



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO 592 OF 2005**

**IN THE MATTER OF THE ESTATE OF NATHAN AMBETSA SHIREKULE (DECEASED)**

**RULING**

1. The deceased herein died on 28<sup>th</sup> July 2004. A letter from the Chief of Shieywe Location, dated 15<sup>th</sup> November 2005, indicates that he was survived by his wife, Rose Recho Ambetsa, and a purchaser named as Richard O. Oyengo. It is also indicated that he had died possessed of a property known as Butsotso/Shikoti/12757.
2. Representation to the estate was sought by the widow vide a petition lodged herein on 16<sup>th</sup> November 2005. She listed herself as the sole survivor of the deceased. She also listed Butsotso/Shikoti/12757 as the asset of the estate. Letters of administration intestate were made to her on 6<sup>th</sup> March 2006, and a grant issued to her on 8<sup>th</sup> March 2006. She lodged a summons herein on 25<sup>th</sup> October 2006, of even date, seeking confirmation of the grant, in which she proposed that the estate devolved upon her wholly. The said application is yet to be determined.
3. The grant of 6<sup>th</sup> March 2006 was revoked on 16<sup>th</sup> February 2017, on an application dated 24<sup>th</sup> July 2013, when it transpired that the alleged widow of the deceased had pre-deceased the deceased, for she had died in 1999 while the deceased died in 2004. The court found that the process of obtaining the said grant was fraudulent, it revoked the grant and made a fresh grant to Ernest Ayumba. The relationship between the deceased and the said Ernest Ayumba is not indicated in the ruling of 16<sup>th</sup> February 2017. I have perused through the affidavit sworn by Ernest Ayumba on 24<sup>th</sup> July 2013. in support of his revocation application of even date, and I have noted that he did not himself state the relationship between himself and the deceased. Anyhow, a grant of letters of administration intestate was issued to the said Ernest Ayumba Shirekule on 5<sup>th</sup> June 2017.
4. The application that I am tasked with determining is a summons dated 20<sup>th</sup> April 2017, for confirmation of the grant made on 16<sup>th</sup> February 2017. It is brought at the instance of the administrator, Ernest Ayumba Shirekule. He has listed himself and Christine Shisia Karakacha and Elizabeth Muhenje Ambetsa as the children who survived the deceased. He proposes that the land, Butsotso/Shikoti/12757, be shared out between him and the two women, so that he takes one half of it and the two women share the other half equally.
5. There is an affidavit of protest sworn by Richard Ochieng Oyengo, on 18<sup>th</sup> August 2017. He claims that he is entitled to the entire land, having bought a portion of it in 1999 from the deceased and the other portion from the deceased's widow, Rose Recho Ambetsa, in 2007. He has attached copies of alleged sale agreements to support his contention. He contends that he took possession of the subject land and developed it substantially. He further contends that the administrator was not a child of the deceased neither were the two women listed in the application as his daughters. He asserts that the rightful survivors of the deceased had not been disclosed. He would like the entire Butsotso/Shikoti/12757 to be devolved upon him to the exclusion of the administrator, and Christine Shisia Karakacha and Elizabeth Muhenje Ambetsa. He swore a supplementary affidavit on 13<sup>th</sup> November 2017 to say that the administrator was not a child of the deceased but a person who had allegedly bought a portion of the land from one Agnes Omuronji Simatwa in 2010.
6. Directions were given on 5<sup>th</sup> October 2017 for disposal of the application by way of written submissions. Both sides have filed written submissions, which I have read through and noted the arguments made.
7. Summonses for confirmation of grant are brought under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya. Under that provision, the court is called upon to confirm two things; firstly, the appointment of the persons to whom the grant of representation was made, and secondly, distribution of the assets ascertained as making up the estate amongst the persons ascertained to be beneficially entitled.
8. I will first deal with the administration. The relevant portion of section 71 is subsection 2(a)(b) which state as follows-

‘(2) The court to which the application is made, or to which any dispute in respect thereof is referred, may –

- a. if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate

according to law, confirm the grant; or

b. if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered ...’

9. The question that I need to ask myself is whether I should confirm the administrator herein and allow him to complete administration of the estate. Whether I should confirm him or not depends on whether he has satisfied the requirements in section 71(2)(a) of the Act, that is to say whether he had been rightly appointed as administrator, whether he had administered the estate in accordance with the law, and whether he will, if confirmed, continue to administer the estate in accordance with the law.

10. The administrator was appointed on 16<sup>th</sup> February 2017 following his successful application for revocation of the grant made earlier to Rose Recho Ambetsa, after it turned out that the said grant had been made to a person who had pre-deceased the deceased. As noted in paragraph 3 of this ruling, the court in the ruling of 16<sup>th</sup> February 2017, which revoked the earlier grant and appointed the current administrator as such, did not state the relationship between the deceased and the person it was appointing as administrator, Ernest Ayumba. I noted too that in the application for revocation of grant the administrator did not depose as to how he and the deceased were related. I note from his affidavit in support of the confirmation application, he claims to be a child of the deceased, together with the two women whose names he has listed in the said affidavit.

11. Curiously, in the written submissions lodged herein by his advocates, dated 13<sup>th</sup> November 2017, he describes himself as a nephew of the deceased, and goes on to say that the deceased had two children who are still alive, but he has not identified them by their names in the written submissions. I find it interesting, the advocate for the administrator would base his written submissions of facts that have not been deposed to in an affidavit. Written submissions can only be founded on facts that have been placed on record before the court by way of either pleadings or affidavits. The information that comes out in the written submissions filed by the administrator suggests that there is matter that the administrator has not disclosed to the court. What is more curious is that these facts ought to have been disclosed in his affidavit sworn in support of the revocation application, as well as in the instant application.

12. The administrator had sworn a further affidavit on 12<sup>th</sup> September 2013. In that affidavit he did not mention the persons who had survived the deceased. There is though a letter annexed in there, dated 18<sup>th</sup> January 2013, written by the Kakamega Central Commissioner, addressed to the County Commissioner for Kakamega County, in which he stated that he had conducted investigations which had revealed that the deceased had had two sons, David Ambunya Ambetsa, who was serving a jail term, and Yusuf Ambetsa, who was found hanged in his house in 2010. The administrator did not mention these two individuals in any of his court papers, yet the two are the persons directly entitled, under Part V of the Law of Succession Act, to the intestate estate of the deceased. What is more, the administrator did not list David Ambunya Ambetsa amongst the survivors of the deceased in his application for confirmation of grant, and did not allocate to him any share in the estate of his deceased father.

13. I am not satisfied that the administrator obtained representation to the estate of the deceased after making full disclosure. He ought to have had disclosed at the revocation stage that the deceased had been survived by the two sons disclosed in the Commissioner’s letter, giving a background as to their whereabouts. Indeed, he should have sought to be appointed as administrator to hold the property of the estate on their behalf. I am not persuaded that the administrator was rightly granted representation to the estate, and that he should be confirmed as such

14. The proviso to section 71(2) of the Act requires that before the court can confirm distribution of an estate as proposed by the administrator applicant, it ought to be satisfied that all the persons beneficially entitled had been identified and so were their shares. That would mean that the administrator ought to satisfy the court that he had ascertained the persons beneficially entitled as well the shares allocated to them in the proposed distribution. For avoidance of doubt the proviso states as follows –

‘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 the grant shall specify all such persons and their respective shares.’

15. The deceased herein had died intestate, for no will was produced, nor was any alleged to exist, and the grant sought and obtained was for grant of letters of administration intestate. The deceased died in 2004, while his wife is said to have had died in 1999. From the letter of the Commissioner dated 18<sup>th</sup> January 2013, he had been survived by two sons, one of whom died in 2010. By the time the application for confirmation of grant was being filed I presume that the sole surviving child of the deceased was David Ambunya Ambetsa.

16. According to section 38 in Part V of the Law of Succession Act, which caters for distribution in intestacy, where an intestate is survived by a child but no spouse, the estate ought to devolve wholly upon the surviving child, and if they be more than one, to the children equally. The provision states-

‘Where an intestate has a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of the sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.’

17. From what is before me, David Ambunya Ambetsa appears to be the only immediate survivor of the deceased, and therefore the sole person entitled absolutely to the estate. The administrator has not disclosed him in his confirmation application. I am not satisfied that he has therefore properly ascertained the persons beneficially entitled to the estate. It would appear that the identity of David Ambunya Ambetsa has been concealed since he is in prison, ostensibly with an intention to disinherit him.

18. Is the administrator himself entitled to a share in the estate? He claims to be a nephew of the deceased. He has not disclosed whether he is

a son of a brother of the deceased or of a sister of the deceased. Whatever the case, his right to inherit the estate of the deceased ranks inferior to that of David Ambunya Ambetsa. That is the effect of section 39(1) of the Law of Succession Act, which states that –

‘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 *mother; or if dead*
- b. brothers and sisters, and any child or children of the deceased brothers and sisters, in equal shares; or if none
- c. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
- d. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares ...’

19. He has listed in his summons for confirmation of grant two women who he says are children of the deceased. The two were not disclosed in the Chief’s letter dated 15<sup>th</sup> November 2005, nor in the Commissioner’s letter of 18<sup>th</sup> January 2013. The administrator did not mention them either in his application for revocation of grant. In the summons for confirmation he claims to be a child of the deceased, yet the true position is that he is nephew. I cannot trust his word, therefore, that the two women are children of the deceased. If, indeed, they are in fact children of the deceased, then they ought rank higher than him in entitlement to a share in the estate, and they should not have to share the property with him. I note that he purports to allocate himself a share to the estate which is bigger than what he allocates to them.

20. Overall, I am not satisfied that the administrator has satisfied the requirements of the proviso to section 71(2) of the Act.

21. On the claim by the protestor, the first thing to be noted is that he claims to have had acquired a portion of Butso/So/Shikoti/12757 from the widow of the deceased in 2007, yet by that date she was long dead. Indeed, the fact of the matter is that she pre-deceased the deceased. What has emerged from the record is that the protestor fraudulently obtained a grant in the name of the dead woman by pretending that she had survived the deceased, and using that grant caused Butso/So/Shikoti/12757 to be transferred to his name. It cannot be, therefore, true that he bought any portion of the property from her when she had died in 1999. Secondly, he says that he had acquired the other portion from the deceased in 1999. I have seen a search certificate, in respect of the said property, dated 16<sup>th</sup> November 2005, which shows that the deceased herein was registered in 2004 as sole proprietor of the said property. If he had, indeed, sold the same to the protestor in 1999 why then would he still have had the same registered in his name in 2004.

22. The property in question is registered land. I suppose that the same is agricultural land, sale of which ought to be subject to the Land Control Act, Cap 308, Laws of Kenya. Under that law, consent of the relevant Land Control Board is essential to the validity of the transaction. That would mean that it is not enough to just produce a sale agreement, whether the transaction had been sanctioned by the Land Control Board is critical.

23. In any event, whether the protestor acquired a valid stake in Butso/So/Shikoti/12757 through sale, whether from the deceased or his widow, is not something that I can determine. Jurisdiction to make that determination has been taken away from the High Court by Article 162(2), as read with Article 165(5), of the Constitution, and vested in the Environment and Land Court. The protestor, and indeed any other person who claims to have acquired any interest in Butso/So/Shikoti/12757 by purchase, should prove their claim at the Environment and Land Court, and obtain a decree in their favour before the same can be conveyed to their names.

24. I shall dispose of the application dated 20<sup>th</sup> April 2017 in the following terms -

- a. That I hereby decline to confirm Ernest Ayumba Shirekule as administrator of the estate of the deceased, and instead I do hereby remove him as administrator, and appoint in his place the Public Trustee;**
- b. That a grant of letters of administration intestate shall issue forthwith to the Public Trustee;**
- c. That the Public Trustee shall ascertain the identities of all the persons beneficially entitled to a share in the estate of the deceased herein prior to moving the court for confirmation of his or her grant;**
- f. That the Deputy Registrar shall cause a certified copy of this ruling to be furnished on the Public Trustee;**
- e. That the matter shall be mentioned to confirm whether a grant has been processed in the name of the Public Trustee and whether (d) above has been complied with;**
- f. That the date for mention in terms of (e) above shall be given in open court at the delivery of this ruling;**
- g. That each party shall bear their own costs; and**
- h. That any party aggrieved by the orders that I have made herein above shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF APRIL, 2019**

**W. MUSYOKA**

**JUDGE**