REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 31 OF 1997

IN THE MATTER OF THE ESTATE OF BENJAMIN ALBERT MULAMA OSUNDWA (DECEASED)

RULING

1. What is for determination is the summons, dated 14th May 2020, brought under section 47 of the Law of Succession Act, Cap 160, Laws of Kenya, Rules 49 and 73 of the Probate and Administration Rules (Revised 2018) and Article 159 of the Constitution of Kenya 2010, seeking principally that the applicant, Francis Kadima Mulama Osundwa, be joined in these proceedings as an interested party and that there be a stay of proceedings. The application was canvassed by the way of written submissions, following directions that were given on 4th June 2020.

2. The applicant contends that he is an heir or beneficiary of the estate of the deceased, and that he is dissatisfied by the judgment of this court delivered on the 30th April 2020. It is his position that the said judgment affects his property, Kakamega/Lumakanda/2318, which had been transferred to him as a gift *inter vivos* by the deceased, and, therefore, it does not form part of the estate. He submits that the said parcel of land was given to him by the deceased with full disclosure to all the beneficiaries. He submits further that he has been staying and has developed on the said parcel for the past 20 years, yet other heirs are now claiming it to be part of the distributable estate. He further submits that the land was still in the deceased's name as it was part of the deceased's estate being Kakamega/Lumakanda/510, and that the deceased had not received a discharge of charge from Settlement Fund Trustees (SFT), and, therefore, the deceased was not able to transfer the same to him before he died. He prays that he be allowed to participate in the proceedings as an interested party as his interests are at stake. He relies on the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules and the decision in *Daniel Walter Rasugu vs. Johana Nyakwoyo Buti & 2 others* [2008] eKLR and urges court to grant the prayers sought.

3. Those opposed the application filed grounds of opposition. They submit that the application is misconceived and bad in law. They state that the applicant is one of the deceased's children from first house, and that he lacked capacity to litigate in his own capacity without letters of administration. They rely on on *Dr Ignitius Awilla Awino vs. Penina Anyango* Civil Appeal No 226 of 1996 (unreported). They further contend that the applicant cannot be joined in a suit that had been heard and determined, since the court had become *functus officio*. They state that the applicant has not provided sufficient reason to be joined in the suit and to stay proceedings that he was not part of, and pray that the application be dismissed. They have cited the decisions in *Board of Trustees Kenya Entrepreneurship Empowerment Foundation vs. MYC 4 & another* (2016) eKLR, *Re Estate of Nzioka Mwatu* (2019) eKLR, *Ibrahim vs. Hassan Charles Kimenyi Macharia* (2019) eKLR and *William Kiprop Komen vs. Racheal Kipngeno Komen* (2005) eKLR.

4. On whether the applicant should be joined as an interested party, I take the view that there is no provision in either the Law of Succession Act or the Probate and Administration Rules for joinder of any party as an interested party. The law on joinder is in the Civil Procedure Act and the Civil Procedure Rules, and the relevant provisions in those pieces of legislation have not been imported into succession and probate practice through Rule 63 of the Probate and Administration Rules. In any event, the joinder provisions in the Civil Procedure Act and the Civil Procedure Rules are with respect to proceedings commenced by way of plaint, where there are two rival parties. In succession and probate matters, the proceedings are not intended to be contentious, taking, as they do, the form of a cause in the estate of a dead person, rather than a suit by one party against another. Strictly speaking, there is no legal foundation for joinder of a party to a succession and probate cause. I appreciate that the same is done in practice by the courts, but there is clearly no legal foundation for it, and, very often, joinder of parties in succession and probate causes, who are not heirs or survivors or dependants or beneficiaries, tends to only compound and complicate the matter.

5. The applicant herein is a son of the deceased. That makes him an heir or beneficiary or survivor or dependant of the deceased, and, therefore, a person beneficially entitled to a share in the estate of the deceased. That should thrust him to the centre of the matter. Unlike an interested party, as a son of the deceased, and as an heir or survivor, he is not an outsider, he cannot possibly come into the proceedings as a third party or interested party, for he is neither. He is an integral part of the family of the deceased, and he should be free to file applications in the matter without the necessity of having to be joined as a third or interested party. He requires no leave to intervene with regard to the estate of his father. The key stakeholders to the estate of a dead person are the surviving spouses and children, such would require leave from no one to intervene in the succession and probate proceedings of their departed spouse or parent.

6. The fact that the applicant had been gifted, if at all, a property *inter vivos* does not mean that he should not play a role in the matter of the estate of his father. Section 42 of the Law of Succession Act requires that *inter vivos* gifts be brought into consideration at confirmation of grant, what is known as bringing such property to the hotchpotch. The fact of *inter vivos* gifting does not make the beneficiaries of such gifts outsiders to the distribution of the estate. They must be listed in the petition as survivors of the deceased, and they must also be listed as survivors in the confirmation application, they must execute the consents in Form 37 and must play their role in the confirmation hearing in terms of section 71(2) of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules. The question, therefore, of a son of the deceased coming into the succession or probate cause relating to the estate his father through leave of court, or as a third or interested party, should never arise.

7. The issue that the applicant raises in his application is not entirely new. It arose at the hearing of the confirmation application, but the same was not properly contextualised since not all the children of the deceased were t involved in the process. The purpose of bringing all the assets into the hotchpotch is not to snatch property from those who might have benefited from *inter vivos* gifts, but rather to ensure that there

is justice and fairness in distribution, by having account taken of all what each of the children or survivors had received from the deceased during his lifetime, so as to determine whether such beneficiaries of lifetime gifts should benefit from the net intestate estate or not, and if they should, how much of the net intestate estate is to be given to them. The issue that the applicant raises should, therefore, have arisen and dealt with comprehensively at the confirmation hearing, but that did not happen, for the reasons that I dealt with in my judgment of 30th April 2020. If the matter had been properly placed before the court at confirmation of grant, and all the survivors of the deceased properly involved in the process of confirmation, we would not be where we are now. In any event, the court has only called for a repeat of the confirmation process in a manner that fully complies with section 71(2) of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules. It has not taken the property away from the applicant, he is legally entitled to participate in the confirmation hearing, by virtue of Rules 40 and 41, to state his position or ventilate his case, and he would not require leave of court to do so.

8. I do not, therefore, see any basis to order that the applicant be joined to this cause, for the reasons I have given above. I say so even though I granted interim orders on 15th May 2020, which included leave for the applicant to be joined as interested party in the proceedings. Let me say that that order is merely academic so far as heirs, dependants, survivors and children of the deceased are concerned.

9. The only principal prayer in the application, dated 14th May 2020, in my view, is that for stay of proceedings. The applicant is not happy with my judgment of 30th April 2020. He is within his rights to be aggrieved, not only because it affects his alleged *inter vivos* gift, but crucially because he is an heir of the estate the subject of these proceedings. He has filed a notice of appeal, a clear indication of his seriousness in mounting an appeal at the Court of Appeal. The orders in the impugned judgment set aside the orders made at the confirmation of the grant, and call for a repeat of the confirmation exercise. The applicant would like that repeat exercise halted so that he can pursue his appeal first. No doubt, proceeding to have the grant confirmed afresh during the pendency of an appeal against the judgment, that set aside the earlier confirmation and ordered a fresh one, has the potential of rendering the proposed appeal nugatory, should the applicant be successful in convincing the Court of Appeal to overturn the said judgment. This is a succession cause, not an ordinary suit. Let all the issues be ventilated fully, whether here or at the Court of Appeal, to the satisfaction of all affected, so that the family of the deceased can ultimately live at peace, with the manner that the estate of their father was distributed, and with the comfort that all those who needed to be heard, on some issue or other, regarding the handling of the estate, were heard.

10. Consequently, I am persuaded that there is a case for stay of the proceedings with respect to implementation of the orders made in the impugned judgment, to allow the applicant his day before the Court of Appeal. Prayer 4 of the application is vaguely drafted, and if I grant an order in its terms, the said order would be meaningless, so I shall order that there be stay of the proceedings, with respect to the judgment of 30th April 2020, pending an appeal, to be lodged at the Court of Appeal, by the applicant. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF JULY, 2020

W MUSYOKA

JUDGE