



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Jotham Nabwere Shamala (Deceased) (Succession Cause 210 of 2006) [2023] KEHC 2834 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2834 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 210 OF 2006**

WM MUSYOKA, J

MARCH 24, 2023

IN THE MATTER OF THE ESTATE OF JOTHAM NABWERE SHAMALA (DECEASED)

RULING

1. On May 13, 2022, I delivered a ruling, wherein I directed the administratrix to take certain steps, to bring her application for confirmation of grant, dated August 6, 2020, into compliance with Rule 40(8) of the *Probate and Administration Rules*, by serving the application on all the survivors of the deceased and other persons beneficially entitled to the estate, and by getting them to sign the form envisaged in Rule 40(8), being Form 37, and, in the event that she is unable to get them all to sign Form 37, to cause them to attend court at the hearing of the confirmation application, so that the court can hear from them, in terms of Rule 41(1) of the Probate and Administration Rules.
2. The persons that I specified, in my ruling, as to be served, were Isaac Shamala Napwela, Solomon Masitsa, Patrick Nabwera, Alfred Shiloya Mung'ahu, Harun Ambwoga Khayati, Chrispinus Madegwa Mukeya, Elizabeth Kirui Nabwera and Selina Kageha Nabwera. I see an affidavit of service, sworn on July 1, 2022, it shows that the papers were served on Harun Ambwoga. Joshua Likaba, an Assistant Chief, is said to have been served too, and to have had accepted service for Alfred Shiroya, Chrispinus Madegwa and Patrick Nabwera.
3. Harun Ambwoga was one of the persons that I had directed that they be served. I did not give directions that anyone be served through the Assistant Chief. The administratrix, therefore, acted without leave of court when he served the Assistant Chief. The law envisages that parties to a cause, or affected by court orders, are to be served personally or directly, and not through proxy. Secondly, the Assistant Chief has not filed an affidavit to depose that upon being served he, in turn, caused the papers to be served upon or given to the persons that he was meant to serve. Consequently, the order has only been partially complied with, with respect to service, to the extent of service upon Harun Ambwoga, the rest of the survivors, and persons beneficially entitled, have not been served. Rule 40(8) has not been complied with to that extent.



4. The second aspect is about Form 37. I have scoured through and perused the papers before me, and I have not come across a consent on distribution in Form 37, duly signed by all the persons beneficially entitled, or even by a section of them. Again, my order and Rule 40(8) have not been complied with.
5. The third aspect is about availing persons who will not have signed or consented to the distribution proposed, by executing Form 37, to attend court, so that the court can hear from them, under Rule 41(1). The matter was in court on October 18, 2022. Those in attendance were Abigael Khatenyi and Patrick Nabwera. The date had been taken by the 2 on July 12, 2022. There is no evidence that they served the other family members or survivors or persons beneficially entitled. No affidavit of service had been filed to evidence service. There is nothing, therefore, on record, to indicate that those others were aware of the date and chose to stay away.
6. Where parties fail to comply with court orders, or fail to agree on distribution, the hands of the court ought not be tied. The court is not stuck. It goes ahead to distribute the property according to what the law says. That is what the courts said in in *Justus Thiora Kiugu & 4 others vs. Joyce Nkatha Kiugu & another [2015] eKLR* (Visram, Koome & Otieno-Odek, JJA) and *In re Estate of Juma Shiro (Deceased) [2016] eKLR* (Mwita, J), that in the absence of a consensus on distribution, the court should be guided by the law, in this case the *Law of Succession Act*. There is no evidence of any consensus on distribution, which departs from what the Act provides, for there is no such document, duly executed by all 6 individuals, who are shown to be beneficially entitled to a share in the instant estate.
7. The deceased died possessed of Isukha/Kambiri/754. The deceased had 2 houses, of the late Mukasia Ingasiali and of the late Esther Makova Nabwera. Each of the 2 houses had 3 children each. Applying section 40, Isukha/Kambiri/754 shall be shared in the ratio of 3:3, which translates to equal distribution of the property between the 6 children of the deceased. Should there be persons who have bought any portions from either of the children, they shall be provided for by those that they bought from, after transmission has been done.
8. The final orders are:
 - a. That I hereby confirm Abigael Khatenyi Nabwera, as administratrix, to complete administration of the estate, by transmitting the same in accordance with the directions given here below;
 - b. That I declare that the deceased died a polygamist, and Isukha/Kambiri/754 shall be shared equally between Isaac Shamala Napwela, Solomon Masitsa, Patrick Nabwera, Elizabeth Kirui Nabwera, Abigael Khatenyi and Selina Kageha Nabwera;
 - c. That for those children of the deceased who are dead or have died, their shares shall pass to their estates, to be distributed in succession proceedings initiated in their names;
 - d. That a certificate of confirmation of grant shall issue in the terms set out in (b) above;
 - e. That the administratrix has 6 months, from the date of this ruling, to transmit the estate in accordance with (b), above, and to report back to court;
 - f. That the matter shall be mentioned after 6 months to monitor compliance, and to facilitate closure of this court file;
 - g. That each party shall bear their own costs; and
 - h. That any party aggrieved by the orders made herein, has leave of 28 days, to move the Court of Appeal, appropriately.



9. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24th DAY OF
March 2023**

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Abigael Khatenyi Nabwera, applicant.

Patrick Nabwera

Esther Nabwera

Elizabeth Nabwera

