REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 161 OF 2010

IN THE MATTER OF THE ESTATE OF PETER AMBANI MATAYWA (DECEASED)

JUDGMENT

1. Peter Ambani Mataywa, the deceased person to who whom these proceedings relate, died on 27th October 1996. Representation to the intestate estate of the deceased was sought by Teresa Ambani Masitsa, in her capacity as widow of the deceased. She expressed the deceased to have had been survived by five sons and three daughters, being Leonard Miheso Ambani, Geoffrey Mataywa, Cleophas Muruli, Livingstone Mwinamo, Benson Ambani, Adelide Itenya, Mirriam Mukasia and Phyllis Khamati. The deceased was expressed to have had died possessed of a property known as Idakho/Lirhembe/1196. Letters of administration intestate were made to her on 27th December 2010, and a grant was issued to her dated 29th December 2010. I shall hereafter refer to her as the administratrix.

2. On 12th July 2011, a summons was lodged herein by the administratrix, dated 8th September 2011, seeking confirmation of the grant herein. The application listed the seven children of the deceased named in the petition as the persons who had been ascertained as having survived the deceased. It was proposed that Idakho/Lirhembe/1196 be shared out between the administratrix and Lirhembe Pentecostal Church. The circumstances under which the church was to be allocated a portion of the estate of the deceased is not defined in the application. The application was heard on 30th October 2013, in the presence of Teresa Masitsa, Benson Ambani, Miriam Mukasia and Phyllis Khamati, and was allowed, and the grant confirmed. A certificate of confirmation of grant in those terms was issued, dated 11th November 2013.

3. On 28th July 2017, Leonard Miheso Ambani, who I shall hereafter refer to as the applicant, lodged an application herein, under certificate of urgency, dated 28th July 2017. The application principally sought revocation of the letters of administration intestate made to the administratrix in 2010 and of the certificate of confirmation of grant dated 11th November 2013. There were supplementary prayers for a prohibitory order to restrain transfer of two parcels of land created out of Idakho/Lirhembe/1196, cancellation of the said titles and their reversion to Idakho/Lirhembe/1196 and his appointment as administrator in the place of the administratrix.

4. The grounds upon which the application is premised are set out on the face of the application, as well as in the facts deposed in the affidavit sworn by the applicant on 28th July 2017. The grounds are that the proceedings to obtain the grant were defective in substance as the consents of all the survivors of the deceased had not been sought, the grant was obtained fraudulently as there were false statements and concealment of matter from the court, the administratrix had not proceeded diligently with the administration of the estate, and she had disinherited other rightful beneficiaries of the deceased. The applicant identifies himself in the affidavit as a son of the deceased and the administratrix. He averred that he had discovered that the register for Idakho/Lirhembe/1196 had been closed, and it was from that process that he got interested in knowing the background. He established that the administratrix had obtained representation to the estate of the deceased, and it was after that that she obtained confirmation of the grant and had the property shared out between herself and the church, leading to the subdivision of the said land into the two parcels the subject of the application, that is to say Idakho/Lirhembe/1797 and 1798. He complains that the process of obtaining the grant and its confirmation were defective. He states that the administratrix did not include the names of the children of the deceased in the Chief's letter. He denies the signature in the consent to the administratrix petitioning for administration saying that he never signed that document. He argues that the church that the deceased had allocated land was known as the Pentecostal Assemblies of God Kenya (PAG), and not the Lirhembe Pentecostal Church that had been allocated the land during confirmation. It is on account of that that the applicant accuses the administratrix of concealing something material from the court.

5. The administratrix responded to that application by swearing an affidavit on 4th October 2017 and filing it here on 19th October 2017. She denies that she has disinherited the other beneficiaries, saying that she instead holds the property in trust for them. She avers further that she commenced the proceedings herein with the knowledge of all the survivors of the deceased, including the applicant. She states that the deceased had given a portion of his land to the Pentecostal Assemblies of God (PAG) Church in 1986, and for which the church paid a token Kshs. 25, 000.00. She described the church as a liability to the estate. She asserts that the church has always been on the said land since 1986 with the full knowledge of the applicant, and she defends her transfer of a portion of the estate land to the church, saying that she did it in good faith. She avers that she is willing to make *intervivos* transfers of the estate property to the children so long as they were ready to meet the cost of the conveyance.

6. Directions were given on 27th November 2018, for the disposal of the application orally and for filing of witness statements and bundles of documents. There has been compliance. On 20th February 2019 the administratrix filed a list of witnesses, a bundle of witness statements

and a bundle of documents. On 11th March 2019, the applicant filed one statement of his proposed witness, Geoffrey Mataywa Ambani.

7. The oral hearing commenced on 11th March 2019. The first on the witness stand was the applicant, Leonard Miheso Ambani. He testified that his name was not on the Chief's letter dated 16th June 2010, nor in the certificate of confirmation of grant dated 11th November 2013. He stated that he did not sign the consent document filed in court simultaneously with the petition on 11th March 2010. He asserted that the signature on that document, purported to be his, was not his. He also stated that the Chief's letter did not list the names of all his siblings. During cross-examination, he said that the deceased had nine children. He said that he and his brother Geoffrey lived on the estate land, and the deceased had not yet showed them where to build. He said that some of them had issues with the administratrix as she did not know what was going on. He complained that the land had been given to a stranger known as the Lirhembe Pentecostal Church. He said that he did not know how the church came into the picture. He conceded that there was a church building that had been standing on the land for the last thirty years, but then said that the name of the church changed recently. He said that the administratrix had not sent anyone to remove him from the land, and added that she had never attempted at any time to remove him or anybody else from the land. He complained that she had not communicated her intention to subdivide the land to him. He said that he wanted the land due to the church to be given to the PAG Church, of which he and his brother, Geoffrey, were adherents.

8. Geoffrey Mataywa Ambani followed. He averred that he did not sign the consent that was filed in court on 11th March 2011, neither did the Chief's letter mention him amongst the survivors of the deceased. He stated that he supported the applicant's position that the land in question reverts to the name of the deceased. He also stated that he wanted the PAG Church restored back to the land. He stated that he had issues with the administratrix, and that they were not even on talking terms. He said that the church had been in occupation of the land for over thirty years and that he had no issue with it. He claimed that the whole land had been sold by the church, even though he was yet to have sight of the sale agreement. He said that no one had yet come to him to ask him to move out of the land.

9. The case for the administratrix opened on 2nd May 2019, with the administratrix, Teresa Masitsa Ambani, on the stand. She stated that she was yet to distribute the estate, saying that she had given a portion of the land to three sons only to cultivate. She stated that the applicant and Geoffrey refused to sign the papers that would have enabled her to seek representation to the estate, and so she approached the Chief, who gave her a letter. She said that all her children had places to reside on the land and to till. She denied giving herself all the land, leaving out her children. She said that it was the deceased who sold land to the church during his lifetime. She said there was an agreement signed between the church and the deceased, and she produced a copy of the agreement as an exhibit. During cross-examination, she said that she had eight children, being three daughters and five sons. She stated that none of the children signed the consent that she filed in court with the petition. She also said that at confirmation none of the children signed consents to distribution. She said that she did not know who endorsed the consents in dispute, adding that she was not literate. She asserted that she was not the one who made the markings on the consent documents. She said that the signatures on the said consent were not false. She said that as she was not literate she could not tell who had been purported to have signed the consents. She conceded that the names of the children were not listed in the Chief's letter. She said that she was unaware that the church was seeking to get one of the sons out of the land. She stated that she was ready to give each of the children their respective portions. She said that the certificate of confirmation of grant indicated that she held the property in trust for the children. She said her land was one acre, the rest belonged to the church.

10. The administratrix was followed to the witness stand by Joseph Munamo. He was from the church. He stated that there was an agreement between the deceased and the church, to which he was privy. He stated that the church was still in occupation of the land. He said that the land had been sold to the PAG Church, which subsequently changed its name. He asserted that it was still the same church.

11. The administratrix's last witness was Nelson Mbakala Lugonzo. He testified that he was privy to the sale of the land by the deceased to the church. He was one of the witnesses to that transaction. He described himself as a deacon in the church. He said that he knew that the deceased had eight children, but he could not tell the actual acreage of the land. He mentioned that there was suit pending in court over the land, CMCCC No. ELC 923 of 2018, which had been brought by the applicant. He said that the church owned Idakho/Lirhembe/1797 Which had been hived off Idakho/Lirhembe/1196. He said he was not party to the process of subdivision of the property.

12. At the close of the oral hearings, the parties filed written submissions. I have read through them and noted the arguments made therein.

13. What I have before me for determination, is an application premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. It seeks revocation of the grant and the certificate of confirmation of the said grant.

14. Section 76 of the Law of Succession Act provides as follows:

> *"76. Revocation or annulment of grant A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—*
>
> *(a) that the proceedings to obtain the grant were defective in substance;*
>
> *(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
>
> *(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*
>
> *(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*
>
> > *(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or*

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances."

15. Going by the provisions of section 76 of the Law of Succession Act, grants of representation are liable to revocation on three general grounds. The first is that the process of obtaining the grant was fraught with problems. It could be that there were defects in the process or that the court was misled in some way. Such would include where the grant was sought by a person who was not qualified to obtain representation to the estate of the deceased, or where certain facts as were required under the law had not been disclosed or were concealed from the court or were misrepresented. The second general ground is where the grant was obtained procedurally and properly, but subsequently the grant holder encountered challenges with administration, such as where they failed to apply for confirmation of grant within the period allowed in law or failed to proceed diligently with the administration of the estate, or failed to render accounts as and when required. The last general ground is where the grant has subsequently become useless or inoperative, usually in cases where the sole administrator dies.

16. In the instant case, the applicant appears to anchor his case on the first general ground, that the process of obtaining the grant herein was attended by challenges. He submits that his consent towards obtaining the grant was not obtained, and that the purported consent document on record was false to the extent that the signature on it purported to be his was in fact not his. I will start by considering the issue as to whether the administratrix had obtained the consent of the applicant and whether that consent was necessary in the first place.

17. The deceased died intestate after the Law of Succession Act had come into force. Representation to his estate was, therefore, subject to administration in accordance with the provisions of the Act. The persons who qualify to apply for administration in intestacy are set out in section 66, which gives an order of priority to guide the court in exercising discretion in the matter of appointment of administrators. The provision states as follows:

"66. Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors: Provided that, where there is partial intestacy, letters of administration in respect."

18. According to that provision, the court ought to be guided by Part V of the Act, which settles the order of priority in entitlement to a share in the estate of the deceased. Priority is given to the surviving spouse, followed by the children of the deceased, followed by parents of the deceased in the event that the deceased was not survived by a spouse or child, other relatives follow thereafter. The same applies with regard to entitlement to administration by dint of section 66. The surviving spouse has priority to administration, followed by the children, parents of the deceased, siblings, other relatives to the sixth degree, the Public Trustee and creditors in that order. When that is applied to the instant case, it would mean that the widow of the deceased, the administratrix herein, had priority to appointment over her children, the applicant included.

19. I note that when she lodged her petition herein on 11th March 2010, she lodged simultaneously with it a copy of a letter of consent purportedly signed by the children, including the applicant. The applicant has renounced the signature on the document. The administratrix, when she gave oral evidence appeared to also say that the children did not sign the purported consent documents. Looking at the alleged signatures on the document, I also doubt the authenticity of the signatures, even though I am not a document examiner. The endorsements are not actual signatures, but the names of the children written apparently by the same hand. I doubt that any value can be attached to the said document.

20. I need to consider whether the said consent was necessary in the circumstances. Rule 7 of the Probate and Administration Rules sets out the procedure for applications for representation. Sub-Rule (7) addresses situations where the petitioner has a lesser right to representation, and requires that he or she either causes citations to issue to the persons with prior right to apply, or gets them to renounce probate, or obtains their written consent allowing the petitioner to apply for representation. The provisions of section 66 of the Act, which I have set out above, should be read together with Rule 7(7) of the Probate and Administration Rules, which states as follows:

"7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

(a) renounced his right generally to apply for grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him to renounce such right or to apply for a grant. "

21. The administratrix in the instant cause had a superior right to administration over the children and the other relatives of the deceased, going by the provision of section 66 of the Act. A reading of section 66 and Rule 7(7) would mean the widow did not need to comply with requirements of Rule 7(7), since that provision applies only to persons who seek representation while they had a lesser right to administration. She did not therefore, have to obtain the consents of her children to apply for representation to the estate of her late husband. She did not have to file the consent letter on record.

22. An issue was raised with respect to the letter on record from the local Chief. The administratrix was accused of causing the Chief to write a letter where the names of the children were omitted. I would be reluctant to blame the administratrix for that. When she testified before me, she appeared to me to be an illiterate person, who would not have been expected to direct the Chief on what was to go into a letter that he was to write for consumption by the court. I would blame the Chief. He ought to have known what was expected of him in writing such a letter. In any event, defects in a letter by the Chief would of little consequence to the process. The law and the rules of procedure, that is to say the Law of Succession Act and the Probate and Administration Rules, do not require the filing of the letter from the Chief. See *Musa vs. Musa* (2002) 1EA182. The filing of such letters developed from practice and its omission is not fatal to appointment of administrators.

23. The applicant also appears to be unhappy with the confirmation process, and seeks revocation of the grant for reasons associated with the confirmation process. Section 76, which provides for revocation of grants, does not make problems with the manner a grant is confirmed a ground or factor for consideration in revocation of grants. The only thing about confirmation of grants that would be a basis for revocation of a grant has something to do with failure to seek confirmation within the period prescribed. Problems with the confirmation process, and especially its outcome, are not grounds for revoking a grant. The remedy available to an aggrieved party is to either seek a review of the orders made on confirmation of the grant or file an outright appeal. See Section 76(d)(i)of the laws of Succession Act.

24. It should be pointed out that a certificate of confirmation of grant is not a grant in itself. For that reason, it is not the instrument envisaged for revocation under section 76. It should also be made clear that the certificate of confirmation of grant is a document that merely certifies that the grant on record has been confirmed. The certificate merely captures the essence or purport of the confirmation orders. The certificate is an extract from the order on confirmation. It is not the order itself. It, therefore, follows that the cancellation of the certificate without touching the order from which it emanates is an exercise in futility. The only act that would render the certificate totally ineffective is the setting aside or vacating of the said order.

25. One of the applicant's problems with the confirmation orders is that they made provision to the Lirhembe Pentecostal Church. He concedes that the deceased had sold a portion of the land to a church during his lifetime, and that church had been in occupation for over three decades. His problem, though, is that the church in question was not the Lirhembe Pentecostal Church, but the PAG Church. The administratrix and leaders from the church testified that the two were in fact one, for the church had merely changed its name. My view of this is that this is all a storm in a tea cup. The deceased had sold property to the church, and the church is not complaining that the land was given to a different church by the administratrix. If ever there was such a dispute, it would be a dispute between two church entities. However, from what is before me, the PAG Church has not come forth to complain, that it was excluded from benefit. No evidence has been placed before me suggesting that the applicant had a power of attorney from the PAG Church to pursue the issue on its behalf. Even if that were the case, I doubt whether that would be an issue for me to determine in these proceedings.

26. The other issue is that the administratrix disinherited the children of the deceased by having the entire estate, save for the provision going to the church, devolve wholly upon herself. In her defence, the administratrix states that she only held the property in trust for the children, adding that she was ready to distribute the property amongst them.

27. I have already alluded to Part V of the Act, which provides for distribution upon intestacy. The scheme of distribution under Part V is that the property is shared out amongst the kin of the deceased. Where the deceased is survived by a spouse and children, the spouse and children take priority over everyone else. Even as between the spouse and the children, the spouse appears to take priority. The design is that the principal destination of the assets is the children, but they would have no direct access to the property during the lifetime of the surviving spouse. The property would only devolve wholly upon them following determination of the life interest on account of the death of the surviving spouse or her remarriage.

28. The relevant provisions state as follows:

"35. Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of

all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—

(a) the nature and amount of the deceased's property;

(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;

(c) the existing and future means and needs of the applicant and the surviving spouse;

(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;

(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and

(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

(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 the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children. Where intestate has left one surviving spouse but no child or children."

29. The administratrix is the surviving spouse of the deceased. So she is entitled to priority at distribution over the children. According to Part V, a surviving spouse is entitled only to a life interest where the deceased is survived by children, and not to the property absolutely, unless, of course, the children consent to taking her absolutely. In the instant case, the surviving spouse had the property devolved absolutely to her, instead of her being assigned a life interest. That did not comply with section 35 of the Law of Succession Act. However, that defect alone cannot be a basis for revocation of the grant.

30. The applicant complains of being disinherited. There could be an element of that to the extent that section 35 was not fully complied with. However, were the administratrix to pass on, the persons who would be entitled to her intestate estate would her children, who include the applicant, and, therefore, it cannot be said that the applicant, and the other children, had been totally disinherited. They would be the ultimate beneficiaries of the estate either way.

31. The administratrix has stated that she was willing to distribute the property amongst the children. She has not cited section 35(2), which gives her a power of appointment of the property during life interest, but it would appear that that is what she has in mind. However, since she does not hold it under life interest, the provision would not apply, instead it would be a case of her distributing the property *intervivos*.

32. In the end the orders that I shall make in this matter are as follows:

(a) That the application for revocation of grant dated 28th July, 2017 is hereby dismissed for the reasons that I have given above;

(b) That I shall review the confirmation orders made on 30th October 2013 to bring them into conformity with section 35 so far as life interest is concerned;

(c) That the terms of the review are that Idakho/Lirhembe/1196 shall devolve upon Lirhembe Pentecostal Church to the extent of 137 feet by 64 feet, and the reminder to Teresa Masitsa Ambani, during life interest and thereafter to the children of the deceased in equal shares;

(d) That the certificate of confirmation of grant dated 11th November 2013 shall be amended accordingly in those terms;

(e) That any party aggrieved by the orders made in this judgement has twenty-eight (28) days to move the Court of Appeal appropriately; and

(f) That each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF SEPTEMBER 2019

W. MUSYOKA

JUDGE