



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 556 OF 2012

IN THE MATTER OF THE ESTATE OF ILAYA LUSICHI (DECEASED)

JUDGMENT

1. The deceased person the subject of these proceedings, Ilaya Lusichi, died on 8th March 2002. A letter from the Chief of Isulu Location, dated 20th June 2012, indicates that he was survived by two individuals, being Johnson Lusichi Shioso and Antony Alfayo Lusigi, whose exact relationship with the deceased is not stated.
2. Representation to the estate was sought by Johnson Lusichi Shioso, in his purported capacity as son of the deceased, in a petition filed herein on 5th July 2017. It is expressed that the deceased was survived by the two individuals indicated in the Chief's letter, and that he died possessed of Idakho/Shibuname/392. The cause was published in the *Kenya Gazette* through gazette notice number 13341 of 21st September 2012. Letters of administration intestate were made on 30th October 2012 and a grant was issued on 7th November 2012.
3. An application for confirmation of the grant dated 15th May 2013, was lodged herein on even date. In the application the administrator sought that the property, Idakho/Shibuname/392, be shared equally between the two named survivors, Johnson Lusichi Shioso and Antony Alfayo Lusigi.
4. To that application, Josephat Mbwabi Muhati swore an affidavit of protest on 8th June 2013. He avers that on 25th August 2011 he bought the whole of Idakho/Shibuname/392 from Antony Alfayo Lusigi and Enos Bahati. He allegedly paid the whole purchase price of Kshs. 440, 000.00. He took vacant possession, but both vendors, Antony Alfayo Lusigi and Enos Bahati, died, in 2012 and 2011, before they could commence succession to the estate of the deceased herein and transfer of the property to him. He avers that Antony Alfayo Lusigi had allegedly bought the land from the deceased in 1997. He avers that the deceased had only one son, Enos Bahati, who was also dead. He described Johnson Lusichi Shioso and Antony Alfayo Lusigi as distant nephews of the deceased, saying that it was a lie for the administrator to describe himself as a son of the deceased. He attaches to his affidavit the sale agreement between himself and Antony Alfayo Lusigi and Enos Bahati, dated 25th August 2011. There is also copy of an agreement between the deceased and Antony Alfayo Lusigi dated 16th April 1997.
5. The reply to the application is through an affidavit the administrator swore on 2nd September 2013. On the sale in 2011 he avers that at that time the vendors were not registered owners of the property and consequently they could not pass a good title to anyone. He avers that by dint of section 39 of the Law of Succession Act, Cap 160, Laws of Kenya, he was the only closest relative of the deceased alive, and, therefore, the only one entitled to the property. He states that he has been in occupation of the property since 2002, and he had extensively developed it.
6. Directions were given that the application would be disposed of by way of *viva voce* evidence.
7. The oral hearing commenced on 28th January 2015. The first to take the stand was the protestor, Josephat Muhati Mbwabi. He averred that he had bought the subject property from Antony Alfayo Lusigi and Enos Bahati. He complained that the succession cause was initiated without involving him. The administrator, Johnson Lusichi Shoso, followed on 8th November 2018. He testified that the deceased was his uncle, being a brother of his father. He described himself as his closest relative alive. He explained that the deceased had a son known as Enos Bahati, who had died without a spouse or children. He said that the said Enos Bahati had sold the land to him for Kshs. 100, 000.00 sometime in 2011. When he died at Gilgil, it was him who was authorized to move his body from Gilgil to Kakamega for burial. Tortester Lusichi was the administrator's first witness. He testified that he was a cousin of the administrator, and a nephew of the deceased. He stated that the deceased had a farm that he left to his son Enos Bahati, who then sold it to the administrator. He said that the administrator used one portion of the farm while the other was occupied by the protestor. The protestor was alleged to have been saying that he had bought the property from Enos Bahati and Antony Alfayo Lusigi. He asserted that the protestor was not related to them and that the person entitled to the property was the administrator. Joseph Museti Liyona was the administrator's last witness. He stated that he was one of the witnesses to the sale transaction between the administrator and Enos Bahati.

8. The application before me is for confirmation of the grant herein. The administrator proposes that the property be shared equally between himself and another, claiming that they are the nephews of the deceased, his only known relatives. The protestor alleges that he had bought the property from a person who had himself bought it from the deceased.

9. Confirmation of grants is provided for under section 71 of the Law of succession Act, Cap 160 Laws of Kenya. Under that law, the court confirms administrators and the distribution proposed in the application. In the instant case, the protestor opposes the application for confirmation. He does not raise any issues regarding the appointment of the administrator as such, or claiming that he was not related to the deceased. He did not provide any material upon which I could hold that he was not related to the deceased and therefore did not qualify to be an administrator of the estate of the deceased. He should have placed before me material that would have demonstrated that the deceased had other survivors who had prior right to administration of the administrator.

10. The protestor's main complaint appears to target distribution of the property. His case is that he is the one entitled to the property in question. He claims to have had bought the property in 2011 from Anthony Alfayo Lusichi and a son of the deceased known as Enos Bahati. He had allegedly bought the whole parcel of land, and took possession. Anthony Alfayo Lusigi had allegedly bought the property from the deceased on 16th April 1997. The administrator on his part alleges that he had bought the same property from Enos Bahati, a son of the deceased, sometime in 2011, and he has produced a sale agreement in which Anthony Alufayo Lusiki is listed among the persons who were privy to that sale.

11. The administrator appears to be asserting his right to the property by advancing two arguments. The first argument is that he is a nephew of the deceased, indeed the only surviving closest relative of the deceased. In the petition he describes himself as a son of the deceased. In the summons for confirmation of the grant his relationship with the deceased is not disclosed. It is in fact the protestor who identifies him as a nephew of the deceased. He did so in the citation that he caused to be issued on the administrator in Kakamega High Court Citation Cause No. 991 of 2012. He also identifies him as such in the protest affidavit of 8th June 2013. Indeed, he describes him as a distant nephew of the deceased. In his oral testimony he said the deceased was a brother of his father, but the name of his father was not disclosed. In my view, the exact nature of the relationship between the administrator and the deceased is not clear. It cannot be said with certainty whether the administrator was sole closest relative of the deceased alive.

12. Secondly, if indeed it is true that the deceased was the administrator's uncle, it has not been disclosed whether the administrator had any siblings, for such siblings would be entitled equally in law to a share of the estate. One of his witnesses, Tortester Lusichi, claimed that the deceased was his uncle. He said that his own mother was a sister of the administrator's father, which by analogy, going by the testimony of the administrator, would make her a sister of the deceased too. That would mean the said Tortester was also a nephew of the deceased, and therefore a person entitled equally to a share of the estate with the administrator.

13. The administrator cited section 39 of the Act to assert his position, but I am not satisfied that he was the only survivor of the deceased. If, indeed, it was true that Enos Bahati was the only son of the deceased, and the said Enos Bahati was not survived by a family of his own, in terms of a spouse or child, he should have gone on to draw the family tree of the deceased family in order to show who then was the next in line. That should have included showing who the siblings of the deceased were, whether they were alive or dead. If they were all dead, who were their children, and whether the said children were alive or dead.

14. The proviso to section 71(2) of the Law of Succession Act, and Rule 40(4) of the Probate and Administration Rules, requires the administrator who applies for confirmation of their grants to seek to satisfy the court that there had been ascertainment of all the persons beneficially entitled to a share in the estate and identification of the said shares. For avoidance of doubt the proviso states as follows –

‘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 the grant shall specify all such person and their respective shares.’

While Rule 40(4) says as follows -

‘Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.’

15. I am not satisfied that the administrator complied with the provisions above. I do not think that there has been proper identification of all the persons who are beneficially entitled to the estate, neither have their shares to the estate been determined.

16. The administrator's other approach is to argue that he is entitled to the property on account of having bought the same from the son of the deceased called Enos Bahati, who had since died. The said sale allegedly happened in 2011. He has attached documents as evidence of the said sale. The deceased herein died on 8th March 2002. A certificate of official search on record, dated 2nd November 2011, indicates that the said property, Idakho/Shibuname/392, had been registered in the name of the deceased on 7th July 1973. The sale transaction over the land between the administrator and the late Enos Bahati happened on 5th July 2011. That would mean that the sale happened after the deceased's death and before representation had been granted to anybody over the estate of the deceased.

17. Under section 79 of the Law of Succession Act, the property of an intestate vests in an administrator. It is upon the said vesting that the administrator is able to enjoy the powers of personal representatives listed in section 82 of the Act and falls under the duties imposed by section 83 of the Act. A person who handles the property of an intestate before a grant is made to them is guilty of intermeddling with it, according to section 45(1), and is liable to the sanctions stated in section 45(2) of the Act. According to section 80(2) of the Act, a grant of letters of administration intestate takes effect only as at the date of the grant. Then there is also section 82(b)(ii) of the Act, which states that the immovable property of the estate is not to be sold before confirmation of the grant.

18. The person who allegedly sold Idakho/Shibuname/392 to the administrator, Enos Bahati, the alleged son of the deceased, had not been appointed administrator of the estate of the deceased as at the date of the alleged transaction on 5th July 2011. The property of the deceased had, therefore, not vested in him by virtue of section 79 of the Act. Consequently, he could not exercise the powers listed in section 82 of the Act, which include the power to sell estate property. The property had not vested in him, and ,therefore ,he could not sell it. The right of ownership over estate property, which is conferred by a grant of representation, did not inhere in him. He had nothing to sell, and even where he purported to sell he could not pass a good title, or any title for that matter, to anyone. In any event, the purported sale contravened section 82(b)(ii) to the extent that the sale was being conducted before a grant had been confirmed. The property did not belong to him, and it never vested in him. It was not his to sell. Effectively, the administrator bought nothing.

19. The protestor's case is that he had bought Idakho/Shibuname/392 from Anthony Alfayo Lusichi, who had in turn bought the property from the deceased. There is copy of a memorandum of sale of land dated 16th April 1997, for sale of Idakho/Shibuname/392, between the deceased and Antony Alfayo Lusigi. It was signed by both sides, before the Chief of Isulu Location, in the presence of two witnesses. The search certificate on record, which I have referred to above, indicates that as at 2nd November 2011, the said property was still registered in the name of the deceased despite his death on 8th March 2002. That would mean that the same was never transferred to the name of the alleged buyer, Antony Alfayo Lusigi. It is not clear from the record before me whether the provisions of the Land Control Act, Cap 302, Laws of Kenya, were ever complied with, which require that such transactions be approved by a land control board within a certain time stipulation. I cannot tell, therefore, whether there was any valid sale transaction between the deceased and the said Antony Alfayo Lusigi. I cannot make any conclusions as to whether he acquired any valid title to Idakho/Shibuname/392, which he could then, in 2011, convey to the protestor herein by sale.

20. I venture to hazard that the sale transaction in 2011, between the protestor and Antony Alfayo Lusigi meets the same challenges as those that face the sale transaction that was allegedly carried out between the administrator and Enos Bahati. Since the property was never transferred to the name of the deceased as at the date of the deceased's death, it remained estate property. The title in it could only vest, according to section 79, in the person to whom representation to the estate had been granted. It was such a grant holder who could validly exercise the power sale of estate property in terms of section 82 of the Act. Any person selling estate property without a grant runs afoul of section 45, for such sale amounts to intermeddling with the estate of a dead person.

21. Antony Alfayo Lusigi had not obtained representation to the estate of the deceased in 2011 when he purported to sell Idakho/Shibuname/392 to the protestor. The property did not, therefore, vest in him as per section 79. He could not, therefore, exercise the power granted by section 82 of the Act to sell it to the protestor. The title in the property did not inhere in him, and therefore he could not sell it. He had nothing to sell. He could not pass any valid title or any title at all to anyone. His act of selling the property amounted to intermeddling, and so did the act of the protestor of purporting to buy the same. I may add that the said transaction was in violation of section 82(b)(ii) of the Act to the extent that it was a purported sale of an immovable asset before a grant of representation to the estate of the deceased owner thereof had been confirmed.

22. My view of the cases of the two parties is that they did not acquire any title to the property in question as none of the alleged transactions complied with the provisions of the Law of Succession Act. I will not venture to determine whether the said transactions could pass muster under the provisions of the relevant land legislation. I do not have jurisdiction over such matters, for jurisdiction over the same was taken away from the High Court by Articles 162(2) and 165(5) of the Constitution. That jurisdiction now lies with the Environment and Land Court, and the two parties should ventilate their cases before that court to determine whether or not they acquired title to the property or the right to occupy and use it under the relevant land legislation.

23. Section 71(2)(d) empowers me to postpone confirmation of a grant for such periods of time as may be necessary pending the doing of certain things. I believe that this a proper case for such postponement. The administrator ought to properly identify all the persons who are entitled to the estate of the deceased, that is to say that all the nearest blood relatives of the deceased, so that the court can determine from the identifications whether or not those persons are entitled to a share in the estate of the deceased. Secondly, both the administrator and the protestor need to move the Environment and Land Court appropriately for determination as to whether the sale transactions that they have placed before me conferred upon them any title to the property in question under the relevant land legislation, or any right to occupy or use the said property.

24. I shall dispose of the application dated 15th May 2013, in the following terms -

a. That I hereby postpone confirmation of the grant herein pending the taking of action by the parties hereto in terms of the orders made here below;

b. That the administrator shall ascertain and identify all the surviving closest relatives of the deceased herein in the terms proposed in paragraphs 13 and 23 of this judgment;

c. That administrator shall thereafter place before the court a list of such relatives of the deceased as ascertained or identified in (b) above by way of an affidavit to be filed herein in the next forty-five (45) days;

d. That both the administrator and the protestor shall move the Environment and Land Court appropriately should they be so minded, for a determination of questions as to whether they have acquired any title to Idakho/Shibuname/392 or the right to occupy and use the said land through the sale transactions alleged in these proceedings;

e. That the matter shall be mentioned after forty-five (45) days to confirm compliance with (c) above;

f. That the mention date shall be given in open court at the delivery of this judgment;

g. That each party shall bear their own costs; and

h. That any party aggrieved by the orders that I have made herein above shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.

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

W. MUSYOKA

JUDGE