



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 510 OF 2010**

**IN THE MATTER OF THE ESTATE OF HELON IHACHI ISIAHO (DECEASED)**

**JUDGMENT**

1. According to the certificate of death on record, serial number 334034, dated 15<sup>th</sup> July 2010, the deceased herein, Helron Ihachi Isiaho, died on 28<sup>th</sup> February 1979. According to the letter by a letter from the Chief of Sirumba Location, dated 15<sup>th</sup> July 2010, the deceased was said to have had been survived by two sons, a grandson and a daughter-in-law, being Andrea Luyeku, Tom Ihachi, Geoffrey Mutanyi Kanila and Grace Imeli, respectively. He was said to have had died possessed of Kakamega/Shivakala/1169.
2. Representation to the estate of the deceased was sought by Andrea Luyeku and Grace Imeli, in their capacities as son and daughter-in-law of the deceased, respectively, in a petition that was lodged herein on 9<sup>th</sup> August 2010. The deceased was expressed to have had been survived by the four individuals listed in the Chief's letter referred to above, and to have died possessed of the property mentioned in that letter. Letters of administration intestate were eventually made to the two petitioners, on 16<sup>th</sup> March 2011, and a grant was duly issued, dated 17<sup>th</sup> March 2011. I shall hereafter refer to the two as the administrators.
3. What I am called upon to determine is a summons for confirmation of grant, undated, filed herein on 15<sup>th</sup> July 2011. It is brought at the instance of both administrators. They have listed the survivors of the deceased to be the four individuals named in the petition and the Chief's letter. The property proposed for distribution is Kakamega/Shivakala/1169. The said summons provides for a schedule for distribution of the property as follows: -
  - a) 1.00 acres, to Andrea Luyeku;
  - b) 0.58 acres, to Tom Ihachi;
  - c) 0.58 acres, to Geoffrey Mutanyi Kanila; and
  - d) 0.58 acres, to Grace Imeli.
4. No consent, in Form 37, was filed, under Rule 40(8) of the Probate and Administration Rules, duly signed by the survivors or beneficiaries.
5. Curiously, one of the administrators who had allegedly signed on the application as one of the applicants, Grace Imeli, filed an affidavit of protest to the application, on 23<sup>rd</sup> February 2012, sworn on even date. I shall hereafter refer to her as the protestor, and her co-administrator, Andrea Luyeku, as the applicant. She avers in that affidavit, that she had not been consulted when the said application was filed in court, saying that she never signed any of the documents that were filed in court by her co-administrator. She specifically denounces the signature on the affidavit in support of the confirmation application, saying she did not sign it, and that it was a forgery. On the proposed distribution, she avers that the deceased also had another property, known as Kakamega/Shivakala/2052. She asserts that Tom Ihachi was not entitled to a share in Kakamega/Shivakala/1169, but was instead entitled to Kakamega/Shivakala/2052. She avers that Kakamega/Shivakala/1169 was supposed to be shared between herself, Andrea Luyeku and Geoffrey Mutanyi. She said that the land was demarcated on the ground and each of them had boundaries separating their respective parcels. She complains that a surveyor had not visited the land to determine the acreages before the distribution was proposed. She proposed that the parties be allowed to settle the matter outside of court prior to distribution by the court.
6. Directions were given on 11<sup>th</sup> July 2019, for disposal of the application by *viva voce* evidence, based on the affidavits on record.
7. The oral hearing happened on 18<sup>th</sup> November 2019. The protestor, Grace Queen Imeli, Identity card number 1323002, testified first. She explained that the deceased had two wives, Teresa Kalani and Dorca Ihachi. Teresa Kalani had four children, being Andrew Iluyeku Ihachi, the late John Musonye Ihachi and the late Chrisaf. The said wife had no daughters. She described herself as the widow of the late John Musonye Ihachi. She said that Chrisaf never married and had no children. The second wife, Dorca Ihachi, had three daughters and one son. She gave their names as Rita, the late Grace Ihachi, the late Ihachi and Tom Ihachi. She said all the daughters of the second wife had all been

married and had children. She explained that she did not support the application as the deceased had two houses and two farms. The first house was entitled to Kakamega/Shivakala/1169, while the second house was entitled to Kakamega/Shivakala/2052. She said that the applicant had built a house on Kakamega/Shivakala/2052 for his third wife. She testified that she had obtained a certificate of official search, which she said showed that the said property belonged to the deceased. She asserted that Kakamega/Shivakala/2052 should be given to Tom Ihachi and not the applicant. She complained that the applicant had not sat down the family to discuss the matter before he filed papers in court. She said that she was satisfied with the portion allocated to her in Kakamega/Shivakala/1169, and expected the applicant to be satisfied with what was assigned to him. She said that Geoffrey Kadira Mutanyi Ihachi, a child of Clement Kadira, was entitled to ½ acre in Kakamega/Shivakala/1169.

8. During cross-examination, she said that the deceased had already died by the time she got married into the family in 1985. She said that she moved into her portion in Kakamega/Shivakala/1169 in 1989, which was ½ acre, and her husband had showed her the extent of the land, and she asserted that she was satisfied with that portion. She confirmed that Andrea had ½ acre on Kakamega/Shivakala/1169, and so had Kadira. She asserted that Tom Ihachi was not entitled to a share in Kakamega/Shivakala/1169, and did not live on either Kakamega/Shivakala/1169 or Kakamega/Shivakala/2052. She said that the certificate of official search on Kakamega/Shivakala/2052, which she had produced, did not reflect the name of the deceased, but that of Josephine Mueni. She said that the applicant had not bought Kakamega/Shivakala/2052, but said that she did not have documents showing that Kakamega/Shivakala/2052 was ever registered in the name of the deceased.

9. The applicant, Andrea Luyeku, identity card number 3335234, testified next. He confirmed that the deceased had two houses as described by the protestor. He explained that the first house had three sons, one of whom died young. He conceded that he came to court alone as the protestor had refused to cooperate. He stated that the deceased died possessed of one parcel of land, Kakamega/Shivakala/1169. He explained that the other parcel that the protestor talked about, Kakamega/Shivakala/2052, was his, having bought it from William Ashitiva in 1975, and that was why he had settled his wife on it. He explained that Tom Ihachi was alive, but had moved to Molo many years ago, where he lived with his mother, who was divorced from the deceased, and remarried. He proposed that the property be shared out as per his proposal in his statement, which tallied with the proposal in the summons for confirmation.

10. During cross-examination, the administrator, stated that Tom Ihachi's mother lived on the land. The deceased had a land case with William Ashitiva over parcel number Kakamega/Shivakala/1169, which terminated with the deceased retaining Kakamega/Shivakala/1169 and William Ashitiva Kakamega/Shivakala/2052. He confirmed that there were boundaries on the land, showing the portions occupied by each of them. He asserted that the deceased had not distributed his land before he died, for if he had done so each one of them would have had their own title deeds. He said that it was the protestor who was opposed to Tom Ihachi being recognized as a survivor, insisting that the deceased had only one wife. He said that he had bought a piece of land adjacent to that of the deceased, and that during land adjudication it was demarcated as part of the deceased's land, hence the proposal that he should get a larger share of Kakamega/Shivakala/1169. He said that he had no documents to prove that he had bought such land, as the same got burnt when his house burnt down, but he said he had witnesses.

11. At the conclusion of the oral hearings, the parties opted to file written submissions. Both sides did comply. I have read their written submissions, which do no more than regurgitate the facts as set out in their papers and the oral testimonies that they gave in open court.

12. From the pleadings, affidavits and oral testimonies, I have identified only two issues for determination, that is whether the grant ought to be confirmed and how the estate should be distributed.

13. In confirmation applications, there are two principal factors for the court to consider, appointment of administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

*“Confirmation of Grants*

*71. Confirmation of grants*

*(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*

*(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—*

*(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or*

*(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or*

*(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or*

*(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:*

*Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”*

14. The principal purpose of confirmation of grant is distribution of the assets. The proviso to subsection (2) of section 71 requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

*“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all person entitled to the estate have been ascertained and determined.”*

15. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? What emerged at the oral hearing was that the deceased had two houses, something that had not come out in the documents filed by the applicant. The deceased died in 1979, before the Law of Succession Act came into force on 1<sup>st</sup> July 1981. That meant that, by virtue of section 2(2) of the Law of Succession Act, the estate fell for distribution according to the customs and traditions of his community, governing intestate succession. Judicial notice can be taken that under that law the persons entitled were the sons of the deceased. In this case, the first house had three sons, one died young leaving two alive. The second house had only one son. The estate was, therefore, available for distribution amongst the four sons. Of the four, only two were surviving at the date distribution was being proposed, that is to say the applicant and Tom Ihachi. The other two had died, that is to say John Musonye and Clement Ganira, and were represented by the protestor and Geoffrey Mutanyi, respectively. The second house had daughters, but these were not entitled under the applicable law. The other issue relates to the widow from the second house. She is still alive, but she was said to have had divorced the deceased, and married someone else. A divorced wife is not considered to be a surviving spouse of the deceased. As a consequence, the mother of Tom Ihachi is not to be counted as a survivor for the purpose of these proceedings. To that extent, I am satisfied that all the persons entitled had been ascertained.

16. The other aspect of the proviso is that the shares of the survivors or beneficiaries identified must be ascertained. In the affidavit sworn in support of the application, I note that the administrator had identified the shares of four individuals named as the survivors. One of the issues that ought to arise, with respect to shares, is of the assets sought to be distributed. Have they been ascertained? The applicant listed only one asset, Kakamega/Shivakala/1169, and that was what he proposes for distribution. The protestor argued that Kakamega/Shivakala/2052 was also an asset in the estate, yet she provided no evidence to support that contention. She produced a certificate of official search, unfortunately the same did not bear the name of the deceased, and she did not produce a green card which would have given a history of the property, linking to the deceased. In the absence of such evidence, it can only mean that the property does not form part of the estate and is not available as an asset in the estate.

17. The distribution proposed gives the applicant a larger share of the estate, with the other three getting smaller, equal shares of the balance. The parties made no effort to place the purport of Luhya customary law on the matter. In the absence of such evidence I shall be guided by the Law of Succession Act, sections 35(5) and 38, which envisage equal distribution of assets amongst the children. The applicant sought to justify getting a larger share by alleging that he had bought a piece of land adjacent to that of the deceased, and during demarcation his land and that of the deceased were adjudicated together as Kakamega/Shivakala/1169. He provided no proof of that, and I shall presume that Kakamega/Shivakala/1169 wholly belongs to the deceased, and the same ought to be shared out equally amongst all four sons of the deceased.

18. I note that the applicant did not file a consent in Form 37, as required by Rule 40(8) of the Probate and Administration Rules, duly executed by all the four survivors. At the oral hearing, only two of the survivors attended court. The other two, who are not administrators, did not attend court. They did not testify. I do not know their position on the distribution proposed. However, since I have already found and held that the property is to be shared equally, it would not matter much that the two did not execute a consent in Form 37, and did not testify at the oral hearing.

19. The final orders to make in this matter are:

**a) That the Summons for Confirmation of Grant, dated 16<sup>th</sup> July 2012, filed on even date, is hereby allowed, in the following terms –**

**(i) The grant made on 16<sup>th</sup> March 2011 is hereby confirmed, and**

**(ii) Kakamega/Shivakala/1169, being the only asset of the estate of the deceased, shall be shared equally between Andrea Luyeku, Grace Queen Imeli, Geoffrey Mutanyi Kanila and Tom Ihachi;**

**b) That a certificate of confirmation of grant shall issue to the administrators in those terms;**

**c) That, this being a family matter, each party shall bear their own costs; and**

**d) That any party aggrieved, by the orders made herein, has leave to move the Court of Appeal, appropriately, within twenty-eight (28) days.**

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

**W MUSYOKA**

**JUDGE**