

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 88 OF 2011

IN THE MATTER OF THE ESTATE OF SIMOTO OMWENJE ISAKA, DECEASED

RULING

1. The cause herein relates to the estate of the deceased herein who died on 4th May 1988. A letter from the Chief of Central Bunyore Location, dated 9th July 2007, indicates that the deceased was survived by five individuals named as Tom Simoto Omulenje, Esau Amulioto Simoto, Japheth Mukaka Simoto, Wycliffe Omucheyi and Monica Awinja Simoto, who are said to be heirs. Save for the widow, Leunita Ambasa Simoto, it is not stated who these individuals were to the deceased.

2. Representation to the estate was sought in Vihiga SRMCSC No. 79 of 2007 by Leunita Ambasa Simoto in her capacity as widow of the deceased. She listed herself and four persons - Esau Amulioto Simoto, Japheth Mukaka Simoto, John Simoto Omuhende and Monica Awinja Simoto – said to be the children of the deceased, as the survivors of the deceased. He was said to have died possessed of E/Bunyore/Emusire/1472 Wycliffe Omucheyi is listed as a purchaser of a portion of W/Bunyore/Emusire/1472. A grant was made on 30th June 2007 to the petitioner.

3. While Vihiga SRMCSC No. 79 of 2007 was still pending, a summons for revocation of the grant made in Vihiga SRMCSC No. 79 of 2007 was lodged herein on 3rd February 2011 by Laban Ambasa Simoto. He complained that some of the beneficiaries had been excluded from the process and their consents had not been obtained. It was averred that the deceased had died a polygamist, who had married three times, and who had begat thirteen children with his three wives. The names of the wives and the children were listed in the application. The applicant stated that he was a grandson of the deceased, and that the estate of his father, the late Likoko Simoto, a son of the deceased, was entitled to a share in the estate of the deceased. The application was compromised by consent on 21st March 2012. The grant made in Vihiga SRMCSC No. 79 of 2007 was revoked, and a fresh grant was to issue to Laban Oburenji Likoko and Leonita Ambasa Simoto. Letters of administration intestate were made to the two out of this cause on 21st March 2012 and a grant issued on 28th March 2012.

4. The parties went to sleep thereafter and the cause was closed by an order made on 22nd July 2015. The cause was reinstated by an order made on 1st February 2016, with the administrators being directed to file an application for confirmation of grant. An application for confirmation of grant was thereafter lodged herein on 17th May 2013 by Leunita Ambasa Simoto. It proposed distribution of the estate property amongst seven individuals. The said individuals had all signed the relevant consents. The matter was placed before the Judge on 11th October 2016, and the court, upon being satisfied that there was no protest on record and that the date for hearing had been obtained by consent, proceeded to confirm the grant.

5. The application that I am called upon to determine, dated 19th October 2016, was prompted by the confirmation of the grant. The application principally seeks revocation of the grant made to Leunita Ambasa Simoto. In the affidavits sworn in support of the application, it is quite plain that the applicant is concerned about the confirmation of the grant. He complains that his co-administrator left out material information, that the mode of distribution was unfair and that it did not reflect the position on the ground. He further avers that the co-administrator had included as beneficiaries persons who were not survivors of the deceased, among other allegations which relate to the confirmation process.

6. The respondent, Leunita Ambasa Simoto, responded to the application an affidavit sworn on 17th November 2016. She asserts that her confirmation application had been served on the applicant's advocate, and that the applicant had not filed any response to her application by the time the same came up for hearing. She claims that the applicant is not a survivor of the deceased and did not reside on the land, she says he put up a structure on the land to hoodwink the court.

7. Directions were given on 17th November 2016 that the application be disposed of by way of written submissions. Both sides have complied. I have perused through the two sets of written submissions and noted the arguments advanced. I note that the written submissions raises matters of fact that are not supported by the affidavits on record. Indeed, much of what is contained in the said submissions ought to have been averred to in an affidavit rather than by way of written submissions. Written submissions are supposed to comprise of nothing more than analysis of the facts as disposed in the affidavits lodged in the application or oral evidence adduced by the parties, and legal arguments founded on those facts. They should never carry any new facts not averred to in the affidavits or adduced orally in court.

8. The application before me is for revocation of the grant on record. The law on revocation of grants is section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. Under that law a grant of representation may be revoked on account of three general grounds. The first is where the process of obtaining the grant was fraught with challenges, such a defects in the process, fraud and misrepresentation, and concealment of information from the court. The second is where there are challenges with the administration of the estate in cases where the grant had been obtained validly. This would be the case where the administrators fail to apply for confirmation of their grant within one year of the making of the grant, or where they fail to proceed diligently with the administration of the estate, or where they fail to render accounts as and when required of them by the law. The third ground is where a grant has become useless and inoperative on account of prevailing circumstances, such as the death of a sole administrator.

9. In this case the applicant has not sought to bring his application on any of the grounds set out in section 76 of the Act. There is no allegation that the process of obtaining the grant had run against the headwinds envisaged in section 76, or that the respondent had not sought confirmation within the period allowed or had not diligently administered the estate, or that she had failed to render accounts when she was required to, or that the grant had become useless or inoperative on account of the current circumstances. What is before me is therefore not a proper application for revocation of the grant herein, and I doubt that I can exercise the discretion given to me by section 76 with regard to revocation of grants.

10. The applicant complains about the process of confirming the grant. He says that the distribution was unfair for the reasons that he has advanced in the application. The reasons advanced therein do not fall within the purview of section 76. The only connection between revocation of grants and their confirmation is that the court, under section 76, can only revoke a grant where the administrators fail to apply for its confirmation within the period stipulated in the law. Problems that arise from the confirmation process, such as failure to be involved in the process or lack of consents or the unfairness of the distribution, are not grounds upon which a grant can be revoked. The remedy available to a party aggrieved by confirmation orders is either to appeal against the order or seek its review or seek its setting aside. The remedy of revocation of the grant is not available.

11. I have perused the record before me. It indicates that the confirmation application was allowed after the court was satisfied that the hearing date had been obtained regularly and that there had been no reply to the application by then. The court exercised its discretion to allow the application. Whether there was proper exercise of discretion is not something that I can judge given that it was exercised by a court with concurrent jurisdiction. Only a higher court can revisit the matter.

12. I need not say more on the matter. There is no merit in the application dated 19th October 2016. I shall, and do hereby, dismiss it with costs. Any party aggrieved by this order is at liberty to challenge the same at the Court of Appeal within twenty-eight (28) days of the date of this order.

DATED, SIGNED and DELIVERED at KAKAMEGA this 3RD DAY OF DECEMBER, 2018

W. MUSYOKA

JUDGE