



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 726 OF 2011

IN THE MATTER OF THE ESTATE OF SHEM OMUHONJA (DECEASED)

RULING

1. On 8th November 2019, I delivered a judgement herein, wherein I made orders and gave the directions as follows:

- (a) That I hereby postpone confirmation of the grant herein, in terms of section 71(2)(d) of the Law of Succession Act, Cap 160, Laws of Kenya;
- (b) That I direct the administrator to file a further affidavit in which he shall list the names of the daughters of the deceased, if the deceased had any, and the names of all the children of the late John Khatika and the late Martin Estimile;
- (c) That the further affidavit in (b) above shall be filed within twenty-eight (28) days;
- (d) That the matter shall be mentioned thereafter on a date to be obtained at the delivery of this ruling; and
- (e) That I shall make final orders on the application dated 5th August 2014 once the administrator complies with (b) above.

2. In an effort to comply with the said orders and directions, the protestor swore an affidavit on 25th November 2019, and filed it herein on 27th November 2019. He explains that the deceased was his grandfather, who had four daughters, who are all now deceased, and their names are given as Miriam Amisi, Gladys Oranga, Roslyne Oranga and Lucy Njiwa. He further gives details of the children of the two sons of the deceased two late sons of the deceased. The children of the late John Khatika are listed as Johnstone Otemba John, Appolo Nabule John, Dorah John, Rose John and Judith Aluso John; while the children of the late Martin Estimile are Jefris Aluso Estimile, Fanis Aluso Estimile, Roselyne Estimile, Gladys Oranga Estimile and Rispah Anono.

3. The background to those orders and directions was that the administrator had not complied with the proviso to section 71(2) of the Law of Succession Act, by ascertaining all the persons beneficially entitled to a share in the estate of the deceased. One category of the individuals beneficially entitled identified as not having been disclosed were the daughters of the deceased. It is now clear that the deceased had daughters who have since died. It is not disclosed whether they had married, and whether they had children, and whether their descendants were notified of these proceedings. The requirement to have all the persons beneficially entitled ascertained is so that they can be brought forward and involved in the process so that they can indicate whether or not they would be entitled to take a share in the estate of the deceased.

4. The deceased herein died in 1974, representation to the estate was not sought until 2009. Going by section 2(2) of the Law of Succession Act, the substantive law to govern distribution of his estate ought to be the law that was in force prior to the Law of Succession Act coming into force, which largely meant African customary law and the Indian Probate and Administration Act of 1881. However, on administration, section 2(2) provides that the same should be based on Part VII of the Law of Succession Act, so long as administration is sought after 1st July 1981, when the Law of Succession Act came into force. It is in that context that section 71(2), which is in Part VII, has to be complied with.

5. Going by section 2(2), it would appear that customary law applies to the distribution of the estate. It will be noted that the customary law of succession is discriminatory against women, and it has largely been tempered by the Constitution and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). That would mean that despite the application of customary law through section 2(2), because of its discriminatory nature against women, its principles are overridden by the Constitution and the Convention, and it would not matter when the deceased passed on, the property ought to be distributed equally amongst all the children, be they male or female.

6. The daughters have been disclosed, but the parties have not disclosed their descendants. I am not altogether satisfied that there is now full compliance with the proviso to section 71(2) of the Law of Succession Act. I still feel that the descendants of the daughters of the deceased are not being factored in the distribution, and to that extent there would be violation of the Constitution and the Convention. I shall, however, cling on the fact that the deceased died in 1974, and that at that time the estate would have been distributed according to customary law. It is not altogether a very good place, but I shall nevertheless distribute the property herein minus the descendants of the daughters. However, I

shall be vigilant to ensure that the female descendants of the late sons of the deceased get their due share.

7. It is common ground that the deceased had four sons, the administrator herein, who is the only son who is alive, and three who are deceased, being John Khatika, Peter Afia and Martin Estimile. Peter Afia died without a spouse or children, but the other two were survived by families. That then would mean that the estate herein should be shared out between the administrator herein, Nelson Shem Oluoch, and the children of his late brothers, John Khatika and Martin Estimile, enumerated in the affidavit that I have recited in paragraph 2 here above.

8. It is also common ground that the deceased died possessed of two parcels of land, being West Bunyore/Embali/951 and 1656. It would appear that the family of the late Martin Etsimile resides on West Bunyore/Embali/1656, a fact that is attested to by both sides. The administrator would like West Bunyore/Embali/951 devolved wholly upon, on the argument that the John Khatika had been given his own share of the land, which he sold and relocated to Tanzania, with the suggestion that he squandered the sale proceeds there. I have no material before which establishes that the late John Khatika was given any land by the deceased prior to the latter's death. I shall, therefore, take it that nothing of that nature ever happened, and the family of the late John Khatika is entitled to a share of West Bunyore/Embali/951.

9. In sum, therefore, West Bunyore/Embali/951, shall be shared equally between the administrator and the estate of his late brother, John Khatika. The share of West Bunyore/Embali/951 going to the estate of the late John Khatika, shall be distributed equally between Johnstone Otemba John, Appolo Nabule John, Dorah John, Rose John and Judith Aluso John. West Bunyore/Embali/1656 shall devolve to the estate of the late Martin Estimile, to be shared out equally between his children, that is to say Jefris Aluso Estimile, Fanis Aluso Estimile, Roselyne Estimile, Gladys Oranga Estimile and Rispah Anono.

10. The final orders are:

- (a) That the grant of letters of administration intestate made on 11th October 2012, to Nelson Shem Oluoch, is hereby confirmed;**
- (b) That the estate shall be distributed in the terms spelt out in paragraph 9 of this ruling;**
- (c) That a certificate of confirmation of grant shall issue accordingly;**
- (d) That each party shall bear their own costs; and**
- (e) That any party aggrieved by the orders made herein, is at liberty to move the Court of Appeal, appropriately, within twenty-eight (28) days.**

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

W. MUSYOKA

JUDGE