REPUBLIC OF KENYA

HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 246 OF 1989

IN THE MATTER OF THE ESTATE OF OLOO OMOLO LUMASAI (DECEASED)

RULING

1. The application for determination is a summons for rectification of grant dated 10th January 2011. It is brought at the instance of Elphas Wambutsi Washiali, who I shall refer to hereafter as the applicant.

2. It seeks rectification of the grant made on 23rd November 1994 to George Andrew Omaso and confirmed on 30th November 1994, so as to reflect the applicant as a buyer or purchaser instead of an heir of East Wanga/Isongo/533, and that his share be reflected as 2.9 acres plus 4 acres, so as to total 6.9 acres. He would also like to have the administrator and other heirs condemned to pay him or reimburse him for the damage caused on the land in December 2010 to the tune of Kshs. 126, 616.00.

3. The application is also supported by an affidavit sworn by the applicant on 10th January 2011. He avers to have had bought 2.9 acres and 4 acres. respectively, to be hived out of East Wanga/Isongo/533. He stated that the deceased died sometime in 1976, while the sale transactions happened in 1981 and 1983, respectively. A grant of letters of administration intestate was made in this cause in 1994. He alleges that the grant was confirmed in proceedings that were conducted in Nairobi instead of Kakamega.

4. The applicant filed another application on 28th July 2011, seeking as the same orders as those sought in the application dated 10th January 2011, but with additional prayers. The additional prayers seek:

(a) That the administrator, who had died, be substituted by Ruth Auma Andati and Hannington Nandwa;

(b) That Ruth Auma Andati and Hannington Nandwa be restrained from selling, subdividing, transferring or dealing with East Wanga/Isongo/533;

(c) That the Land Registrar responsible for Kakamega be restrained from dealing with East Wanga/Isongo/533 pending determination of the cause or further court orders; and

(d) That orders be directed to the police to enforce the said orders.

5. In the affidavit that he swore in support on 12th July 2011, he avers that he had bought 2.9 acres and 4 acres, respectively, out of East Wanga/Isongo/533, from the estate of the deceased sometime in 1981 and 1983. He reiterates that the deceased died in 1976 and representation to the estate was first made in 1994. He asks the court to rectify the grant to include the 6.9 acres that he had alleged purchased, to avoid fraud and concealment of matter from the court.

6. Since the two applications are related, I shall dispose of them simultaneously.

7. The application dated 17th July 2011 was placed before the Judge on 23rd July 2013, whereat the court substituted the dead administrator with Ruth Auma Andati and Hannington Nandwa as administratrices. The new administrators were restrained by way of injunction with respect to East Wanga/Isongo/533. The Land Registrar was also restrained as prayed. It was further directed that the rest of the prayers be canvassed by way of oral evidence. The orders of 23rd July 2011 were made oblivious of the order that had been made on 19th October 1999 to have Ruth Auma Andati substitute her late brother, George Andrew Lumasai, as administrator. A grant of letters of administration intestate was issued to her, of even date. The substitution order of 23rd July 2011 were, therefore, needless.

8. The hearing happened on 8th July 2019. Eliphas Wambutsi Washiali, national identity card number 6314441, the applicant, was the first on the witness stand. He satisfied that he had bought two portions of East Wanga/Isongo/533 from the estate of the deceased. He stated that he bought the portions from his sons, George Andrew Omaso, Lumasai, Atibu Maende, Indakwa Omaso, Aggrey Masakha Omaso. The estate had not been distributed by then. The agreement for 2.9 acres was dated 1st February 1981, while that for 4 acres was dated 30th April 1983. After that the parties initiated the instant succession cause, where George Andrew Omaso was appointed administrator. At

confirmation, he was awarded 2.9 acres. He stated that he was entitled to 6.8 acres from the estate of the deceased. He confirmed that the deceased was already dead as at the time the sale agreement was entered into, and the children had not done succession to the estate, and eth land had not been subdivided. He confirmed further that he was not related to the deceased, nor was he ever a dependant of the deceased. He stated that three sons of the deceased were dead, that is to say George Andrew, Atibu Maende and Joseph Indakwa, while two others had disappeared, that is to say Wycliffe Lumasai and Aggrey Lumasai. He stated that two sons had married and had children, while three of them were not married. He identified the persons on the land as Issa Maende, Shikanda, Juma Lumasai and Wesonga, who he said were children of the persons who sold the land to him. He stated that he was given 2.9 acres by the court, and that he had worked on the 4 acres for thirty years. He stated that the original administrator had sworn an affidavit on 28th November 1994, acknowledging that he had sold 4 acres to him, but that affidavit was not taken into account by the court at confirmation. He stated that part of the 4 acres was subsequently sold, part of it was unoccupied and none of the children of eth deceased were claiming it.

9. James Wandere Onyimbo, national identity card number 0676131, followed. He testified that he did not witness the sale of 2.9 acres, but was a witness to the sale of 4 acres on 30th April 1983. He confirmed that he did not see a title deed to confirm that the property belonged to the sellers, and that the title deed he saw was in the name of the deceased, the father of the sellers. He also stated that at the sale he did not see a copy of letters of administration intestate.

10. The next witness was James Inakwa Nzeya, national identity card number 20515733. He stated that he was present in 1981 when the applicant bought the 2.9 acres, although he did not sign the agreement of sale. He also said that he did not sign the sale agreement in 1983 when he bought the 4 acres. He stated that the property belonged to the deceased, who had died by then. He said that the sons had authority to sell the property then. He stated that the widow of eth deceased was alive then, and was present at the sale. He further said that he was not aware whether succession had been done.

11. After the applicant closed is case, the administrators case opened. Only one administratrix, Ruth Auma Andati, national identity card number 11741324, testified. She identified the deceased as her father. She said that some of her brothers had died, and some had disappeared, she did not about their whereabouts. She mentioned that the deceased had several daughters, and named Margaret, Gladys, Julia and Beatrice as some of them. She invited the court to give orders as per the surveyors report. She stated that the land the applicant was claiming was 1.6 acres, and she was ready to have it given to him. She stated that he just abandoned the land. She explained that after their parents died, her brothers needed money for burial, and the applicant gave them money, sheep, maize and other things for that purpose. He later said that he wanted land in exchange. She said that she occupied 2.8 acres on the land. Wycliffe had died, but he left two sons on the ground, Felix Omaso and Bernard Waga. The late James Mukabana bought a portion of the land from the late widow of the deceased, which he later sold to the church. Emmanuel had also bought a portion of the land from the late widow of eth deceased. Moses Nanjendo had also bought a portion from the late widow of eth deceased. Reuben Washiali had also bought a portion of the land from the late widow of eth deceased. She stated that all these persons should allocated their shares. She stated that Aggrey Omaso had disappeared but had been survived by sisters. Issa Omaso and Meshack were grandchildren of the deceased who should allocated shares.

12. During cross-examination, she confirmed that the grant was confirmed in 1994, and she had objected but she could not tell the fate of her objection. She identified Moses, James, the applicant and Peter as persons who had bought land from her mother, but she could not tell when the transactions took place and did not have copies of sale agreements relating to them. She conceded that the deceased had other daughters, quite apart from herself, she got her share from the estate, but the other daughters did not. She stated that George and Andrew did not have children, and they had given their shares to her. She stated that Aggrey should keep his share. She stated that the applicant bought land from the sons of the deceased, he identified the acreage sold as 1.6 acres. She stated that that was the acreage on the ground that the surveyors established. She stated that there were boundaries around the applicant's land that the sons of the deceased had fixed. She stated that she objected to the applicant getting 4 acres, saying that his entitlement was 1.6 acres.

13. At the close of the oral hearing, the parties were directed to file written summons. The written submissions by the applicant are dated 11th January 2020, and they comprise of nothing more than a summary of the facts as laid out above. The written submissions by the administratrix are dated 8th November 2019. It is submitted that the survey ordered by the court showed that the applicant only occupied 1.6 acres on the ground, and not the 6.9 acres that he claims. It is submitted that if he insists to getting the balance of 5.3 acres, then he should initiate a separate claim against the estate. The administratrix has cited *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR. She urges the court to distribute the court according to the survey report filed pursuant to the orders made on 3rd March 2014.

14. The applications dated 10th January 2011 and 12th July 2011 are premised on Rules 43(1), 63 and 73 of the Probate and Administration Rules, and section 97 of the Law of Succession Act, Cap 160, Laws of Succession Act.

15. Rectification of grants is provided for in section 74 of the Law of Succession Act, Cap 160, Laws of Kenya and Rule 43(1) of the Probate and Administration Rules. Section 74 provides as follows:

> *"74. Errors may be rectified by court*
>
> *Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly."*

Rule 43(1) says:

> *"Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was made."*

16. From the language of section 74 of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules, it would appear that they are about grants of representation and rectification of errors on such grants.

17. An error means a mistake. See *Concise Oxford English Dictionary*, Twelfth edition, Oxford University Press, New York, 2011, page 485. In *Black's Law Dictionary*, Tenth Edition, Thomson Reuters, St. Paul, 2004, page 659, defines error as a mistake of law or fact in a court's judgment, opinion or order. It defines mistake as an error. Section 74 of the Law of Succession Act is, therefore, to be invoked to correct errors or mistakes, relating to grants of representation.

18. Section 3 of the Law of Succession Act, the interpretation section of the Act, does not define a ''grant of representation.'' The definition is carried in Rule 2 of the Probate and Administration Rules, in the following terms:

> *""grant" means a grant of representation, whether a grant of probate or of letters of administration with or without a will annexed, to the estate of a deceased person."*

19. The Law of Succession Act, at sections 53 and 54, provides for the forms that the grant may take. The provisions say as follows:

> "*Forms and Grants*
>
> *53. Forms of grant*
>
> *A court may—*
>
> *(a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either—*
>
> *(i) probate of the will to one or more of the executors named therein; or*
>
> *(ii) if there is no proving executor, letters of administration with the will annexed; and*
>
> *(b) if and so far as there may be intestacy, grant letters of administration in respect of the intestate estate.*
>
> *54. Limited grants*
>
> *A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act."*

20. The two summonses seek rectification of a grant, allegedly issued to the late administrator on 23rd November 1994 and confirmed on 30th November 1994. The rectification sought is so as to allocate the applicant an additional 4 acres to what was allegedly allocated to him on 30th November 1994.

21. Section 74 and Rule 43(1) can only be invoked to rectify errors in grants of representation. In the applications before me it is clear, from the language of the prayers, that there is a confusion in the mind of the applicant with regard with what he wants rectified. Whereas the prayer is clear that he seeks rectification of a grant, the details of what he would like rectified have nothing to do with the grant itself, but the process of its confirmation. Yet, the discretion given to the court to rectify grants under section 74 and Rule 43(1) have nothing to do with corrections of errors that arise from confirmation proceedings. So, as a court, I cannot purport to exercise power to rectification under those provisions to do what the applicant invites me to do. Secondly, from the language of Rule 43(1), an application for rectification of grant can only be sought by the holder of the grant sought to be rectified. The applicant herein is not the administrator of the estate, and, therefore, there is no basis for him to seek rectification of a grant that he does not hold.

22. The applications are also premised on Rule 63 of the Probate and Administration Rules. Rule 63 does not provide for any applications, what it does is to import certain provisions of the Civil Procedure Rules to probate practice. One of the provisions imported is that which provides for review of court orders and decrees. It does not come out clearly from the applications as to whether Rule 63 is cited in that context, but since what the applicant seeks is a revisit of the confirmation proceedings so as to have him allocated the additional 4 acres that seeks. So what he essentially seeks is a revision of the confirmation orders so that he can be added the extra acres. The question is whether that can be done through review proceedings.

23. The discretion given to a court to review its orders or decrees is exercisable on two principal grounds. One is where the applicant has discovered evidence of significant importance, which was not in his possession at the time the orders were being made. The second one is where there is a glaring error on the face of the record. There is also the omnibus ground, any other sufficient reason.

24. I have carefully perused through the affidavit sworn in support of the applications, and the ground that the applicant appears to rely on for review is that although the administrator had averred in his affidavit of 28th November 1994 that the court did not take that averment into account. I have perused that affidavit filed herein on 28th November 1994, but sworn on an unknown date that November 1994, by George Andrew. He did aver that he had sold 4 acres to the applicant. However, the distribution that he proposed did not include the name of the applicant, for distribution was proposed only to George Andrew Omaso, Aggrey Omaso, Joseph Indakwa Omaso, Atibu Mayende Omaso and Olumasi Omaso, equally. Clearly, therefore, the distribution proposed to five sons of the deceased. It would appear that when the application for confirmation of grant was placed before the Judge on 30th November 1994, the application was allowed as per the distribution

proposed, since the certificate of confirmation of grant that was extracted from those orders distributed the property to George Andrew Omaso, Aggrey Omaso, Joseph Indakwa Omaso, Atibu Mayende Omaso and Olumasi Omaso, with each of them taking 2.9 acres.

25. The question then is, was there an error on the face of the record? There would be an error on the face of the record where the error is that made by the court itself. I do not see any. The Judge merely adopted the distribution that had been proposed by the administrator. The administrator had not listed the applicant as a beneficiary, what he had done was to merely state that he had sold a portion of the land to him, without proposing that he was entitled to be allocated any shares in the estate. The court made no error, therefore, there is nothing to review. Was it discovery of material that was important to the final determination of the matter, which material was not available at the time. I do not think so. The applicant had been identified as a son of the deceased in the Chief's letter and in the petition, which was itself false and misleading. It is the administrator who had sold the land to him, and the administrator had disclosed the fact in the application for confirmation. There cannot have been any discovery with respect to the applicant. His name was not new in the proceedings, it was on record, yet he was not an heir of the deceased, neither was he a creditor of the deceased as he had bought no property from the deceased.

26. I need to address my mind on the question of the applicant not being a creditor of the estate. The deceased died in 1976, the applicant purports to have bought portions of the land from the children of the deceased in 1981 and 1983, and confirms that representation had not been obtained to the estate until 23rd November 1994. The deceased had died before the Law of Succession Act had come into force on 1st July 1981. According to section 2(1) of the Law of Succession Act, the substantive provisions said Act, those relating to disposition, apply to estates of persons who died after the Act came into force. Section 2(2) of the Act applies the law and custom, to estates of persons who died before the Act came into force, and whose administration commences after 1st July 1981, relating to distribution of estates, that applied before 1st July 1981. However, with respect to administration, estates of persons dying before the estate came into force, on 1st July 1981, are subjected, by section 2(2) of the Act, to Part VII of eth Act. Part VII carries the provisions relating to administration of estates. The provisions in Part VII run from 44 to 95, inclusive. Representation to the estate of the deceased herein was sought in 1989 and grant was made in 1994. That would mean that although the deceased died before the Law of Succession Act commenced, his estate was administered after the commencement, and therefore Part VII applied to that administration.

27. Under section 79 of the Law of Succession Act, the estate of a dead persons vests in the executor or administrator. In this case the deceased died intestate, and, therefore, the estate vested in the administrator, appointed in 1994 and substituted in 1999. The vesting of the assets of the estate in the administrator constitutes the administrator the legal owner of the said assets. He enjoys, over the assets, the same rights as the owner had, and can exercise such powers, with respect to the asset, as the owner could exercise. That would mean the rights and powers to sell estate assets, to enter into contracts over the same, among others. It must be borne in mind though that an administrator is a fiduciary, and his powers and rights are limited to that extent, for he holds the property, not as his own, but on behalf of others, that is to say heirs, beneficiaries, dependants, creditors and other categories of persons beneficially entitled. Section 79 provides as follows:

> *"79. Property of deceased to vest in personal representative*
>
> *The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."*

28. I have alluded to powers exercisable by the administrator upon the assets being vested in them by virtue of section 79 of the Act. Those powers are enumerated in section 82 of the Act in the following terms:

> *"82. Powers of personal representatives*
>
> *Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—*
>
> *(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;*
>
> *(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:*
>
> *Provided that—*
>
> > *(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and*
> >
> > *(ii) no immovable property shall be sold before confirmation of the grant;*
>
> *(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;*
>
> *(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:*

Provided that except so far as otherwise expressly provided by any will—

(i) no appropriation shall be made so as to affect adversely any specific legacy;

(ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required."

29. Section 82 of eth Act should be read together with section 80(2) of the same Act, which stipulates when a grant of letters of administration intestate take effect. For a person who has died intestate, the grant of letters of administration is effective from the date when the grant is made. That means that the administrator is only able to exercise the rights of an owner vested by section 79 and the powers of administration stated in section 82 after he is appointed an administrator. From the date of appointment onwards, he can validly do any of the acts covered by section 82. The converse of that is that anything done before then would be without authority, and null and void. Section 80(2) says as follows:

"*80. When grant takes effect*

(1) ...

(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant."

30. The time a grant of letters of administration intestate takes effect should be contrasted with a grant of probate. According to section 80(1), of the Act, a grant of probate is effective from the date of death, and not from the date of the making of the grant. The reason for this is that the executor to whom the grant of probate is made is not, unlike the administrator, appointed by the grant. Instead, he is appointed by the will of the deceased, and his office becomes effective upon death. The grant, therefore, does not appoint him; it merely authenticates or evidences the appointment by will. That would mean that the executor, since he is appointed by will, does not have to wait for grant of probate to begin exercising his office as executor. His office is effective from the moment the testator dies, and he can begin to execute the wishes of eth deceased as from that moment. He literally steps into the shoes of the deceased right from the moment breathes his last. Whatever the executor does, which is in keeping with his office, and in conformity with the will, is valid, even before the grant is made. What the grant of probate does is to provide of the appointment of the executor, and thereby authenticate or validate anything that the executor might have done before the grant was made. This is described as relating back to date of the death of the testator. However, the principle of relation back does not apply in the event of intestacy. The grant of letters of administration intestate does not, therefore, relate back to date of the deceased's death. It cannot, therefore, authenticate or validate any acts done by the administrator before his appointment as such. That would mean that whatever the administrators do before appointment by the grant of letters of administration intestate would remain null and void. See *Ingall vs. Moran* [1944] KB 160, *Kothari vs. Qureshi and Another* [1967] EA 564, *Lalitaben Kantilal Shah vs. Southern Credit Banking Corporation Ltd* HCCC No. 543 of 2005, *Otieno vs. Ougo and another (number 4)* [1987] KLR 407, *Troustik Union International and another vs. Mrs. Jane Mbeyu and another* [1993] eKLR, *Martin Odera Okumu vs. Edwin Otieno Ombajo* HCSC N9479 of 1996, *Coast Bus Services Limited vs. Samuel Mbuvi Lai* CACA No. 8 of 1996, *Ganijee Glass Mart Ltd & 2 others vs. First American Bank Ltd* [2007] eKLR, among others. Section 80(1) says:

"*80. When grant takes effect*

(1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.

(2) ..."

31. Sections 79, 80 and 82 of the Act should also be read together with section 45 of the Act, which provides as follows:

"*45. No intermeddling with property of deceased person*

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose,

take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."

32. The purport of section 45 of the Act is that the property of an intestate should not be handled by a person who has no authority to handle

it. The authority to handle such property emanates from the grant of letters of administration, and would mean that a person who handles such property without a grant would be contravening that provision, and would be guilty of what is known as intermeddling. Intermeddling means taking possession of such property or disposing of or even filing suit over it when the person has no letters of administration. See *Gitau and Two Others vs. Wandai and Five Others* (1989) KLR 231 and *John Kasyoki Kieti vs. Tabitha Nzivulu Kieti & Annah Ndileve Kieti* (2001) eKLR.

33. As narrated elsewhere, the deceased herein died in 1976, representation to his intestacy estate was obtained in 1994, while the land transactions happened in 1981 and 1983. It follows that the said transactions were conducted by a person or persons that the property had not yet vested under section 79, and the sellers had no power to sell it and they, therefore, exercised a power that they did not have under section 82. It also means that both the sellers and the buyers intermeddled with the estate of the deceased, contrary to section 45 of the Act. Since the property did not vest in the sellers, they had no authority to sell it and they could not possibly pass any title to the buyers. The transactions were null and void. The applicant has no basis at all to claim against the estate since he did not transact with it, but with busybodies, and he should only look up to those who sold him the property for recompense.

34. It should be clarified that the mere fact that one is a child or spouse of a dead person does not grant them any right to handle the property of the dead person unless they have the authority that comes from the law as stated in sections 45, 79 and 82 of the Law of Succession Act. Transacting with sons of an intestate, who are yet to comply with the applicable law, gives no authentication whatsoever to any such transactions, they remain as dead as a dodo.

35. The other thing is that what the applicant basically seeks is a redistribution of the estate. The applicant is not an heir of the estate nor a creditor of the estate. He would have no legal basis for seeking a redistribution of the estate. Even if he could mount an application in that respect, he has not given any reasons why the previous distribution should be revisited.

36. I reiterate that the applicant was not a creditor of the estate, for he never transacted with the deceased nor with the administrators of the estate. He purported to buy the property from intermeddlers, and those conferred no rights to him as against the estate of the deceased. I reiterate that the only legitimate claim that he has is against the sons who sold the property to him.

37. In view of everything that I have said here above, it is my conclusion that I find no merit in the applications dated 10th January 2011 and 12th July 2011, and I hereby dismiss the same. The administrator shall have the costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8TH DAY OF MAY, 2020

W. MUSYOKA

JUDGE