



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 295 OF 2003

IN THE MATTER OF THE ESTATE OF AKHURA KUBAKHA alias AKHURA MUYALE (DECEASED)

JUDGMENT

1. The certificate of death serial number 652340, dated 23rd October 2001, indicates that the deceased to whose estate this cause relates, was known as Akhura Kubakha, who died on 16th November 1987. There is a letter on record from the office of the Chief of Mukuyu Location, dated 27th February 2002. It indicates that the deceased had been survived by seven (7) individuals, a widow, five sons and a brother. The widow is expressed to be Berneta Achenya Akhura, while the sons are described as Julius Muchika Akhura, Richard Muyale Akhura, Zakayo Amboso Akhura, John Liluma Akhura and Peter Ingosi Akhura; while the brother is named as Peter Busula Muyale. The deceased is said to have had died possessed of a property described as Isukha/Mugomari/276.
2. A petition for letters of administration intestate was lodged herein by Julius Machika Akhura, in his capacity as son of the deceased. In the affidavit in support he has listed the individuals named in the Chief's letter, that is to say Berneta Achenya Akhura, Julius Muchika Akhura, Richard Muyale Akhura, Zakayo Amboso Akhura, John Liluma Akhura, Peter Ingosi Akhura and Peter Busula Muyale. He is also expressed to have died possessed of the property known as Isukha/Mugomari/276. Letters of administration intestate were made to the petitioner on 17th October 2003, and a grant was duly issued to him, dated 24th October 2003. I shall subsequently refer to the petitioner as the administrator.
3. The administrator lodged an application herein on 6th December 2011, for confirmation of grant, dated 6th December 2011. In the affidavit in support of the summons, he listed the survivors of the deceased to be the seven individuals listed in the Chief's letter and the petition, that is to say Berneta Achenya Akhura, Julius Muchika Akhura, Richard Muyale Akhura, Zakayo Amboso Akhura, John Liluma Akhura, Peter Ingosi Akhura and Peter Busula Muyale. He proposes that the asset of the estate, Isukha/Mugomari/276, be shared out equally between four sons of the deceased, being Julius Machika Akhura, Richard Muyale Akhura, Zakayo Amboso Akhura and John Liluma Akhura.
4. The application dated 6th December 2011, was placed before the Judge on 20th March 2012, and was allowed, meaning that the grant was confirmed on the terms proposed in that application. A certificate of confirmation of grant was duly issued, dated 28th March 2012. Isukha/Mugomari/276 was devolved, equally, to Julius Muchika Akhura, Richard Muyale Akhura, Zakayo Amboso Akhura and John Liluma Akhura, with each one of them taking 0.70 of a hectare.
5. It would appear that the orders made on 20th March 2012 provoked the filing of the summons for revocation of grant, dated 21st November 2016, by the widow of the deceased. She complains, in that application, that the distribution excluded the family of the late Stephen Ingosi Akhura, a son of the deceased who had died. She states that the court was misled that he had died without family, yet he had left behind two widows, Leah Nekesa and Indombo, both of who had children. She also says that the deceased had been survived by a brother, who was entitled to a portion of Isukha/Mugomari/276, which was ancestral property. She states that the consent on distribution was executed by only two of the beneficiaries.
6. The administrator did not reply to the application, and when the application came up for hearing before the Judge on 23rd October 2018, it was allowed as prayed. However, the said orders did not appoint fresh administrators.
7. On 20th November 2018, a summons was lodged herein by Julius Machika Akhura, seeking to be appointed administrator, and for confirmation of the grant. He proposed that the estate be shared out between the seven individuals listed in the petition, with the share for the late Stephen Ingosi Akhura going to his widow, Leah Nekesa, to hold in trust for her children.
8. The application was placed before me on 20th January 2020. I opted to hear the parties orally before making fresh appointments and distributing the property.
9. The surviving widow, Bereneta Ajenya Akhura, was the first on the stand. She described the deceased as her husband, with whom they had four children, being Richard Muyale, Zakayo Amboso, John Liluma and Stephen Ingosi. The deceased had a fifth son, known as Julius

Machika Akhura, with another woman, known as Sevenzia. He described Peter Busula Muyale as a brother of the deceased. She stated that Stephen Ingosi had died, and was survived by a widow, known as Leah Nekesa. She explained that during demarcation, Peter Busula was a minor, and the whole of the family land, Isukha/Mugomari/276, was, for that reason, registered in the name of the deceased, which included a portion that was due to Peter Busula.

10. Peter Busula Muyale testified next. He described the deceased as his brother. He confirmed that he was married to Bereneta Ajenya Akhura, and that they had four children being Julius Machika, Zakayo, Liluma and Ingosi. He stated that one child was deceased, he identified him as Muyale. She identified Leah Nekesa as the widow of the late Stephen Ingosi. He explained that the deceased was his elder brother, and that during land adjudication, the family land, Isukha/Mugomari/276, was registered in the deceased's name. He stated that he was entitled to a portion of Isukha/Mugomari/276. He further stated that the surviving widow of the deceased had showed him his portion, and surveyors had mapped out his share. He stated that he supported the mode of distribution proposed in the application.

11. In a confirmation application, the court is called upon to address two issues – appointment of the administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act 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.”

12. With respect to the appointment of administrators, the court is required to ascertain whether the administrators had been properly appointed. Secondly, the court is required to evaluate whether, upon being so properly appointed, if it does find that they were so properly appointed, the administrators went about administering the estate in accordance with the law. Finally, the court is required to assess whether the administrators, upon confirmation of their grant, would continue to properly administer the estate in accordance with the law.

13. In the instant case, there are no administrators. The grant made on 17th October 2003 was revoked on 23rd October 2018. So the task before me is not confirmation of the administrators but their appointment. The previous administrator did not respond to the revocation application. He had been accused of failing to provide for two sets of beneficiaries, the brother of the deceased, Peter Busula Muyale, and the family of the late Stephen Ingosi Akhura. The fact that he did not respond to that application meant that he was not ready to account, yet the office he held was one of trust, where he was bound to account. I shall accordingly not consider him for reappointment as administrator.

14. The deceased was survived by a spouse. She is the one who had mounted the revocation application. Under section 66 of the Law of Succession Act, the surviving spouse has a prior right to administration over the children and siblings of the deceased. So the surviving spouse herein is eminently qualified for appointment. I shall consider appointing the brother of the deceased to assist her.

15. Before I venture to discuss distribution of the estate, let me first consider whether the requirements of the proviso to section 71(2) of the Law of Succession Act have been complied with. That proviso makes it a requirement that the court, before it confirms a grant, be satisfied of certain things. First, that the administrators have ascertained the persons who were beneficially entitled to the estate, the assets that make up the estate and the shares to which the persons who are beneficially entitled have been allotted. Ideally, the issues to appointment of administrators and distribution should follow only after the court has been satisfied of these two. 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.”

16. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? What has emerged from the filings is that the deceased had married only one wife, and he had four children, all sons with him, and that there was a son born outside wedlock known as Peter Ingosi Akhura. It also emerged that he had been survived by a brother. The asset of the estate is said to be ancestral or family land, that was registered in the name of the deceased, but holding a portion thereof for the benefit of his brother. I have not seen any opposition to that position. One of the sons of the deceased has since died. He was married. I was told in the revocation application that he had two wives, but in the instant application only one of them is recognized. Anyhow, the instant cause is about the estate of the deceased, and not the son. His share shall devolve to his estate, where the issue of who his heirs are can be resolved. I am, therefore, satisfied that the survivors or persons beneficially entitled to the estate of the deceased have been identified.

17. On distribution, I note that the deceased died possessed of one parcel of land, Isukha/Mugomari/276. It was ancestral property, with the deceased and his brother being entitled to it. That would mean that the two should share the same equally. After which, the half-share going to the deceased should then be shared equally between the widow and her four sons.

18. In the end, the final orders that I shall make in this matter are as follows:

- (a) That I hereby appoint Bereneta Ajenya Akhura and Peter Busula M uyale administrators of the estate of eth deceased;**
- (b) That a grant of letters of administration intestate shall issue to them accordingly;**
- (c) That I declare that the persons beneficially entitled to a share in the estate are Bereneta Ajenya Akhura, Peter Busula Muyale, Julius Machika Akhura, Richard Muyale Akhura, Zakayo Ambosho Akhura, John Liluma Akhura, Peter Ingosi Akhura and the estate of Stephen Ingosi Akhura;**
- (d) That Kakamega/Mugomari/276 shall initially be shared equally between the deceased and Peter Busula Muyale, and thereafter the share due to the estate of the deceased shall be shared equally between Bereneta Ajenya Akhura, Julius Machika Akhura, Richard Muyale Akhura, Zakayo Ambosho Akhura, John Liluma Akhura, Peter Ingosi Akhura and the estate of Stephen Ingosi Akhura;**
- (e) That the survivors of the estate of Stephen Ingosi Akhura shall access the share due to that late son of the deceased through initiating a succession cause to his estate as the persons who make up that family were not clearly identified;**
- (f) That that a certificate of confirmation of grant shall issue to the administrators 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 has the liberty, within twenty-eight (28) days, to move the Court of Appeal appropriately.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE