



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSENO. 230 OF 2011

IN THE MATTER OF THE ESTATE OF CHRISTOPHER WASHIKA ONGOMA alias PANCRAS (DECEASED)

JUDGMENT

1. I am called upon to determine an application for confirmation of grant, dated 16th December 2013. It is purported, on the face of it, to have been brought by a person known as Milka Akiru Parapara, an administratrix of the estate. The affidavit in support of the application is, however, sworn by Phanice Kusimba Sumba, who describes herself as the 1st petitioner, one of the administrators of the estate. I shall accordingly refer to Phanice Kusimba Sumba, as the applicant. I shall treat the reference to Milka Akiru Parapara as an error on the record.

2. The applicant states the persons who survived the deceased to be Phanice Kusimba Sumba, Tiberius Adrian Nanzai Washika, Kevin Apolinaris Washika, Wilson Washika Ongoma, Elizabeth CA Washika and Esther Nechesa Washika. She proposes that South Wanga/Buchifi/1349 be shared out equally amongst the six survivors; Marama/Shinamwenyuli/1995 be shared out equally amongst the six survivors; and that South Wanga /Buchifi/1138 be shared unevenly between the six survivors so that Phanice Kusimba Sumba, Wilson Washika Ongoma and Esther Nekesa Washika take 3 acres of the land, with the balance of 7 acres going to Tiberius Adrian Nanzai Washika, Kevin Apolinaris Washika and Elizabeth CAM Washika. Motor vehicle registration mark and number KJM 515 and LR 209/9524/84 are to be sold and the proceeds of sale shared equally amongst the six survivors. The shares and dividends in Kenya Commercial Bank Limited, Firestone East Africa Limited, Nation Media Group Limited, Standard Chartered Bank Kenya Limited, Mumias Sugar Company Limited and Barclays Bank of Kenya Limited are to be shared equally. The death gratuity held by the Public Trustee, Kakamega, is also to be shared equally. The moneys held in the accounts operated by the deceased in Kenya Commercial Bank Limited Mumias Branch (091-126044299) and Barclays Bank Kenya Limited, Kakamega Branch (0098700986) to be shared equally amongst the six survivors. It is proposed that the rental income collected from the house on LR 209/9524/84 be accounted for before the sale, and thereafter shared equally amongst all six survivors. That proposed distribution is supported by the applicant, and also by Wilson Washika Ongoma and Esther Nechesa Washika, who have signed a consent, dated 6th December 2013, which was simultaneously filed with the application.

3. The application provoked the filing of an affidavit of protest, by Tiberius Adrian Nanzai Washika, Kevin Apolinaris Washika and Elizabeth CAM Washika, through a joint affidavit that they swore on 4th August 2014. I shall refer to them as the protestors. They aver that the applicant was only entitled to a life interest in the share that was due to her children, being Wilson Washika Ongoma and Esther Nechesa Washika. They also aver that LR 209/9524/84 had been bought by their mother, the late Lydia Auma Washika, long before the applicant began to cohabit with the deceased, and the same was registered in the name of the deceased as a trustee. They assert, therefore, that the rent from that property was due to them exclusively. Indeed, they assert that that property does not form part of the estate of the deceased. They would also like the applicant to account for the sugarcane proceeds from South Wanga/Buchifi/1138. They further aver that the shares in Kenya Commercial Bank Limited, Firestone East Africa Limited, Nation Media Group Limited, Standard Chartered Bank Kenya Limited, Mumias Sugar Company Limited and Barclays Bank of Kenya Limited were registered in the name of the deceased on transmission from their late mother, they had been jointly purchased by the deceased and their late mother, and that they were held in trust for them, and therefore the applicant and her children were not entitled to them. In the end they propose distribution as follows. South Wanga/Buchifi/1349, Marama/Shinamwenyuli/1995 and South Wanga/Buchifi/1138 to be shared equally amongst the five children, with the applicant having a life interest in the shares going to her two children. It is proposed that LR 209/9524/84 be shared equally between the children of the late Lydia Auma Washika, that is to say Tiberius Adrian Nanzai Washika, Kevin Apolinaris Washika and Elizabeth CAM Washika. It is proposed that the death gratuity be shared equally by all the survivors, while all the shares in Kenya Commercial Bank Limited, Firestone East Africa Limited, Nation Media Group Limited, Standard Chartered Bank Kenya Limited, Mumias Sugar Company Limited and Barclays Bank of Kenya Limited to be devolved upon Tiberius Adrian Nanzai Washika, Kevin Apolinaris Washika and Elizabeth CAM Washika.

4. Both sides were unable to agree on the mode of distribution, forcing the court to give directions on the disposal of the application, on 1st October 2013 and 30th June 2015, to the effect that disposed be by way of *viva voce* evidence. The oral hearing happened on 23rd July 2019. Only the applicant and one of the protestors testified.

5. One of the protestors, Kevin Apolinaris Washika, who is also one of the administrators, was the first to take the stand. He described the applicant as his stepmother, who was married after his own mother died, and therefore, the deceased was not a polygamist. According to him, the deceased had only one house. He stated that he proposed a distribution that separated the two sides of the family, so that the property was shared between the children of the first wife on one hand, and the applicant and her children on the other hand. On LR 209/9524/84, he stated

that although the property was registered in the name of the deceased, it was actually his mother who bought it, using shares that she had in East Africa Industries Limited. He conceded that he did not have documents to support that contention. He also stated that the shares in the various companies should also devolve upon the protestors as they sued to belong to their mother, when she died, they passed on to the deceased. He stated that all the assets were acquired before the applicant came into the family. During cross-examination, he stated that LR 209/9524/84 was occupied by a tenant who was paying Kshs. 25, 000.00 per month, and that it was the protestors who were collecting the rent. He conceded that all the assets were in the name of the deceased.

6. The applicant followed. She stated that all the assets were in the name of the deceased. She confirmed that the deceased had a first wife, known as Lydia Auma, who was the mother of the protestors. She stated that she married the deceased before the first wife died. She stated that the first wife was a primary school teacher, while she was not in formal employment. She stated that the deceased did not buy any property after the deceased died. She said that LR 209/9524/84 was acquired before the first wife was married. During reexamination, she conceded that she married the deceased after the first wife died, but said that she already had children with the deceased by then. She stated that she had not seen any documents showing that some of the property belonged to the late first wife. She stated further that the deceased had informed her that he had acquired all the assets.

7. In confirmation applications, there are two principal matters for the court to consider: appointment of the 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.”

8. The principal purpose of confirmation 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.”

9. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? There is a letter on the record from the Chief of Buchifi Location, dated 9th March 2011, which indicates that deceased was survived by the six individuals named in the summons for confirmation of grant, and the affidavit of protest. These six individuals are listed in the petition for letters of administration intestate, which was filed herein on 25th March 2011, as the survivors of the deceased.

10. It is clear from the filings that the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules were complied with. No one has been left out. The distributions proposed by both sides, although they differ in substance, cater for all six survivors. There is no contest in the protest about the composition of the family of the deceased.

11. The second consideration should be whether the assets of the estate have been ascertained. This is critical as the succession cause is all about distribution of the property that the deceased died possessed of. Both sides are agreed on the assets that were left in the name of the deceased. The protestors, however, argue that some of the assets were actually acquired by their mother before the applicant joined the

family. I am satisfied, therefore, that the assets that made up the estate were ascertained, nothing has been concealed, nor omitted from the schedule.

12. The third consideration is how the assets of the estate ought to be distributed amongst the persons that have been identified as survivors of the deceased. It is common ground that the deceased was survived by a spouse and five children. Under Part V of the Law of Succession Act, which governs intestate succession, where intestacy happens, like in the instant case, distribution would take several forms, depending on whether the deceased was survived by a spouse and children, section 35; or by a spouse without children, section 36; or by children but no spouse, section 38; or by no spouse nor children, section 39; or was a polygamist, section 40. The said provisions states as follows:

“35. Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) ...

(3) ...

(4) ...

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children. [Act No. 8 of 1976, s. 7, Act No. 16 of 1977, Sch.]

36. Where intestate has left one surviving spouse but no child or children

(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—

(a) the personal and household effects of the deceased absolutely; and

(b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and

(c) a life interest in the whole of the remainder: Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to

(2) The Minister may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1).

(3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in section 39. [Act No. 8 of 1976, s. 8.]

37. Powers of spouse during life interest

A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.

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.

39. Where intestate has left no surviving spouse or children

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the

intestate in the following order of priority—

- (a) father; or if dead
- (b) mother; or if dead
- (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
- (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
- (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

40. Where intestate was polygamous

- (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
- (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38”

13. In the instant case, it would appear that one side of the family argues that the deceased was a monogamist, and since he was survived by a widow and children, the section 35 applied. The other argument appears to be that the deceased had two families, that of the first wife, the late Lydia Auma, and the second one, of the applicant. It would appear that that would mean that the estate fell for distribution under section 40. It must be stated that the positions taken by both sides appear to be quite fluid. I note that the children of the first wife appear to embrace both arguments. They assert that the deceased was not a polygamist, while at the same time emphasizing that the deceased had two wives.

14. Was the deceased a monogamist or a polygamist? The answer to that question will determine the mode of distribution that should be adopted eventually. It is common ground that the deceased married twice, not simultaneously but serially. The applicant was married after the mother of the protestors died. It cannot, therefore, be asserted that he was a polygamist, for he did not have two wives at the same time. Was he a monogamist? Yes, he was, first with the mother of the protestors, and later with the applicant. The end result was that he ended up with two sets of families, children born of the first wife, and of the applicant.

15. The provisions in Part V, that I have set out above, with respect to distribution of the assets of an intestate, do not provide for a scenario like what is before me. It provides strictly for situations, where the deceased had married during his lifetime, in which he was either a polygamist or a monogamist, and not where he be assumed a second wife after the demise of the first wife. My position, with regard to that scenario, would be that, although in reality the deceased was not a polygamist, in the sense of having several wives at the same time, the fact that he ended up with two or more sets of children, with women that he married in a series, after the death or divorce of the first wives, meant that his situation mirrored that of a polygamist, and section 40 should apply to the distribution of his estate. I shall, therefore, distribute the estate of the deceased herein based on section 40 of the Act.

16. My understanding of section 40 is that the polygamist’s estate has to be distributed amongst his family by taking into account the number of households in the family, and the number of children in each household. The estate is then distributed, or shared out, amongst the households taking into account the number of surviving spouses and children in each household. The deceased had two wives, and children with each one of them. The late Lydia Auma had three children, being the protestors herein, while the applicant had two children. I shall take it that the family of the late Lydia Auma was the first house, which has three children, while the family of the applicant was the second house, which has two children. Adding the surviving widow, the applicant, as an additional unit to the children, means that the first house had three units and the second house three units, making a total of six units. The ratio of sharing should work out at 3:3 therefore.

17. There was the argument that some of the assets did not belong to the estate, since the deceased had held them in trust. It was submitted that the mother of the protestors had acquired some of the assets, but they were registered in the deceased’s name. It was also argued that the mother of the protestors had bought the shares in the firms, and the said shares then reverted to the deceased upon her death, through the process of succession. The protestors did not file any documents to support their assertions, that their mother was the person who had acquired the said assets, and, therefore, their father only held them in trust for them. The protestor who gave oral evidence at the hearing conceded that he had no documents to support his case. Since the allegations were not supported by any evidence, I shall take it that all these assets were the property of the deceased, available for distribution to all.

18. The other argument was that all the assets were acquired during the coverture of the deceased and the mother of the protestors. The applicant conceded as much. However, I was not pointed to any statutory provision in the Law of Succession Act, that provides that in distributing an estate of a polygamist, I should take into account the time at which each of the wives got into the family, and when the assets were acquired , so as to assess who had contributed to the acquisition of what. The statute generally envisages equal distribution, and I shall distribute the estate with that in mind. If there was desire on the part of any of the wives to have their shares as spouses determined then they should have filed a matrimonial property dispute to determine just that. I do not think the probate court is the place for determining such questions. If it is felt that that ought to be taken into account, then Parliament should be caused to amend the Law of Succession Act to provide for the same.

19. It was submitted that those collecting rent from the Nairobi property ought to account for those rents, and that those utilizing the farms, by planting sugarcane, should do the same. There was an indication on the rent collected per month by the first house from the Nairobi

property, however, the applicant was not questioned about the cane she was farming on one of the lands. She did not controvert that allegation when the same was made in the affidavit of the protestors. It would appear that both houses have benefited from income accruing from the estate. I feel disinclined to push either of them to account for what they have collected.

20. The protestors asserted that the applicant, as a surviving widow, was only entitled to a life interest in the share that was to go to her children. The distribution envisaged in section 40 actually treats the surviving spouse as if she was one of the children. It is for that reason that the second house would end up being three units instead of two. That then means that, although section 40(2) brings into play the application of the life interest principle through sections 35 to 38, the additional unit referred to in section 40(2) would in fact be the widow's share. In my view since she has an additional unit to herself, it would not matter whether she retains a life interest over the entire 3 shares due to her house or she takes the additional unit's share absolutely. The sum of it, in my understanding, is that under section 40, all the survivors, be they spouses or children, get to share the property equally. Equal distribution would appear to be more reasonable where the ratio of distribution is even, as in this case.

21. On appointment of administrators, I do note that the first house had mounted an objection, which was compromised through a consent that was recorded before the Deputy Registrar on 31st July 2014. Since appointment of the administrators was by consent, and since none of the two sides have raised issue with the manner of the said appointment, or with their manner of administering the estate, I shall confirm them as administrators, so that they can complete the exercise of administration by distributing the estate in the terms that shall be ordered in this judgement.

22. In view of what I have stated above, I shall dispose of the application, dated 16th December 2013, in the following terms:

a. That I hereby confirm Phanice Kusimba Sumba and Kevin Apolinaries Sumba as the administrators of the estate of the deceased herein;

b. That I hereby declare the said Phanice Kusimba Sumba as the surviving spouse of the deceased; and Tiberius Adrian Nanzai Washika, Kevi Apolinaries Washika, Wilson Washika Ongoma, Elizabeth CAM Washika and Esther Nechesa Washika as the surviving children of the deceased;

c. That declare that the family of the deceased comprised of two houses, being the house of the late mother of the protestors as the first house and that of the applicant as the second house;

d. That the estate of the deceased shall be shared out between the two houses of the deceased at a ratio of 3:3 in terms of section 40 of the Law of Succession Act;

e. That all the assets of the estate, identified in the summons for confirmation of grant and the affidavit of protest, shall be shared equally between all the six survivors of the deceased for the reasons given in paragraphs 17,18 and 20 of this judgement;

f. That a certificate of confirmation of grant shall issue accordingly in those terms;

g. That each party shall bear their own costs; and

h. That any party aggrieved by the orders that I have made herein shall have the liberty, within twenty-eight (28) days, to move the Court of Appeal, appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF MARCH, 2020

W. MUSYOKA

JUDGE