



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 875 OF 2015

IN THE MATTER OF THE ESTATE OF FREDRICK SHIKUKU MUKABANA (DECEASED)

RULING

1. According to certificate of death number 742709, dated 30th June 2005, the deceased died on 10th December 2004. According to a letter from the Chief of Chekalini Location, dated 30th November 2015, he was survived by two widows, Phanice M. Shikuku and Florence N. Shikuku; eight sons, being Jared O. Shikuku, Peter M. Shikuku, Augustine M. Shikuku, Matayo O. Shikuku, Richard N. Shikuku, Jacob M. Shikuku, Javan A. Shikuku and Shem Maloba Shikuku; and three daughters, being Elizabeth M. Odanga, Beatrice K. Ayako and Gladys M. Okute. Laban A Kidevedo, Domitilah Ayuma and the Salvation Army Church are listed as buyers. The Chief's letter indicates that he died possessed of Kakamega/Chekalini/141 and Marama/Buchenya/811.
2. Representation to the estate of the deceased was sought in a petition lodged herein on 15th December 2015, by Jared Omutanyi Shikuku and Peter Muyonga Shikuku, in their respective capacities as sons of the deceased. They listed all the thirteen individuals listed in the Chief's letter as surviving spouses, sons and daughters of the deceased. They have also listed the two assets listed in that letter. Letters of administration intestate were made to the two petitioners on 23rd June 2016, a grant was duly issued, dated 19th September 2016. I shall refer to the two of them as administrators.
3. What I am called upon to determine is a summons for confirmation of grant, dated 23rd May 2017, brought at the instance of both administrators. The survivors listed are the thirteen persons listed in the Chief's letter of 30th November 2015, plus the three buyers. The assets listed as available for distribution are Kakamega/Chekalini/141 and Marama/Buchenya/811. It is proposed that Marama/Buchenya/811 devolves upon Shem Maloba Shikuku; while Kakamega/Chekalini/141 is to be shared between the rest of the survivors, including buyers, at diverse proportions. Attached to the affidavit in support is a consent in Form 17 signed by 16 individuals, copies of their national identity cards, and copies of search certificates for Kakamega/Chekalini/141 and Marama/Buchenya/811.
4. There is a further affidavit on record sworn by Jared Omutanyi Shikuku and Florence Nasimuyu Shikuku, on 26th July 2017. They aver to be widows of the deceased, who swear the affidavit to support the confirmation application. They express that Kakamega/Chekalini/141 be shared out as proposed in the application. They state that two of the survivors had declined to sign the consents, that is to say Jacob Mukabana Shikuku and Gladys Makokha Okute, a son and a daughter-in-law of the deceased, who had been allocated land a long time ago, claiming additional land and thereby interfering with other survivors' shares. They aver that the distribution proposed accorded with the deceased's wishes.
5. The application first came up for hearing on 27th July 2017, before Sitati J. Ten of those in attendance supported the proposals in the said application, that is to say Florence Nasiminyu Shikuku, Phanice Mutende Shikuku, Elizabeth Mmboga Odanga, Augustine Mukhwana Shikuku, Matayo Ongoma Shikuku, Peter Muyungu Shikuku, Beatrice Ayako Khabeko, Javan Aswani Shikuku, Amaheno Laban Kedevede and Richard Nyikuri Barasa. One of them stated that she did not agree with the proposals, that is Gladys Makokha Okute. The views of another two are not indicated, that is to say Jared Omutanyi Shikuku and Domitilah Ayuma Nduluyu. The court directed that Gladys Makokha Okute files an affidavit of protest within a fortnight.
6. I have carefully, closely and scrupulously perused through the file of papers before me, and I have not come across any affidavit of protest, neither by Gladys Makokha Okute nor by any other person.
7. The application was placed before me on 16th July 2019. Twelve of the survivors were in court being, Jared Omutanyi, Florence Nasiminyu Shikuku, Phanice Mutende Shikuku, Elizabeth Mmboga Odanga, Augustine Mukhwana Shikuku, Matayo Ongoma Shikuku, Peter Muyungu Shikuku, Javan Aswani Shikuku, Amaheno Laban Kedevede, Gladys Makokha, Domitilah Ayuma, Amaheno Laban and Richard Nyikuri. I took them again through confirmation of their respective positions. Those who expressed support for the application were Florence Nasiminyu Shikuku, Phanice Mutende Shikuku, Elizabeth Mmboga Odanga, Augustine Mukhwana Shikuku, Matayo Ongoma Shikuku, Peter Muyungu Shikuku, Beatrice Ayako Khabeko, Javan Aswani Shikuku, Amaheno Laban Kedevede, Domitilah Ayuma and Richard Nyikuri Barasa. Gladys Makokha Okute and Jacob Shikuku indicated their opposition to the proposals, and I elected to hear the two of them.
8. Gladys Makokha Okute indicated that the deceased had given her two acres out of Kakamega/Chekalini/141. She explained that she was a

daughter-in-law of the deceased, married to his first son, Charles Okute Shikuku, who is also deceased. She complained that Richard Nyikuri had been put on her two acres. She stated that she was not aware of any sale of the land, and she was not party to it. She insisted on getting the two acres given to her by the deceased. She stated that she had separated from her husband as at the date of his death, but then she had come back, and was in occupation of the land.

9. Jacob Shikuku Mukabana stated that the deceased had three wives, and that he was from the third wife. He said that the deceased had distributed his land before he died. His case was that the distribution proposed did not conform with the scheme left by the deceased. He stated that the deceased had showed them where to settle, but added that some places had been redistributed after he died. He stated that the deceased had distributed his property amongst his eldest sons from each of the three houses, each one of them getting two acres. He stated that his mother had died, and she had gotten her share. He said records existed of the said distribution, which were being kept by the eldest sons. He insisted that the elder sons ought to produce the records. He said that the succession process was initiated without involving him. He asserted that a person who died before getting their share should still be allocated that share, to be divided amongst his survivors. He stated that his mother died leaving him as sole son and some daughters. He said he was satisfied with the way the deceased had shared out the land, but he did not agree with the distribution proposed in the application. He claimed that the deceased had made a will. He said that his mother's grave had been given to his stepmothers. He said that the deceased had given out his land to his wives so that they could take care of his daughters. He said that he had the two acres that his father gave him. He stated that widows cannot be chased away, and that the land where his mother's grave was situated should be allocated to him. He invited the court to address the question of what should happen to graves, saying that he was ready to move the grave. He complained that the land given to the surviving spouses was large, and insisted that it should have included his mother's share. He stated that there were five daughters from his mother's house, who were all alive. He said he did not know the number of daughters in the other houses.

10. After the two testified, the court also heard the administrators. The first was Jared Omutanyi Shikuku. He stated that he was aware that the deceased had distributed his property amongst his sons before he died. He said that he gave his two wives a portion separate from his sons. On the graves, he stated that once someone died, they would be entitled to just the 4 feet by 6 feet. He confirmed that he had sisters, but asserted that only the sons were entitled to be given land. He said that if Jacob Shikuku wanted to give his sisters a share, he was free to do so. He stated that the land given to the widows would be redistributed once the widows died. He asserted that Jacob Shikuku had been involved in the process and that was why his name was listed amongst those of the other beneficiaries. He stated that there were wills and they were in a file that he was holding. He stated that the deceased had nine daughters in total, four from the first house, three from the second house and five from the third house. He admitted that the daughters had not been allocated any land.

11. Peter Muyonga Shikuku followed. He stated that he was aware that the deceased had given two acres to the husband of Gladys Makokha Okute. He explained that the deceased had discussed and agreed with her husband that they would sell ½ acre from the two to pay dowry to the man who had previously married Gladys Makokha Okute. He stated that Okute's first wife was to get 0.7 HA of the land. He stated that the sisters of Jacob had not indicated that they were needy, and if they had any complaints they could come forward. He accused Jacob of not cooperating with the rest of the family, and of lacking respect for the widows. He confirmed that the deceased had twelve daughters, four from the first house, three from the second house and five from the third house. He confirmed that the daughters were not allocated shares in the estate. He stated that they had not sought their views on whether or not they were interested in taking a share in the estate. He stated that they could cater for the needs of the daughters from their mothers' shares.

12. I adjourned the matter to another date to make room for attendance by the daughters. On 25th November 2019, some of the daughters attended court, and I took their views on the proposed distribution. From the first house, four daughters were in court, that is to say Alice Shikuku, Elyna Shikuku, Veronica Shikuku and Priscilla Shikuku. They indicated that they were all aware of the proposed distribution, and were not opposed to it. From the second house, only one daughter was in court, Evaline Shikuku. She too stated that she was aware of the proposed distribution, and was not opposed to the proposals. She mentioned her sisters as Rael Shikuku and Elyna Shikuku, who were not in court. She said they worked in Nairobi and were aware of the date. From the third house, two daughters were in attendance, Tabitha Angolo Shikuku and Eseri Anyanzwa Shikuku. They indicated that their sisters: Mapesa Shikuku, Elyna Shikuku and Agnes Shikuku, were not in court. One of the two present said she was aware of the proposed distribution, but did not agree with it, while the other indicated that she was not aware of what was proposed.

13. What is clear from the record so far is that the deceased had married three wives, and, therefore, his household constituted of three houses. The deceased was a polygamist. For purposes of distribution of the estate, section 40 of the Law of Succession Act, Cap 160, Laws of Kenya, which provides for the distribution of a polygamist's estate, should apply.

14. The affidavit sworn in support of the summons did not indicate that the deceased had three houses, and has not listed the surviving members of each of the three houses. Distribution under section 40 is according to houses, and, therefore, it is critical that the application be clear on the number of the houses and the members in each of the houses. Otherwise, I am unable to apply section 40 to the facts set out in the application before me.

15. For avoidance of doubt, section 40 provides as follows:

“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.”

16. Where any child of the deceased has died, that fact should be disclosed, and if he or she was survived by children, the names of the children should be listed. Section 40(2) envisages that after the estate is apportioned under section 40, as between the houses, the property

should thereafter be distributed within the houses in accordance with section 35 to 38 of the Act. These provisions cannot be applied effectively unless there is complete and accurate disclosure of all the persons who survived the deceased.

17. One of the issues that arose relates to the rights of surviving widows. In a polygamous setting, each widow enjoys life interest in all the land allocated to her house, and the children in that house do not distribute the property amongst themselves until after the widow herself passes on.

18. Sections 35 to 38 provide 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.

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 any person.

(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.

37. ...

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.”

19. Section 35(5) makes reference to sections 41 and 42. Section 41 deals with situations where some of the survivors of the deceased are minors or their own parents, being children of the deceased, were also deceased. Where some of the survivors are minors or are grandchildren of the deceased, whose own parents are dead, those facts ought to be disclosed, so that they can be factored at distribution. Section 42 deals with situations where some of the assets were distributed during the lifetime of the deceased to some of the survivors or beneficiaries. Where there was such distribution by the deceased during his life time, then that must also be disclosed, so that it can also be factored in the distribution.

20. It must be pointed out that *inter vivos* or lifetime distribution, that is referred to above, is where the deceased transferred land to anyone, and the land was transferred to the names of the beneficiaries. Where no such transfers were done, it would be presumed that there was no lifetime distribution or transfers of assets.

21. Sections 41 and 42 provide as follows:

“41. Property devolving upon child to be held in trust

Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.

42. Previous benefits to be brought into account

Where—

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

22. One of the issues raised by one of the parties is with respect to distribution of land where wives of the deceased are buried. The deceased died after the Law of Succession Act came into force. The Act does not take into account graves on the land, and, therefore, the issue of who is buried where is irrelevant. It will be up to the parties to agree amongst themselves on distribution on the ground, to cater for such issues as the graves. The court distributes the land without thinking about the graves, and leaves it to the parties to work around what to do with the graves.

23. It transpired that the daughters of the deceased were not disclosed in the Chief’s letter, the petition and the application for confirmation of grant. The omission was grave. The Law of Succession Act does not discriminate on the basis of gender. The property of a dead person is available for distribution amongst all the children of the deceased, daughters included. The daughters have equal rights to the sons. It is not up to the sons to dole out the land to the daughters as favors or as an act of a charity to them. The daughters are to be treated equally. Failure to disclose the daughters, and to exclude them from benefit, is a good ground for the grant to be revoked. I shall not do that for now, but I shall give the administrators a chance to correct that anomaly.

24. I raise these issues because under the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, administrators are required to satisfy the court that they had ascertained all the persons beneficially entitled to a share in the estate and that the shares of such persons have been ascertained too. The court ought not go ahead to distribute the estate before it is satisfied that the administrators have complied with the provisions in the proviso to section 71(2) and Rule 40(4). It is a condition precedent to distribution of the estate. The court cannot distribute the estate before the administrators comply with the proviso to section 71(2) and Rule 40(4).

25. The proviso to section 71(2) and Rule 40(4) state as follows:

“71(2)(d) ... *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.*”

“40(4). *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.*”

26. The parties have also stated that there were wills. One administrator stated that those documents were in his file. Jacob had alluded to the same and said that his elder brothers were holding onto those documents. If the wills relate to the estate of the deceased herein, then the wills should be placed before the court for consideration before the estate is distributed.

27. The application dated 23rd May 2017, as currently framed, does not address all these factors. I cannot do justice if I were to proceed to distribute the estate on the basis of the facts placed before me in the application.

28. The final orders that I shall make in this matter are as follows:

(a) That I hereby postpone determination of the summons dated 23rd May 2017, to allow the applicants file a further affidavit to address all the issues that I have raised in the instant ruling;

(b) That the applicants shall in particular:

(i) list the family according to the wives or houses, indicating whether the wife is alive or not, and all the children in each house (whether alive or dead),

(ii) children should include the daughters of the deceased, whether or not married,

(iii) for any children of the deceased who are themselves dead, they shall list their children, and

(iv) list creditors of the estate, including buyers of estate land from the deceased, displaying copies of the sale agreements;
and

(c) That the matter shall be mentioned after thirty (30) days, for compliance and for further directions.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF MAY, 2020

W. MUSYOKA

JUDGE