REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 389 OF 2009

IN THE MATTER OF THE ESTATE OF AMINA ARUMBA MUSA Alias RABECCA ARUMBA (DECEASED)

JUDGMENT

1. This matter relates to the estate of Amina Arumba Musa, who is also known Rabecca Arumba Mwani, who died on 17th March 2007, according to a certificate of death, which is on record, serial number 68537, dated 5th May 2009. The letter from the Chief of Khayega Location, dated 29th May 2009, is not very helpful, to the extent that it does not disclose whether the deceased had been survived by a spouse or children. The letter mentions that the deceased had a brother, the late Ibala Khechi, but it does not disclose whether the said brother had been survived by any children.

2. Let me repeat for the umpteenth time, that it is not a requirement of the law, for it is not provided for in the Law of Succession Act, Cap 160, Laws of Kenya, nor in the Probate and Administration Rules, that a letter from the Chief of the Location from which the deceased hailed be filed. The same is an extra-legal device resorted to by the court to assist it identify the persons who survived the deceased, for the court has no mechanism for confirming the persons by whom the deceased was survived, except by relying on officers of the former provincial administration, who represent the national government at the grassroots , and are in direct contact with the people, and, therefore, the best suited government functionaries to assist the court identify the genuine survivors of the deceased.

3. The Chief has no role in succession proceedings beyond what I have stated in the preceding paragraph. What the Chief is expected to do is to simply give to the court the names of the immediate survivors of the deceased. A letter from the Chief which does not identity all the immediate survivors of the deceased is not of much utility to the probate court.

4. Be that as it may. Representation to the estate of the deceased herein was sought, vide a petition lodged herein on 14th July 2009, by Elizabeth Ikhuva Shiaminikha, in her purported capacity as daughter of the deceased. She expressed the deceased to have had died possessed of a property known as Isukha/Shirere/592. She has listed herself as the sole survivor of the deceased. Letters of administration intestate were made to the petitioner on 18th September 2009, a grant was duly issued, dated 29th September 2009. I shall consequently refer to her as the administratrix. The said grant was confirmed on 7th July 2009, on an application dated 8th April 2009, and the estate was devolved to Linet Ibala and Mary Idera Shiaminikha jointly. A certificate of confirmation of grant was duly issued, dated 27th July 2010.

5. Subsequent to that confirmation, a summons for revocation of the grant was lodged herein on 18th November 2014, by Moses Milimo Shymenekha, dated 17th November 2014. The applicant was a son of the administratrix, who described himself as an administrator and a beneficiary of the estate. He complained that the proceedings had been mounted without notice to him, and another, Jenipher A. Shimenga, who is also described as another administrator. That application was disposed of by Sitati J, in a ruling that was delivered on 23rd September 2015, on the basis that the administratrix ranked in priority over her children or the grandchildren of the deceased, and, therefore, the administratrix had been properly appointed as administratrix.

6. Shortly thereafter, another application for revocation of the grant, dated 11th January 2016, was brought at the instance of Jenipher Achitsa Shimenga, who I shall refer hereto after as the applicant. She would like the grant made on 20th September 2009 revoked, on grounds that the administratrix had failed to provide the full identities of the beneficiaries of the estate, had obtained the grant by means of false statements and had concealed vital facts from the court. In the affidavit sworn in support of the application, the applicant averred that the administratrix had left her and her brother, Moses Milimo Shiamenekha, the applicant in the application dated 17th November 2014, under the care of the deceased, that it was the deceased who had raised the two of them, that the deceased educated them, that the two of them resided on the estate, that they considered the deceased as their biological mother, among other claims. She complains that the administratrix benefited the applicant’s her other two siblings to her detriment and that of her brother. She avers that it was the wish of the deceased that she and her brother be settled on Isukha/Shirere/592, and that the administratrix get another property within Shirere area, that was not yet in the name of the deceased. She accuses the administratrix of failing to perfect the title to that other property, even though she resided on it. She has attached a copy of the official search certificate, dated 15th August 2014, for Isukha/Shirere/592 to demonstrate that the same has since been registered in the names of the persons to whom the property was devolved at confirmation, that is to say Linet Iballah and Mary Shiaminikha. It is this application that I am called upon to determine.

7. The response to the application is vide an affidavit that the administratrix swore on 9th March 2016. She avers that a similar application had been presented by Moses Milimo, and was determined, and, therefore the issues raised are *res judicata*. She asserts that she is the sole heir of the deceased, and denies abandoning the applicant and her brother to the care of the deceased, saying that she had raised and educated all her children. She avers that the application does not meet the threshold for an application for revocation of grant. She avers that being the sole survivor of the deceased, she did not require the consent of the applicant before mounting the petition for representation to the estate of her deceased mother. She asserts further that the provisions of section 38 of the Law of Succession Act tilted to her favour. She further asserts that the applicant was not entitled to inherit from the estate of her deceased grandmother, while she, the administratrix, as a daughter of the deceased and the mother of the applicant, was alive. She asserts that it was her discretion to share out the estate to her children as she wished, and goes on to say that she registered the property in the names of Linet Iballah and Mary Shiaminikha, for reasons that she knew herself.

8. Directions on the disposal of the application, dated 11th January 2016, were given on 31st May 2016, for oral hearing of the same.

9. The oral hearing happened on 4th July 2019. The applicant was the first on the witness stand. Her testimony largely mirrored the averments made in the affidavit that she had sworn in support of the application. One critical disclosure at the oral hearing was that the administratrix had seven children, and of the seven only two benefited from the estate of the deceased. She explained that the other property that the deceased died possessed of had been bought from Joseph Shimoli, although she did not know its land reference number. During cross-examination, she conceded that the administratrix was a closer relation of the deceased than she was, as she was a daughter of the deceased, while she, the applicant, was a granddaughter. She protested that the administratrix had not involved her in the succession process.

10. The applicant called Moses Milimo Shyamenekha, her brother and a son of the administratrix. He explained that the administratrix had thirteen children, but only seven were alive as at the date he gave evidence. He stated that he lived with the administratrix briefly before he moved out to live with the deceased. He stated that the administratrix lived on Isukha/Shirere/5925. He produced a certificate of official search on that property, which showed that the same was created on 5th June 2013 as a subdivision from Isukha/Shirere/3197, and was registered in the names of Mary Idieva Shamenekha and Lynet Ibala.

11. On the respondent's side, only the administratrix testified. Her evidence largely mirrored the averments made in her affidavit.

12. I have closely perused the court record. As narrated here before, the revocation application that I am tasked with determining is the second one. An earlier one brought by another child of the administratrix was dismissed. The issues raised in the application the subject of that ruling of 23rd September 2015 are the same as those raised in the instant case. The court found that the son of the administratrix did not rank equally with her in administration, and also in the distribution of the estate. It is noteworthy that the estate had been distributed as at the date the said application was filed and ruling delivered on 23rd September 2015.

13. For avoidance of doubt, Sitati J. said as follows, which I believe lays the application the subject of this judgment to rest:

> "6. … the law provides that the children of a deceased person rank in priority after the spouse when it comes to benefiting from a deceased person's estate. In this regard, Section 36 of the Law of Succession Act is relevant to the extent that where a deceased person has left a surviving spouse, then such spouse is entitled as set out under Section 36(a)(c) including the proviso thereof. Section 38 provides for a situation where a deceased has left a surviving child or children but with no spouse. The Section reads:
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> "38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child, if there be only one, or equally divided among the surviving children."
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> 7. Section 41 of the Act deals with property devolving upon a child being held in trust while Section 42 provides that previous benefits shall be brought into account in determining the share of the net estate finally accruing to the child, grandchild or house. In the case of: In the matter of the Estate of Dorcas Njeri Githuku (deceased) – Nairobi High Court Succession Cause No. 1968 of 2002, the deceased was survived by one child, a married daughter and the Court held that she was her sole survivor and therefore the person entitled to the estate of the deceased under Section 38.
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> 8. In the instant case, the Petitioner has shown that she is the deceased's only surviving child and in the circumstances she is the one who is entitled to the deceased's estate. Her son, the Objector herein does not rank anywhere, except through the Petitioner, other considerations would have come into this matter and he would have had a share in the deceased's estate, but not otherwise."

14. I would agree with the submissions by the administratrix that the issues raised by the applicant are *res judicata*, to the extent that they are similar to those raised in the summons for revocation of grant dated 17th November 2014, which was the subject-matter of the ruling of 23rd September 2015. The issues have been decided by a Judge exercising concurrent jurisdiction with mine. I cannot purport to decide the same issues as were before Sitati J., as that would amount to me sitting on appeal on a determination made by my colleague. The children of the administratrix, who were left out of the distribution at confirmation, should have challenged the decision of 23rd September 2015 on appeal, instead of mounting a second summons for revocation of grant, founded on the same facts.

15. I believe that I have said enough. The summons for revocation of grant dated 11th January 2016 is without merit, and I hereby dismiss the same. Any party aggrieved is hereby granted leave to appeal to the Court of Appeal, within twenty-eight (28) days. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF JANUARY, 2021

W. MUSYOKA

JUDGE