



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 404 OF 2002

IN THE MATTER OF THE ESTATE OF AMBROSE MATHADALO (DECEASED)

RULING

1. The certificate of death serial number 692413, dated 3rd September 2002, indicates that the deceased to whose estate this cause relates, was known as Ambrose Madaladalwa Musungu, who died on 23rd August 1998. There is a letter on record from the office of the Applicant Chief of Museno Sub-Location, dated 2nd July 2002, which identifies Teresa Mbaya Shumila as the next of kin. He was said to have died possessed of a property known as Shitochi 600.
2. A petition for letters of administration intestate was lodged herein, on 9th September 2002, by Teresa Mbaya Shumila, in her capacity as sister of the deceased. In the affidavit in support she listed herself as sister and sole survivor of the deceased. The deceased was also expressed to have died possessed of Isukha/Shitochi/600. Letters of administration intestate were made to the petitioner on 9th January 2006, and a grant was duly issued to them, dated 15th March 2006.
3. According to a certificate of death, on record, serial number 952167, of 2nd May 2007, Teresa Mbaya Shumila, died on 20th December 2006. An application, dated 4th September 2017, was then brought, by Isabella Khatenje Ngaira, seeking to substitute the late Teresa Mbaya Shumila as administratrix. She explained that the deceased herein had no wife and children. The husband of the late Teresa Mbaya Shumila had sought to substitute her as administrator, but he also died before that could happen. The late Teresa Mbaya Shumila had three children all of whom died young. The applicant, Isabella Khatenje Ngaira, described herself as the only one interested person in the estate, having purchased Isukha/Shitochi/600, which was not transferred to her as the deceased died before that could happen.
4. While the application dated 4th September 2017 was still pending, the same individual, now going by the name Esabellah Khatenje Ngaira, filed another application, dated 29th October 2019, seeking substitution and confirmation of grant. She described herself, in that application, as a sister of the late Teresa Mbaya Shumila. She stated that the late administratrix had no other beneficiaries and that she was her next of kin. She referred to a letter from the Chief of Khayega Location, dated 26th November 2019, which identified her as such. She sought to have the substitution done, and the property devolved upon her. That application was placed before the Judge on 3rd December 2019. Substitution was allowed, but the new administratrix was directed to apply afresh for confirmation of her grant. She was issued with a grant of letters of administration intestate on 6th December 2019. I shall refer to her hereafter as the administratrix.
5. The new administratrix filed a summons for confirmation of her grant, dated 19th December 2019, in which she identified the heirs as herself and Felix Isiaho Isoso. The nature of the relationship between them and the deceased is not disclosed. It is proposed that the estate be shared out equally between the two, in the proportions indicated in the affidavit sworn in support and in Form 37.
6. The application was placed before me on 29th July 2020. The two purported heirs attended court. The administratrix described herself as a sister of the deceased. She said that the deceased never married, and had no children. She further said that he had two siblings, herself and the late administratrix, Teresina Mmbaya Shumera. She said that Teresina also died. She had children, but they had all died young. Felix Isiaho Isoso described himself as a buyer of the estate asset from the administratrix, Esabellah Khatenje.
7. I have a feeling that the administratrix herein is not a sister of the deceased. She was not identified as such by the late Teresina Mmbaya Shumera, when the latter sought representation to the estate. She was also not identified as such by the Assistant Chief who wrote the first letter of introduction to the court. When she sought to substitute the late Teresina Mmbaya Shumera, in the application dated 4th September 2017, she did not identify the deceased as her brother, rather she said she had bought property from him, but he died before he could transfer the property to her. In the application of 19th December 2019 she did not describe the deceased as her brother, instead she was saying that the late Teresina Mmbaya Shumera was her sister. It was at the hearing of the application, on 29th July 2020, that she characterized, for the first time, the deceased as her brother. It does not add up. She must be telling an untruth.
8. In intestacy, the survivors of the deceased, where there was no spouse nor children, nor parents, nor siblings, are the next relatives in line,

in accordance with section 39 of the Law of Succession Act, Cap 160, Laws of Kenya. That would mean the first paternal cousins of the deceased, and if he had no first cousins, then second cousins, and so on. An estate should not be devolved upon strangers before it has been established that the deceased had no known relatives upto and including the sixth degree of consanguinity.

9. For avoidance of doubt, section 39 of the Law of Succession Act states as follows:

“Where intestate has left no surviving spouse or children

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”

10. Of course, where no relatives can be traced, the property does not go to the strangers who may show up claiming to be related to the deceased in some vague way or other, or to have bought the property but provide no evidence of such sales; such property goes to the State. The property is liquidated, and the proceeds paid into the Consolidated Fund.

11. I am not prepared to order devolution of the estate herein to the applicant and her associate. They have no proof that they are related to the deceased in any way. They have equally provided no proof that they bought the property from the deceased.

12. So that the court can get a more accurate picture of the persons who survived the deceased, and who ought to get a share in his estate, I shall direct the Deputy Registrar to cause a certified copy of this ruling to be made available to the County Commissioner for Kakamega County, with a covering letter, requesting him or her to have investigations conducted to confirm whether the deceased had been survived by the persons envisaged under section 39 of the Law of Succession Act, and, if possible, cause a family chart to be drawn to guide the court accordingly.

13. As there is a possibility, subject to what the County Commissioner may establish, that the deceased was not survived by any of the persons envisaged under section 39, and that the estate may have to devolve upon the State in terms of section 39(2) of the Law of Succession Act, it would be prudent to bring in the Public Trustee into the matter at this stage. The Deputy Registrar shall, therefore, furnish the Public Trustee with a certified copy of the ruling herein, for information and further action.

14. Let the matter be mentioned after three (3) months, on a date to be identified at the delivery of the ruling, to confirm compliance by the Deputy Registrar, and for further directions. The confirmation application, dated 19th December 2019, is accordingly postponed, in terms of section 71(2)(d) of the Law of Succession Act, to await action by the County Commissioner and the Public Trustee. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 16th DAY OF October 2020

W. MUSYOKA

JUDGE