



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 748 OF 2010

IN THE MATTER OF THE ESTATE OF PHILIP PIKA WAMOTSA (DECEASED)

RULING

1. The certificate of death serial number 022444, dated 7th July 2011, indicates that the deceased to whose estate this cause relates, was known as Philip Pika Wamotsa, who died on 30th September 1997. There is a photocopy of a letter on record from the office of the Chief of Shivanga Location, dated 28th July 2010. It indicates that the deceased had been survived by eleven (11) individuals, being Lenah Kalimesi Pika, Wycliffe Shibweche, Ibrahim Daniel Pika, Ezekiel Pika, Stephen Wanyama Pika, Benjamin Pika, Julius Kaminde Kasikoni, Jabu Kasikoni, a son of a late son of the deceased called Benson Kavagi; while the daughter-in-law is Milka Wangoi Kamau, Evans Kasikoni, John Kasikoni and Dick Kasikoni.

2. Representation to his estate was sought in a petition lodged herein by Lenah Bika Philip in her purported capacity as widow of the deceased. She listed six (6) individuals as the survivors of the deceased. Those listed were said to be a widow, Lenah Bika Philip; three (3) sons being Wycliffe Shibweche Pika, Ibrahim Daniel Pika and Benjamin Pika; a grandson, Stephen Wanyama; and a daughter-in-law, Margret Kaskon. He was said to have had died possessed of a property known as North Kabras/Malava/732. Jafred Werakoko, Jafred Musafiri Songha and Gerishon Peter Katamu were listed as creditors. Letters of administration intestate was made to Lena Bika Philip on 10th January 2012, and the Judge signed the grant on 26th January 2012. I shall refer to Lena Bika Philip as administratrix.

3. On 28th June 2012, a summons for revocation of the grant made in paragraph 2 above was filed by Wycliffe Shibweche Pika, dated 26th April 2012. His case was that the administratrix, appointed under that grant, was too old and almost senile to be able to administer the estate. He also argued that she had not consulted the children of the deceased before applying for representation, and complained that she had listed some individuals as creditors of the estate yet they were strangers to the estate. He submitted that the grant had been obtained fraudulently by relying on false statements and concealing matter from court. He argued further that the administratrix had excluded some of the survivors of the deceased. He disclosed that the deceased had married twice, and, therefore, he had two houses. The first wife was said to be Rispa Khamusori Pika, while Lenah Khalimisi Pika was the second wife. The survivors under the first house were said to be two sons, Wycliffe Shibweche Pika and Ezekiel Pika; five grandsons, Jabu, John, Evans and Pika, the sons of a son of the deceased called Kaskon Pika, whose widow was named as Margret Kaskoni. The survivors in the second house were listed as Lenah Khalimisi Pika, widow; the late Charles Pika, son of the deceased; and three grandsons, Stephen Wanyama, Benjamin Pika and Ibrahim Daniel Pika. Two other individuals were also named as survivors being, the late Chitui Wamotsa, a brother of the deceased, and Lunani Chitui, a granddaughter of the deceased. He asserted that as at the time of his death, the deceased had no liabilities, saying that the only liability that he was aware of was a loan from the Agricultural Finance Corporation, which he had personally cleared.

4. The administratrix responded to that application through her affidavit sworn on 2nd April 2013. Of importance in that reply was the averment that the applicant had introduced individuals who were not entitled directly to the estate. She stated that the grandsons in the first house were represented by their mother, Margaret Kaskoni. From her own house, she mentioned that Charles Pika was represented by his son, Stephen Wanyama Pika. As for Chitui Wamotsa, she argued that he was a brother of the deceased who had his own land. She stated that Lunani Chitui was a son of Chitui Wamotsa, and, therefore, not a beneficiary.

5. The summons for revocation of grant was subsequently withdrawn vide a notice dated 13th May 2013, which was reinforced by a consent recorded in open court by the advocates for both sides on 26th January 2015. The administratrix died on 18th August 2013. She was replaced by Ibrahim Daniel Pika and Wycliffe Sibweche Pika, to whom letters of administration intestate were made on 26th January 2015, and a grant signed in their favour on 9th February 2015. I shall hereafter refer to the two as administrators.

6. On 15th September 2015 a summons for confirmation of the said grant, dated 14th September 2015, was filed by Ibrahim Daniel Pika, who I shall refer hereafter as the applicant. He sought that the subdivisions of Kakamega/Malava/732 be nullified and that the same be restored to the name of the deceased. He proposed that the property be shared out between Wycliffe Shibweche Pika, Margret Kaskon, Ezekiel Pika, Ibrahim Daniel Pika, Wanyama Charles, Benjamin Pika and Obel Muchiti Njoroge at different proportions. He complained that the estate asset had been subdivided unlawfully before grant was confirmed and despite the pendency of these proceedings.

7. There is a protest to the proposed confirmation of grant. The same is filed by Jafred Werakoko, sworn on 1st November 2018. I shall refer to him hereafter as the protestors. He complains that the proposed distribution does not indicate his share in the estate. He claims one (1) acre out of Kakamega/Malava/732, having bought the same from 'a deceased brother to one Kaskon Pika Wamotsa. He has attached copy of a sale agreement dated 27th January 1999. He says that he is in occupation and uses the portion, which is currently under cane. He states that the failure to be listed as a creditor was evidence that the administrators were still disputing his claim, that he had bought the land from their brother Kaskon Pika Wamotsa. He argues that the court, whilst distributing the estate, should allocate to him his one acre entitlement.

8. Directions were not taken on the disposal of the confirmation application. The matter was adjourned several times on various flimsy excuses. Eventually on 25th July 2019 I decided that I would determine it on the basis of the documents on record.

9. The application that I am tasked with determining is an application for confirmation of grant. There are two principal items for consideration in a confirmation application – confirmation of the administrators and distribution of the estate.

10. For avoidance of doubt, section 71 of the Law of Succession Act states:

“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.”

11. 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.

12. At this stage I need to consider whether the administrators herein were properly appointed. With regard to that it will be noted that the court will confirm the administrator to continue with administration to completion, once it is satisfied that the administrator was properly appointed. In this case, the administrators were appointed through a consent that was stated by and signed in open court by the advocates for the parties on 26th January 2015. That mode of appointment cannot be faulted and I shall hold that the two were properly appointed.

13. 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. No one has raised issue with the manner in which the administrators have administered the estate, in terms of either not collecting assets or not rendering accounts. None of the survivors have raised any issues with them, and the only contest before me is between them and the protestor, an alleged purchaser of part of the estate from one of their brothers. It would appear that the administrators have nothing to account for, and therefore I shall take it that they have administered the estate in accordance with the law ever since their appointment. As nothing has arisen with regard to their manner of appointment and their manner administration of the estate, I shall find that they are likely, upon being confirmed, to continue to administer the estate in accordance with the law.

14. Distribution of an estate raises two issues for consideration by the court. The first, and the more critical is about the assets that make up the estate. Succession is all about the property, and without it, it cannot be said that there is an estate to be distributed, and the question of succession should not even arise. The second is the matter of the persons who are beneficially entitled to a share of the property. The persons beneficially entitled would be the survivors, heirs, beneficiaries, dependants and creditors. These two critical aspects of confirmation are brought in through the proviso to section 71(2), which for avoidance of doubt I feel I should reproduce herein:

“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.”

15. The same provision has 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 persons entitled to the estate have been ascertained and determined.”

16. The proviso 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.

17. In the instant case, there is no dispute, that the deceased died possessed of only one property, Kakamega/Malava/732. The question of the ascertainment of the assets of the estate is not an issue.

14. The next issue relates to the persons beneficially entitled. Have they been ascertained? There is no dispute as to who the survivors of the deceased are. He died a polygamist, having married twice. The administrators represent each of the two houses. They are in agreement on the survivors.

19. There is a dispute though on the creditors. In the petition three individuals were named as creditors. The second administrator, Wycliffe Shibweche Pika, disputed, in his revocation application, which he later withdrew, that there were creditors arguing the deceased died without any debt. It was not disclosed by the administratrix how these three were creditors. It was not alleged by the administratrix whether they had transacted with the deceased prior to his death over his land or other things. The current administrators have not made provision for these creditors, which would mean that they do not recognize them or their claims against the estate.

20. Of the three alleged creditors, only one has come forward, the protestor herein. He has alleged that he bought a portion of Kakamega/Malava/732 from a son of the deceased in 1999. Clearly, he did not transact with the deceased prior to his death for the deceased died in 1997. So, is the protestor a creditor of the estate? He is not a creditor of the estate if he did not transact with the deceased. The stake that the claims in the estate is alleged to have accrued after the deceased died. He did not transact with deceased but with a son of the deceased after the demise of the deceased.

21. Legally, after a person has died, his estate does not automatically vest in any of the survivors, be they widows or children. It vests in the court by law, and it resides in the court until the court appoints a personal representative, whether an executor or an administrator. Before that appointment, any person who handles estate property would be engaging in criminal activity, for dealing with estate property under those circumstances is out lawed by section 45 of the Law of Succession Act. Section 45 states as follows:

“Protection

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.”

22. The reason why a personal representative qualifies to legally handle estate assets as an owner would lie in section 79 of the Law of Succession Act, under which the assets of the estate are vested in the grant-holder. The said provision 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.”

23. Since the assets of the estate are vested in the personal representative by virtue of section 79 of the Law of Succession Act, the law then vests the personal representative with certain powers. These are set out in section 82 of the Law of Succession Act. They include the power to sell estate property. That would mean that the person appointed as administrator has the assets vested in him, enabling him to deal with this legally as if he was the owner thereof, so that he does not offend section 45 of the Law of Succession Act, and because of that he can exercise the power to sell the property under section 82. If a person is not an administrator, the property cannot, and does not, vest in him under section 79 and he does not have the power to sell the under 82, and if he purports to, he would fall afoul of section 45 of the Law of Succession Act. Section 82 states as follows:

“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;

(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Provided that except so far as otherwise expressly provided by any will—

i. no appropriation shall be made so as to affect adversely any specific legacy;

ii. (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required...” (emphasis added)

24. In the instant matter the protestor allegedly bought the land from a son of the deceased who was not an administrator. Indeed, that particular son of the deceased did not become a personal representative of the deceased at any stage. The property of the estate did not vest in him at all under section 79. He did not have the powers that section 82 confers on personal representatives, and, therefore, he had no authority, by virtue of section 45, to sell the said property, as the same did not vest in him. What he, and all those involved, including the purported buyer, the protestor, did was to intermeddle with estate property. They indulged in the criminal activity envisaged in section 45(2) of the Act. The transaction in question was an illegality but and a nullity.

25. The law is so strict on the handling of estate property that, even though it vests estate property in personal representatives, it still places certain restrictions with respect to their handling of immovable property. Section 82(b) (ii) states that such property should not be sold before confirmation. So that if the person who sold the property to the protestor ever became an administrator, which he did not, or even if were an administrator at the time of the alleged sale, which he was not, the same would still be invalid so long as the transaction happened before the grant was confirmed.

26. The protestor did not transact with the deceased and therefore, he was not a creditor of the estate, as I have stated above. Equally, he dealt with a person in who the estate of the deceased had not been vested, and who had no authority to sell the property to sell to him. As the property did not vest in the seller, the said seller could not pass any valid title to the protestor. The seller had nothing to sell. The property did not belong to him, it belonged to the deceased. That being the case the protestor has no case in these proceedings against the estate. He acquired no stake in the estate, and should only look up to the person with who he transacted to make good.

27. Having dealt with the matter of the assets and the survivors, the next step should be distribution, for the proviso to section 71(2) requires that the shares of each of the survivors be ascertained. The persons who have been identified as survivors in this matter do not appear to have any problems at all with the distribution proposed. That being the case I shall take it that they are all satisfied with it. I shall accordingly approve it.

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

a. That I hereby confirm the appointment on 26th January 2015 of Ibrahim Daniel Pika and Wycliffe Sibweche Pika as administrators of the estate of the deceased and approve them to complete administration of the estate herein;

b. That I hereby confirm the distribution proposed in their summons for confirmation of grant dated 14th September 2015;

c. That a certificate of confirmation of grant shall issue in those terms:

d. That to facilitate the distribution that I have approved above, I hereby grant prayer 1 of the summons dated 14th September 2015;

e. That I declare that the protestor was not a creditor of the estate and is not entitled to anything from the estate as such:

f. That each party shall bear their own costs; and

g. 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