REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 92 OF 2011

IN THE MATTER OF THE ESTATE OF ANDASHE MUNYETI (DECEASED)

RULING

1. The application for determination is dated 5th July 2018. It seeks review of orders that the court had made on 26th April 2012, 5th November 2015 and 30th March 2016, on grounds of discovery of new and important matter of evidence not within his knowledge at the time of trial, and mistake or error apparent on the face of record. In the alternative, it seeks correction of conflict of orders made on 5 th November 2015 and 30th March 2016 if the court upholds the judgement of 5th November 2015. It is brought at the instance of Iddi Yahuma Andashe.

2. The new evidence alleged to have been discovered is a document relating to pronouncements that the deceased made in Tiriki language. The same is attached, and is dated 11th May 1990. It is alleged to have been authored by the deceased. He allegedly declared that he had married twice, and both marriages had produced children. He also allegedly declares that he had two parcels of land. The one at Saosa Village he gives to the first family, and the second family he gives Shipala Village. The applicant asserts that he discovered the document after the judgement. He states that the documents placed before the court, and upon which the judgment is founded, were false as they had not been authored by the deceased.

3. On the question of errors on the face of the record, he points to a conflict between the order made on 5 th November 2015 and that made on 30th March 2016. He states that the order of 5th November 2015 had directed that the estate be shared out equally amongst all the children of the deceased, while on 30th March 2016 the court proceeded to share out the property afresh.

4. I have carefully perused through the record of papers before me and I have not come across any response by the respondent, Simeon Munyeti Andashe, although I do note from the oral submissions by Mr. Munyendo that there was such a reply.

5. The application was argued orally on 17th December 2018. Iddi Yahuma argued that there was conflict in the orders and that there was new evidence. He claimed that the documents relied on by the respondent at the trial were in fact made by the respondent himself. He also alleged that the resplendent had lied to court that a certain witness was dead, yet that said witness was alive. He submitted that one order said that the estate ought to be shared equally, while the other said the other distributed the estate between Simon, Iddi and Joel where Simeon got half of the property while he and Joel shared the other half. James Kangwana supported the said submissions without adding anything to them. Mr. Munyendo submitted that there was no new material to warrant review. He stated that the documents sought to be introduced were old documents that the parties must have had all along.

6. Three orders are targeted in these proceedings, they were made on 26th April 2012, 5th November 2015 and 30th March 2016.

7. The order of 26th April 2012 was premised on an application dated 3rd February 2011. The said application sought that two assets of the deceased, Kakamega/Cheptulu/1124 and 1125, be reverted to the name of the deceased, or be cancelled and reverted to Kakamega/Cheptulu/292 in the name of the deceased. The order of 5th November 2015 found and held that the said property, Tiriki/Cheptulu/292, which I suppose is the same as Kakamega/Cheptulu/292, be shared equally among all the beneficiaries of the deceased, that is to say all the children of the deceased, in terms of 35(5) of the Law of Succession Act, Cap 160, Laws of Kenya. The order of 30 th March 2016 confirmed the grant in terms of paragraph 8 of an affidavit sworn on 27th April 2012, supporting an application for confirmation of grant of even date. According to that affidavit, the deceased was said to have been survived by three individuals, being Simeon Munyeti Andashe, Joel Kangwana Anashe and Iddi Yahuma Andashe. Paragraph 8 proposed that Kakamega/Cheptulu/292 be shared out into two equal portions between the two houses of the deceased, so that Simeon Munyeti Andashe from the first house took 0.65 hectare while Joel Kangwana Anashe and Iddi Yahuma Andashe shared the other 0.65 hectare between themselves.

8. The applicants' case, if I understand it well, is that by the order of 5th November 2015, the property, Tiriki/Cheptulu/292, which I suppose is the same as Kakamega/Cheptulu/292, was to be shared equally amongst all the children of the deceased. Yet, when the matter came up for confirmation on 30th March 2016 the said property was shared out amongst three children and in a manner that was not equal amongst them.

9. The relevant portion of the judgement delivered on 5th November 2015 reads as follows –

> 'The Law
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> 24. The prevailing situation in this matter is well captioned under Section 35(5) of the Law of Succession Act. The said Section 35(5) states as follows: - "35(5) Subject to the provisions of Sections 41 and 42 and subject to any appointment or award made under this Section, the whole residue of the net intestate estate shall on the death, or in case of a widow, remarriage of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.'
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> 25. The spirit under the said Section 35(5) of the Law of Succession Act is to afford equal distribution of the estate amongst the children of the deceased. Despite many disputes on whether the distribution ought to be equal or equitable by taking into account issues for instance ages, gender, financial status of the children, the provisions of the law have all along and very clearly envisaged equal distribution for the word used in Section 35(5) is "equally" and not otherwise.
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> 26. What the Court is saying in the preceding paragraphs is that whether the Petitioner/Defendant has his own land elsewhere which he bought for himself, he is still entitled to an equal share of his father's estate unless he denounces his right to such a share. He has not denounced his right to a share in his father's estate. Accordingly, I find and hold that the deceased's estate being LR No. Tiriki/Cheptulu/292 shall be shared equally among all the beneficiaries of the deceased's estate, namely all the children of the deceased.
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> 27. In this regard, the Petitioner shall proceed to fix the Summons for Confirmation of Grant dated 27/4/2012 on a date to be taken at the registry.'

10. My understanding of the judgement is that the court found and held that the asset of the estate was to be distributed equally between all the children of the deceased. The administrator was then directed to list the pending application for confirmation of grant for hearing so that the estate could be distributed in the terms of paragraph 26 of the said judgement.

11. The applicants argue that the distribution of 30th March 2016 did not accord with paragraph 26 of the judgement to the extent that the distribution was not equal amongst the children of the deceased. Secondly, they appear to suggest that the distribution was not amongst all the children of the deceased instead the estate was distributed amongst only three sons. It is in that respect that he argues that there is an error on the face of the record, for the order of 30th March 2016 does not appear to comply with that of 5th November 2015.

12. It is plain from the order of 30th March 2016 that the estate was distributed amongst three sons of the deceased. Secondly, the distribution was also between the two houses of the deceased equally, as opposed to being between the children. Thirdly, the distribution was not equal amongst the three sons, for one son got one half of the property all to himself while the other two sons shared the remaining half.

13. To determine whether or not there is an error on the record I have to consider the question as to who were "all the children of the deceased" to whom the estate should have been distributed equally. I have scrupulously perused through the judgement of 5th November 2015 and noted that the same does not identify the children of the deceased to whom the property in question was to be shared equally. There is no list in the judgement of the names of the said children. What comes out clearly from the judgement was that the deceased had two wives and several children. At paragraph 3 the judgement recited the testimony of the applicants where he had said that the first wife of the deceased had two children, the administrator and his sister, while the second house had seven children being the applicants and their two brothers and three sisters. The petition lists only three individuals, the same three that benefit from the distribution of 30th March 2016.

14. From the recorded evidence of Simeon Munyeti Andashe, the administrator, who testified on 26th February 2015, as DW1, he named the children of his stepmother, Peris Khabusaya Andashe, as Dinah Mukabulu Andashe (married), Joel Makani also known as Kangwana Andashe, Iddi Yahuma Andashe, Robai Khavere Andashe, Margaret Andashe (dead), Charles Musungu Andashe (dead), Grace Andashe (married) and Benjamin Mulundi Andashe (dead). He stated that his mother had only two children, himself and Sabeti Sukuva. From his testimony it would appear that the deceased was not a polygamist for he married the second wife after the death of the first one.

15. So what did the court mean in paragraph 26 of the judgment by "all the children of the deceased?" Did it mean the three individuals named in the petition, or all the children that the administrator mentioned when he testified on 26th February 2015? My understanding of that is that the court meant that the estate ought to have been distributed amongst all the children of the deceased, and not just the three sons listed in the petition. All the children would include the children of any child of the deceased who were themselves dead. I shall treat the order of 5th November 2015 to be referring to the children of the deceased alive as at that date the administrator gave his testimony in court as well any grandchildren whose parties were dead. It is to those, both male and female, that the estate ought to have been distributed to on 30th March 2016. To that extent, therefore, there is an error apparent on the face of the record.

16. Ideally, after the order in paragraph 26 of the judgment of 5th November 2015 was made, the administrator ought to have filed a further affidavit to his application dated 27th April 2012 so as to include the children that had been omitted from the list in paragraph 4 and 8 of his affidavit of 27th April 2012 in order to comply with the order of 5th November 2015. If any of the said children were not interested in taking a share in the estate of the deceased, then they should have renounced their entitlement by filing either a deed of renunciation or an affidavit renouncing the entitlement.

17. From the language in the body of the judgment of 5th November 2015, the court expected a distribution that would accord with section 35(5) of the Law of Succession Act, equally to all the children, but the distribution the court approved on 30th March 2016 appears to conform, not with section 35(5) as envisaged in the judgement, but section 40 of the Act, where the intestate was a polygamist, and where the estate is to be distributed according to the number of children in each house. Yet, the court had not, in the entire judgement, adverted to the

said section 40. It appears that the orders of 30th March 2016 were made oblivious of the earlier orders made on 5th November 2015.

18. I would, accordingly, agree with the applicants that there was an error on the face of the record to the extent that the order of 30th March 2016 did not accord, as it should have done, with that made on 5th November 2015. The same is, therefore, available and amenable for review. There is inherent power under Rule 73 of the Probate and Administration Rules, as read with Article 159 of the Constitution. The provisions of the Civil Procedure Rules, on review of court orders and decrees, are among those that have been adopted into probate practice by Rule 63 of the Probate and Administration Rules.

19. On discovery of new evidence, in terms of the document that the applicants allege they have stumbled upon since delivery of the judgement on 5th November 2015, I do note that they allege that the said document is the one with the authentic handwriting of the deceased and that the other document had been authored by the administrator himself. I note that the two documents were not subjected to forensics by an expert in handwritings or document examination. The applicants did not place any report stating that the document dated 11th May 1990 had been examined by a handwriting expert who had concluded that it was in the hand of the deceased, and similarly the other document they allege was made by the administrator had been so forensically examined and determined to be in the hand of the administrator and not that of the deceased. Without such material before me I cannot possibly determine on the authenticity of the said document, and I cannot, therefore, hold that the same is new evidence that would have swayed the trial court one way or the other.

20. In the end, I conclude that the applicants have not satisfied me that they discovered new evidence to warrant review of the orders sought to be reviewed. I am, however, persuaded that there is an error on the face of the record to the extent that the order of 30th March 2016 did not accord with the order pronounced in paragraph 26 of the judgement of 5th November 2015.

21. I shall accordingly review the order of 30th March 2016, to bring it into accord with the order of 5th November 2015, so that Tiriki/Cheptulu/292, which I suppose is the same as Kakamega/Cheptulu/292, is shared equally between Simeon Munyeti Andashe, Sabeti Sukuva, Dinah Mukabulu Andashe, Joel Makani (also known as Kangwana) Andashe, Iddi Yahuma Andashe, Robai Khavere Andashe and Grace Andashe. The certificate of confirmation of grant dated 19th July 2015 shall be amended accordingly. Each party shall bear their own costs. Any party aggrieved by the orders that I have made herein has twenty-eight (28) days to appeal against them at the Court of Appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14th DAY OF June, 2019

W. MUSYOKA

JUDGE