REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 447 OF 2011

IN THE MATTER OF THE ESTATE OF PETRO MASHETI ASAMBA (DECEASED)

RULING

1. The application for determination is the summons for confirmation of grant, dated 22nd March 2019. It is brought at the instance of Robai Khanyeleli Andala, the administratrix of the estate herein. I shall refer to her, hereafter, as such.

2. The applicant has identified the survivors of the deceased to be 3 daughters, being Robai Khanyeleli Andala, Celina Kwahala Mukoya and Flocie Ayuma Muruka; and 3 grandsons, being Kennedy Liyayi, Samuel Ambeyi and Isaac Masheti. The deceased is said to have had 4 children, being the 3 daughters, and a son, who has since died, the late Jeremiah Shitsukane. He is said to be the father of the 3 grandchildren of the deceased, Kennedy Liyayi, Samuel Ambeyi and Isaac Masheti. The deceased died possessed of a property known as Kakamega/Iguhu/1157, measuring 19 acres or 6.4 hectares. It is proposed that the same be shared equally between the 4 children of the deceased, so that each gets 4.75 acres. It is further proposed that the share to the late Jeremiah Shitsukane should devolved upon his 3 sons, who would each take 1.58 acres.

3. Kennedy Liyayi Masheti has protested to the proposed distribution, saying that they were not involved in the distribution of the estate, and that the other beneficiaries did not sign a consent on distribution. He avers that after his parents died, his grandparents, including the deceased, took him and his siblings in as their own children, and, therefore, for the proposes of distribution, they ought to be treated as children of the deceased equally with the 3 daughters of the deceased. He proposes that the property, which he says measures 15.82 acres, ought to be shared equally between 3 daughters and the 3 grandchildren, and a Joy Atieno alias Mary Lihavi, whose relationship with the deceased he has not defined.

4. That prompted the administratrix to file a response. She avers that the protest had reminded her of some details. One such being the actual acreage of the land which is 6.4 hectares, which would translate to 16 acres, and not 19 or 15.82 acres. She then revises her proposal so that what is shared is 16 acres, with each of the 4 children taking 4 acres. She also avers that she is reminded that the deceased had a child called Joy Atieno alias Mary Lihavi, and she revises the distribution as between the grandchildren so that each takes 1 acre.

5. Directions were given on 30th November 2020, for canvassing of the application by way of written submissions. There has been compliance. The administratrix and the protestor have filed written submissions, which I have read through and noted the arguments made.

6. The deceased died on 26th September 2003, long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force. His estate is, therefore, for distribution in accordance with the provisions of the Act, specifically Part V thereof. He was survived by children but no spouse. One of the children had pre-deceased him, but he was survived by children of his own, 4 of them. Consequently, the relevant provisions, for the purpose of this distribution, ought to be sections 38 and 41 of the Law of Succession Act, which state as follows:

> *"38. Where intestate has left a surviving child or children but no spouse*
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> *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 shall be equally divided among the surviving children."*
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> *"41. Property devolving upon child to be held in trust*
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> *Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate."* (emphasis added)

7. Section 38 says that where the intestate is survived by children, the said children take the property equally. Section 41 says that where one of the children of the deceased is himself or herself deceased, and such deceased child is survived by a child or children of his or her own, then the share due to him or her ought to devolve upon his or her said child, and where more than one, the children would take equally.

8. The scenario here is that the deceased had 4 children, 3 survived him, and 1 had predeceased him, but was survived by his own children. The distribution pattern, therefore, should be that the estate is shared equally between the 4 children of the deceased, with the share due to the dead child being devolved equally between his 4 children.

9. That sounds fairly straightforward. However, the protestor argues that the deceased herein had taken him and his siblings as his own children after the demise of their parents. He would like his siblings and himself, therefore, to be considered to be children of the deceased, by dint of section 3(2) of the Act, for the purpose of section 38 of the Act.

10. I believe the case here is fairly straightforward. The deceased had 4 children. One died and his children came under the wings of the deceased. I am not persuaded that that act of caring for his own grandchildren constituted them his children. They remained his grandchildren. Under the law of intestacy their father is entitled to a share in the estate. There should be no reason for the protestor and his siblings to be treated as children of the deceased, when their own father has an automatic share to the estate. Section 3(2) of the Act is meant to take care of non-family members that male individuals often take under their wings and raise as if they were their own children. It should not be of application to grandchildren, given that such grandchildren have access to the estate of their deceased grandfather through their own late parents. To elevate them to the level of children of the deceased would be to do injustice to the real children of the deceased.

11. The protestor has raised several other issues: such as lack of consent to distribution, not being involved in the preparation of the application for confirmation, among others. The law provides a platform for survivors who wish to present their cases at confirmation to do so by filing affidavits of protest. The protestor has taken advantage of that. The fact, therefore, that he was not consulted over the making of the confirmation application, or that a consent in Form 37 was not filed, should not be fatal to the application, more so, in such a case as this, where the administratrix has made proposals that conform strictly with sections 38 and 41 of the Law of Succession Act.

12. The orders that I make finally are:

(a) That the grant made to the administratrix herein, on 9th December 2011, is hereby confirmed;

(b) That Kakamega/Iguhu/1157 shall devolve equally to Robai Khanyeleli Andala, Celina Kwahala Mukoya, the late Jeremiah Shitsukane and Flocie Ayuma Muruka;

(c) That the share devolving upon the late Jeremiah Shitsukane shall be distributed equally between his children: Kennedy Liyayi, Samuel Ambeyi, Isaac Masheti and Joy Atieno alias Mary Lihavi;

(d) That a certificate of confirmation of grant shall issue in those terms;

(e) That each party shall bear their own costs; and

(f) That any party aggrieved by this outcome, is hereby granted leave, of twenty-eight (28) days, to move the Court of Appeal, appropriately, on appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6th DAY OF August, 2021

W. MUSYOKA

JUDGE