



REPUBLIC OF KENYA



KENYA LAW
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Shabulimo Mulochi alias Joseph Shavulimo Mulochi (Deceased) (Succession Cause 435 of 2015) [2022] KEHC 16902 (KLR) (23 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 435 OF 2015
WM MUSYOKA, J
DECEMBER 23, 2022**

JUDGMENT

1. The deceased herein, Shabulimo Mulochi alias Joseph Shavulimo Mulochi, died on December 9, 2011, as per certificate of death, dated June 24, 2015. According to the Chief of Ivihiga Location, by letter dated July 7, 2015, he was survived by a widow, Rebecca Shitukha, 2 sons, John Shabulimo and James Joseph; and 2 daughters, Phemina Khacali and Jescah Mugo. The late Zena Minyatta is named as the other daughter of the deceased. Musa Makai Mulochi, the late Elisha Musonye Shitawa and the late Wilson Musungu are named as claimants. There is a title deed attached, in respect of Kakamega/Shiru/930, in the name of Joseph Shavulimiu Mulochi. There is a certificate of official search of the same property dated June 2, 2015, showing the same to be registered in the name of the deceased.
2. Representation to the intestate estate was sought in this case by John Mwanuli Shabulimo, in his capacity as son, in a petition filed herein on July 9, 2015. The deceased is said to have been survived by the individuals named in the Chief's letter. In the liabilities column are listed the persons named as claimants in the chief's letter of July 7, 2015. Objections were raised by Musa Makai Mulochi, but the court appointed John Mwanuli Shabulimo the administrator on October 12, 2018, and a grant was duly issued, dated December 10, 2018. The said John Mwanuli Shabulimo subsequently died, and was substituted, on May 9, 2019, by James Achevi Joseph. The new administrator was directed to file for confirmation of his grant, and liberty was given to Musa Makai Mulochi to file a protest to the confirmation application, and to urge his case at the confirmation hearing. I shall refer to James Achevi Joseph, hereafter as the administrator.
3. The summons for confirmation of grant was filed on September 16, 2019, bearing an even date. It identified the survivors as 1 son, James Achevi Joseph, 2 daughters Jescah Achakulwa and Femina Khalumba and 4 children of the late son of the deceased, John Mwanuli Shabulimo, the estate was said to comprise of Kakamega/Shiru/930. It was proposed that the same be shared out between James Achevi Joseph, Jescah Achakulwa and Femima Khalumba and the children of John Mwanuli Shabulimo. James Achevi Joseph allocated himself 2 portions, each measuring 0.35Ha; with the balance of 0.35Ha, being shared equally between Jescah Achakulwa, Femima Khalumba and the 4



children of John Mwanuli Shambulimo. There is a consent on distribution executed by James Achevi Joseph.

4. Musa Makai Mulochi filed an affidavit of protest, sworn on October 8, 2019. He avers that the succession cause was filed despite pendency of an ownership dispute over Kakamega/Shiru/930. He avers that although Kakamega/Shiru/930 was registered in the name of the deceased, his late father, Simon Makai, was entitled to ½ share of it. He states that the deceased disposed of his ½ share and attempted to evict him from the remaining portion. He challenged the attempted eviction at the Land Dispute Tribunal for Tiriki East Division, and the Land Dispute Tribunal ruled in his favour on June 13, 2007. That verdict was adopted as an order of the court though Vihiga SPMCC MISC No40 of 2007, and a decree dated August 20, 2008 was duly issued. I shall refer to Musa Makai Mulochi as the protestor.
5. Directions were given on March 24, 2021 for disposal of the confirmation application by viva voce evidence
6. The oral hearings happened on July 12, 2021. The protestor was the first to take the witness stand. He stated that he was seeking compliance with the decision of Tiriki East Division, Land Dispute Tribunal, which was on August 20, 2008. He stated that his father was entitled to ½ of Kakamega/Shiru/930. He said that his father died in 2001, and that he was his sole survivor. He said that he had not yet obtained representation to the estate of his father. He stated that the Land Dispute Tribunal had awarded the land to him. He said he did not have money to execute the judgment of the Land Dispute Tribunal. He said Kakamega/Shiru/930 was registered in the name of the deceased in 1992, but his father did not challenge the same. He stated that he and his father resided away, hence they were not well acquainted with the land at home.
7. Samuel Musungu Munale testified next. He was a cousin of the protestor, and a nephew of the deceased. He stated that the deceased was registered fraudulently as proprietor of Kakamega/Shiru/930. He said that their grandfather had directed that deceased gives a share of Kakamega/Shiru/930 to the father of Musa Makai Mulochi. He further said that the deceased had sold 1 acre out of Kakamega/Shiru/930. He said that the portion meant for Musa Makai Mulochi was still available, and Musa Makai Mulochi occupied it.
8. Paul Amisi followed. His testimony largely reiterated that of the other witnesses.
9. The case for the administrator opened, and he testified on February 16, 2022. He described the protestor as his brother. He averred that the deceased had 6 children, that he would take ½ of Kakamega/Shiru/930, and the rest of the children would take the other ½. He said that the father of Musa Makai Mulochi had his own land. He stated that the deceased had sold a portion of the land to Elisha Musonye, whose family occupied the portion given to them. He said he was not aware of any Land Dispute Tribunal proceedings in 2007. He said that the father of Musa Makai Mulochi was put on Kakamega/Shiru/930 by Kanu Youths, and therefore he entered the land by force. Gideon Makodo and John Muyuka testified along similar lines.
10. At the end of the oral hearings, the parties opted to file written submissions. The submissions on record were filed by the administrator on May 16, 2022. I have gone through the same and noted the arguments made. Unfortunately, the said submissions make no legal arguments.
11. The application for determination is a summons for confirmation of grant. The law on confirmation of grants is in section 71 of the *Law of Succession Act*, Cap 160 Laws of Kenya, and the procedure is set out in Rules 40 and 41 of the *Probate and Administration Rules*. The deceased died intestate in 2011,



long after the *Law of Succession Act* had come into force in 1981, distribution of the estate is, therefore, to be governed by Part V of the *Law of Succession Act*.

12. The proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the *Probate and Administration Rule* are critical in the handling of confirmation applications. They cast a duty on both the administrator and the court, to be satisfied that the persons beneficially entitled to a share in the estate have been ascertained, and their shares too. There is no dispute that the deceased was survived by the individuals listed in the Chief's letter of July 7, 2015. Am satisfied that the survivors have been ascertained John Mwanuli Shabulimo has since died, and so his share should go to his children or his estate. Zena Mimuatta is also dead. It was not indicated as to when she died and who survived her. The administrator will have to clarify on that.
13. Persons beneficially entitled include creditors and other claimants from the estate. The Chief's letter has identified Musa Makai Mulochi, the late Elisha Musonye Shitawa and the late Wilson Musungu as claimants. The 3 are listed as liabilities in the petition. Curiously, at confirmation, no provision is made for them. Indeed, there is no mention of them. It is the administrator who introduced them in the matter; by placing the Chief's letter on record, which mentions them; and by listing them as such in the petition. Having brought them into the matter the administrator who bound to give an account relating to them. Why were they listed as claimants in the Chief's letter of 7th July 2015, and as liabilities in the petition? Why were they left out in the confirmation? Did it mean that they ceased to be liabilities? And so, how did they ceased to be liabilities? Silence by the administrator, with respect to them, would not do. Their names appear in the papers as persons beneficially entitled to a share in the estate, as creditors or liabilities. There is a lapse, for the administrator has not addressed the case of these 3 individuals in the confirmation application. To that extent the proviso to section 71(2) of the *Law of Succession Act* has not been complied with.
14. Musa Makai Mulochi has filed a protest affidavit. He has defended his claim. That explains his beneficial interest. He says Kakamega/Shiru/930 is ancestral land, to which he is entitled to ½. He has placed on record documents that show that there was litigation on the matter and there is a court decree waiting to be given effect. When the administrator testified he feigned ignorance of the litigation and decree. Even if he was aware of the Land Dispute Tribunal proceedings, as administrator, it was his duty, once the protestor raised the issue, to have followed up to establish the authenticity of the claim, especially now that Land Dispute Tribunal and court proceedings have been placed on record. Regarding the late Elisha Musonye Shitawa, the administrator testified that he knew that the deceased had sold a portion of the estate to him. Yet he has not made provision for him, and he had not attached any documents to support the alleged sale. If the late Elisha bought a portion of Kakamega/Shiru/930, then he had beneficial interest in the estate, and he should have been disclosed in the confirmation application, and its share apportioned. Not much was said about the late Wilson Musungu, of his beneficial interest in the estate. If his estate has beneficial interest in the estate, then the administrator should have addressed the issue in the confirmation application.
15. The ascertainment of beneficiaries or persons with beneficial interest is important, for it is these individuals who should get a share in the estate. The ascertainment of creditors or purchasers or liabilities is critical, for this category of beneficiaries ought to be settled first. According to Part V, sections 35,36,38 and 39 and 83, what ought to be distributed to the survivors is the net intestate estate, that is after creditors, liabilities, claimants and purchasers have been dealt with. Distributing an estate, amongst the survivors exclusively, would disadvantage legitimate creditors or liabilities. What the survivors should take should be net of what is due to creditors, liabilities or purchasers.
16. The proviso to section 71(2) and Rule 40(4) require the shares of the beneficiaries to be ascertained. In this case, the administrator has only attempted to ascertain the shares due to the survivors. The shares



due to the liabilities, creditors and purchasers have not been ascertained. That would mean, with regard to liabilities creditors and purchasers, there has no compliance with the proviso to section 71(2) and Rule 40(2) in that regard.

17. Even regarding the shares ascertained for the survivors there are issues. The deceased was survived by children only, for there was no mention of a surviving spouse. Where a deceased person is survived by children only, then section 38 of the Law of Succession Act applies. The estate is to be shared equally amongst the children, be they male or female, married or unmarried. The survivors may depart from the equal distribution envisaged by section 38, by consent. That consent can be expressed in writing or the parties may attend court and orally signify their consent before the judge. The proposals placed before the court by the administrator do not comply with the section 38, for there no equal distribution. The administrator takes ½ of Kakamega/Shiru/930 leaving the other 4 children to share the other ½ between themselves. There is no consent on record, duly signed by all the children of the deceased or their successors, conceding to the unequal distribution proposed by the administrator. The Form 37 filed herein, purporting to be a consent on distribution, it is only signed by the administrator, who is the maker of the proposals. Secondly, the administrator did not avail the children of the deceased or the successors, at the hearing of his confirmation application, for them to get a chance, under Rule 41(1) of the Probate and Administration Rule, to be heard on the matter. The effect of all this is that there no proper ascertainment of the shares of the identified on ascertained survivors of the deceased.
18. The administrator has not explained why he had allocated ½ of Kakamega/Shiru/930 to himself and the other 4 children the other ½ share. Section 38 provides for equal distribution. There is no distinction as between son and daughter, or man and woman, or male and female. All are treated equally, and take equally. Secondly, the death of a child of the deceased before distribution does not diminish or extinguish his/her share or entitlement. By virtue of section 41 of the Law of Succession Act his/her children would step in and take the share due to them. Alternatively, the same accrues to his/her estate.
19. I have indicated above that there is no consent on distribution amongst the survivors. The courts have said, in that where there is no consent or consensus on distribution in a manner departing from Part V, the court would have no option but to share the estate strictly in accordance with the Law of Succession Act. In this case, section 38 of the Law of Succession Act, equally amongst the children as their survivors.
20. On the claim by the protestor, I have seen copies of the proceedings that were before the Tiriki East Division, Land Dispute Tribunal. The dispute was on Kakamega/Shiru/930. It was between the protestor and the deceased. Both sides testified and called witnesses. In the end, the Land Dispute Tribunal decided in favour of the protestor, in the following terms.

“ This court of elders rules the case in favour of the client Musa Makai Mulochi. He get the remaining portion of land Kak/shiru/930 of which Shavulimo has already sold his portion. Sub -division must be done immediately. Before both parties, should there be any part dissatisfied, it has right to appeal to provincial Land Disputes Tribunal Committee within 30 days from this date of 13th June 2007.”
21. I have seen the decision in Vihiga SRMC in Misc. Application No40 of 2007, between the protestor and the deceased, where the award of the Land Dispute Tribunal was adopted on June 18, 2008 in the following terms

“ It is hereby ordered as follows;



1. The award from Tiriki East land dispute's tribunal is hereby adopted as a judgment of this court.

in terms

That the claimant Musa Makai Mulochi to get the remaining portion from land known as Kakamega/shiru/930 of which the Respondent has already sold his and that subdivision of the said land be reflected immediately”

22. My view is that the Land Dispute Tribunal under the *Land Dispute Tribunal Act*, No18 of 1990, Laws of Kenya, had no jurisdiction to make determination on ownership of registered land, for its mandate was on questions of boundaries and occupation. The decision of 13th June 2007 was on ownership of Kakamega/Shiru/930 as between the protestor and the deceased. However, the matter of title to land is outside my jurisdiction by virtue of Articles 162(2) and 165(5) of the Constitution and, therefore, whatever views I may have of the decision of June 13, 2007 and the decree of June 18, 2008 are of no moment, what I should note is that there is a valid decree of a competent court, and there is no evidence that it has set aside. I believe that it is still valid and subsisting, and I believe the protestor is entitled to half of Kakamega/Shiru/930 by dint of that decree. Am alive to the fact that the protestor is and has been in occupation.
23. Other than what I have determined in paragraph 22, above, it is my holding, with respect to the application dated September 16, 2011 that there are certain issues that would need be addressed before final orders are made.
24. The orders that I should make at this stage are a s follows; -
 - a. That I declare that the protestor is entitled to ½ share of Kakamega/Shiru/930, and the estate of the deceased to the other ½;
 - b. That the Land Registrar for Vihiga County is hereby directed to give effect to the decree in Vihiga SRMC Misc. Application No40 of 2007, of June 18, 2008^{{}^{}{}}}, by hiving half off Kakamega/Shiru/930 and registering the same in the name of the protestor Musa Makai Mulicho;
 - c. That, I declare that the ½ share due to the estate shall be shared equally between the administrator, the estate of John Mwanuli Shabulimo, the estate of Zena Mimuatta, Jescah Achakulwa and Femima Khaluma;
 - d. That the distribution in (c), above, shall not be effected before the shares due to the late Elisha Musonye Shitawa and the late Wilson Musungu are determined, and a certificate of confirmation of grant shall not issue until those shares are ascertained;
 - e. That the matter shall be mentioned on a date to be allocated at delivery of this judgment, for compliance with (d), above;
 - f. That costs shall be in the cause; and
 - g. That any party aggrieved has leave of 28 days, move the Court of Appeal, appropriately.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS.....23rd
.....DAY OFDecember2022**

WM MUSYOKA

JUDGE



Erick Zalo, Court Assistant.

Mr. Khayumbi, instructed by J I Khayumbi & Company, Advocates for the Administrators

Mr. Amasakha, instructed by Amasakha & Company, Advocates for the protestor.

