



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 144 OF 1983

IN THE MATTER OF THE ESTATE OF JOHN AKWEMBA AKUBANIA alias JOHN KHAYINGA AKUBANIA (DECEASED)

RULING

1. On 30th April 2020, I delivered a ruling, in which I dismissed an application dated 4th December 2014. Arising from that judgment, an application for its review was lodged herein on 21st December 2020, by Elias Moard Mategwa. The grounds for review are that there are errors apparent on the face of the record, discovery of new material, the grant and certificate of confirmation do not refer to estate of the deceased, there were no handwritten notes of the Judge on record confirming the grant, no certificate of confirmation of grant issued in favour of Rose Okwemba and her identity was not ascertained. He would like the grant to be revoked, and the transmission of the estate executed on the basis of the grant be nullified.
2. Review of orders made by a probate court is provided for through Rule 63 of the Probate and Administration Rules, which has imported the provisions of the Civil Procedure Rules relating to the same. Review is sought on the basis of error on the face of the record, and discovery of important evidence which was not available at the time the decision sought to be reviewed was being made. There is also the omnibus ground of any other sufficient reason.
3. The first allegation that the applicant makes is that the grant and the certificate of confirmation of grant do not refer to the estate of the deceased. The grant herein was initially made on 3rd October 1983, in the High Court of Kenya at Kakamega, in Succession Cause No. 144 of 1983, in the matter of the estate of John Khayinga Akubania, also known as John Khayinga Akubania, to Richard Nandi. The grant was made on the basis of a petition dated 18th August 1983, lodged in Kakamega Succession Cause No. 144 of 1983, by Richard Nandi, in the matter of the estate of John Khayinga Akubania. That is what is on record.
4. After the grant was confirmed on 22nd May 1985, two documents were generated, taking the form of a confirmed grant of letters of administration and a certificate of confirmation of grant.
5. The confirmed grant of letters of administration states as follows:

“IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 144 OF 1983

IN THE MATTER OF THE ESTATE OF JOHN KHAYINGA AKUBANIA..... DECEASED

CONFIRMED GRANT OF LETTERS OF ADMINISTRATION PURSUANT TO SECTION 71(2)(b) OF THE ACT TO A PERSON OTHER THAN THE ORIGINAL GRANTEE

BE IT KNOWN that on the 3rd October, 1983, Letters of Administration Intestate of all the estate of JOHN KHAYINGA AKUBANIA deceased late of Uasin Gishu District who died on the 1st November, 1981, at Eldoret which by law devolves to and vests in his personal representative were granted by this court to RICHARD NANDI of P.O. Box xx, Kakamega.

AND BE IT KNOWN FURTHER that upon the said grant of representation coming before this court for confirmation this 22nd May, 1985 and the court not being satisfied that the said grant should be confirmed the court did direct that a confirmed grant in respect of the estate of the said deceased do issue to ROSE OKWEMBA of P.O. Box xx, Kakamega she having undertaken faithfully to administer the same according to law and render just and true account thereof wherever required by law to do so.

Issued by the High Court through the Registry at Kakamega this 22nd May, 1985.

Hon. Mr. Justice Aganyanya

JUDGE OF THE HIGH COURT”

6. The certificate of confirmation of grant of confirmation of grant is in the following terms:

“FORM P. & A 54

REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

SUCCESSION CAUSE NO. 144 OF 1983

In the matter of John Khayingo Akubani DECEASED

CERTIFICATE OF CONFIRMATION OF CONFIRMATION OF GRANT TO ORIGINAL GRANTEE

I hereby certify that the above named grant of letters of administration to the Estate of the late JOHN KHAYINGO AKUBANI issued to RICHARD NANDI therein named has this 22nd day of May 1985 been confirmed by this Court pursuant to the provisions of Section 71 of the Law of Succession Act.

DATED the 22nd day of May 1985.

D. K. S. AGANYANYA

JUDGE OF THE HIGH COURT”

7. The two documents recited above were extracted from orders that DKS Aganyanya J made on 22nd May 1985. For avoidance of doubt, the handwritten record of 22nd May 1985, by DKS Aganyanya J, reads as follows:

“22/5/85

In chambers

Coram: DKS Aganyanya J

Petitioner Nandi – present

Deceased wife – Rose Okwemba – present -

Samuel Atsiaya – purchaser of portion of the land – present

Assistant Chief: Thomas Mutongoi present

Deceased son – MO – present:

Court: After discussing the matter it was discovered the petitioner was only presented by the succession papers for signature otherwise he knew of the deceased wife and son. The wife said she knew only Samuel Atsiaya as purchaser of part of her husband’s land but not the rest including the Assistant Chief Thomas Mutongoi who claimed to have purchased part of the land from the deceased. In the ultimate result it was agreed that letters of administration be confirmed in the name of deceased wife Rose Okwemba to hold the land in trust for MO who is still a minor. Questions of purchasers of parts of the land by other persons including Atsiaya and Mutongoi to be decided in another forum.

DKS Aganyanya J

Order: Land Registrar requested to confirm issue of grant of letters of administration made on 3rd October 1983 in the name of Rose Okwemba as trustee of MO.

DKS Aganyanya J

22/5”

8. I do not understand it when the applicant says that the grant made on 22nd May 1985 and the certificate of confirmation of grant issued on the same date, based on the orders DKS Aganyanya J made the same day, does not refer to the estate. Reference to the estate is in the intitulement, where the succession cause number is cited and the person to whose estate it relates. The body of both documents also makes reference to the estate to which the grant and certificate relate. In any case, the court made the orders for issuance of a grant to Rose Okwemba and confirmed it. The order is a permanent record. If errors were made in the extraction of the grant and the certificate from the orders, the effect would not be to render the order a nullity or void, for the problem would not be with the order, but the document extracted from it, and the solution to such errors would be to have the documents amended or rectified so that they confirm with the orders. The order of 22nd May 1981 is a permanent record, as I have said above. It is still intact, valid, and subsisting. It was never reviewed by the High Court, nor set aside or varied by the Court of Appeal.

9. The applicant says that there are no handwritten notes of the order that DKS Aganyanya J made on 22nd May 1981. That is obviously not a correct statement. The original file of papers in Kakamega HCSC No. 144 of 1983 is before me. I can see the notes in the hand of DKS Aganyanya J, made on 22nd May 1985. The matter was placed before DKS Aganyanya J on two occasions, on 14th May 1981 and 22nd May 1985. DKS Aganyanya J made handwritten notes of what transpired on those two dates. They are on record, in His Lordship's handwriting. I have set them out, both, in my judgment of 30th April 2020, at paragraphs 23 and 29, to create an alternative record just in case the handwritten records are plucked out or got lost or misplaced. I am surprised that the applicant makes that allegation. After I delivered my judgment, he requested for typed proceedings, the same were typed, from the original handwritten record, and what was extracted from the handwritten record of DKS Aganyanya J is in pages 2 and 3 of the typed record. Let the applicant approach the Deputy Registrar, so that he can be shown the handwritten record, if he is doubtful of what I set out in my judgment, or of what appears in the typed proceedings that were supplied to him at his request.

10. The other point that the applicant makes is that no certificate of confirmation of grant was issued to Rose Okwemba. No such certificate was processed in the terms similar to those in the certificate that I have recited in paragraph 6 of this ruling. Such a certificate was unnecessary as Rose Okwemba had been given a confirmed grant in the terms that I have recited in paragraph 5 of this ruling. The confirmed grant was both a grant and a certificate, the two were combined in one document. It tells the whole world that a grant was made to Rose Okwemba, and that that grant had been confirmed, hence the reference to a confirmed grant. There was then no need to again issue a certificate to say that the grant had been confirmed. The purpose of a certificate of confirmation of grant is to certify that the grant has been confirmed, so if the grant itself says it has been confirmed, there would no need for a certificate.

11. The last point is that the identity of Rose Okwemba, as a party in the instant succession cause, is or was not ascertained. I dealt with this matter at length in my judgment of 30th April 2020. At the time I handled the matter, Rose Okwemba was no more. The issue of her status for the purpose of these proceedings was before DKS Aganyanya J in 1985. The name first came up before DKS Aganyanya J on 14th May 1985, and it would appear that it was Richard Nandi who brought it up, when DKS Aganyanya J sought to be satisfied under the proviso to section 71(2) of the Law of Succession Act, Cap 160, Laws of Kenya, and Rule 40(4) of the Probate and Administration Rules, as to whether all the persons beneficially entitled had been ascertained. There is a duty cast on the court by the proviso to section 71(2) and Rule 40(4), for the court to be satisfied first before it goes on to confirm a grant. DKS Aganyanya J. was not satisfied with what was before him, no doubt, and it was in that process that Richard Nandi brought up the name of Rose Okwemba. Richard Nandi presented Rose Okwemba before DKS Aganyanya J on 22nd May 1985, and DKS Aganyanya J was satisfied that she was the wife of the deceased, and he went on to confirm the grant to her, Rose Okwemba. That is permissible under section 71(2)(b) of the Law of Succession Act, where the court is not satisfied under section 71(2)(a) of the Act, that the person appointed administrator was the right person to be so appointed. That was the case here, the court was not satisfied that Richard Nandi was the right person to appoint administrator in respect of the instant estate, given that the deceased had a wife, Rose Okwemba, and a child, who had priority to administration over Richard Nandi, by dint of section 66 of the Law of Succession Act.

12. For avoidance of doubt, the relevant portions of section 71 of the Law of Succession Act, state as follows:

“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 unadministered; or

c. ...

d. ...

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.”

13. If any of the parties were not satisfied with what happened before DKS Aganyanya J, or with the orders that the Judge made with respect

to Rose Okwemba, it was open to them to place the matter before DKS Aganyanya J., or his successor, for review, or to challenge the same on appeal at the Court of Appeal. I cannot possibly sit on appeal over the orders of 22nd May 1985, for they were made by a Judge who had concurrent jurisdiction to mine. Neither can I review them. Firstly, the applicant has not presented any material before me which demonstrates that there was an error apparent on the face of the record with respect to those orders as they touched on the status or identity of Rose Okwemba, nor has he disclosed that he has discovered new material of great significance about the identity of Rose Okwemba which information or material was not available on 22nd May 1985 when the parties appeared before DKS Aganyanya J, when those orders were made. Secondly, review can only be sought and granted within reasonable time. The issue of Rose Okwemba was before DKS Aganyanya J. in May 1985, the applicant is asking the court to revisit the issue 35 years later, to determine her identity or status with respect to the estate herein. Clearly, asking for review of a court order 35 years after it was made is unreasonable.

14. Lastly, with respect to errors on the face of the record, the applicant has not pointed to any errors in the judgment under review that he would like me to correct. The issues he is anchoring his application on have nothing to do with the judgment. The grant and certificate that he points at were not issued on the basis of or generated from the orders of 30th April 2020. Rose Okwemba was not introduced into the matter through the judgment of 30th April 2020, neither was her status or identity as the spouse of the deceased pronounced in the said judgment. The misguided argument, that the record does not bear the handwritten notes of DKS Aganyanya J, also has nothing to do with the judgement of 30th April 2020. The applicant has not demonstrated that there are errors or mistakes on the face of the judgment he seeks to be reviewed, instead he is pointing out errors in the record but not in the judgment itself. He has not demonstrated that there is anything in the judgment itself that should be the subject of review.

15. Overall, there can be no merit at all in the application dated 2nd December 2020. The same is for dismissal, and I hereby dismiss it, with costs.

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

W. MUSYOKA

JUDGE