

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
SUCCESSION CAUSE NO. 302 OF 2002

IN THE MATTER OF THE ESTATE OF RAMADHAN KWEYU AMULABU (DECEASED)

RULING

1. On 31st October 2019, I delivered a judgment in which I directed the administratrices to file a further affidavit in which they were to:

- (i) list the wives of the deceased, dead or alive;
- (ii) list all the children, both male and female, married or single, of the of the deceased through his wives identified in (i) above;
- (iii) list all the spouses of the children of the deceased listed in (ii) above;
- (iv) list all the grandchildren of the deceased through the persons listed in (ii) and (iii)
- (v) list all the other relatives of the deceased entitled to a share in the estate giving details of the relationship and explaining why they should be provided for; and
- (vi) list all the alleged purchasers of a portion of the assets of the estate, providing documentary evidence of the transactions supporting the sales.

2. The first administratrix filed a further affidavit, sworn on 27th November 2019, in which she listed the following as survivors of the deceased:

- (a) Besi Hamushida Kweyu (deceased) – wife;
- (b) Rukia Ashioya Kweyu (deceased) – wife;
- (c) Saidi Amulabu Kweyu (deceased) – son, whose survivors are Jane Njeri Njenga, widow, and Aider Keya Amulabu and Violet Besi Amulavu, children;
- (d) Saleh Amulabu Kweyu (deceased) – son, whose survivors are Lydia Namusia and Rosemary Waswa, widows, and Reagan Salah, Elijah Saleh, George Saleh and Agnes Saleh, children;
- (e) Iddy Kwakhu Kweyu (deceased) – son, whose survivors are Florence Maloba Wakhu, widow, and Edwin Kweyu Wakhu and Benson Indimuli Wakhu, children;
- (f) Mary Nakholi Kweyu – daughter;
- (g) Ayub Ambani Kweyu (deceased) – son, who was not survived by immediate family;
- (h) Nichodemus Olwichi Amulabu (deceased) – stepbrother, whose survivors are Anthony Wakhu Olwichi, son, and Everlyne Wangila Amulabu, daughter-in-law and widow of a son, the late Tapman Kanji Simiyu.

3. The administratrix also averred that the deceased had been holding three acres of the estate property known as East Wanga/Isongo/385 in trust for his stepbrother, the late Nichodemus Olwichi, the father of Anthony Wakhu Olwichi and the late Tapman Kanji Simiyu. She did not list any purchasers of the said property.

4. In the judgment of 31st October 2019, I had identified the following, from the material that was before me then, as the survivors of the deceased or beneficiaries of his estate, that is to say:

- (a) Besi Haumushida Kweyu (deceased) – wife;
- (b) Rukia Ashioya Kweyu (deceased) – wife;
- (c) Saidi Amulabu Kweyu (deceased) – son;
- (d) Saleh Amulabu Kweyu (deceased) – son;

(e) Iddy Kwakhu Kweyu (deceased) – son;

(f) Mary Nakholi Kweyu – daughter; and

(g) Ayub Ambani Kweyu (deceased) – son.

5. From the material before me, the deceased died possessed of East Wanga/Isongo/385, measuring 21 acres. Of the 21 acres, 3 acres are due to the estate of the late Nichodemus Olwichi Amulabu, to be shared out equally amongst his survivors. That would mean leaving 18 acres to be shared out amongst the survivors of the deceased herein, Ramadhan Kweyu Amulabu.

6. The deceased died a polygamist. According to Part V of the Law of Succession Act, Cap 160, Laws of Kenya, the estate of a polygamist should be shared out according to section 40, which 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.”

7. Section 40(1) envisages the sharing out of the estate amongst the houses taking into account the number of children in each house, and taking any of the surviving widow as an additional unit. After that, according to section 40(2), the estate is shared out within the houses in accordance with sections 35 to 38 of the Law of Succession Act, depending on whether there was a surviving spouse and children, or a surviving spouse only without children, or surviving children only without a spouse.

8. I note that the administratrix has not listed the survivors of the deceased according to their houses. I have also noted that the two wives of the deceased have all since died. Section 40(1) of the Act may not apply, and, therefore, I shall have to apply section 40(2). Since none of the houses have a surviving spouse, and comprise only of children, I shall apply section 38 of the Act, which provides for distribution of the estate amongst the children. I shall also bear in mind section 41, which deals with situations where children of the deceased are themselves dead and are survived by their own children, who would be the grandchildren of the deceased.

9. Sections 38 and 41 say as follows. For the sake of avoidance of doubt: “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.”

“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. ”

10. The 18 acres, according to section 38 of the Law of Succession Act, should be shared equally between Mary Nakholi Kweyu, the estate of Saidi Amulabu Kweyu, the estate of the late Saleh Amulabu Kweyu and the estate of the late Iddy Kwakhu Kweyu.

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

(a) That I hereby confirm the grant that was made on 31st October 2019 to Lydia Namusia Silas and Jane Njeri Njenga;

(b) That East Wanga/Isongo/385 shall be shared out as follows;

(i) 3 acres to the estate of the late Nichodemus Olwichi Amulabu; and

(ii) 18 acres to be shared equally between Mary Nakholi Kweyu, the estate of the late Saidi Amulabu Kweyu, the estate of the late Saleh Amulabu Kweyu and the estate of the late Iddy Kwakhu Kweyu;

(c) That where the shares have been devolved upon the estates of deceased persons, the members of the family of each of such deceased persons shall commence succession proceedings in respect of the estate of such persons;

(d) That a certificate of confirmation of grant shall issue accordingly

(e) That each party shall bear their own costs; and

(f) 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.

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

W. MUSYOKA

JUDGE