



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION NO. 31 OF 2017

IN THE MATTER OF THE ESTATE OF MWANJE NZAVILI

NYALE alias DAVID MWANJE NZAVILI (DECEASED)

CORAM: Hon. Justice R. Nyakundi

Mwaure & Mwaure Waihiga Advocate for the Applicant

Omagwa Angima Advocate for the Objector

J U D G M E N T

Essentially, this matter is all about amended Summons for confirmation of grant made and issued in favor of **David Gasper Shuma** and **William Kazungu Mwanje** as administrators to the intestate estate of **Mwanje Nzavili Nyale** be confirmed having met the legal criteria under the Succession Act. Therefore according to the administrators, the confirmation of grant is to facilitate the distribution of the estate to the beneficiaries.

For the above contentions, the administrators placed reliance in their respective affidavits dated 10.12.2019. That this is so they contend that the grant of letters of administration be confirmed in the model proposed under paragraph 4 and 8 of the amended affidavits dated the aforesaid date of 10.12.2019. The objector in counterpoint has thrown the gauntlet in his effort to undercut the administrators affidavits in support.

First, the objector avers that in respect of the parcel of land referred **Kilifi/Mbaraka Chembe/226** of the **Late Mwanje Nyale alias David Mwanje Nzavili**, a portion of it measuring 8 acres was sold in 1981 at Kshs.6,000/=. Second, however the interest in that subject matter was never transferred to conclude the terms of the sale agreement of 31.10.2016. Third, that the sale agreement was freely entered into with all the beneficiaries so as to honour their father's earlier commitments. Fourth, that in view of their repudiation and in any case and having done so in writing in conformity with the legally recognized rubric for such agreements, the procedure to confirm the grant ought to be denied, without incorporating the purchasers interest.

The objector the goes to repeat the remedies which he is seeking that the initial Grant of Letters revoked by the Court be reinstated. That the objector was in possession of the suit land which he set out to distribute to the beneficiaries while hiring out his 8 acres of land in conformity with the sale agreement.

Submissions on behalf of the objector

Learned counsel, **Mr. Angima** argues and submitted that the objector who had entered into a binding agreement for the sale of the land and who did all that was required of him under the terms of payment, should not be deprived of his right to property. Further, Learned counsel submitted that the administrators/beneficiaries by effluxion of the Law should complete the intention of conveying all interests and rights for the eight acres of land.

According to Learned counsel, the agreement which was subsequently reduced to writing and that it was a term of the contract that the land would be transferred to him as agreed ought to be included in the mode of distribution. In furtherance of the submissions, Learned counsel cited the following authorities: **Titus Muraguri Warothe & 2 Others v Naomi Wanjiru Wachira Nyeri HCSC No. 122 of 2002 Halsbury's Laws of England Vol – 15.**

Submissions

On behalf of the administrators regarding the above, counsel for the administrators argued and submitted that the objector is a creditor whose

interest had not ripened. That the objection to the confirmation proceedings as set out by the objector lacks want or form to persuade this Court to decline granting the reliefs under Section 71 (1) of the Law of Succession Act. Learned counsel further submitted that the agreement of sale relied upon by the objector is defective for not complying with the conditions of sale on completion of the purchase price.

Learned counsel on the other hand also submitted that the Land Board consent to transfer title to land was never applied for within the provisions of Section 6 & 8 of the Act. In consequence, therefore on this aspect, Learned counsel submitted Section 4 of the Limitations of Action Act bars the Court from entertaining the objection raised by the objector on the sale of land purported to have been entered with the deceased.

Determination

As between the objector and administrators the legal issues are:

(1). Whether, the objector is entitled to an order for specific performance where there is a caveat as to the nature of the agreement of sale entered after the death of the deceased as the owner of the interest.

(2). Whether the objection proceedings are cognizable in Law to dissuade this Court from confirming the grant of letters of administration, to the administrators.

As a corollary to the first issue its already pointed out that the objectors right of accrual can only have showed remedy having regard to initiation of the process of land by seeking the Land Control Board consent in terms of Section 6 and 8 of the Operational Act, namely Land Control Board Act. Again, the objector relies on the sale agreement dated 31.10.2016 in maintaining that his claim and right to property had already crystalized and not statute barred.

Accordingly, the objector argues that this Court has the jurisdiction to determine the matter under Section 93 (1) of the Succession Act or grant the relief being sought under the terms of the agreement. Yet still another issue raised by the objector and of significance in defending the claim was on reinstatement of the revocation of grant. In other words, the beneficiaries had delayed in pursuing the matter and as owner of the 8 acres he had every right to petition for grant of letters of administration.

In my view, on the express provisions of Section 66 of the Law of Succession Act and Rule 7 (7) of the Probate and Administration Rules requires, the probate Court to exercise discretion in the issuance of grant of letters of administration for the administration of intestate estate. It is of interest to observe the provisions recognizes preference to be given to certain persons to administer the deceased estate who passed on intestate:

(a). Surviving spouse/spouses, with or without association of other beneficiaries.

(b). Other beneficiaries entitled on intestacy with priority according to their respective beneficial interest as provided for in part of the Act.

The objector in this case ranks at the tail end of the ranking in a class of persons recognized in the order of preference to be considered as a person entitled to be appointed as an administrator of intestate estate. Where such an application for grant of letters of administration are made, in my view evidence of repudiation from other ranked class of persons under the above provisions would be a necessity under the doctrine of exhaustion on preferred persons to be issued with the Letters of Grant to an estate. Contrary to what the objector pleads, there was no sufficient evidence of repudiation for that right in the making of the grant to be passed to him as a creditor. The objectors stake to the deceased on the sale agreement of the eight (8) acres dated 30.10.2016, to one is void abinitio on the strength of the beneficiaries lacking capacity to deal with the deceased estate.

In the instant case as has been pointed out, the deceased as the registered owner of the intestate property under Section 3 of the Law of Succession Act passed on as particularized on the 16.12.1998. This Court would like to say as emphatically as I can that the purported sale of land herein between the objector and named beneficiaries took place at that time when they had no capacity to deal with intestate property. The estate of the deceased was yet to be vested in the domain of the administrator as defined under Section 83 of the Law of Succession. For there was no appointed administrator known in Law by the due date of the agreement rendered any such transactions void by virtue of Section 45 and 82 of the aforesaid Act.

From the record, initial grant of Letters of Administration intestate happened to have been issued on 19.9.2017 by **W. Korir J.** That grant which has the force of the Law had not been confirmed to facilitate any transactions therein on the deceased estate. This Court has found that based on the record, the alleged sale in 2016, cannot possibly be a valid sale in the circumstances, for lack of a confirmed grant.

It may be that the parties had the intention to enter into a legally binding agreement but unfortunately it became tainted with illegality for reason of non-appointment of administrators by the Court to administer the estate.

I find it difficult to understand how the parties could enter into contracts to intermeddle with intestate estate, before the conclusion of the making of a grant of letters of administration. In this respect the title and entries on ownership remained to be in the names of the deceased. That certificate of title referenced as **Kilifi/Mbaraka/Chembe/226** was not capable of any distribution sale, transfer, conveyance or for purpose of alienating any part of it, without a certificate of confirmed grant. I agree with the petitioners that the question framed by the objector cannot be possibly answered by this Court.

I would, therefore answer this question, in the case stated by the objector, that the cause of action is not a cause particular within the jurisdiction of this Court. As there has been no change in the Law, pursuant to Article 162 (2) and 165 (5) of the Constitution, the ownership

of immovable property and the nature of the transactions which give rise to specific performance as a remedy rests with Environment and Land Court. It appears to me that Learned counsel for the objector misapprehended the Law on contract and recognized interest of the purchaser to the deceased intestate estate. His submission also hinges on the principles of equity which had not ripened for this Court to appropriate the eight (8) acres under a constructive trust.

The arguments presented by Learned counsel to a large extent upon the words principles of equity deemed to be that the objector has a right to occupy the eight acres, premised on the illegal agreement dated 30.10.2016. That being so, it is obvious the vendors had no capacity to enter into a sale agreement on behalf of the estate of the deceased.

I have come, therefore to no hesitation whatsoever to the conclusion that the High Court has no jurisdiction to adjudicate over the objectors claim or inquire into the validity of the sale agreement. It is not even a claim to be cured by oral evidence. This is a matter of Law applicable within the legislative scheme of the Law of Succession. His claim to the deceased land outside rests first on the adjudication by Environment and Land Court.

That objection is therefore non-suited to the petitioners summons for confirmation of grant. The survivors or beneficiaries throughout all this had no really power or right to transact on any of the assets of the deceased after his death without a legal instrument commonly known as certificate of confirmed grant. The objector fell in error and the best description of the purported sale in one which is dead on arrival.

What the above means is for this Court to sanction, the amended Summons for Confirmation of Grant filed in Court on 13.12.2019. Subject to any exception hereinafter mentioned which is not relevant. The principle underlying the distribution be in conformity with paragraph 8 of **Gasper David Shuma**.

Accordingly, I would allow the amended Summons for Confirmation of Grant with no orders as to costs.

DATED, SIGNED AND DELIVERED via email AT MALINDI THIS 5TH DAY OF NOVEMBER, 2021

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R. NYAKUNDI

JUDGE