

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VIHIGA

SUCCESSION CAUSE NO. 71 OF 2021

IN THE MATTER OF THE ESTATE OF PAUL CHORE IMBISI alias IMBISI PAUL (DECEASED)

RULING

1. The deceased herein died on 14th July 2013. A letter from the Sub-Chief of Mbale, dated 24th June 2014, shows that he was survived by his wife, Amina Kaiza; and children, Priscilla Adema, Awa Nasubo and Saidi Manyulage. A copy of a certificate of official search on record, dated 26th May 2014, shows him to have been the owner of Kakamega/Mbale/1684. Representation to his estate was made to Amina Kaiza Chore, on 25th September 2014, in her capacity as widow of the deceased, and a grant of letters of administration intestate was issued, dated 9th October 2014. I shall refer to her hereafter as the administratrix. The grant was confirmed on 1st February 2016, on an application dated 28th October 2015. Kakamega/Mbale/1684 was devolved upon the administratrix and the three children equally.

2. What I am called upon to determine is the application for revocation of grant, dated 16th August 2017. It is at the instance of Damaris Imbisi, the mother of the deceased. I shall refer to her hereafter as the applicant. Her complaint is that the deceased held Kakamega/Mbale/1684 in trust for the family. She says that she resides on the land, yet the administratrix wanted to sell the land and relocate to Tanzania.

3. In reply to the application, the administratrix, by the affidavit sworn on 3rd May 2018, says that the deceased was the sole proprietor of Kakamega/Mbale/1684, and the other family members, including the applicant, had their own parcels of land. She states that the applicant lives on a different parcel of land. She asserts to be qualified to administer the estate of her late husband, and that the children of the deceased, that the applicant was purporting to fight for, have already been allocated their share in the estate at confirmation. She accuses the applicant of ill motives.

4. There is a response to the reply by the administratrix, by John Malenge, a brother of the deceased, sworn on 30th October 2020. He avers that the deceased got Kakamega/Mbale/1684 through succession proceedings to the estate of their late father. As a last born son of their late father, the deceased was meant to hold Kakamega/Mbale/1684 jointly with the applicant, and for that reason the applicant should have been involved in the process of obtaining representation to the estate of the deceased herein. He cites customary law. The applicant swore a further affidavit, on 30th October 2020, which largely reiterates the contents of the affidavit by John Malenge, and to assert that she had a life interest in Kakamega/Mbale/1684.

5. The grounds upon which grants of representation are revoked are clearly set out in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The applicant herein has latched on the ground of fraud, that she was not involved in the process of obtaining representation. The deceased herein was survived by a widow and children. Those are the persons entitled to a share in his estate. Other relatives, like his parents and siblings, reckon only where the deceased did not have a wife and children of his own. See *In re Estate of Joshua Orwa Ojode (Deceased)* [2014] eKLR (Musyoka J). It is not contested that the administratrix was the lawful wife of the deceased, and that the two had the three children listed in the petition. It is not alleged that the deceased had another spouse and other children, who were not disclosed. The administratrix had prior right to administration over the applicant and anyone else, and she needed consents from no one, and needed to notify no one, before seeking representation to the estate of her late husband. See Rules 7(7) and 26 of the Probate and Administration Rules, *In re Estate of Mary Karugi Mwangi (Deceased)* [2018] eKLR (Meoli J) and *In re Estate of Festo Lugadiru Abukira (Deceased)* [2019] eKLR (Musyoka J).

6. The applicant says that she has a life interest in Kakamega/Mbale/1684. She has not provided any proof of that. The certificate of official search for Kakamega/Mbale/1684, on the record, indicates that the deceased was the sole proprietor of Kakamega/Mbale/1684. There is no endorsement that the deceased held it in trust for anyone, or that the applicant had a life interest in it.

7. Am told that there were succession proceedings with respect to the estate of the late husband of the applicant and the father of the deceased, which led up to Kakamega/Mbale/1684 being devolved upon the deceased herein. Those proceedings were not presented or placed before me, and I have no way of vouching for what the applicant is saying. If those proceedings had granted her a life interest in Kakamega/Mbale/1684, then she should have placed a copy of the certificate of confirmation of grant issued in those proceedings to support her case.

8. Am told too about Maragoli culture and custom about mothers and their last born sons. No evidence was led on the existence of this alleged custom. No treatises or judicial precedents were cited to me on it. Yet customs are a matter of evidence. I have no way of knowing whether such a custom exists for me to assess whether or not it applies here. The burden was on the applicant to adduce evidence on the existence of such a custom, and its application to the estate of the deceased herein. She made no effort in that direction. See Rule 64 of the Probate and Administration Rules and *Ernest Kinyanjui Kimani vs. Muiru Gikanga and another* [1965] EA 735 (Newbold VP, Crabbe and Duffus JJA) and *Nyariba Nyankomba vs. Mary Bonareri Munge* (2010) eKLR (Makhandia J). In any case, the application of customary to distribution of the estate of a person dying after 1st July 1981 has been proscribed by section 2(1) of the Law of Succession Act. See *In re Estate of Mbiyu Koinange (Deceased)* [2020] eKLR (Muchelule J), *Rono vs. Rono and another* [2005] 1 KLR 538 (Omolo, O’Kubasu & Waki JJ), *In re Estate of Juma Shiro – Deceased* [2016] eKLR (Mwita J) and *Kuria and another vs. Kuria* [2004] KLR (Musyoka AJ).

9. On the contention that the applicant has a life interest over Kakamega/Mbale/1684, flowing from the succession proceedings relating to the estate of her late husband, which led up to Kakamega/Mbale/1684 being registered in the name of the deceased herein, I would like to say this, that the proceedings in the estate of her late husband are not before me, and I cannot vouch for what she now claims before me. If she were entitled to a life interest in any of the assets devolved to the children of her late husband, then the instant cause would not be the proper forum to agitate these rights. The proper forum for that ought to be in the cause in the matter of the estate of her late husband. If mistakes were made in the succession cause relating to her late husband, so that her entitlement to life interest in Kakamega/Mbale/1684, if at all, was not reflected, then she should be pursuing those claims in that cause, and not in the cause to the estate of her son. She should only bring those claims here upon the court seized of the estate of her late husband granting her favourable orders.

10. The grant herein was properly made to the widow of the deceased herein, and the estate was properly distributed to the persons properly entitled to it under Part V of the Law of Succession Act, specifically section 35 thereof, that is to say to the widow and children of the deceased herein. There was no fraud or misrepresentation. The only beef the applicant and John Malenge appear to have with the administratrix is that she is of Tanzanian origin. That is of no consequence whatsoever. The deceased was at liberty to marry a woman from wherever in the world, and the fact that the widow is not an indigenous Kenyan does not diminish her right to what rightly belongs to her through succession. If she desires to sell the portion devolved to her, she would be within her rights, for that portion of the land belongs to her, and land is a commodity, which can be availed in the market for sale like any other.

11. In the end, I find no merit whatsoever in the summons dated 16th August 2017, and I hereby dismiss the same. Any party aggrieved by these orders is at liberty to move the Court of Appeal appropriately. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER 2021

W MUSYOKA

JUDGE