

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 169 OF 2009

IN THE MATTER OF THE ESTATE OF FRANCIS ATABACHI LUKALE (DECEASED)

RULING

1. On 30th November 2017, Sitati J delivered a ruling herein, wherein it was ordered that searches be conducted to establish the acreage of two parcels of land, being Isukha/Shinyalu/51 and 1225, before the court embarks on the exercise of distributing the same amongst the persons beneficially entitled. The parties complied with those directions, by filing official searches, on 11th December 2017, on the two parcels of land, both dated 30th November 2017. According to those searches, Isukha/Shinyalu/51 and 1225, measure 1.4 hectares and 0.23 hectares, respectively.

2. Should I proceed to distribute the estate as per the orders of 30th November 2017? The two searches reveal something even more fundamental, about ownership. Both were registered on 19th May 1975, in the name of Khakoni Shiema. The deceased herein is one Francis Atubachi Lukale. The certificate of death on record, dated 15th November 2007, serial number 60762, is in respect of Francis Atubachi Lukale. The letter from the Chief of Shibuye Location, introduced to the court a person known as Francis Atubachi Lukale, and made no mention of Khakoni Shiema. There is nothing on record to indicate that Francis Atubachi Lukale and Khakoni Shiema were one and the same person. That would mean, therefore, that Isukha/Shinyalu/51 and 1225 do not vest in the estate of the deceased herein, for they are assets belonging to Khakoni Shiema. The two are, therefore, not available for distribution in the estate herein, until it is established that Khakoni Shiema was the other name for the deceased herein.

3. The official search for Kakamega/Shinyalu/446, dated 14th May 2008, shows that the deceased herein is the registered proprietor of the said property. The registration, curiously, happened on the same date with those for Isukha/Shinyalu/51 and 1225, on 19th May 1975. That would mean that that is the only asset available for distribution in the out estate herein. Consequently, that is the only asset that I shall proceed to distribute.

4. The survivors entitled to a share in Kakamega/Shinyalu/446, as identified in the ruling of 30th November 2017, are Philip Muchesia, Peter Shiakava Atavachi, Patrick Siema, George Lukale and the family of the late Gerald Muhanji. The deceased died on 7th March 2004, after the Law of Succession Act, Cap 160, Laws of Kenya, had come into operation in 1981. The estate is available for distribution in terms of Part V of the Act. The survivors are children of the deceased, and there is no surviving spouse. Section 38 of the Act shall apply, so that the property is shared equally between the 5 sons.

5. For avoidance of doubt, section 38 of the Law of Succession Act says as follows:

“38. Where intestate has left a surviving child or children but no spouse 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.”

6. The grant on record is hereby confirmed, in the terms that I have set in paragraph 4 above. The share due to the dead son of the deceased shall pass to his estate, to be distributed in succession proceedings to be mounted in his name, as there is nothing on record to indicate whether he had other children, apart from the one disclosed. Anyone aggrieved by these orders has leave of 28 days to move the Court of Appeal appropriately. It is so ordered.

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

W. MUSYOKA

JUDGE