliged to explain what happened so that transmission never happened. What difficulties did they face? What steps did they take to surmount them? That should have been done first before coming to court to ask, effectively, for a re-distribution of the estate.

3. I am told the beneficiaries died. That is to say Asha Asiko, Mariam Olivichi Otaka and Clementina Nyarotso. There are no averments as to when these people died. No documents have been placed on record to prove their deaths. The applicants should have placed certificates of death on record. The court cannot just act on mere averments in an affidavit as evidence of death. Government certifies that a person has died by issuing a certificate of death. That is the official proof of death. No public institution, the courts included, is going to act merely on the basis of an affidavit where no certificates of death are not produced.

4. I am invited to substitute the alleged dead beneficiaries with their children. There is no evidence, by way of birth certificates, that these alleged children are indeed children of the alleged dead beneficiaries. Government requires registration of births, and issues certificate, as evidence of birth and parentage. I cannot act on mere averments in a Motion and affidavit that some person is a child of another, where no birth certificate is produced to connect the two individuals.

5. In addition to the above, what the applicant is doing, by the Motion before me, is to conduct a succession into the estates of the alleged dead beneficiaries through this instant cause. A succession ought not to be conducted within another succession. Such a process has the potential of disadvantaging other persons who might have beneficial interest in the estate. For instance, other children of the dead beneficiary, who are not mentioned. At the hearing on 17th May 2021, I was told that Mariam Olivichi had 5 children, yet in the application, I am invited to substitute her with only 1 of them, without it being proposed that that 1 would hold the share in trust for the rest. The fact that she had 5 children is not even disclosed in the application. Their names are not even disclosed. Clementina Nyarotso was similarly, allegedly, survived by 2 children, yet I am asked to substitute her with only 1 of them. There is no invitation to have him or her hold the share in trust for that other child, whose name is not even disclosed. Should I go ahead and allow the application, these other children would be excluded and disinherited. That is why it is critical that succession to the estates of these persons ought not to be done through the instant cause. The applicants should cause the property to be transmitted through the certificate of confirmation issued in 2009, and then the shares of the dead beneficiaries can be dealt with in succession causes initiated in the names of the dead beneficiaries.

6. The second aspect to it is that estates are not just about the children or survivors of a deceased person. Other persons may also have a beneficial interest in the property. I am talking of creditors, purchasers and liabilities. When succession is done summarily, in the succession cause of the parent of the beneficiary, then such creditors, purchasers, liabilities and other claimants stand to be locked out. .

7. I notice that the distribution that the court approved in 2008 gave a share to Joseph Ingunyi, according to the certificate of confirmation of grant on record. In the Motion, dated 18th January 2021, there is no mention of Joseph Ingunyi in the prayers for substitution, yet in the revised distribution proposed in paragraph 5 of the affidavit of Zainabu Shiundu Juma, the share for Joseph Ingunyi disappears. It is not clear what is proposed to happen to it, for his name does not appear at all in that affidavit. I see the name of Joseph Wafula Khamala, but I cannot tell whether there is any connection between that name and Joseph Ingunyi. I have not been told whether Joseph Ingunyi is dead. I do not think he is, because a person by that name was in court before me on 17th May 2021. He has not filed an affidavit, nor a consent. His interest, as per the certificate of confirmation of grant, cannot be altered without his consent or involvement, or even any averments in the affidavit proposing the changes.

8. If the changes proposed have something to do with Joseph Ingunyi having sold his interest to Joseph Wafula Khamala, then he would be abusing court process by having it sanctioned the sale. What he should have done is to cause his share to be transmitted to himself through the relevant land legislation, after which he could sell it to Joseph Wafula Khamala, and then, thereafter, transfer it to him. The parties are taking shortcuts and denying the State revenue that should accrue from land transactions that these parties are trying to avoid through this process.

9. I am not persuaded that I should grant the orders sought in the Motion, dated 18th January 2021. Let the parties read very carefully what I have stated in my ruling, and act accordingly. The said Motion is dismissed. There shall be no order as to costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF SEPTEMBER 2021

W MUSYOKA

JUDGE