REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 991 OF 2014

IN THE MATTER OF THE ESTATE OF FESTO AKWERA

KUSEBE alias AKWELA KUTSEBE (DECEASED)

RULING

1. I am tasked with determining two applications, dated 14th October 2018 and 17th April 2019.

2. The certificate of death serial number 089281, dated 18th May 2011, indicates that the deceased person to whose estate this cause relates, was known as Festo Akwera Kusebe, who died on 9th February 2007. I have noted from other documents on record that he was also known as Akwela Kutsebe. There is a letter on record from the office of the Assistant Chief of Itumbu Sub-Location, West Bunyore, dated 8th November 2014. It indicates that the deceased had been survived by a widow, Rispah Onyona Akwela.

3. Representation to the estate was sought by the said Rispah Onyona Akwela, vide a petition she filed herein on 25th November 2014, in her purported capacity as widow of the deceased. She expressed herself as the sole survivor of the deceased, who she described as having died possessed of one asset, being West Bunyore/Itumbu/42. Letters of administration intestate were made to her on 7th April 2015. A grant was duly issued, dated 10th April 2014. I shall refer to Rispah Onyona Akwela hereafter as the administratrix. The grant was confirmed on 24th November 2017, on an application dated 18th July 2017. West Bunyore/Itumbu/42 devolved wholly upon her. A certificate of confirmation of grant issued in those terms, dated 16th March 2017.

4. A summons for revocation of the grant made on 7th April 2015 was filed herein on 15th October 2018, dated 14th October 2018. The application was brought at the instance of Norah Asikoye, who I shall refer hereafter as the applicant. The grounds upon which she seeks the revocation are set out on the face of the application, while the factual background is given in her supporting affidavit, which she swore on 14th October 2018. She avers that the grant was obtained in a defective process as the consents of the other survivors and beneficiaries of the deceased were not obtained, and that the administratrix did not include her as a beneficiary.

5. In her affidavit in support, the applicant avers that she was a daughter-in-law of the deceased, and that her matrimonial home was on West Bunyore/Itumbu/42, where she resided and tilled the land. She avers that the deceased had one wife, the administratrix, and six children, being the late Charles Kuchebe, the late James Makachia Akwela, the late Anyona, Oripa Akwele and Julia Ayoti. She states that the deceased had apportioned his land amongst his children before he died. She claims that the deceased came to her home on 6th August 2018 and threatened to evict her and it was after that she established that the property had since been registered in the name of the administratrix. She says that the administratrix has become violent and was asking her to get out of the land. She complains that the administratrix obtained representation to the estate without her knowledge and consent, she and her children were not included in the process and that she would be rendered destitute should she be evicted. She says she is a widow of a son of the deceased known as the late James Makachia Akwela.

6. The matter was placed before Njagi J. on 15th October 2018. The court granted prayer 5 of the application, whose effect was to allow registration of an order of inhibition against West Bunyore/Itumbu/42, to inhibit transfer to third parties and any other dealings with that land.

7. The administratrix responded to the application through her affidavit, which she swore on 27th May 2019. She avers that at the time she sought representation to the estate she was not aware of the whereabouts of the applicant hence she decided to proceed alone, while she was well aware that she was a beneficiary. She says that the share of her late husband of the applicant was secure. She states that there would be no need to annul her grant since a fresh grant can still reissued in their joint names. She also says that there was no need to have her registration as proprietor of West Bunyore/Itumbu/42 as the share of the late husband of the applicant was always assured and would be curved out of the title at distribution. She states that the applicant was misusing the order she obtained on 15th October 2018 to take full control of the estate. She accuses her of burying her son on a portion of the land that had been earmarked for a public access road. She further avers that the said order was being used to prevent surveyors from carving out a public road. She says that she does not dispute that the applicant was a daughter-in-law of the deceased but repeats that she was not around for her to obtain her consent to the petition. She pleads

that she has no malice or ill will towards her, and that she was old and bedridden and had no intention of disposing of the land.

8. The administratrix lodged her own application, dated 17th April 2019, seeking the setting aside or vacating or variation or moderation of the orders made on 15th October 2018. She complains that the applicant was not in a hurry to prosecute herrevocation application after she had obtained the orders that are the subject of her application. She complains further that the applicant had delayed unreasonably before serving her with the said order. She further complains that the said order is being used to frustrate the creation of a public access road through the property.

9. The applicant responded to the application through her affidavit sworn on 27th May 2018. She argues that the application was founded on the wrong provisions of the law, section 73 of the Law of Succession Act, which is not relevant at all to the issues raised in the application. Secondly, she says that the access road did not touch the subject property, West Bunyore/Itumbu/42, but passed through other properties.

10. Directions were taken on 27th July 2019. Both applications were was to be disposed of by way of written submissions to be highlighted. The highlights were done on 23rd September 2019. I have noted the arguments made by both Mr. Mung'ao and Mr. Wekesa for the parties.

11. A revocation application is grounded on and its determination pegged on the three general grounds set out in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The first general ground is, captured in section 76(a) (b) (c) of the Law of Succession Act, focuses on the process of obtaining a grant. If the process is found to be tainted by defects or improprieties, fraud, misrepresentation and concealment of material facts from the court, then the grant would be liable for revocation. Representation ought to be obtained in a clean and open process that is defined by integrity and propriety. The office of administrator is an office of trust. It is an office in equity. It should be underpinned by fairness and confidence. The process of appointing any person to that office must itself not be undermined by lack of integrity and fairness. Where these qualities lack, at these very initial steps of obtaining appointment to office, then the trust and confidence, that the persons beneficially entitled to the assets to be managed by the person seeking that office, are expected to have on such a person would be lost.

12. The second general ground, captured in section 76(d) of the Law of Succession Act, concentrates on the administration of the estate. At this point the court would be dealing with a situation where the process of obtaining the grant is adjudged to have been proper and above board, but the administrator faced challenges with the administration process itself. Such would be the case where an administrator fails to apply for confirmation of their grant within the period prescribed by the law, see sections 71(1), 73 and 76(d) (i). The law envisages that confirmation ought to be sought six months after the grant is made, and at any rate within the year of its making. Anything outside that period would invite revocation. Distribution of the estate, which comes with confirmation of the grant, is a critical responsibility of the administrator. Indeed, it is the only other duty after collection and preservation of the estate and payment of debts and liabilities. An administrator who fails to apply for confirmation of their grant would have totally failed in his duties as administrator.

13. The other case would be where the administrator fails to proceed diligently with administration of the estate, see section 76(d) (ii) of the Law of Succession Act. The duties cast on administrators are set out in section 83 of the Law of Succession Act. Failure to discharge any of those duties effectively would amount to a failure to proceed diligently with administration. It includes the failure to get in all the free property of the deceased including pursuing debts owing to the estate and moneys payable to the estate by reason of the deceased's death, failure to ascertain the debts and liabilities of the estate, failure to render accounts, and failure to complete administration of the estate within the timelines set out by the Law of Succession Act. The very being of an administrator is to discharge these duties. The other situation would be where accounts are not rendered as and when required by law. The office of a personal representative is one trust. The personal representative holds the property of the estate on behalf of others, be they survivors, beneficiaries, heirs, dependants or creditors. He stands in a fiduciary position with regard to the assets and the persons beneficially entitled. He owes them a duty to account for his administration and the management of the assets that he holds on their behalf. The duty is also owed to the court by reason of the court having appointed the personal representatives through the grants of representation.

14. That third general ground is where the grant has become useless or inoperative on account of subsequent events, that is subsequent to the making of the grant. It would arise where a sole personal representative has died. There would be no person to carry on administration under his grant, rendering the document useless and inoperative. It would also be the case where the administrator suffers disability whether physically or mentally, rendering him incapable of discharging his duties, such as where he becomes insenile or of unsound mind or lapses into a coma from which he does not recover or suffers such debilitating physical injuries that make it practically impossible for him to do anything for himself. An administrator who is adjudged bankrupt would also fall under this net for he would lose capacity, by virtue of section 56 of the Law of Succession Act, and he cannot possibly act as administrator, and the grant he holds would become a useless piece of paper.

15. 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."

16. In the instant case, the applicant pegs her application for revocation of grant on section 76(a) (b) (c) of the Law of Succession Act, on grounds that the process of obtaining the same was attended by procedural flaws, fraud and concealment of matter from the court. Her principal claim is that her existence was concealed from the court as she was a daughter-in-law of the deceased, by virtue of being a widow of one his sons. The administratrix did responds to the application, and took the position that she proceeded without obtaining the consent of the applicant because she was unavailable. In any event she said that she would have ultimately provided for the applicant and her children.

17. It is common ground that when the administratrix sought representation, she projected herself as the sole survivor of the deceased. The letter she got from the Assistant Chief was in those terms. She swore an affidavit to support her petition where she presented herself as the sole survivor of the deceased. She repeated that in her affidavit in support of the application for the confirmation of her grant. She has not denied the disclosure by the applicant that there were other survivors of the deceased. I note that three children of the deceased are alive, while three are dead. Of the three who are dead is the late husband of the applicant. It is not disclosed whether the other deceased children of the deceased had spouses and children.

18. Several issues arise from that response. One is the non-disclosure of the other beneficiaries. Two is the failure to obtain the consents of the other survivors.

19. I will start with the last issue. I have noted that the deceased died intestate after the Law of Succession Act had come into force. Representation to his estate is, 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."

20. According to that provision, the court should to be guided by Part V of the Act, which sets out 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 I apply those provisions to the instant case, it would follow that the widow of the deceased, the administratrix herein, had priority to appointment over her children, the applicant included.

21. I note that when she lodged her petition herein on 25th November 2014, she did not attach any documents by way of consents or renunciation of probate by any of the surviving children.

22. Was the said consent 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. Rule 7(7) of the Probate and Administration Rules, 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. "

23. Then there is Rule 26 of the Probate and Administration Rules, which states as follows:

"26(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."

24. Rule 26(1) (2) applies where representation is sought by a person with equal right to others who have not petitioned like him. In such case, the petitioner is expected to notify such persons with equal entitlement. The individuals with entitlement who have not applied for representation would signify that they had been notified of the petition by either executing renunciation of their right to administration or by signing consents in Forms 38 or 39. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly dealing with these issues, that is by indicating that notice was given to all the other persons equally entitled, and perhaps demonstrating that such person had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

25. The administratrix in the instant cause, being a surviving spouse, had a superior right to administration over the children and the other relatives of the deceased, going by section 66 of the Act. A reading of section 66 and Rules 7(7) and 26 of the Probate and Administration Rules would mean that the widow herein did not need to comply with requirements of Rules 7(7) and 26, since those provisions apply only to persons who seek representation while they had an equal or 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.

26. The other issue for consideration is the question of the omission of the applicant from the list of beneficiaries. The record before me indicates that the administratrix approached this matter in a manner that suggested that she was the only person who survived the deceased. The letter she obtained from the Assistant Chief said so. One would have expected that the Assistant Chief, whose jurisdiction, no doubt, covers a few villages, would have known the individuals who had survived the deceased, or would have at least enquired before he wrote the letter, so that he could give the court more reasonable or credible information on the actual state of affairs. Instead, he appears to have had colluded with the administratrix to paint the unreal picture that the deceased had been survived by only one individual, herself. She perpetuated that lie in her petition. She swore an affidavit to support her petition, where she averred that she was the sole survivor of the deceased. She compounded that lie when she sought confirmation of her grant. She swore an affidavit to support that application where she listed herself as the sole survivor the deceased and proposed that the sole asset of the estate devolves wholly upon her. She has conceded in her reply to the revocation application that the applicant, being a widow of her son, who had borne children with her son, was a person entitled to a share in the estate. She did not controvert the applicant's claim that the deceased in fact had other children besides her husband. These individuals were concealed from the court.

27. The administratrix claimed, in the same response to the revocation application, that she was planning that at a later to distribute the property to the applicant at a later date, an argument which is not supported by any law or legal process. She had had her grant confirmed and her proposed mode of distribution confirmed. She then took that certificate to the lands registry and caused transmission of the property to her name. The succession process was thereby completed. There was no other process outstanding. There was no other distribution to be done, and, therefore, her claim that she was to distribute the property to the children later has no basis. Indeed, to which children was she to distribute the property to since she had not even disclosed to the court that the deceased had any children.

28. Does the law require disclosure of these other relatives of the deceased? The framework for applications for grants of representation is section 51 of the Law of Succession Act. The most relevant provisions are in section 51(2)(g)(h), which state as follows:

"Application for Grant

51. (1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) Every application shall include information as to—

(a) ...

(b) …

(c) …

(d) …

(e) …

(f) …

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the deceased..."

29. Under section 51(2) (g) the petitioner is required to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The administratrix herein only disclosed herself, but not the children and grandchildren of the deceased whose own parents were dead. She has conceded in her response to the revocation application that such close relatives of the deceased existed, yet she did not disclose them in her petition, and, therefore, there was no compliance with section 51(2) (g).

30. The administratrix was obliged to disclose the children of the deceased and the children of any of them who had died. This is required because, as a surviving widow, she was not entitled absolutely and exclusively to the intestate estate of her departed husband. If anything, she was entitled only to a life interest over the property, for the ultimate destination of the property of the deceased is not to her but to the children of the deceased. Her entitlement to absolute access to the estate is limited to personal and household goods, but not to capital assets, which are destined to the children. It is about a parent passing property on to his or her descendants but not to his or her contemporaries or ascendants.

31. The concept of succession, whether under statute or common law or customary law, is about generational transfer of family wealth from parents to children. That is why the property passes absolutely to the children but not to the surviving spouse, who would only be entitled to a life interest over that property. I am alive to the argument that the surviving spouse should have priority over the children and the property ought to pass to him or her exclusively and absolutely first, and subsequently to the children following the demise of the surviving spouse. That contention has no backing in law, and is utterly contrary to the concept of succession. Such argument distorts the concept. It should be emphasized that succession is not meant to be within a generation, where property passes from one spouse to the other, but outside, of the generation, where family wealth passes from one generation to the next.

32. The position that I have stated above is supported by section 35 of the Law of Succession Act, which states:

"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."

33. It will be seen, therefore, from the above provision that the failure to disclose the children of the deceased would distort the scheme of succession envisaged in section 35, so that instead of the estate being distributed under section 35, where there is a surviving spouse and children, it would be handled through section 36, as was the case here, where the deceased was survived only by a spouse but no children. It clearly suggests that a surviving spouse who conceals existence of the children from the court intends to remove the devolution of property from section 35 so as to bring it within section 36. Such a scheme can only be described, at best, as fraudulent and dishonest. Even then section 36 does not guarantee such a surviving spouse absolute access to the property. Indeed, there is no provision anywhere in the Law of Succession Act that entitles a surviving spouse to have absolute and exclusive access to the property of their departed spouse save as indicated above. For avoidance of doubt, section 36 provides as follows:

"36. Where intestate has left one surviving spouse but no child or children

(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—

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

(b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and

(c) a life interest in the whole of the remainder:

Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.

(2) The Minister may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1).

(3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in section 39."

34. I need not say more. A case for revocation of the grant herein has been made out successfully. The conduct of the administratrix, from the very inception of the matter to its conclusion, clearly points to the fact that she does not merit the position of administratrix, which is one of trust, as she has proved herself untrustworthy.

35. There is the second application about public access roads. The matter before me is for distribution of the assets of the deceased. The orders that the court made on 15th October 2018 were for preservation of the estate, so that no transfers and like dealings are carried out pending determination of the matter. That would include the creation of access roads through the estate of the deceased. That activity should await finalization of the matter, transmission of the property to those lawfully entitled to it and the vesting of the same to their names. I see no reason, therefore, to interfere with the said order.

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

(a) That the application dated 14th October 2018 is allowed on the following terms-

(i) the grant made herein on 10th April 2014 to the administratrix, Rispah Onyona Akwela, is hereby revoked,

(ii)the orders that confirmed that grant on 24th November 2016 are hereby set aside and the certificate of confirmation of grant issued on 16th March 2017 is hereby cancelled,

(iii) the transmission of West Bunyore/Itumbu/42 into the name of the administratrix, and which was carried out on the basis of the certificate of confirmation of grant dated 16th March 2017, is hereby nullified,

(iv) the title deed issued to the administratrix herein on the basis of the said certificate of confirmation of grant is hereby cancelled, and,

(v) the Land Registrar, responsible for Vihiga County, is hereby directed to revert the registration of the subject property to the name of the deceased herein, Festo Akwera Kusebe alias Akwela Kutsebe;

(b) That the application dated 17th April 2019 is hereby dismissed;

(c) That the matter shall be mentioned on a date to be given at the delivery of this ruling for the purpose of appointing fresh administrators, who shall exclude Rispah Onyona Akwela, and for further directions;

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

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

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8th DAY OF November 2019

W. MUSYOKA

JUDGE