REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 58 OF 1996

IN THE MATTER OF THE ESTATE OF JACKSON SAKWA CHAKONGO (DECEASED)

RULING

1. I delivered a ruling in this matter on 19th July 2018, wherein I directed that an application dated 18th June 2018 be disposed of first before a ruling is delivered on an application dated 26th April 2018. There was a further order that the application dated 26th April 2018, which was heard on 19th June 2018, be disposed of simultaneously with that dated 18th June 2018.

2. The background to this matter is that the deceased herein died on23rd October 1990. A letter from the Chief of East Wanga Location, dated 13th February 1996, indicates that the deceased had been survived by a widow, Sellinah Fiketi Sakwa, four sons and a daughter, namely Benjamin Makokha, John Elijah, Charles Chitechi, Shem Chakongo and Okutoyi Nechesa. Representation was sought in the cause by Charles Chitechi through a petition lodged in the cause on 14th February 1996. He listed the individuals named in the Chief's letter as the survivors of the deceased, and listed E. Wanga/Isongo/1462 as the property that the deceased had died possessed of. Letters of administration intestate were made to the petitioner on 2nd May 1996 and a grant duly issued on 6th May 1996.

3. It would appear that there were tussles over the estate thereafter between the widow and the administrator, and also amongst the children of the deceased themselves. On 19th September 2009, Chitembwe J directed the administrator and his brothers to file affidavits proposing distribution of the estate. These directions were given on the back of a summons for confirmation of grant filed herein on 9th August 2006. Two proposed modes of distribution, by the administrator and Benjamin Makokha were filed. Benjamin Makokha proposed equal distribution of E. Wanga/Isongo/1462 amongst the four sons - Benjamin Makokha, John Elijah, Charles Chitechi and Shem Chakongo – with each taking 0.915 hectares. The administrator proposed an uneven sharing as follows Benjamin Makokha – 1.44 hectares, John Elijah – 1.15 hectares, Charles Chitechi – 3.68 hectares and Shem Chakongo – 2.52 hectares. After reviewing the evidence and the law Lenaola J delivered a ruling on 29th September 2010 wherein he ordered distribution of the estate equally as per the proposal made by Benjamin Makokha. A certificate of confirmation of grant in those terms was issued dated 18th October 2010.

4. It is the distribution that Lenaola J ordered on 29th September 2010, as encapsulated in the certificate of 18th October 2010, that the application dated 18th June and amended on 20th June 2018, seeks to have reviewed or set aside. It is brought at the instance of the administrator, Charles Chitechi Sakwa. He argues that the distribution ordered by the court did not reflect the will of the deceased. A copy of what the administrator refers to as the will of the deceased is attached to his affidavit in support of the application. His case is that the distribution ordered by the court was different from what he had proposed in his application dated 9th August 2006.

5. There is a reply to the application by John Auma Sakwa, whom I presume is also known as John Elijah Sakwa, through an affidavit sworn on 26th September 2018. He points out that the application for review is brought eight years after the orders on distribution had been made. He states that the administrator participated in the proceedings leading up to the making of the orders and had opportunity to raise the issues that he is now raising. He asserts that there is no error on the face of the record to warrant review. In any case, he says, the administrator is attacking the merits of the decision on distribution, and that being the case he ought to have filed an appeal against the said orders. He further argues that the administrator had not presented any special circumstances to warrant departure from the distribution ordered by the court and none had been presented before the Judge who made the impugned orders. He states that the administrator is inviting this court to sit on appeal on its own decisions. He opines that the review application was provoked by the filing of the application dated 26th April 2018. He asserts that the deceased did not leave a will and that that was the reason that prompted the administrator to initiate a cause in intestacy.

6. The administrator responded to the replying affidavit by filing a further affidavit that he swore on 23rd October 2018. He explains that it took him eight years to seek review because the court file went missing and also because he had had an accident. He asserts that there were good reasons for review and therefore there was no need to appeal. He says that the deceased had allocated them shares during lifetime. He say further that the respondents did not protest at the mode of distribution reflected in the deceased's will. He says that special reasons exist for the court to depart from distributing the estate equally. These are that the court should have followed the distribution that he had proposed, the will the deceased had left, the fact that some of his brothers had sold land and the disputes that he had with his brothers before the Chief and the police as per the documents that he has exhibited in his affidavit. He said that the deceased had indeed left a will and that he petitioned for letters of administration intestate by oversight, arguing that that did not in any event override the contents of the will.

7. There are other affidavits on record by the administrator and John Elijah Sakwa sworn on 2nd February 2019 and 25th February 2019, giving further exposition to the issues.

8. The application was argued orally on 7th March 2019. The administrator argued that he sought review as Lenaola J had made an error at distribution by considering extraneous matters. He stated that the Judge confirmed the grant contrary to the wishes of the administrator as expressed in his application of 9th August 2006. He argued that the deceased had left a written will and the distribution that he had proposed followed the wishes as expressed in that will. He said that he wished to have the certificate of confirmation of grant amended so as to conform with the wishes of the deceased as reflected in the will. He went on to explain his delay in seeking review of the impugned orders. He asserted that the sons of the deceased set up homesteads on the land by virtue of the terms of the will. He accused his brothers of having disposed of land contrary to law.

9. In reply, Mr. Obilo for the respondents, submitted that the document claimed to be a will of the deceased did not meet the requirements of formal validity of a will as set out in section 11 of the Law of Succession Act, Cap 160 Laws of Kenya, as it was not attested by at least two witnesses as required in law. He also submitted that administrator was in possession of a will of the deceased contrary to law as a beneficiary is not supposed to have custody of a will. He stated that by virtue of section 30 of the Law of Succession Act, the application had been overtaken by events following the confirmation of the grant. He further submitted that when the matter came up for confirmation of grant he did not raise the issue of the will.

10. The application before me is for review of court orders. The remedy of review is provided for under the Civil Procedure Rules, which is subsidiary legislation made under the Civil Procedure Act, Cap 21, Laws of Kenya. The provisions in the Civil Procedure Rules on review have been imported into probate practice by Rule 63 of the Probate and Administration Rules. Where there is doubt as to that importation, the court can also act on the basis of Rule 73 of the Probate and Administration Rules which saves the inherent powers of the court to make such orders as may it may deem fit to meet the ends of justice. Then there is also Article 159 of the Constitution.

11. Review is sought on three general grounds – error on the face of eth record, discovery of new evidence of significant importance that the applicant was not able to get and place before the court before the order sought to be reviewed was made, and any other sufficient reason. Any other sufficient reason is an omnibus, which carries all other reasons that may justify review.

12. In the instant case the administrator has not expressed himself to have based his application on any of the grounds stated above. He does not allege error on the face of the record nor discovery of important evidence after the order was made, neither does he argue that other sufficient reasons exist. He is not represented by an advocate and he is a layman, so I shall excuse him.

13. Let me first consider whether there was an error on the face of the record. The administrator appears to say that when he sought distribution of the estate, he placed certain proposals before the court on distribution. He says that the court did not consider his proposals and ended up ordering distribution on terms other than those that he had proposed. The application seeks that the court revisits the issue of distribution so as to have the estate distributed as per the terms that he had proposed at distribution, which he asserts were in accord with the will of the deceased, copy of which is exhibited to the instant application.

14. Does that amount to an error on the face of the record? I think it does not. The probate court is not bound at distribution of an estate by the terms proposed by the administrator. Distribution of an estate of a dead person is governed by the law. The deceased herein died in 1990. The estate of a person dying after 1st July 1981 is regulated by the Law of Succession Act. The said Act has set out how an estate is to be distributed upon the intestacy of the deceased or where the deceased died leaving a will. Where he died testate, having left a valid will, the court will order distribution in terms of the will of the deceased. If he died intestate, having not left a valid will, distribution will be as per the provisions of the Law of Succession Act on intestacy or on such terms as the survivors may agree on.

15. What happened in the instant case? After the deceased died in 1990 the cause herein, was initiated by the administrator in intestacy. He approached the court on the basis that the deceased had died intestate, having not made a valid will. The administrator acknowledges that fact. When the administrator moved for confirmation of his grant in the application lodged herein on 9th August 2006 it was not mentioned that the deceased had died testate and that the distribution proposed was as per the terms of any alleged will. The matter came up before the court several times before the confirmation of the grant, and I have not come across any minute indicating that the administrator ever alerted the court before then that the deceased had left a valid will. The court for that reason proceeded to distribute the estate following the provisions of the Law of Succession Act which governed the situation where the deceased was survived by children only without spouse. That provision is found in section 38, the property is shared equally between the children. The court cited that provision and reproduced its terms in the ruling to justify the equal distribution. Quite clearly the court followed the law in the circumstances and it cannot be said that it made any error or mistake on the face of the record. To clear any doubts, I shall reproduce the provision in section 38 in this ruling. It says:

> *"38. Where intestate has left a surviving child or children but no spouse Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."*

16. Did the administrator discover any evidence after 19th September 2010 of great significance and which he had not been able to place before the court before it made its order? He does not say so in his papers. The only new thing that he mentions is the alleged will of the deceased made on 30th June 1983. He says that he had the will all along and that he had shown it to the police and provincial administrators during the time he had disputes with his siblings over the estate. He has exhibited letters from the police and provincial administrators dating to 2004/2005, long before the grant was confirmed. It cannot therefore be said that he discovered the will after the grant was confirmed.

17. Are there any other reasons that suffice for review of the said orders? I have read and reread the application and the affidavits, and I do not see any other sufficient reason to warrant review..

18. The administrator alleges that the deceased died testate, having left a will that he had made on 30th June 1983, copy of which has been exhibited to the instant application. He urges that the distribution that he had proposed, and which the court did not follow, for the reasons that the court set out in its ruling of 19th September 2010, tallied with the terms of the alleged will. As mentioned here above, the cause herein was commenced in intestacy, the grant that was made to the administrator on 2nd May 1996 and the certificate of 6th May 1996 were in respect of letters of administration intestate. It was the said grant that the administrator asked the court to confirm. He never intimated that the deceased had died testate. The administrator never sought at any time to prove the will and to have his grant of letters of administrator revoked and substituted with one of probate of a written will or of letters of administration with written will attached.

19. Secondly, the validity of the alleged will has been called to question. The document before me bears a thumbprint embossed above the name of the deceased. The formal validity of a will is provided for in section 11 of the Law of Succession Act. The written will must be signed by the testator or maker, and it is required that his signature must be attested by at least two witnesses. This means that the testator ought to affix his signature to the will in the presence of witnesses or he should later acknowledge his signature on the document to the witnesses. The attesting witnesses are thereafter required to affix their own signatures on the will.

20. For avoidance of doubt section 11 says as follows:

> "*Written wills No written will shall be valid unless— (a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator; (b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will; (c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."*

21. The document dated 30th June 1983, purported to be the will of the deceased, bears one signature, that purported to be of the deceased. It does not bear the two signatures of the person who should have attested its execution by the deceased. That being the case therefore it follows that the same, if it was intended at all to be a written will, was not properly attested as it does not have the signatures of the attesting witnesses. It cannot in the circumstances be said to be valid. It cannot pass as the will of the deceased. It is a document of no legal effect. The contents of the said document cannot therefore form basis for distribution of the estate of the deceased.

22. I note that the deceased was survived by two daughters. Their fate has not been mentioned. The issue has not arisen in the proceedings before me, and the two have not approached the court. I shall be content to let the matter rest there.

23. In my ruling of 19th July 2018, I had directed that I would determine the application dated 18th June 2018 simultaneously with that dated 26th April 2018. I have disposed of that dated 18th June 2018 and I now turn to the second one. It seeks that I direct the Kakamega County Surveyor to visit E. Wanga/Isongo/1462 with a view to have it partitioned in terms of the certificate of confirmation of grant dated 18th October 2010. The administrator had opposed this application as he sought to have the estate distributed on his terms which he alleged were founded on the will of the deceased. I have held that the alleged will was not valid and could not be the basis for distribution of the said estate. I find that there is merit in the application of 26th April 2018. The grant was confirmed in 2010. The distribution orders should be implemented. There should be closure. Litigation on this estate should come to any end.

24. In the end the orders that I make herein are as follows:

> **(a) That the application dated 18th June 2018 and amended on 20th June 2018 is hereby dismissed;**
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> **(b) That the application dated 26th April 2018 is allowed in its entirety;**
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> **(c) That this being a family matter, each party shall bear their own costs; and**
>
> **(d) That any party aggrieved by the orders made herein has the liberty to move the Court of Appeal appropriately.**

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14TH DAY OF JUNE 2019

W. MUSYOKA

JUDGE