



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 16 OF 2009

IN THE MATTER OF THE ESTATE OF FRANCIS EKUMBA MASIKANA (DECEASED)

RULING

1. This matter is for confirmation of grant. Several such applications are pending.
2. The first in time was filed on 14th June 2016, dated 15th June 2016. It is brought by Lawrence Nerima Masikana and Patrick Odongo Ekumba, the administrators appointed by the grant made on 4th May 2009. The deceased is said to have been survived by two children, being Lawrence Nerima Masikana and Patrick Odongo Ekumba, and it is proposed that the estate, comprised of South Wanga/Lureko/346, be shared out between the two of them, with Lawrence Nerima Masikana taking 2.5 acres and Patrick Odongo Ekumba 4 acres. A certificate of official search attached to the application puts the acreage of the land at 6.3 acres.
3. The second application in time was filed on 18th November 2016, dated 26th October 2016, by Lawrence Nerima Masikana, Patrick Odongo Ekumba and Julius Chimwani Masikana. The deceased is said to have had been survived by three children, being Lawrence Nerima Masikana, Patrick Odongo Ekumba and Julius Chimwani Masikana. It is proposed that South Wanga/Lureko/346 be shared out between the three of them, so that Lawrence Nerima Masikana takes 2.15 acres, Patrick Odongo Ekumba 2.15 acres and Julius Chimwani Masikana 2 acres.
4. There is no response to the two applications. What I see on record is an affidavit sworn by Lawrence Nerima Masikana on 29th June 2018, which was filed herein on even date. He avers that the other two players in the application were his brothers, who he claims had refused to come to court.
5. The third and last application was filed herein on an unknown date, but it is dated 8th January 2019. It is brought at the instance of Lawrence Nerima Masikana and Patrick Odongo Ekumba. They describe themselves as the sole survivors of the deceased and propose that South Wanga/Lureko/346 be shared out between Lawrence Nerima Masikana takes 2.15 acres, Patrick Odongo Ekumba 2.15 acres and Julius Chimwani Masikana 2 acres.
6. Lawrence Nerima Masikana swore a further affidavit on 20th July 2020, which he filed herein on 22nd July 2020. He avers that the deceased had subdivided the property amongst his three sons and they had been staying peacefully on the land, which they had developed extensively, with distinct boundaries. He swore another affidavit on 11th September 2020, which largely repeats the averments made in his earlier affidavits.
7. When the application dated 15th June 2016 was placed before Mwita J on 12th October 2016, the court noted that the Chief's letter dated 8th December 2008, had indicated that the deceased had left behind a minor described as JME, who the applicants in the summons for confirmation of grant had not provided for. The court adjourned the matter, and directed the administrators to file a supplementary affidavit to provide for the said JME. The matter came up for hearing several times without all the beneficiaries being in attendance.
8. The matter was first placed before me on 2nd July 2018. I was informed that the deceased had four daughters, whose names were given as Carolyne, Gaudencia and Monica. I was not given the name of the fourth daughter. I adjourned the matter and directed the administrators to cause the daughters to attend court at the next hearing, or otherwise to get the daughters to renounce their right to the estate.
9. The matter was thereafter placed before Njagi J severally, when all the survivors of the deceased were not in attendance. When it was placed before me next, on 28th November 2019, I was told the deceased was survived by four children, who were named as Patrick Odongo, JM, Gaudencia and Monica. I was told that all were alive, and had reached age of majority. I adjourned the matter and directed the administrator to avail all the children at the next hearing. On 5th November 2020, only Lawrence Masikana and Patrick Odongo were in court. I postponed the application to a date when the three could be availed. I was particularly interested in the three because they are not disclosed in all three pending applications for confirmation of grant. At the next hearing on 26th January 2021, Lawrence Nerima was in court alone. He alleged that he had served the three, and pointed me to an affidavit of service that he had filed. Looking at the affidavit of service, I noted that it made no reference to the four individuals who were required to have been served: JM, Julius Chimwani, Gaudencia and Monica. I put off the matter once again for service to be effected on the four. At the next hearing, on 26th April 2021, only Lawrence

Nerima was in court, he told me that the four individuals were due to appear before the District Officer, and I adjourned the matter. On 14th June 2021, Lawrence Nerima was in court alone. He said the individuals had been served by the District Officer. I directed that I would determine the matter based on the material on record.

10. The deceased herein died on 26th December 1996. The letter from the Chief of Matawa Sub-Location indicates that he was survived by three individuals, being Lawrence Nerima, Patrick Odongo Ekumba and JME, the latter two are described as sons. The deceased was said to have had died possessed of a property known as S/Wanga/Lureko/346.

11. What is before me is a summons for confirmation of grant. The deceased died on 26th december 1996, long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into operation on 1st july 1981. He died intestate. His estate, therefore, fell for distribution in accordance with the intestate provisions of the said Act. Confirmation of grants is provided for under section 71 of the Law of Succession Act, which provides as follows:

“Confirmation of Grants

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

12. The principal purpose of confirmation of a grant is distribution of the assets. The proviso to section 71(2) requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate, and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4), which governs applications for confirmation of grant, as follows:

“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons entitled to the estate have been ascertained and determined.”

14. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? It would appear that the applicants have not properly ascertained the survivors of the deceased. Firstly, although the Chief’s letter names JME as a son of the deceased, he is not provided for in any of the pending applications for confirmation of grant. On 12th October 2016, Mwita J directed the administrator to file a supplementary affidavit to provide for JME. Instead of bringing JME on board, the applicants filed a second summons for confirmation of grant, introducing Julius Chimwani Masikana as a son of the deceased, instead of JME, as directed by the court. Secondly, when the applicants appeared before me severally, they stated that the deceased had two daughters, named as Gaudencia and Monica, and they even mentioned Carolyne as another daughter. The two were not provided for in the three applications for confirmation of grant. They were not disclosed in the Chief’s letter nor in the petition. In view of that, it is my conclusion that the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules have not been complied with.

15. The other aspect of the proviso is that the shares of the survivors or beneficiaries identified must be ascertained. Shares are about the property being distributed. There is no dispute that the deceased died possessed of only one asset, S/Wanga/Lureko/346. It was mentioned in the Chief’s letter and the petition. I have seen a copy of certificate of official search, dated 30th September 2008, which shows that the deceased was registered as proprietor of the property on 9th January 1967. A second certificate of official search, dated 4th July 2016, shows that registration changed on 26th January 2021 to have Lawrence Nerima Masikana. I do not know how and why this happened. The grant has not been confirmed, and there is no court order directing that the property change hands from the deceased to Lawrence Nerima Masikana. Secondly, if the registration details had to change at all, following the making of grant, on 4th May 2009, jointly to Lawrence Nerima Masikana and Patrick Odongo Ekumba, and issued on 11th June 2009, then it ought to have been made in the joint names of the two.

I find and hold that this registration was fraudulent, and should not have been effected. It can only have been done with an ulterior motive.

16. The other aspect of the proviso to section 71(2) and Rule 40(4) is with regard to distribution, the court must be satisfied as to the distribution proposed, in terms of being satisfied that the shares of all the persons beneficially entitled have been ascertained. The applicants have suppressed three survivors of the deceased, being children of the deceased, that is to say JME, Gaudencia Ekumba and Moinca Ekumba. There was also mention of a Carolyne. They have not disclosed them as such in the applications, nor provided for them. Put differently, they have concealed their existence, and have consistently sought to distribute the property to the two applicants, the administrators themselves, to the exclusion of everybody else. The applicants have also been trying to introduce a fourth person in the matter, Julius Chimwani Masikana, and have allocated to him shares in the estate. I am not satisfied that the applicants have ascertained the shares that are due to the children of the deceased.

17. It bears emphasising that the most critical consideration, in assessing entitlement to a share in an estate, is the relationship between the survivor and the deceased. Sections 35, 36 and 38 of the Law of Succession Act give priority to the surviving spouse and children of the deceased. Where these two categories exist, then other relatives, such as parents, siblings and members of the extended family of the deceased are excluded. These two have a prior exclusive entitlement in intestacy. Where there is a surviving spouse or child or both, then no one else is entitled, unless they make a special case. A special case could be where they prove dependency under section 26 of the Law of Succession Act. Another case could be where they establish that the deceased held the property in trust for other individuals. Outside of that, parents, siblings and other members of the extended family of the deceased are excluded. They only come in under section 39 of the Law of Succession Act, where the deceased was not survived by a spouse or children or both. So, before a parent or brother or sister or cousin or nephew or uncle of a deceased person claims entitlement to the intestate estate, they must prove that the deceased was not survived by a spouse or child. If there exists a spouse or child, then the spouse or child must be disclosed, and must be involved in the process of administration, and must be provided for at distribution unless they waive or renounce their entitlement to inherit. See *In re Estate of Joshua Orwa Ojode (Deceased)* [2014] eKLR (Musyoka J).

18. The material before me has not clearly identified the survivors of the deceased. Whereas it is clear that JME, Patrick Oodngo Ekumba, Gaudencia Ekumba and Monica Ekumba are children of the deceased, and are the persons beneficially entitled to S/Wanga/Lureko/346, the property registered in the name of their father Francis Ekumba, it is not clear to me how Lawrence Nerima Masikana and Julius Chimwani Masikana are related to the deceased. Although Lawrence Nerima Masikana has filed numerous affidavits herein, he has made no effort whatsoever to explain how he and Julius Chimwani Masikana are related to the deceased. Was he their father or brother or uncle or grandfather? If he was their brother or uncle, why and how would they be entitled to a share in his estate? And why would they appear to have a superior claim to that of the children of the deceased?

19. It is a mandatory requirement, at the stage of applying for representation that the immediate family members of the deceased be disclosed, by dint of section 51(2) of the Law of Succession Act. Failure to comply with these provisions makes the process of applying for and obtaining a grant of letters of administration intestate defective, and failure to disclose may amount to concealment of matter from court, or misrepresentation, or fraud, which would expose the grant to revocation by the court under section 76 of the Law of Succession Act, even by the court on its own motion, that is without being invited by anyone to revoke the grant. Giving misleading information to the court is even a criminal act, for which a person can be prosecuted. It is that serious. Parties who come to court for one reason or other, and file papers, must be careful that they do the right thing, otherwise they expose themselves to very serious consequences, should it turn out that they have not done the right thing, or they have gone out their way to suppress information, to mislead the court, for their own selfish ends.

20. Confirmation is not just about distribution, it is also about the court assessing whether the persons appointed as administrators were properly appointed, and if they were, whether they properly went about administering the estate, and if they did not, whether they should be confirmed to continue administration for the purposes of completion after confirmation. These are requirements under section 71(2)(a) of the Law of Succession Act. A person who obtains administration upon concealing the rightful heirs of the deceased cannot be said to have obtained representation properly. A person who does not have priority to share in the estate, and, therefore, no prior right to administration over the children of the deceased, by dint of section 66 of the Law of Succession Act and Rules 7(7) and 26 of the Probate and Administration Rules, and who has not obtained the consents of the children of the deceased, or gotten them to waive their right to administration, or filed an affidavit to explain why there is no renunciation or waiver or consents, cannot be said to have been properly appointed. A person who fails to comply with court orders, which require him to include a child of the deceased in distribution, and to bring the children of the deceased to court, or to obtain their renunciation, cannot be said to be properly administering the estate. Indeed, the singular failure to disclose the children of the deceased, and to carry on as if these children did not exist, is clear testimony that the administrator is not properly administering the estate, and such a person should not be trusted to continue with administration of the estate to completion. There is also the question of the fraudulent transfer of the estate asset the name of Lawrence Nerima Masikana in 2021, when his grant has not yet been confirmed, and when the grant is made jointly to him and another, yet he only gets himself registered as sole proprietor without disclosure that he is registered as such as administrator. These are not acts of an honest transparent person.

21. I am not persuaded that I should confirm the grant herein and approve the distribution proposed, before the concerns that I have raised in paragraph 17 herabove have been addressed. In the circumstances, I shall make the following orders:

(a) That I hereby postpone, under section 71(2)(d) of the Law of Succession Act, the three summonses for confirmation of grant, dated 15th June 2016, 26th October 2016 and 8th January 2019, pending clarification, by the administrators, of the issues that I have raised above, and compliance with the directions that are given hereunder;

(b) That the administrators shall provide for the children of the deceased, that is to say JME, Patrick Odongo Ekumba, Gaudencia Ekumba and Monica Ekumba, and Carolyne;

(c) That the administrators shall disclose the relationship between the deceased and Lawrence Nerima Masikana and Julius Chimwani Masikana, and why the two should be provided for out of the estate of the deceased;

(d) That for the purpose of dealing with the above, the administrators shall file a further or supplementary affidavit, within the next fourteen days;

(e) That final orders, on distribution of the estate of the deceased, with respect to S/Wanga/Lureko/346, shall be made only after full compliance with the directions in (b), (c) and (d), above;

(f) That the registration of Lawrence Nerima Masikana as proprietor of S/Wanga/Lureko/346, on 26th January 2012, is fraudulent, and I hereby direct the Land Registrar, responsible for Kakamega County, to cancel the same, and to revert the property back to the name of the deceased proprietor, Francis Ekumba; and

(g) That the matter shall be mentioned thereafter for compliance and further directions.

22. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER., 2021

W MUSYOKA

JUDGE