REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VIHIGA

SUCCESSION CAUSE NO. 66 OF 2021

(FORMERLY KAKAMEGA SUCCESSION CAUSE NO. 871 OF 2012)

IN THE MATTER OF THE ESTATE OF ASOGA SHABANGA (DECEASED)

RULING

1. The deceased herein died on 4th November 1977. Representation was initially granted to Benjamin Shahasi Asoga, his son, in Hamisi RMCSC No. 16 of 2019, on 9th October 2009. He was said to have had been solely survived by the said Benjamin Shahasi Asoga, and to have died possessed of Kakamega/Serem/147. The grant of 9th October 2009, was confirmed on 15th October 2009, and Kakamega/Serem/147 was wholly devolved upon Benjamin Shahasi Asoga.

2. A summons for revocation of the grant of 9th October 2009, dated 8th August 2012, was filed herein on 7th August 2012, at the instance of Burton Asoga Shavanga, on grounds that he was also a son of the deceased, and that he had been left out of the proceedings. That revocation application was resolved by consent, on 11th May 2015, on terms that the grant made in Hamisi RMCSC No. 16 of 2019, be revoked and a fresh grant be issued in the names of Benjamin Shahasi Asoga, and that Kakamega/Serem/147 be reverted to the name of the deceased. A grant of letters of administration intestate was issued in those terms on 13th July 2015. On 23rd June 2016, the administrator, Benjamin Shahasi Asoga, was directed to file for confirmation of his grant within thirty days.

3. The application for confirmation of grant was filed, on 25th May 2018, by Burton Asoga Shavanga. I shall refer to him hereafter as the applicant. It proposes that Kakamega/Serem/147 be shared out equally between Benjamin Shahasi Asoga and Burton Asoga Shavanga.

4. There is an affidavit of protest by Benjamin Shahasi Asoga, sworn on 30th August 2018, and filed herein on 3rd September 2018. He asserts that he is the person who is solely entitled to the property, saying that the applicant was not a beneficiary nor a dependant or a liability of the estate, and, therefore, he was not entitled to a share in it. It is further averred that the applicant has never stayed on the subject land.

5. Directions were given on 1st November 2018, for disposal of the application dated 3rd May 2018, by way of *viva voce* evidence.

6. The oral hearing happened on 26th January 2021. Peter Analo Sigani was the first witness. He said that the deceased was his brother, since their parents were brothers. I would take it that to mean that the witness and the deceased were cousins. He explained that the deceased had four children, being one daughter and three sons. The sons were identified as Peter Shabanga, Benjamin Asoga and Ezekiel Asonga. Peter Shabanga was said to be dead, while the status of Ezekiel Shavanga was not disclosed. Burton Asoga was identified as a son of Ezekiel Shavanga, making him a grandson of the deceased. He explained that the deceased had shared out his land before he died, and that he, the witness, was one of the elders who participated in the subdivision of the land. The deceased gave land to his son Peter, and, after he died, the elders, him included, met and shared out land between the remaining sons, that is to say the administrator and the applicant, and affixed boundaries. He stated that the father of the applicant was not buried on Kakamega/Serem/147, but on the land occupied by the applicant. He asserted that the applicant was entitled to inherit the land where his father was buried. The parcel given to Peter was said to be Kakamega/Serem/148.

7. Paul Luvonga followed. He was a son of the administrator. He stated that the applicant was his cousin, as the deceased was their grandfather. He stated that he and his father, the administrator, lived on Kakamega/Serem/147, and that the applicant lived on a separate piece of land, but had a house on Kakamega/Serem/147. He stated that the deceased had only given land to Peter Shabanga, but not to the other sons. He stated that the deceased had four children.

8. The administrator did not attend court, after the applicant closed his case, on 26th January 2021, despite being given an opportunity to attend court on 16th March 2021, and the matter then moved to written submissions.

9. The proviso to section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, and Rule 40(4) of the Probate and Administration Rules

require that the court be satisfied that there is full disclosure of all the persons beneficially entitled to a share in the estate of the deceased. The administrator and the applicant herein have not done a good job of that, in the papers that they have filed herein, for there is no full disclosure of all the survivors. Indeed, the papers are incredibly vague on how the deceased and the administrator and the applicant related. That only became clear at the oral hearing, and so did the issue as to who the children of the deceased were. It came out that they were four: a daughter and three sons. To that extent, I am satisfied as to the persons who were beneficially entitled to a share in the estate, from the oral hearing.

10. Regrettably though, the administrator only disclosed himself as the survivor of the deceased. He said nothing about the other three children: the daughter, the late Ezekiel, who is the father of the applicant, and the family of the late Peter. The applicant had to force himself into the proceedings, by way of a revocation application. The daughter and the family of the late Peter do not feature at all, yet the cause herein is about the estate of their late father. That would mean that Section 51(2) (g) of the Law of Succession Act was not complied with. It sets out the categories of the persons who ought to be disclosed.

11. I would like to emphasize that, under the Law of Succession Act and the Probate and Administration Rules, the persons who ought to be disclosed are the persons who survive the deceased, and not the persons who are ultimately entitled to the property available for distribution. Distribution is an issue to be addressed at confirmation of grant, and, therefore, at the time representation is sought, all the children of the deceased ought to be disclosed and involved in the process, regardless of whether they will get a share in the estate or not. The non-involvement of the daughter, said to be Mary, and of the family of the late Peter, is something that should be fatal to the confirmation proceedings herein, as one half of the family of the deceased has not been involved in the whole process.

12. No attempt has been made to explain the non-involvement of the family of the late Peter. It would appear that there was an *inter vivos* distribution from which he benefitted, when he was given Kakamega/Serem/148. However, the fact that he benefitted from a lifetime distribution or gift from the deceased is no excuse to exclude him or his family from the proceedings. Nothing has been placed on record to show that Kakamega/Serem/148 was registered in his name. He should have been disclosed and involved, and an explanation given, at confirmation, as to why he was not being allocated a share. Treating him as if he never existed, or was never a child of the deceased, is not what is envisaged in law. The succession process is not just for the children ofthe deceased who would be entitled to get a share in the property he died possessed of. It includes all of them, such as those who got *inter vivos* gifts, and who should not expect anything else or anything at all from the estate. They must be involved, for them to come to court, to confirm to the court that they indeed benefitted from *inter vivos* gifts, and had no claim to the rest of the assets of the estate.

13. It would appear that Mary, the daughter, was left our merely because she was a woman. I can take judicial notice of that based on what I know about the culture and traditions of the community from which the family comes from, based on my experience at this station. The deceased died in 1977, and customary law applies to distribution of his estate by dint of section 2(2) of the Law of succession Act. It is notorious that under customary law married daughters are not entitled to share in their late father's estate, and that unmarried daughters would be entitled to the limited extent of having a life interest to any portion of the estate allocated to them to utilize. Either way, under the Law of Succession Act and the Probate and Administration Rules, there is no requirement that daughters are not to be disclosed or not to be involved on account of customary law. Section 2(2) of the Act applies Part VII of the Act to estates of persons dying before the 1st of August 1981. Part VII is about administration of estates. Section 51(2) (g) is in Part VII. It requires disclosure of all the children of the deceased, both sons and daughters. When sections 2(2) and 51(2)(g) of the Act are read together, the outcome could be that daughters of dead persons must be disclosed and involved in the succession process regardless of whether the deceased died before or after 1st August 1981, when the Law of Succession Act commenced. The non- disclosure and non-involvement of Mary is another fatal omission in this process.

14. Kenya is under a new constitutional dispensation, following the promulgation of the Constitution of Kenya, 2010, on 27th August 2010. Article 27 of the Constitution frowns on discrimination based on gender. Article 2(6) of the Constitution makes any treaty or convention ratified by Kenya part of the law of Kenya. Kenya ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). By dint of Article 2(6) of the Constitution, the principles exposed in CEDAW form part of the laws of Kenya. The effect of the Constitution of Kenya, 2010 is that it overrides section 2(2) of the Law of Succession Act, with respect to subjecting customary law to estates of persons dying before 1st August 1981, which has the effect of excluding daughters from benefiting from estates of their dead parents. Mary or her successors would be entitled to a share in the estate of her late father, by dint of the provisions of the Constitution of Kenya 2010. She should have been disclosed, or involved in the process, for her to indicate to court whether, or not, she desired to assert the rights conferred upon her by the Constitution, to override the discrimination against her founded on Section 2(2) of the Law of Succession Act.

15. The other element, of the proviso to section 71(2) of the Act and Rule 40(4) of the Rules, is that, other than disclosing the persons beneficially entitled to a share in the estate, the applicant, to the confirmation application, ought to allocate the shares of each of the persons beneficially entitled. The persons beneficially entitled to the subject estate are four. Two have been disclosed in the application, and it is just the two who are allocated shares in the said estate. There ought to have been a disclosure of Mary and Peter, and if there was justification, in not allocating them any shares, it ought to have been indicated that they get nothing out of the estate, and reasons assigned. The omission to do so is fatal.

16. The other thing is that there is no disclosure as to how many children survived the late Ezekiel. The proceedings are crafted in manner that suggested that the applicant is the only child of the late Ezekiel, yet there is no concrete or express pleading to that effect. The court does not act on conjecture, and does not have to read between the lines. The parties must plead all the facts. They must lay all the cards on the table. They must give the court the complete picture. The court does not conduct independent investigations, hence the need for full disclosure, for completeness of the picture. The court ought not allow devolution of the share due to the late Ezekiel, if at all he is entitled, wholly to the applicant, without disclosure as to whether the said Ezekiel had other children, both male and female, apart from the applicant. Devolving the entire share to him could have the effect of discriminating against the other children of the late Ezekiel, disinheriting them.

17. The last thing that I would like to address is with regard to the competence of the application dated 8th May 2018. It is brought by Burton Asoga Shavanga. I have very closely and scrupulously perused and scrutinized the record before me, to satisfy myself as to whether the applicant herein was ever appointed administrator. I have not come across any order appointing him administrator of the estate, whether singly or jointly with Benjamin Shahasi Asoga. He, therefore, does not hold a grant of letters of administration intestate to the estate of the

deceased herein. That being the case, he has not *locus standi* to file for confirmation of a grant that he does not hold. I say so because section 71(1) of the Law of Succession Act and Rule 40(1) of the Probate and Administration Rules envisage the filing of a summons for confirmation of grant by "the holder" of a grant. Since he is not "the holder" of the grant herein he has no capacity to file for confirmation of the grant herein, and his application, dated 8th May 2018, is clearly incompetent.

18. Secondly, there is no order on record directing the applicant to file for confirmation of grant. Even if such order existed, it would be void, as it would be inconsistent with section 71(2) of the Act and Rule 40(4) of the Rules. In any case, the directions given in the ruling of 23rd June 2016 were for the petitioner to move the court for confirmation of the grant made to him. The "petitioner" refers to Benjamin Shahasi Asoga, and not the applicant herein, Burton Asoga Shavanga. The remedy that the applicant had, in the event that the administrator failed to comply with the orders of 23rd June 2016, was to apply for revocation of the grant made to him, rather than to apply for its confirmation.

19. I believe I have said enough, to demonstrate that the application, dated 8th May 2018, is not available for determination, in the form it is in, and I have no option but to have it struck out. I hereby strike out the same. Let a proper application for confirmation of grant be filed by the holder of the grant sought to be confirmed, and let it comply fully with the requirements of section 71 of the Law of Succession Act and the Rule 40 of the Probate and Administration Rules.

20. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF MARCH, 2022

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Ms. Sijenje, instructed by Messrs. ABL Musiega & Company, Advocates, for the applicant.

Mr. Amasakha, instructed by Messrs. Amasakha & Company, Advocates, for the administrator.