



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 485 OF 2013

IN THE MATTER OF THE ESTATE OF JOSEPH KOYABE MUKTENYO (DECEASED)

JUDGMENT

1. I am called upon to determine two applications, one dated 13th July 2018 and the other dated 27th July 2018.
2. The application dated 13th July 2018 is for confirmation of the grant herein, which had been made to the administrator herein, Francis Munialo Malingumu on 10th March 2014 and was issued 14th March 2014. In the affidavit in support of the application, the persons said to have survived the deceased, described as heirs, are Nancy Wamaitha Kangethe, Sammy Allan Dapash, Fred Mwoga Luvembe, Wycliffe Madegelo Mbogo, Elizabeth Nasambu Ndiwa, Charles Muktei Mbali, Joseph Simiyu, Francis Munialo Malingumu, Jane Khatunyi, Agnet Machuma, Night Nangunda and Roseline W. Wabwile. It is not indicated how these individuals are related to the deceased. The deceased is said to have died possessed of Kakamega/Mautuma/606.
3. It is proposed that the said property be shared out between these individuals unevenly, with four of the persons, being Francis Munialo Malingumu, Jane Khatunyi, Agnet Machuma and Night Nangunda being allocated nothing. Attached to the application is a consent form to the proposed mode of distribution purportedly signed by all the individuals save for Jane Khatunyi, Agnet Machuma and Night Nangunda. There is a letter from the Chief of Mautuma Location, dated 2nd July 2018, which purports to explain why Jane Khatunyi, Agnet Machuma and Night Nangunda have not been allocated shares in the estate. They are said to be daughters of the deceased. Jane Khatunyi allegedly disappeared from home and thereafter got married in Tanzania. The other two, Agnet Machuma and Night Nangunda, are alleged to have gone underground after being involved in a murder sometime in 2016. It is said that their whereabouts cannot be traced. In any case it is said that they had been given their share of the land, which they sold to a Fred Munga Uwembe, and it was on that basis that they have not been allocated anything in the proposed distribution.
4. The summons dated 27th July 2018 is brought at the instance of Joseph Wanjala Khaemba Njakusi, who I shall hereafter refer to as the applicant, seeking that the confirmation proceedings be delayed, that the name of Roselyne Namukuru Wabwile be removed from the schedule of the survivors of the deceased and that the applicant be listed as a person beneficially entitled. His case is that he had entered into a sale agreement with the deceased to buy 1.15 acres out of Kakamega/Mautuma/606. He avers that the same got lost or disappeared from his house and that he had made a report of the loss at the Lumakanda Police Station. He complains that the matter was commenced without his knowledge yet he was a beneficiary. He states that the deceased had obtained consent from the local land control board for transfer of 1.15 acres to him. He complains that the administrator had colluded with Roselyne Namukuru Wabwile to have the 1.15 acres transferred to her.
5. The administrator filed an affidavit on 20th August 2018, sworn on 15th August 2018, in response to the application dated 27th July 2018. He states that he initiated the succession cause with the assistance of Roselyne Namukuru Wabwile and the other individuals named in the petition as beneficiaries. He denies that the deceased had sold 1.15 acres of the property to the applicant, as any sale by the deceased was done with his knowledge and consent. He avers that the deceased sold land to Roselyne Namukuru Wabwile in two phases. He says he was witness to the transaction and the applicant was not party to the agreement. It is his case that the deceased thereafter attended the land control board and got consent to subdivide the property into six portions. He died before presenting the subdivisions for registration.
6. Roselyne Namukuru Wabwile swore an affidavit on 15th August 2018, filed herein on 20th August 2018. She supports the case presented by the administrator in material particulars. She says that she is the one who bought the land from the deceased and single handedly paid for it.
7. The applicant swore a further affidavit on 7th December 2018. He avers that Roselyne Namukuru Wabwile was his wife, but that they were separated. He says that they have four children together. He asserts that it was him who bought land from the deceased, and not Roselyne Namukuru Wabwile. His case is that the administrator and Roselyne Namukuru Wabwile were colluding, and that the documents they were relying were forgeries. He suggests that the loss of his documents, relating to the transactions, from his house, had something to do with Roselyne Namukuru Wabwile, after their marriage ran into headwinds. .
8. The two applications were canvassed orally. The oral hearing happened on 13th December 2018. The applicant, the administrator and Roselyne Namukuru Wabwile testified. Two other witnesses also testified, being Maurice Wabuke Wanyama and Pamela Muhonja Davava. The evidence largely elaborated on the averments made in the affidavits filed by the various parties. The parties also filed written

submissions which I have read through and noted the arguments.

9. In confirmation applications, there are two principal matters for the court to consider, appointment of the administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

“Confirmation of Grants

71. Confirmation of grants

(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.”

10. The principal purpose of confirmation is distribution of the assets. The proviso to subsection (2) of section 71 is that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the share due to them. The proviso is emphatic that the grant shall not be confirmed before the court is so satisfied. Therefore, there is no need for me to address the matters that fall under section 71(2) if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all person entitled to the estate have been ascertained and determined.”

11. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? There is a letter on the record from the Assistant Chief of Magara Sub-Location dated 14th December 2012 which indicates that deceased was survived by his son, the administrator herein, and three daughters, Jane Khatunyi, Agnet Machuma and Night Nangunda. In the petition for letters of administration intestate, which was filed herein on 9th July 2013, the son and three daughters are listed as the survivors of the deceased. The three daughters appear to have had signed consents to allow the administrator petition for representation. These consents are dated 20th December 2012.

12. In the liabilities column of the affidavit in support of the petition the following persons are listed: Nancy Wamaitha Kangethe, Sammy Allan Dapash, Fred Mwoga Luvembe, Wycliffe Kibisu Mbogo, Elizabeth Nasambu Ndiwa, Charles Muktei Mbali, Joseph Simiyu, and Roselyne Namukuru Wabwire. In 2018 when the application for confirmation of grant was filed, these individuals were listed amongst the four children of the deceased as survivors. It is not explained how they became survivors of the deceased. However, it emerges from the application dated 27th July 2018 that one of the individuals claims to be a creditor, having allegedly bought a portion of the property from the deceased, that is to say Roselyne Namukuru Wabwire.

13. What comes out very clearly to me is that the deceased was survived by four children. These are the individuals who are entitled to a share in the estate of the deceased.

14. The second consideration should be whether the assets of the estate have been ascertained. This is critical as the succession cause is all about distribution of the property that the deceased died possessed of. According to the letter of the Assistant Chief dated 14th December 2012, the deceased died possessed of a property known as Kakamega/Mautuma/388. A certificate of official search dated 5th December 2012, filed in court together with the petition, indicates that Kakamega/Mautuma/388 was subdivided on 10th January 1984 into Kakamega/Mautuma/576 and 577, and the register for Kakamega/Mautuma/388 was closed. The certificate indicates that Kakamega/Mautuma/388 had been registered in the name of the deceased on 10th January 1984. The property listed in the petition as that which the deceased died possessed of is Kakamega/Mautuma/576. There is a certificate of official search on record on Kakamega/Mautuma/606, which does not bear an official court stamp, but appears to have been lodged in court simultaneously with the summons for confirmation of grant. It is dated 7th June 2017, and shows that the said property was registered in the name of the deceased on 30th July 1984. It is this property that has been presented for distribution in the confirmation application. There are other documents on

record, dated 24th August 2017 and 5th October 2017, being transfer forms for transmission of Kakamega/Mautuma/606 to Nancy Wamaita Kangethe, Sammy Allan Dapash, Fred Mwoga Luvembe, Wycliffe Kibisu Mbogo, Elizabeth Nasambu Ndiwa, Charles Muktei Mbali, Joseph Simiyu, and Roselyne Namukuru Wabwire.

15. The narrative above clearly points a rather disturbing picture. It is the responsibility of the administrator to ascertain the assets that the deceased died possessed of. Indeed, an application for confirmation of grant ought not to be presented until that exercise has been completed, for distribution of assets should only be proposed once there is clarity as to what the deceased died possessed of.

16. Section 71 of the Law of Succession Act should always be read together with section 83, which sets out the duties of an administrator. One of such duties is that to render accounts within six months of the making of the grant. That duty coincides with that set out in section 71 requiring that confirmation of grant be sought within the same period. Presumably, the summons for confirmation of grant ought to include an account on the administration. That should include a full and accurate inventory of the assets.

17. Section 83 states as follows:

“83. Duties of personal representatives

Personal representatives shall have the following duties—

(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts;

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.” (emphasis added)

18. The confirmation application before me does not give a full and accurate inventory of the assets. There are documents on record that in 1984 the deceased had acquired two assets, Kakamega/Mautuma/576 and 606, yet only Kakamega/Mautuma/606 was presented for distribution. No explanation has been given as to what became of Kakamega/Mautuma/576. Kakamega/Mautuma/576 and 577 were subdivisions from Kakamega/Mautuma/388, no details have been given with regard to who was registered as proprietor of Kakamega/Mautuma/577. Could Kakamega/Mautuma/577 be a property that is registered in the name of the deceased?

19. The other matter is that the administrator appears to have had attempted to have Kakamega/Mautuma/606 transferred in 2017 to the persons listed in his petition as liabilities. It would appear that he only filed the summons for confirmation of grant in 2018 after he failed to achieve that objective. That attempt was brought to the fore in the dispute that erupted between the applicant and his estranged wife, Roselyne Namukuru Wabwire. Over all, I am not persuaded that all the assets of the estate were presented for distribution. I believe that some assets remained concealed from the court.

20. The third consideration is how the assets of the estate ought to be distributed amongst the persons that have been identified as survivors of the deceased and creditors of the estate.

21. It is common ground that the deceased was survived by a son and three daughters. As he had died intestate, Part V of the Law of Succession Act ought to apply to the distribution of the assets. Section 38 covers the situation where the deceased is survived by children but no spouse. In such a case the estate ought to be shared out equally amongst the children. The Law of Succession Act makes no distinction between male and female children, nor between married and unmarried children. They are all treated equally. The law is gender neutral. Section 38 states:

“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.”

22. So, has the administrator complied with section 38 in his proposed distribution, by sharing out the assets equally between himself and his three sisters? In the proposed distribution, the three sisters of the deceased are allocated nothing in the estate. The property is instead shared out exclusively to persons that the administrator has listed as liabilities or creditors. He has given justifications for omitting to allocate anything to his sisters. That justification is carried in the letter from the Chief dated 2nd July 2018.

23. He says one of them, Jane Khatunyi, disappeared from home and got married in Tanzania. The fact that a person has disappeared from home does not disqualify them from benefiting from the estate of their deceased parent. The Law of Succession Act has no provisions that would support the proposition by the administrator, and I have not been pointed to any case law to that effect. The fact that a daughter of the deceased has married is not a disqualifying fact to inheritance. There is no provision in the Law of Succession Act which disentitles a daughter from benefiting from the estate of their departed parent upon her getting married. The administrator has not pointed me to any statutory provision which allows him to do that, neither has he cited any case law. The fact that a daughter has gotten married in a foreign country, or resides abroad upon getting married to a foreign national, does not also take away her rights under section 38 of the Law of Succession Act. I am not aware of any law that says so, and none has been cited to me. There is, therefore, no legal justification whatsoever for excluding Jane Khatunyi from benefit.

24. The allegations that are used to purportedly justify exclusion of the other two daughters, Agnet Machuma and Night Nangunda, are that they were involved in a case of murder, which forced them to go underground and they are, therefore, untraceable, and that they had purportedly been given their share of the land, which they sold to a named individual.

25. On the murder allegation, I note that no details have been given. When or in which year is it that they were involved in a murder? Where was this? Who was murdered? What was their role? Were they charged in court? Details around those questions would be critical in assessing the credibility of the allegation. It would be crucial to provide documentary evidence. The allegations being made by the administrator against his sisters impute criminal conduct on their part. These are serious allegations to make casually. They must be supported by credible evidence. More so as they impute murder, which is a capital offence under Kenyan law. Such allegations should not be made so casually and lightly. In any event, the mere fact that a child of a deceased person has engaged in criminal conduct or is a criminal, even a seasoned one, does not take away such a child's rights under section 38. He or she would still be entitled to a share in their parent's estate equally with the children who are criminals, whether the criminal is in jail or not. The law makes only one exception, and that is where the crime is the murder of the parent to whose estate they seek a share. That exception is stated in section 96 of the Law of Succession Act. It has not been alleged that the two murdered the deceased herein, for it would only be in such case that they could be excluded from benefit. Even then, it has to be proved that they were subjected to a criminal trial and where convicted of the offence. Section 96 states as follows:

“96. Sane murderer not to share in victim's estate

(1) Notwithstanding any other provision of this Act, a person who, while sane, murders another person shall not be entitled directly or indirectly to any share in the estate of the murdered person, and the persons beneficially entitled to shares in the estate of the murdered person shall be ascertained as though the murderer had died immediately before the murdered person.

(2) For the purpose of this section the conviction of a person in criminal proceedings of the crime of murder shall be sufficient evidence of the fact that the person so convicted committed the murder.”

26. It is claimed that the two daughters had been allocated their share of the estate, which they then sold. No details are given of the person who allegedly gave them their alleged share, and when that allegedly happened. It is not disclosed which land, by way of reference numbers, was given to these two. No documentary evidence has been provided of the alleged sale of the unknown land to Fred Munga Uwembe.

27. The other claim running through the allegations against the three daughters is that they disappeared, or they are not traceable, or their whereabouts are unknown. One is at unknown place in Tanzania, where she got married. The other two are criminals, according to the administrator, who have gone underground, their whereabouts are alien to the administrator. That could very well be so, but that alone, that is fact of disappearance or the whereabouts being unknown, does not extinguish the right of a child to a share in the estate of their dead parent.

28. It would appear to me that the administrator herein is using every trick in the book to ensure that his sisters are excluded from benefit, so that the entire estate is left to him. It is unfortunate the extent to which human being can go in order to acquire wealth, including disowning their blood siblings and embracing total strangers. I conclude that I make with regard to this is that there is no plausible justification from the material before me for the administrator not to have made provision for his three sisters. I reject his submission that he has no idea about their whereabouts.

29. Quite apart from the children of the deceased, there are persons that the administrator has presented as liabilities of the estate, I believe it would be more accurate to refer to them as creditors of the estate. He listed them in the petition and in his summons for confirmation of grant. They are Nancy Wamaitha Kangethe, Sammy Allan Dapash, Fred Mwoga Luvembe, Wycliffe Kibisu Mbogo, Elizabeth Nasambu Ndiwa, Charles Muktei Mbali, Joseph Simiyu, and Roselyne Namukuru Wabwire. He has not given details of how these liabilities arose, or how the individuals came to be creditors of the estate. The nature of their transactions with the estate are not detailed. He does not disclose whether they transacted with him over estate assets, or with the deceased. At one point he described them as persons who assisted him in the initiation and prosecution of these proceedings. He did not give details of the alleged assistance.

30. It should be made clear that the only transactions over immovable assets of the estate that ought to be respected are those that are carried out between the deceased person and a claimant. It is only such can be regarded as creating liabilities or constituting such claimants as

creditors. Transactions that are carried out with relatives of a deceased person after he has died and before confirmation of grant are null and void. In the first place the only person who can bind the estate is the administrator for the estate vests in him by virtue of section 79 of the Law of Succession Act. That vesting allows him to handle estate property without offending the intermeddling provisions in section 45, and enables him to exercise the powers set out in section 82. The powers in section 82 includes the power to sell estate property, but that power is restricted with regard to immovable property. The same cannot be sold unless grant has been confirmed. The nature of the transactions that the individuals listed in the petition as liabilities engaged in with the deceased or with the administrator ought to have been disclosed so that the court could assess whether or not they fell afoul of section 45 or section 82(b) (ii) of the Law of Succession Act.

31. For avoidance of doubt the said provisions state 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.”

“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.”

“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 ...”

32. The other thing is that it is not enough for an administrator to merely give names of persons and describe them as liabilities or creditors without giving details of what their claim is. In the summons for confirmation of grant, the claims by the alleged creditors were not detailed. They are listed as having survived the deceased, which is not a true fact. The concept of survivorship is stated in Part V of the Law of Succession Act. The survivors envisaged there are relatives of the deceased. These individuals were not related to the deceased. They did not survive him. Their claim against the estate is not explained, yet in the distribution schedule they are given the entire estate. No justification has been given. No documents have been exhibited to support the allocations. No case has been made out to support the allocations at all. The estate of a deceased person ought not to be distributed to strangers in such a manner, to the total detriment of the survivors, especially the children of the deceased.

33. The second application presents a dispute between a couple over a transaction that was alleged to have happened between the deceased and either of them. Documents were produced to support the alleged transaction. There is some evidence that would appear to suggest that there was indeed such a transaction. I cannot however, determine whether the said sale was genuine or not. That should await the coming on board of the daughters of the deceased, so that they can state their view of the said transaction. At least, that the application by the applicant has shed some light on the nature of the stake claimed by Roselyne Namukuru Wabwile. However, I have no jurisdiction to determine the matter as to whether it was the applicant or his wife who had transacted with the deceased. That is a dispute they will have to present before the Environment and Land Court. The High Court has no jurisdiction over that in view of Articles 162(2) and 165(5) of the Constitution.

34. The picture that emerges so far is untidy. The administrator has not fully disclosed the assets of the deceased, has sought to dispose of some before confirmation of grant, and has not provided for his sisters. He has provided for strangers to the estate, to the detriment of the actual beneficiaries. I am, therefore, not persuaded that he has satisfied me in terms of the proviso to section 71(2) and Rule 40(4) of the Probate and Administration Rules. I doubt whether the matter is ripe for distribution of the estate. At least, the estate cannot possibly be distributed in the manner proposed by the administrator.

35. So should I confirm the administrator as such? I reiterate what I have stated above. I do not believe that the administrator herein is a trustworthy person to warrant his continuing to hold the office of administrator. This is an office of trust, for the holder holds estate property, which does not belong to him, on behalf of those beneficially entitled to it, trusting that he shall manage the same according to the law, and ultimately distribute it to those entitled in due time. He has suppressed information from the court. He has failed to disclose critical information that would assist the court exercise its discretion. He has sought to disinherit his sisters, and to unjustly enrich strangers. The daughters of the deceased, who should be the natural candidates for appointment as administrators to take his place are not in the picture. They do not appear to be even aware of these proceedings. I even doubt whether they signed the consents on record, dated 20th December 2013. Another administrator ought to be appointed, who is neutral, to complete administration, or until the daughters are traced and brought on board. I am considering the Public Trustee, who is the administrator of last resort.

36. In view of what I have stated above, I shall make the following orders and give the following directions:

(a) That I hereby decline to confirm the grant herein on the basis of the application dated 13th July 2018 and I hereby dismiss the said application;

(b) That as the claims brought under the application dated 27th July 2018 can only be determined by the Environment and Land Court, I hereby also dismiss the said application;

(c) That I hereby revoke the letters of administration intestate that were made on 10th March 2014 to the administrator herein, Francis Munialo Malingumu, and I order cancellation of the grant issued to him based on those letters, dated 14th March 2014;

(d) That I hereby appoint the Public Trustee the administrator of the estate herein, and I direct that letters of administration intestate be issued accordingly to the Public Trustee;

(e) That I direct the Deputy Registrar to furnish the Public Trustee with the grant to be issued under (d), above, and to supply her with a certified copy of the judgment herein;

(f) That the Public Trustee shall trace the daughters of the deceased and discharge all the other duties that are concomitant with the appointment;

(g) That the matter shall be mentioned after ninety (90) days for compliance and further directions;

(h) That each party shall bear their own cost; and

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

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8TH DAY OF NOVEMBER 2019

W. MUSYOKA

JUDGE