REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 867 OF 2013

IN THE MATTER OF THE ESTATE OF JOHN AMEYO alias AMEYO AMBANI (DECEASED)

JUDGMENT

1. The certificate of death serial number 207743, dated 2nd December 1988, and filed herein, indicates that the deceased person to whose estate this cause relates, was known as John Ameyo Gavis, who died on 24th July 1988. There is a letter on record from the Chief of Butsotso South Location, dated 1st November 2013. It indicates that he died possessed of property described as Kisa/Khushiku/679 and 714. It unhelpfully says that two of his sons, Justus Ambani Ameyo and Edward Omurana Otiko, were interested in seeking representation to his estate, instead of listing for the benefit of the court all the persons who had survived the deceased.

2. Representation to his estate was sought by the said Justus Ambani Ameyo and Edward Omurana Otiko, through a petition that they lodged herein on 19th November 2013. They listed themselves as the only persons who survived the deceased, and stated that the deceased died possessed of the assets listed in the Chief's letter referred to above. Letters of administration intestate were made to them on 14th February 2014, and a grant was duly issued, dated 25th February 2014. Following the decease of Edward Omurana Otiko, the grant was amended on 17th February 2016, through a Motion dated 24th July 2015, to substitute him with his widow, Beatrice Ayako Orembe. I shall hereafter refer to Justus Ambani Ameyo and Beatrice Ayako Orembe as the administrators.

3. The two administrators then lodged a summons herein on 11th April 2016, of even date, seeking confirmation of their grant. According to the affidavit that they swore in support of the application, they identified themselves, that is Justus Ambani Ameyo and Beatrice Ayako Orembe, as the only survivors of the deceased, and proposed that the two assets be shared out between the two of them, so that Justus Ambani Ameyo takes Kisa/Khushiku/679, while Beatrice Ayako Orembe is allocated Kisa/Khushiku/714.

4. When the summons came up for hearing before Mwita J, 21st November, 2018 it transpired that although the widow of the deceased had survived the deceased she had been excluded from the process, and that the deceased also had daughters who had also been excluded. The court postponed the confirmation and directed the administrators to file a supplementary affidavit listing the widow and the daughters as survivors of the deceased. There was compliance for the administrators filed a supplementary affidavit, on an unknown date, sworn on 6th December 2016. They listed the survivors of the deceased as his widow – Mary Omuronji Ameyo, his son – Justus Abuko Ambani, his daughter-in-law – Beatrice Ayako, and two daughters – Rossy Ameyo Amuhaka and Linent Owano Makoba. The proposed distribution remained the same, save that the widow was to have a life interest over Kisa/Khushiku/679. It was said that the two daughters were happily married and had no interest in the estate. There is an affidavit on record, sworn on 14th February 2017, by Rossy Ameyo Amuhaka, wherein she avers that she had no objection to the estate being shared out as proposed in the supplementary affidavit of the administrators sworn on 6th December 2016.

5. On 30th January 2017, an affidavit of protest, sworn on 27th January 2017, by Felistus Awinja Anjere, was lodged in the cause, with respect to the summons for confirmation of grant. I shall hereafter refer to Felistus Awinja Anjere as the protestor. She avers that she was a sister-in-law of the deceased, as her late husband, Francis Anjere, was a brother of the deceased, and that she was in occupation of Kisa/Khushiku/679 and 714. She claims that her late husband had acquired the two parcels of land from the widow of the deceased, Mary Omuronji Ameyo, for Kshs. 100, 000.00, through a written agreement of sale made on 23rd April 2001. She states that she and her husband then moved into the two parcels of land immediately and began to utilize them. She states further that her son, Hudson Anjere, put up a house on Kisa/Khushiku/714 in 2004, and that she and her husband had planted trees on the said land. She claims that the widow of the deceased was to include her late husband's name in the process but when he died she changed her mind.

6. The administrators, through Justus Abuko Ambani, responded to the protest affidavit through a replying affidavit that he swore on 24th February 2017. He concedes that his mother had sold the estate property to the late husband of the protestor, but he avers that the said sale happened without their knowledge. He further avers that as the purchaser had not fully honoured the terms of the sale agreement, the widow of the deceased and the family decided to refund the money that had been paid so far. He states that there were proceedings before the Chief, where the elders decided that the money be refunded. He urges the court to order the protestor to accept the refund.

7. Directions were taken that the confirmation application and the protest be disposed of by way of oral evidence, and that witness statements be filed. The parties complied with the direction on filing of witness statements for they did place several statements on record.

8. The oral hearing commenced on 26th June 2018, with the protestor, Phelestus Awinja Anjere – holder of national identity card number 4182321, being the first to take the witness stand. She reiterated the averments made in her affidavit of protest. She conceded that the property sold by the widow of the deceased was registered in the name of the deceased, but asserted that the widow lived on the land. She conceded that the deceased had died by then and that his widow sold land that belonged to a dead person. She stated further that she was not a witness to the sale, but said that she was aware that the sale money was paid. She stated that she and the widow of the deceased did not agree on a refund of the purchase price, saying that no meeting was held for that purpose, and that she and her family were not willing to take the refund.

9. She was followed to the stand by Raylands Amos Aywa – holder of national identity card number 1917093. He said that he was party to the sale agreement alleged by the protestor, for he was the one who wrote it. He had been invited to the event by the buyer. He said that he knew that the deceased was dead at that material time. He stated that the protestor's husband bought the two parcels of land, Kisa/Khushiku/679 and 714. He stated that he was not aware whether there was an agreement that the sale money paid by the buyer be refunded.

10. The protestor's third witness was Joseph Aseka Okuyumba. He stated that the protestor used to farm the land belonging to the deceased. It was his evidence that when he was born he found her husband farming the land, and he did not know that it previously belonged to the deceased. He said that he was not present when the farms were sold, adding that he was not even aware that there was a sale. He said he only got to know about the sale when the matter came to court.

11. The case for the administrators opened on 17th July 2018, with the first administrator, Justus Abuko Ambani Ameyo, on the witness stand. He explained how he had proposed that the estate be distributed. He said that he was not party to the sale transaction between his mother and the protester's husband. He conceded that the protestor had been on the land for a long time and that he had benefited from using it. He stated that his brother, the late husband of the second administrator, Beatrice Ayako Orembe, had never lived on nor utilized any of the two parcels of land. He also stated that he had not utilized any of the two pieces of land, and was not aware whether the protestor was related to him in any way.

12. He was followed in the witness stand by Mary Omuronji Ameyo – holder of national identity card number 0506323, the widow of the deceased. She confirmed that she had sold the said property to the husband of the protestor after the deceased died. She stated that they did go to the Chief's office, where she and the protestor signed a document in which the protestor agreed to a refund of the purchase price. She said that she was not aware at the time of sale that she was related to the buyer. She stated that she had four children with the deceased, being Otiko Omurung'a, Linet Owano, Rose Mwaka and Justus. She stated that Otiko had a *boma* on Kisa/Khushiku/714. She stated that the protestor's husband did not pay her the agreed full purchase price.

13. The next witness was Mesabo Emisiko – the holder of national identity card number 1891731. He said that he was from the same clan with the deceased. He stated that he knew the lands of the deceased, and could confirm that he never saw the deceased sell them to anyone. He stated that the said property ought to be inherited by the widow of the deceased and his children.

14. At the close of the oral hearings, the parties were directed to file and serve written submissions. Only the petitioner filed written submissions, on 5th September 2018. I have read through them and noted the arguments made therein.

15. In a confirmation application the court is called upon to confirm two issues – the appointment of the administrators and distribution of the estate. With respect to the appointment of administrators, the court is required to ascertain whether the administrators had been properly appointed. Secondly, the court is required to evaluate whether, upon being so properly appointed, if it does find that they were so properly appointed, the administrators went about administering the estate in accordance with the law. Finally, the court is required to assess whether the administrators, upon confirmation of their grant, would continue to properly administer the estate in accordance with the law. I suppose that with regard to the third limb, the court will be guided chiefly by the material before it that points to whether the grant had been obtained properly and whether the administrators had administered the estate properly and in accordance with the law up to the point of the filing of the confirmation application.

16. The confirmation provisions further deal with the sort of orders that the court may make. Where the court is satisfied that the grant was properly obtained, and the administrator had been administering the estate in accordance with the law and will continue to do so, it may confirm the administrator to continue in office. Where it is not so satisfied, it may transfer the confirmed grant to someone else. That effectively means that it would revoke the grant held by the administrator seeking confirmation, and make a fresh grant to someone else and thereafter proceed to confirm that fresh grant in a straightaway manner.

17. For avoidance of doubt, this is what section 71 of the Law of Succession Act, says:

> "*Confirmation of Grants*
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> *71. Confirmation of grants*
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> *(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*
>
> *(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—*
>
> *(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or*

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

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 such grant shall specify all such persons and their respective shares."

18. What is of interest to me at this stage is whether the administrators herein were properly appointed. With regard to that it will be noted that the court will confirm the administrators to continue with administration to completion, once it is satisfied that the administrator was properly appointed. I note that the appointment of administrators is not contested. Indeed, the reasons for which the court could have revoked the grant herein for want of propriety in the manner it was obtained were addressed by Mwita J on 21st November 2016, when it was noted that the process was defective and lacked integrity to extent that the administrators had not disclosed some of the survivors of the deceased, to wit, his widow and daughters. That problem was cured by the order that the administrators do file a supplementary affidavit to disclose the three survivors who had been omitted and to make provision for them. The administrators complied with the order. That being the case the matter need not be revisited, and it should be taken that the administrators had been appointed through a proper process that complied with the law.

19. The other consideration is whether the administrators, upon their being properly appointed, went about the business of administering the estate in accordance with the law. Again, no one has raised issue with the manner in which the administrators have administered the estate. I shall, therefore, presume that they have administered the same in accordance with the relevant law. Are they likely to continue administering the estate in accordance with the law upon their being confirmed as administrators? Again, no one raised issue with their ability to complete administration of the estate in accordance with the law. I shall, therefore presume that they remain capable of administering the estate, to completion upon their being confirmed into office as administrators.

20. Having disposed of the first limb of the confirmation application, I should now turn to address the matter of distribution. Distribution of assets raises two issues. The first, and the more critical, is about the assets that make up the estate. Succession is all about property, and without property there is no estate for distribution, and the question of succession does not answer. The second one, is the matter of the persons who are entitled to a share of the property. The two critical aspects of confirmation are brought out in the proviso to section 71(2). That proviso to section 71(2) requires that the court be satisfied, before distribution, that the administrator has ascertained all the persons who are beneficially entitled to the estate and has determined the shares of each one of them to the assets. That presupposes that all the assets available for distribution should have also been ascertained before distribution can be proposed, for distribution should be of the assets that are available for that purpose.

21. In the instant case, there is no dispute, that the deceased died possessed of two assets, Kisa/Khushiku/679 and 714. Therefore, the matter of the assets of the estate being ascertained should not be an issue. However, the question as to whether the said property was still estate property, and, therefore, available for distribution in the instant estate has been raised by the protestor. Her case is that the property is registered in the name of the deceased, and, on paper, therefore, it is property belonging to the estate. However, she asserts that after the deceased's demise, the said assets were sold to her late husband by the widow of the deceased, and, therefore, the assets no longer belong to the estate of the deceased herein, but to the estate of her late husband. That would mean that the property would not be available for distribution amongst the survivors of the deceased, and the court ought not confirm the proposed distribution, instead it should order that the property passes on to her late husband's estate for distribution as assets in that estate.

22. The issue that I have to grapple with, therefore, is whether the assets that make the estate of the deceased herein were validly sold to the late husband of the protestor. It is common ground that there was a sale transaction of the said lands between the late husband of the protestor and the widow of the deceased. The sale happened after the deceased herein had died. The question is, could the widow of the deceased enter into such a transaction and bind the estate?

23. The deceased died in 1988, after the Law of Succession Act had come into force on 1st July 1981. Section 2 of the said Act sets out the scope of the Law of Succession Act, and states that it applies to estates of persons who die after it comes into operation. Therefore, it is the provisions of the Act that ought to govern the administration of the estate and distribution of the assets.

24. Section 45 of the Act provides that the assets of the estate of a dead person should be handled only by persons who have authority in law to handle them. Such authority derives from a grant of representation. Which means that only the person with authority to handle such property should deal with it. The same provision makes it an offence to handle estate property without authority, and terms it as intermeddling. For avoidance of doubt, section 45 states as follows:

"45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one

year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."

25. That provision should be read together with section 79 of the Law of Succession Act, which vests the assets of the estate in the personal representatives of the deceased, be they executors or administrators. That would then mean that once a grant of representation is made, the person holding the grant becomes the legal owner thereof, in the sense that the property of the deceased vests in him. The rights of an owner in here in him. It is in that respect that the grant-holder acquires the authority to deal with the property without intermeddling with it. Section 79 states:

"79. Property of deceased to vest in personal representative.

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."

26. The vesting of the property of the deceased in a personal representative by section 79, means that the grant-holder enjoys the powers that are set out in section 82 of the Act. Those powers include powers that the deceased had before he died, such as power to sue and be sued, power to dispose of assets by sale, among others. The relevant portions of that provision states that:

"82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant …"

27. The overall effect of these provisions is that a person cannot legally deal with the property of a dead person unless they have been granted representation to his estate, for it is through such a grant that the estate of the deceased is vested in the grant-holder, and it is upon the making of such a grant that the holder is able to exercise the powers, of an owner of the assets, that are set out in section 82; which are designed to facilitate administration of the estate. That would mean that unless a person holds a grant they have no authority to handle estate property. The filial relationship between the deceased and his spouse or children confers no powers whatsoever over estate property. A surviving spouse, therefore, does not have an automatic power and rights to deal with the estate of her late husband or wife merely on account of the marital bond between them. That relationship confers upon her no right or power to sell such property or lease it or enter into contracts over it or deal with it in anyway whatsoever unless and until they are granted representation. The same applies to the children. They, like any other person, would intermeddle with such property when they handle it without the authorization that comes with representation being granted to them.

28. In the instant case, the deceased died in 1988. The sale transaction at the centre of the dispute me was entered into in 2001. Representation to the estate of the deceased herein was granted in 2014. That means that at the time the sale agreement was entered into, representation to the estate was yet to be granted, and the estate of the deceased vested in no one. The effect of it is that in 2001 no one could legally deal with or handle the assets of the estate without falling afoul of section 45 of the Act, that is without intermeddling with the estate. I would mean that any dealings over that property between 24th July 1988, when the deceased died, and 14th February 2014, when representation was granted in this cause, no one had authority to enter into any deals over the estate, and if any one entered into any deals they could not confer any right over the property to anyone. Any dealings with the property between those dates amounted to intermeddling, they were illegal, they amounted to criminality and they were null and void as a result. To make it clear, let me say that there was no administrator in 2001, and therefore the estate did not vest in any person who could validly deal with the property as if it belonged to them. The widow of the deceased has never been appointed administrator of the estate. She was not an administrator in 2001 and she could not therefore validly deal with the assets of the estate. The assets did not vest in her, and therefore she had nothing to sell. Her purported sale of the assets amounted to intermeddling, she engaged in criminality and illegality, and the purported sale was a nullity from inception.

29. I have stated here above that the widow of the deceased was not appointed an administrator of the deceased's estate at any stage. That would mean her acts or conduct in 2001 with respect to the property could not be sanitized by her in any way. If the deceased had died testate, having made a will in which he had appointed the widow an executrix, her acts prior to representation being made to her could be authenticated, for a will is effective from the date of death. That makes the intermediate acts of the executor, carried out prior to grant of representation valid, on the basis of the principle of relation back. Section 80(1) of the Law of Succession Act is relevant. The provision states:

"*80. When grant takes effect*

(1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such."

30. The deceased died intestate. The principle of relation back does not apply in intestacy; it only applies to testate succession. That is the effect of section 80(2). In any event, the widow was not, and has never been, a personal representative of the deceased for the principle to apply to her acts. Section 80(2) says:

"*(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant."*

31. The other relevant provision is section 82(b)(ii). The property the subject of the sale was immovable, land. Even though the holder of a grant has power sell estate property, sale of immovable property is restricted. Immovable property can only be sold after the grant has been confirmed. That means that the grant-holder has no automatic right to sell estate immovable before the grant has been confirmed. Such a sale, before grant is confirmed, would only be valid where the grant-holder obtains leave of court before the sale. Otherwise, where such leave is not obtained, the sale would be null and void. The sale herein was carried out before the grant herein had been confirmed, besides it taking place before the grant was even made and was carried out by a person who was not even a personal representative, and, therefore, it was as dead as a *dodo*.

32. Having identified the assets and the survivors, the next step should be to propose distribution, for the proviso to section 71(2) requires that the shares of each of the survivors be ascertained. The administrator herein has made a proposed mode of distribution; in which he has shared out the assets between two of the children of the deceased, and left out the other two, who are daughters. One of the daughters has since renounced her right to a share in the estate, the other daughter has not filed any document to either support the proposals made or to indicate whether she renounces or waives her rights. There is no evidence on record to indicate whether or not she was notified of these proceedings. I note that the interest of the surviving widow has been catered for in accordance with section 35 of the Act.

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

(a) That I hereby to confirm Justus Ambani Ameyo and Beatrice Ayako Orembe as administrators of the estate of the deceased;

(b) That I confirm that Mary Omuronji Ameyo, Justus Abuko Ambani, Beatrice Ayako Orombe, Rossy Ameyo Amuhaka and Linent Owano Makoba, are the survivors of the deceased for the purpose of distribution of his estate;

(c) That that I hereby confirm that Kisa/Khushiku/679 and 714 are assets of the estate of the deceased and are available for distribution, and I hereby declare that the purported sale of the said assets by Mary Omuronji Ameyo to the protestor's husband in 2001 was null and void;

(d) That I hereby decline to confirm the distribution proposed by the administrators to the extent that Linent Owano Makoba has neither consented to the proposed distribution nor renounced her right to inherit;

(e) That I direct the administrators, within the next thirty (30) days, to obtain the consent of Linent Owano Makoba to their proposed distribution, or her renunciation or waiver of her right to inherit, or otherwise cause her to attend court to state her position;

(f) That the matter shall be mentioned on a date to be assigned at the delivery of this judgment for compliance and further directions;

(g) That each party shall bear their own costs; and

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

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF October 2019

W. MUSYOKA

JUDGE