



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 17 OF 2018

IN THE MATTER OF THE ESTATE OF SIMIYU WASIKE WALUBENGO (DECEASED)

JUDGMENT

1. According to the certificate of death on record, serial number 388830, dated 21st April 2010, the deceased herein, Simiyu Wasike Walubengo, died on 22nd January 2010. According to the letter from the Chief of Lukusi Location, dated 28th December 2017, the deceased was said to have had been married four times, and to have had been survived by one widow, ten sons and thirteen daughters, the surviving widow was listed as Nasaka Temturia. The sons are Isaac Mandila, Timothy Ngunete Moses Wakhungu, Boniface Simiyu, Patrick Simiyu, Joseph Chetambe, Joseph Walubengo, Thomas Sitati, Charles Ngunete, Richard Simiyu and Richard Simiyu. The daughters are listed as Joyce Nakhumicha, Margaret Rubia, Mary Nanjala, Neddy Simiyu, Frida Namaemba, Gladys Nambuswa, Ann Nanjala, Elizabeth Simiyu, Agneta Nasievanda, Salome Simiyu, Elizabeth Simiyu, Ann Simiyu and Joy Katogo. He was said to have died possessed of three pieces of land, being Ndivisi/Muhuu/514, Ndivisi/Muhuu/517 and Kakamega/Mabusu/101.

2. Representation to the estate of the deceased was sought by Isaac Mandila Simiyu and Timothy Ngunete Simiyu, in their capacities as sons of the deceased, in a petition that was lodged herein on 27th August 2018. The deceased was expressed to have had been survived by twenty-two individuals, and to have died possessed of the property mentioned in the chief's letter. The persons listed as the survivors are Joseph Chetambe, Moses Wakhungu, Patrick Kakai, Gladys Namburua, Joyce Nakhumicha, Net Simiyu, Margaret Rubia, Joseph Walubengo, Thomas Sitati, Charles Ngunete, Richard Simiyu, Eliza Simiyu, Salome Simiyu, Joy Kadogo, Athonina Simiyu, Alice Nyongesa, Rosemary Nasimiyu, Elizabeth Simiyu, Fridah Namaemba, Anne Naliaka, Agneta Nasieranda and Nasaka Temturia. The nature of relationship between them and the deceased was not disclosed. Letters of administration intestate were eventually made to the two petitioners, Isaac Mandila Simiyu and Timothy Ngunete Simiyu, on 27th February 2020, and a grant was duly issued, dated 27th February 2020.

3. A summons for revocation of the said grant was filed herein on 28th July 2020, by the widow, Temturia Nasaka Simiyu, dated 2nd November 2019. At the time the summons was being filed the grant had not yet been made. She complained that the consents of the survivors had not been sought. She went on to disclose the four wives that the deceased had married and their respective children. She complained further that the petitioners had listed two individuals who were not survivors of the deceased, being Alice Nyongesa and Rosemary Nasimiyu.

4. Isaac Mandila Simiyu filed an affidavit in reply to the application. He avers that the family had met prior to the filing of the petition, and agreed on the three individuals who were to represent the family as administrators, the third person being Joseph Walubengo, the adult son of the deceased. The said Joseph Walubengo did not cooperate, and so the two petitioners went ahead without him. He accuses the applicant of having sold a portion of the estate's land. He asserts that they had listed individuals who were all survivors of the deceased, saying the two named by the applicant were not strangers.

5. The application dated 2nd November 2019 was resolved on 28th July 2020 by consent. The grant made on 27th February 2020 was revoked by consent, and it was agreed that a fresh grant do issue to Nasaka Temturia Simiyu, Isaac Mandila Simiyu and Timothy Ngunete Simiyu. It was directed that the new administrators file for confirmation of their grant within forty-five days. Thereafter a grant in the names of the three individuals was issued on 30th July 2020.

6. A summons for confirmation of grant was subsequently filed on 26th September 2020, by Temturia Nasaka Simiyu, dated 24th September 2020. She has listed the survivors of the deceased to be seven sons and nine daughters. The property proposed for distribution is Ndivisi/Muhuu/514, Ndivisi/Muhuu/517 and Kakamega/Mabusu/101. The said summons provides for a schedule for distribution of the property as follows: -

a. Ndivisi/Muhuu/514, 21.27 acres, to the first house, that is to say Khasoa Watubwa Simiyu, Joseph Chetambe Simiyu, Moses Wakhungu Simiyu, Patrick Kakai Simiyu, Gladys Namburua Simiyu, Net Simiyu, Joyce Nakhumicha Simiyu, Fridah Namaemba Simiyu and Agneta Nabierandi;

b. Ndivisi/Muhuu/517, 7.4 acres, to the first house, that is to say Khasoa Watubwa Simiyu, Joseph Chetambe Simiyu, Moses

Wakhungu Simiyu, Patrick Kakai Simiyu, Gladys Namburua Simiyu, Net Simiyu, Joyce Nakhumicha Simiyu, Fridah Namaemba Simiyu and Agneta Nabierandi; and

c. Kakamega/Mabusi/101, 19.5 hectares, to the second house, that is to say Temtiria Nasakha Simiyu, Joseph Simiyu Walubengo, Thomas Sitati Simiyu, Charles Ngorete Simiyu, Elizabeth Nafula Simiyu, Salome Nanjala Simiyu, Richard Juma Simiyu, Ann Nekesa Simiyu, Joy Eila Simiyu, Ann Naliaka Simiyu and Eliza Simiyu.

7. A consent, in Form 37, was filed, under Rule 40(8) of the Probate and Administration Rules, on 28th September 2020, dated 24th September 2020, signed only by the survivors or beneficiaries from the second house. It is not signed by members from the other house.

8. A second summons for confirmation of grant was filed on 7th October 2020, by the other two administrators, dated 24th September 2020. They have listed the survivors of the deceased to be some twenty-two individuals named in the application. The property proposed for distribution is Ndivisi/Muhuu/514, Kakamega/Mabusi/101 and Kakamega/Mabusi/102. The said summons provides for a schedule for distribution of the property as follows: -

d. Ndivisi/Muhuu/514, 21 acres, Isaac Mandila (3 acres), Timothy Ngurete Simiyu (2 acres), Patrick Kakai Simiyu (2 acres), Moses Wakhungu Simiyu (2 acres), Neddy Siiyu (1/2 acre), Margaret Nasambu Simiyu (1/4 acre), Joyce Nakhumicha Simiyu (1/4 acre), Fridah Namaemba Simiyu (1/4 acre) and Nasaka Temturia Simiyu (7 acres to hold in trust for herself and her children);

e. Kakamega/Mabusi/101, 47 acres, to Isaac Mandila Simiyu (5 acres), Timothy Ngurete Simiyu (5 acres), Moses Wakhungu Simiyu (3 acres), Gladys Nambuswa Simiyu (1½ acres), Philip Kisaka Simiyu (4 acres), David Kakai Simiyu (2 acres), Patrick Kakai Simiyu (2 acres), Margaret Nasambu Simiyu (1/4 acre), Joyce Nakhumicha Simiyu (1/4 acre), Fridah Namaemba Simiyu (1/4 acre), Charles Walubengo Wasike (1½ acres), Jackson Makoto Wafula (1 acre), Rosemary Nasimiyu Makokha (1/4 acre), Alice Nyongesa Simiyu (1/4 acre), Agneta Nasiebanda Simiyu (1/2 acre), Grace Nakonjo Simiyu (2 acres), Elizabeth Nabangala Simiyu (1/2 acre), Kennedy Wanjala Nalianya (1/4 acre) and Nasaka Temturia Simiyu (15.3 acres to hold in trust for her children); and

f. Kakamega/Mabusi/102, 2.5 hectares, to Isaac Mandila Simiyu and Timothy Ngurete Simiyu (1.66 acres to hold in trust for themselves and their siblings) and to Nasaka Temtiria Simiyu (0.833 acres to hold in trust for her children).

9. Directions were given on 7th October 2020, for disposal of the two applications by way of *viva voce* evidence. 1st December 2020 was located as the date for hearing. The dates were allocated in the presence of Mr. Tanui and Mr. Kagunza for the parties.

10. Come 1st October, only Mr Kagunza and the party he represented, the administratrix and her house were in court. As the date had been taken in court, by consent, I proceeded to hear the parties that were before me. The person who testified was not the administratrix, Temtiria Nasakha, but her daughter Simiyu Ella Joy. She testified on her behalf, explaining that her mother was elderly. She stated that the deceased had two houses, and that she came from the second house. The whole family had sat and agreed on distribution. She explained that apart from the two houses, the deceased had other children, and that she had involved them in the process. She said that the deceased had settled the two families. The second house was settled at Mabusi B2 Scheme, while the first house was at Ndivisi Muhuu. She complained that after the deceased some members of the first house forced their way into the property at Mabusi.

11. Mr Kagunza represents the administratrix and the second house, the applicant in the application dated 24th September 2020. After he closed the case for the administratrix, he invited me to determine the matter.

12. Directions had been given on the disposal of the two summonses for confirmation of grant, and a date given in open court in the presence of the advocates for both sides for hearing. On the date appointed for hearing only one party was in court, the other party was absent, and no explanation was given. The party present presented her case, the absence of the other party meant that their case was not represented. Consequently, I shall allow the case of the party who breathed life to their application, and dismiss the application of the party who was absent. The effect is that the application dated 24th September 2020 is allowed, while the application dated 5th October 2020 is dismissed.

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

a. That the Summons for Confirmation of Grant, dated 24th September 2020, filed on 26th September 2020, is hereby allowed, in the following terms –

i. The grant made on 27th February 2020 is hereby confirmed, and

ii. Ndivisi/Muhuu/514, Ndivisi/Muhuu/517 and Kakamega/Mabusi/101 are devolved in the manner proposed, save that Ndivisi/Muhuu/514 and Ndivisi/Muhuu/517 are to be shared equally amongst the named members of the first house, Kakamega/Mabusi/101 shall devolve to the widow during life interest and thereafter to the named child in equal shares;

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 19TH DAY OF MARCH, 2021

W MUSYOKA

JUDGE