



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 385 OF 1988

IN THE MATTER OF THE ESTATE OF OMAR MAKOKHA MATSAKHU (DECEASED)

RULING

1. This matter relates to the intestate estate of Omar Makokha Matsakhu. According to the certificate of death on record, dated 19th December 1985, serial number 143582, he died on 10th August 1985. Representation was sought in this cause, vide a petition lodged herein on 8th December 1988, by Mohammed Matsukhu Makokha, in his capacity as son of the deceased. He expressed the deceased to have been survived by individuals listed in the petition, but their relationship with the deceased is not indicated. They are Mohamed Matsukhu Makokha, Asman Barasa Makokha, Ali Shimbuchi, Shaban Wanjala Makokha, Yusuf Simiyu Makokha, Ismail Ngiti Makokha, Sorophina Nabachole w/o Makokha and Saina Nasiowoni w/o Makokha. The deceased was expressed to have died possessed of North Wanga/Khalaba/379 and motor vehicle registration mark and number KVD 142. Letters of administration intestate were made to petitioner on 10th July 1989, and a grant was duly issued, on even date. It would appear from the record before me that the grant is yet to be confirmed.

2. What I am called upon to determine is a summons, dated 12th February 2019, which seeks revocation of the said grant. It is brought at the instance of Sorophina Nabachoye Makokha. I shall hereafter refer to her as the applicant. Her case is that she is a widow of the deceased, and the administrator her son, to whom she consented to be administrator. She had expected that he would administer the estate and distribute the estate amongst his siblings and other beneficiaries. She avers that upon his being appointed, the administrator merely caused the property to be registered in his name, but has since not distributed the estate. She has also accused him of selling of the property, and has attached a copy of a sale agreement to support his case.

3. The administrator has responded to the application. His affidavit was sworn on 17th May 2019. He concedes that the applicant is his mother. He concedes too that his grant is yet to be confirmed since 1988. He says that the clan allowed him to sell a portion of the estate land to educate his children, and that after that he bought other parcels of land, being North Wanga/Khalaba/314 and 2333. He avers that he disposed of the portion that he was entitled to, and did not affect what is due to the other heirs. He accuses the applicant of having made it difficult for him to administer the estate through her disagreeable nature. He argues that revocation of the grant will occasion inordinate delay in the administration of the estate. He has attached documents to demonstrate that he sold estate assets, and bought other property.

4. Directions were given on 3rd March 2020 for disposal of the application by *viva voce* evidence. I see on record witness statements that were filed with respect to that. Those directions were varied on 2nd February 2021, to the effect that the application be canvassed by way of written submissions. I have seen on record written submissions that were filed by the applicant.

5. What is for determination is for revocation of grant. Revocation of grants is provided for under section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, which says as follows:

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

6. Under section 76 of the Law of Succession Act, grants of representation are liable for revocation on three general grounds. The first is that the process of obtaining the grant was fraught with problems. It could be that there were defects in the process or that the court was misled in some way. Such would include where the grant was sought by a person who was not qualified to obtain representation to the estate of the deceased, or where certain facts as were required under the law were disclosed or were concealed from the court or were misrepresented. The second general ground is where the grant was obtained procedurally and properly, but subsequently the grant holder encountered challenges with administration, such as where they failed to apply for confirmation of grant within the period allowed in law or failed to proceed diligently with the administration of the estate, or failed to render accounts as and when required. The last general ground is where the grant subsequently became useless or inoperative, usually in cases where the sole administrator died or became of unsound mind or was adjudged bankrupt.

7. In the instant case, the applicant raises issues with the second general ground, that the process of administration of the estate was attended by various challenges. Her principal arguments are that the administrator has not distributed the estate since his appointment in 1989, and has instead embarked on disposing of estate assets. The administrator has conceded both, the fact that he has not sought confirmation of his grant since 1989, and that he has sold estate assets.

8. The matter before me is fairly straightforward. Indeed, it is a case which a court can dispose of *suo moto*. Section 71 of the Law of Succession Act requires that a grant of representation ought to be confirmed upon expiration of 6 months, and, therefore, the administrator is obliged to apply for confirmation upon expiration of 6 months. The programme in the Law of Succession Act, running in sections 71, 73, 76(d)(i) and 83, is that a grant of representation should be confirmed and the estate distributed within one year of its making. Under this programme, administration of an estate should not run forever, if everything were to follow the script, the administration ought to be completed within one year. Failure to apply for confirmation of the grant after 6 months, and to complete administration within one year is a good ground for revocation of the grant under section 76(d)(i). The administrator herein has utterly failed in that department. The grant was made to him on 10th July 1989, and 32 years down the line, he is yet to apply for confirmation of his grant, and to complete administration. He should have applied for confirmation of his grant in January/February 1990, and completed administration by July/August 1990. He has given no plausible explanation whatsoever for his spectacular failure.

9. An administrator is a fiduciary, he holds property that does not belong to him, but the estate of a dead person. He holds it on behalf of the survivors of the deceased, heirs and beneficiaries of the estate, dependants and creditors. He owes a duty to the persons on whose behalf and for whose benefit he holds the property. The bearer of a duty has an obligation to account for his dealings with the property, that he holds in trust, to the persons for whose benefit he holds the same. An administrator in intestacy holds that office on appointment by the court. By that appointment he incurs a duty to the appointing authority to account for what he has done with the property he holds in trust for others. An office of trust confers confidence on the holder, the court and the beneficiaries trust and have confidence in the administrator that he would do the right and fair thing in handling the property, including distributing the same at the due time.

10. The fact that the office of administrator is one of trust is underlined by various provisions in the Law of Succession Act. One of the duties of the administrator, under section 83, is to render accounts within 6 months. It is stated in section 83(e), that within 6 months of appointment, the administrator shall produce to court a full and accurate inventory of the assets and liabilities of the estate, and a full and accurate account of all dealings with the estate up to the date of the account. Rendering of accounts is a statutory obligation, and it arises naturally from appointment as administrator, for the reasons I have given above. Failure to discharge the statutory duty to render accounts is a ground, under section 76(d)(iii) of the Law of Succession Act, for revocation of a grant. Indeed, section 76(d)(iii) is specific about failure to render the accounts envisaged in section 83. It should not be lost to the parties that the accounts ought to be rendered within 6 months, which should coincide with the duty to file for confirmation of grant. From the material before me, the administrator has woefully failed in this duty. No accounts were ever filed from 1989 when the grant herein was made.

11. The other ground for revocation of grant under section 76(d), is the failure to proceed diligently with administration. An administrator who fails to render accounts as and when required of him by the law, and who equally fails to apply for confirmation of his grant within the timelines set by the cannot be said to have proceeded diligently with administration. To make matters worse, he embarks on the exercise of wanton plunder of estate assets by selling them to third parties before the grant is confirmed.

12. Section 79 of the Law of Succession Act vests the estate of the deceased in the administrator. That means that he steps into the shoes of the dead owner of the property, and is able to exercise powers and duties over the property that could only be exercised by the dead owner. The vesting of the assets in the administrator is only meant to facilitate and ease the exercise of administration. The vesting constitutes the administrator legal owner of the property. However, that ownership is not absolute, for the administrator is only but a trustee. The property does not belong to him absolutely, it is estate property that comes to him for the sole purpose of administration, with a view to settle any debts and liabilities, and to distribute the net estate to heirs, beneficiaries, dependants and survivors. An administrator who acts contrary to his trusteeship breaches the trust and exposes himself to liability.

13. Among the powers conferred upon administrators by section 82 of the Law of Succession Act, is that to dispose of estate assets by way of sale. However, that power of sale is not to be exercised willy-nilly. Section 82(b)(ii) is specific that that power of sale, with respect to immovable assets, cannot be exercised until after confirmation of grant. Immovable assets refer to land. Land cannot be sold by an

administrator before his grant has been confirmed. The administrator herein sold land to third parties, before his grant was confirmed. He violated section 82(b)(ii) of the Act, and the alleged sale was a nullity. He claims that the sale was necessitated by the need to raise money for the education of his children. May be there was a good reason, but then the law still had to be followed. Section 82(b)(ii) did not sanction the sale, and the same was a nullity. If the administrator was keen on following and obeying the law, now that section 82(b)(ii) did not allow him to sell land, he should be applied for leave of court to be allowed to sell the land. Such application would have required that the other survivors of the deceased be given a chance to have a say on the alleged sale.

14. He also says the clan had sanctioned the sale. Administration of estates of dead people is governed by the Law of Succession Act, and under that law it is the court which oversees administration, not the clan. The clan has no role at all in the matter, unless it is invited by the court, and whatever it does, without authority of the court, amounts to intermeddling with the estate of a dead person. Intermeddling with an estate is a criminal offence under section 45, and if it is true that the clan dealt with the matter, it was indulging in criminality by dint of section 45. The acts of the administrator of selling estate assets without authority of the court and without reference to the law displays a person who did not understand his duties as such, or who was bent of abusing his office as administrator for his own benefit. Such a person cannot be trusted to occupy a position of trust as administrator.

15. I believe I have said enough to demonstrate that there are very fertile grounds for revocation of the grant that was made to the administrator in 1989. Consequently, the orders that I shall make herein are as follows:

- (a) That the grant made herein on 10th July 1989 to Mohamed Matsukhu Makokha is hereby revoked;**
- (b) That as a consequence of (a), above, any sale transactions relating to the immovable assets of the estate carried out on the basis of the said grant are all hereby nullified, and the any land transferred or subdivided on the basis of the said grant shall be reverted back to the estate;**
- (c) That the Land Registrar responsible for Kakamega County shall give effect to the order in (b), above;**
- (d) That as a consequence of the order in (a), above, new administrators shall be appointed upon consultations within the family of the deceased, and the matter shall be mentioned after 30 days for that purpose;**
- (e) That the administrators to be appointed shall include 2 surviving spouses and 2 surviving children from each house, and shall exclude Mohamed Matsukhu Makokha;**
- (f) That the new administrators shall apply for confirmation of their grant within 45 days of their appointment;**
- (g) That each party shall pay their own costs; and**
- (h) That any party aggrieved by the orders made herein has leave of 28 days to move the Court of Appeal appropriately.**

16. It is so ordered.

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

W MUSYOKA

JUDGE