

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 105 OF 2003

IN THE MATTER OF THE ESTATE OF MANESE OTIENO ESHITUBI

RULING

1. On 27th February 2020, I delivered a judgement where I:

- (a) postponed confirmation of the grant herein in terms of section 71 (2)(d) of the Law of Succession Act, Cap 160, Laws of Kenya, and directed the administrators to file an affidavit in which they were to disclose the names of all the spouses and all the children of the deceased, indicating who among those listed was dead;
- (b) directed that for the purposes of (a) above, all the children of the deceased included daughters of the deceased, whether married or unmarried;
- (c) directed that where any of the children of the deceased were themselves dead, the administrators were to list all the surviving children of any such dead children of the deceased, irrespective of their sex or gender;
- (d) directed that the matter be mentioned for compliance and to assess whether there would be need to hear the other persons beneficially entitled in terms of the Rule 41 (1) of the Probate and Administration Rules; and
- (e) declared that the court would confirm the grant once the administrators fully comply with the said directions.

2. Only one of the administrators, the fourth, complied. He filed an affidavit, sworn on 30th June 2020, in which he listed the persons, who, according to him, had survived the deceased. He states, in that affidavit, that the deceased had five wives, namely - Phoebe Nyapola (deceased), Grace Angulo (deceased), Jerita Masava (deceased), Mwanaidi Nechesa (deceased) and Repha Anyolo Otieno. Each of the wives are said to have had been blessed with children. Phoebe Nyapola was blessed with six (6) children, namely - Wycliffe Anguda (deceased), Margaret Namai (deceased), Joseph Sakwa, Maurice Asunwa, Dorcas Onindo and Rose Mukhwana. Grace Angulo was blessed with eight (8) children, being Fred Chitande, Wilson Afubwa, Livingstone Otieno, Johnstone Nandwa Otieno, Harrison Ramoya, Lorna Mukhwana (deceased), Emily Mukhwambo and Roselida Lukale (deceased). Jerita Masava was blessed with six (6) children, that is to say Johnstone Namani, Reuben Kalayi, John Namayi, Selpher Amumbwe, Dina Okoth (deceased) and Fatuma Omulubi. Repha Anyolo Otieno was blessed with seven (7) children - Alexander Amukambwa, Festo Akwera, Christine Lubanga, Frida Otieno Obulimile, Irene Shundu, Abigael Omung'asia and Rosebella Ambetsa. Mwanaidi Nechesa had no children. He states that the whereabouts of Selpher Amumbwe are unknown. He tabulates lists of grandchildren of the deceased whose own parents, being children of the deceased, are dead. The late Wycliffe Anguda is said to have had been survived by Namai, Akwere and Chweya. The late Margaret Namai had been survived by Benson and Peter Nasio. The late Lorna Mukhwana was survived by Stanley Namai Aura and Patrick Kachisa Aura. The late Roselinda Lukale had no children. He states further that the deceased had only one known asset, being Marama/Lunza/247, which measures approximately 4.30 hectares. He avers that it was within his knowledge that the daughters of the deceased had no interest in the estate, and prays that the property of the estate be distributed amongst the sons and the surviving widow.

3. As it emerged from the body of the judgment, the purpose of the affidavits, envisaged in the orders, was to give the court a detailed list of all the survivors of the deceased, since the court required to have a clear picture of all the persons who had survived the deceased, and who were, therefore, entitled to a share in his estate, before it could make final orders on the distribution of the estate. From the averments made in the affidavit, it is clear that the deceased had twenty-seven (27) children, being thirteen (13) sons and fourteen (14) daughters. Five (5) of the children of the deceased are dead. In the judgment of 27th February 2020, I had stated as follows, in that regard :

“The principal purpose of confirming the grant is to pave the way for distribution of the assets. The proviso to subsection (2) of section 71 states that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the share due to them. The proviso is emphatic that the grant shall not be confirmed before the court is so satisfied. Therefore, there is no need for me to address the matters that fall under section 71(2) if what is envisaged in the proviso has not been done.”

4. The 4th administrator states that the daughters of the deceased are not interested in the estate. I note, though, that there is nothing on record to indicate that the said daughters of the deceased have renounced their entitlement to the estate. With respect to survivors, or persons beneficially entitled to a share in the estate of the deceased, not taking up the shares due to them, the court, in *In Re the Estate of the late George Cheriro Chepkosiom (Deceased)* [2017] eKLR, ordered as follows:

“...However, as there is no evidence before me in this regard, it is necessary that any beneficiary not interested in the estate of the deceased files an affidavit renouncing such interest, such affidavit to be filed within the next (30) days of today to enable the court issue final orders with respect to the distribution of the estate.”

5. The affidavit filed by the 4th administrator states that the daughters of the deceased did not have interest in taking up their shares or entitlements in the estate. He had previously produced letters that purported to indicate that some of the daughters renounced the right to inherit. However, I was unable to accept the said letters as evidence, as the same had not been authenticated. In any event, the administrators should have produced the said daughters at the oral hearing to speak for themselves. As stated above, in *In Re the Estate of the Late George Cheriro Chepkosiom (Deceased)*(supra), it is important that anyone who has a stake in the estate, or is beneficially interested in the estate, and is no longer interested in taking up their share or entitlement, renounce such interests by way of affidavit or oral evidence.

6. The affidavit that has been placed on record in compliance with the directions made in the judgement, of 27th February 2020, is not comprehensive, for its omission to attach copies of deeds of renunciation or affidavits by the daughters and other survivors or beneficiaries who are said to be not interested in taking up their shares or entitlements in the estate. It is in the best interests of the parties herein that all the daughters of the deceased, and the survivors of any of them who are dead, file affidavits to either renounce or affirm their interest in the estate to enable the court sufficiently distribute the estate. The daughters or their survivors are given thirty (30) days to file and serve such affidavits. The matter shall be mentioned thereafter for compliance. The alternative, to filing the affidavits to renounce entitlement, would be for the daughters, or their survivors or successors, to attend court, on the date appointed for mention, to orally tell the court their position on the distribution.

7. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA 24TH THIS DAY OF JULY, 2020

W MUSYOKA

JUDGE