



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION NO. E651 of 2020

IN THE MATTER OF THE ESTATE OF JOSEPH MARTIN SHIKUKU OYONDI (DECEASED)

FRIDA NAFUNA SHIKUKU.....1ST OBJECTOR/APPLICANT

JACOB ANDECHE SHIKUKU.....2ND OBJECTOR/APPLICANT

STEPHEN ASHIEMBI SHIKUKU.....3RD OBJECTOR/APPLICANT

MARTHA SHIKUKU.....4TH OBJECTOR/APPLICANT

JACINTA AMUNGA SHIKUKU.....5TH OBJECTOR/APPLICANT

VERSUS

EMMANUEL NOEL OSYLE SHIKUKU.....PETITIONER/RESPONDENT

RULING

1. The deceased herein Joseph Martin Shikuku Oyondi died on 22.8.12 at the age of 79. A grant of probate of written will (the Grant), was issued to Emmanuel Noel Osyle Shikuku, the Respondent on 23.2.21.

2. By their Summons dated 15.3.2, Frida Nafuna Shikuku, Jacob Andeche Shikuku, Stephen Ashiemi Shikuku, Martha Shikuku and Jacinta Amunga Shikuku, the Applicants seek the following orders:

1. Spent.

2. Spent.

3. An order setting aside the grant of probate dated 23rd February, 2021 issued in respect of the estate.

4. That Stephen Ashiemi Shikuku and Jacob Andeche Shikuku be appointed as the Legal Representatives of the deceased's estate.

5. A grant of Letters of Administration ad colligenda bona be issued to Stephen Ashiemi Shikuku and Jacob Andeche Shikuku for purpose of:

a. Procuring bank statements from Absa Bank Limited Plaza Business Centre Branch account number [xxxx], Standard Chartered Bank Kitale Branch account number [xxxx], Standard Chartered Bank, Koinange Branch account number [xxxx], Dubai Bank account number [xxxx].

b. Opening and running an estate bank account;

c. Collecting and depositing rent in respect of apartments number C4 and C5 situate in Olive Apartments Lavington, Maisonette in Olympic Estate, Kibera Nairobi and Maisonette in south C;

d. Procuring possession through the assistance of Officer Commanding Station Central Police Station of motor vehicle registration number KAE 310D Nissan Patrol and;

e. Commencing and defending any proceedings for or against the estate.

6. Such further or other order as this Honourable Court deems just to grant.

7. Costs of this application be provided for.

3. In the supporting affidavit sworn on even date by Stephen Ashiemi Shikuku, the 2nd Applicant, on behalf of the other Applicants, it is averred that the deceased was polygamous. He married three wives, Dolly Achieng Shikuku (deceased), Beverlyn Ongecha Shikuku (deceased) and Frida Nafuna Shikuku, the only surviving widow. The deceased left the following persons surviving him:

- | | |
|-----------------------------|----------|
| i. Frida Nafuna Shikuku | widow |
| ii. Sylvano Madanji Shikuku | son |
| iii. Martha Akollo Shikuku | daughter |
| iv. Timothy Oyondi Shikuku | son |
| v. Emmanuel Noel Shikuku | son |
| vi. Abraham Andayi Shikuku | son |
| vii. Jacinta Amunga Shikuku | daughter |
| viii. Joan Ayuka Shikuku | daughter |
| ix. Stephen Ashiemi Shikuku | son |
| x. Jacob Andeche Shikuku | son |
| xi. Lucy Shikuku | daughter |

4. The Applicants contend that the Grant was obtained on the strength of a forged and fraudulent document purporting to be the will of the deceased. The Applicants accuse the Respondent of seeking through the purported will, to disinherit the beneficiaries of the deceased and obtained the Grant in secrecy without involving them in the proceedings to obtain the Grant. The Applicants contend that the deceased's 2 late wives Dolly and Beverly, daughters Maende and Julia and son Joseph are interred on the deceased's property known as Title No. Bungoma/Kiminini/259. Accordingly, the deceased could not have given the entire property to the Respondent as indicated in the purported will. The Applicants further accuse the Respondent of intermeddling with the estate of the deceased and intends to evict Fridah, the surviving widow of the deceased, from her matrimonial home on the said property.

5. The Applicants contest the will which is purported to have been drafted by Shamalla & Company Advocates and witnessed by the Right Honourable Retired Prime Minister Raila Odinga and Richard Leakey. According to the Applicants, the will is questionable and suspicious in that it does not recognise Frida, the surviving widow and does not disclose the names of the deceased's 10 known dependents. The purported will only provides for the Respondent and one Sylvano Madanji Shikuku to the exclusion of all others. The will does not also list all assets of the deceased and it took the form of a letter written by the deceased on the letter head of the said firm of advocates.

6. The Applicants further averred that the firm of Shamalla Advocates denied having authored the will or having the deceased as their client and further that at the time the will was made, the firm traded under the name and style of Jennifer Mary Shamalla. Further, Richard Leakey, one of the purported witnesses of the will denied by his letter dated 9.3.21 having witnessed the signing of the will.

7. The Applicants urged the Court to revoke the Grant and appoint Stephen Ashiemi Shikuku and Jacob Andeche Shikuku as joint administrators of the estate with powers to preserve and protect the deceased estate since there is a risk that the Respondent may proceed to deal with the properties and is likely to disinherit the other beneficiaries. The Applicants also urged to the Court to direct the Director of Criminal Investigations to investigate the matter.

8. The Applicants listed the following assets as forming the deceased's estate:

- i. Isukha/Lubao/1161
- ii. Bungoma/Kiminini/259 (formerly 259, 260, 261 and 262)
- iii. Apartment C4 and C5 at Olive Gardens, Lavington

- iv. Three-be maisonette at Olympic Estate, Woodley Kibera, House No.24
- v. Four-bedroom house, Butere, Kakamega County;
- vi. Nissan Patrol Registration Number KAE 310D;
- vii. Farm equipment (Tractors, plough, Harrow, hardi sprayer, planter and Trailer);
- viii. Bank deposits at Gulf Bank Kenyatta avenue accounts numbers, [xxxx], [xxxx] and [xxxx]
- ix. Standard Chartered Bank Limited, Koinange street branch account No.[xxxx].
- x. Standard Chartered Bank, Kitale Branch account number [xxxx],
- xi. Standard Chartered Bank Limited, Koinange street branch account No. [xxxx];
- xii. Absa Bank Limited Plaza Business Centre Branch account number [xxxx];
- xiii. Dubai Bank account number [xxxx].
- xiv. Shares with Kenya Power & Lighting Company Limited, certificate number [xxxx]
- xv. Shares with Kenya Airways.

9. In spite of service, the Respondent did not file any response to the Application nor did he attend the hearing of the same. The hearing proceeded by way of oral submissions by counsel for the Applicants. I have duly considered the Application as well as the said submissions authorities cited. The issues that emerge for consideration are:

- i. Whether the purported will of the deceased is valid.
- ii. Whether the Grant should be revoked.
- iii. Whether a fresh grant should be issued to Stephen Ashiemi Shikuku and Jacob Andече Shikuku.

Whether the purported will of the deceased is valid

10. It is the Applicants' case that the purported will of the deceased is a forgery. The Applicants relied on a letter dated 17.1.2020 from the firm of Shamalla Advocates in which they stated that they did not author the will and that the deceased had never been their client. This letter is however not useful in buttressing the Applicants' case. This is because the purported will was allegedly drawn by the firm of Shamalla & Company Advocates run by Hon. Japeheth Shamalla now deceased, and not the firm run by Jennifer Shamalla. Indeed, it is for this reason that in the letter, the said firm stated that it cannot confirm the authenticity of the will.

11. In his letter dated 28.1.2020, Richard Leakey, one of the witnesses in the presence of whom the deceased allegedly signed the purported will stated that his signature thereon is a forgery. He stated, ***"I have never signed as witness to a will drawn by the late Martin Shikuku."*** Section 11 of the Law of Succession Act stipulates that for a will to be valid, it must inter alia be witnessed by at least 2 witnesses as follows:

No written will shall be valid unless—

a) ...

b) ...

c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

12. Richard Leakey one of the alleged attesting witnesses of the purported will denied having witnessed a will made by the deceased and stated that his signature was forged. This alone renders the will invalid. The law is clear that no written will shall be valid unless attested by 2 or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will. Even if the will herein were indeed made by the deceased, the same would be invalid for want of 2 competent witnesses. In a situation it is unnecessary to call expert evidence to determine whether or not the signature in the will is that of the deceased.

13. A careful look at the purported will reveals a number of issues of concern. First, no advocate would prepare a will on the firm's letter headed paper. Secondly no advocate would entitle a will, ***TO WHO IT MAY CONCERN***. The language in the document is also not that of a lawyer. Notably, the Respondent did not respond to the Application. The claims by the Applicants therefore remain uncontroverted. All

these factors cast doubt on the authenticity of the will.

14. In view of the foregoing, it would appear to me that the document which the Respondent passed off as the will of the deceased is a forgery. Under the Penal Code, the uttering a false document as the Respondent herein has done, is a criminal offence that renders him liable for prosecution. Section 353 of the Penal Code provides:

Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.

Whether the Grant should be revoked

15. The grounds upon which a grant of representation may be revoked are stipulated in Section 76 of the Law of Succession Act which provides:

76 A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

a) that the proceedings to obtain the grant were defective in substance;

b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.

c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either –

i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

ii. to proceed diligently with the administration of the estate; or

iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

e) that the grant has become useless and inoperative through subsequent circumstances.

16. The Applicants seek revocation of the Grant on the ground that the will on the basis of which the Grant was issued, is a forgery. The Court has found that the will is invalid. Accordingly, the proceedings to obtain the Grant based on an invalid will were defective in substance. The Grant cannot therefore stand.

17. Further, the record shows that in his initial petition, the Respondent applied for a grant of letters of administration intestate. In that application, he listed as survivors of the deceased 4 children namely himself, Sylvano Mdanji Shikuku, Lucie Awor Shikuku and Martina Maende. The Applicants have however averred that the deceased was survived by a widow and 10 children, a fact that was not controverted.

18. It is clear to the Court that the Respondent obtained the Grant fraudulently by the making of a false statement, *to wit* that the deceased was survived by only 4 children. The Respondent also obtained the Grant by concealment from the Court the fact that the deceased was survived by a widow and other children, something that was material to the case. The Court is therefore satisfied that the grounds for revocation of grant have been established.

19. Further, Rule 26 of the Probate and Administration Rules provides:

1. Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

2. An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require

20. Under the provisions of Rule 26, the surviving widow and children of the deceased were respectively entitled to apply for a grant in priority to or in the same degree as the Respondent. Their involvement and consent were therefore mandatory. Their exclusion by the Respondent in the proceedings to obtain the Grant is sufficient ground to have the Grant revoked.

Whether a fresh grant should be issued to Stephen Ashiemi Shikuku and Jacob Andeche Shikuku

21. In the Application, the Applicants sought that that upon revocation of grant, a fresh grant be issued to 3rd Applicant and Jacob Andeche

Shikuku in place of the Respondent. However, at the hearing, counsel informed the Court that the person to be appointed administrator together with the 3rd Applicant is Martha Shikuku, the 4th Applicant and not Jacob Andeche Shikuku the 2nd Applicant.

22. The Act has conferred absolute discretion to the Court to make a determination as to the person(s) to whom a grant may be made. Section 66 of the Act provides:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

23. The 3rd and 4th Applicants are both children of the deceased. The Court sees no reason not to exercise its discretion to appoint both as administrators of the estate of the deceased in the best interests of all concerned. Once the administrators are appointed, they shall have powers as administrators to do all that they seek to be authorised to do in prayer 5 of the Application. The powers and duties of administrators are duly set out in Sections 82 and 83 of the Law of Succession Act.

24. In the result I find that the Summons dated 15.3.21 is merited and make the following orders as are necessary for the ends of justice:

- i. The grant of probate of written will issued to Emmanuel Noel Osyle Shikuku on 23.2.21 is hereby revoked.
- ii. Fresh grant of letters of administration of the estate of Joseph Martin Shikuku Oyondi is hereby issued to Stephen Ashiambi Shikuku and Martha Shikuku.
- iii. The Deputy Registrar is directed to furnish the Director of Public Prosecutions with a certified copy of this ruling together with the purported will with a view to considering initiating criminal proceedings against Emmanuel Noel Osyle Shikuku.
- iv. This being a family matter, each party shall bear own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 6TH DAY OF AUGUST 2021

M. THANDE

JUDGE

In the presence of: -

.....**for the Applicants**

.....**for the Respondent**

.....**Court Assistant**