

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 446 OF 2011

IN THE MATTER OF THE ESTATE OF KIMAYO s/o SHIBEYI alias KIMAYO SHIBEYI (DECEASED)

JUDGMENT

1. On 27th September 2018, I postponed determination of an application for confirmation of grant dated 23rd November 2012, and directed the Chief of Shibuye Location to furnish the court with accurate information on who the actual survivors of the deceased are, as the information in the application appeared to be either confusing or misleading or both.

2. The Chief of Shibuye Location has provided the information sought, through a letter dated 26th March 2019. It transpires from it that the deceased never married, and, therefore, he had no surviving spouse nor children. He was said to have had brothers, said to be Paul Amboyi Shibeyi, Joseph Shitiavayi Shibeyi and Litwachi Paulina Shibeyi, who are also all dead. He was said to have been survived by three nephews, being John Hunter Amboyi, Raphael Katambani and David Amboyi Shikami. Francis Atavachi Shitiavayi was said to be another nephew, who has since died. The fathers of the nephews, that is to say the brothers of the deceased, were not indicated. There was also a long list of grandnephews, but who are not aligned to any of the nephews. I have no way, therefore, of telling whether the parents of the grandnephews are alive or not.

3. The deceased died intestate in 1972, before the Law of Succession Act came into force on 1st July 1981. According to section 2(2) of the Law of Succession Act, the law to govern distribution of the estate of a person dying before the Act came into force is the law and customs in application at the time of death. The deceased persons was, no doubt, a Luhya by tribe. I was not told what the relevant customary law provided so as to guide me in distribution in this case. Customary law was notorious that succession was patrilineal, and property passed from the dead to his male relatives. The sons had priority, unless the deceased had none, in which case the property then passed to the brothers of the deceased, and in case there were none, to the nephews, and in the event there were none to the grandnephews, if he had any.

4. The material from the Chief's letter is not altogether conclusive, but from the affidavit of Raphael Katambani Matikina, sworn on 7th June 2012, it would appear that Raphael Katambani Matikina was a son of Joseph Shitiavayi Shibeyi, while John Hunter and Daudi Amboyi were sons of Paul Amboyi Shibeyi. The affidavit identifies Peter Muyeshi as another son of Paul Amboyi Shibeyi, however, the Chief's letter is silent on that. Both the Chief's letter and the affidavit of Raphael Katambani Matikina are silent on whether Litwachi Paulina Shibeyi had any spouse or children. I shall take it that the said Litwachi Paulina Shibeyi did not have any survivors, and shall, therefore, not be considered in the distribution. George Shakaba Hunter is not listed in the Chief's letter in any capacity, but I shall take it that he is a son of John Hunter. He shall not be entitled to take a share in the estate of his granduncle so long as his father is also inheriting from the same estate.

5. The immediate surviving relatives of the deceased are his three nephews, John Hunter Amboyi, Raphael Katambani and David Amboyi Shikami. The estate of the deceased shall accordingly be shared equally amongst the three. A certificate of confirmation of grant shall issue accordingly. Each party shall bear their own costs. Any party aggrieved has twenty-eight days to challenge the distribution ordered above at the Court of Appeal. It is so ordered.

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

W. MUSYOKA

JUDGE