

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO 388 OF 2011

IN THE MATTER OF THE ESTATE OF JOHN AKIBAYA CHUGI (DECEASED)

RULING

1. The deceased herein died on 27th June 1992. Representation to his estate was initially commenced in Nairobi HCSC No. 2381 of 2002, but that cause was transferred to the High Court at Kakamega by an order made on 17th May 2011, whereupon it was allocated its current number Kakamega HCSC No. 388 of 2011. A letter from the Office of the Chief of Busali West Location, dated 30th August 2002, indicates that he was survived by a widow, Damani Ingado Akibaya, and four sons and a daughter-in-law. The sons were listed as Hassan Akibaya, Daudi Chugi, Ephraim Musambuli and Abisai Likomba; while the daughter-in-law was said to be Mary Imali Mudembei.

2. The petition herein was lodged by two of the sons, Ephraim Musambuli and Abisai Likomba, and they listed the persons named in the Chief's letter as the survivors of the deceased. They also listed Kakamega/Bugina/224 a grant of letters of administration intestate was made to the two on 5th November 2002.

3. Another cause relating to the same estate was initiated at the Senior Resident Magistrate's Court at Vihiga in SRMCSC No. 100 of 2007. Letters of administration intestate were made in that cause on 2nd March 2011 and a grant was issued out of that cause on 3rd March 2011. When the administrator in that cause moved the court for confirmation of his grant the pendency of the cause herein was brought to light and the court declined to confirm the grant to await completion of the High Court proceedings. Subsequently, a summons was filed herein on 5th April 2011, dated 4th April 2011, seeking revocation of the grant made in Vihiga in SRMCSC No. 100 of 2007. That application was resolved on 2nd March 2013 when the said grant was revoked.

4. The application that I am called upon to determine is the summons for confirmation of grant dated 20th November 2017, brought at the instance of the administrators. They propose distribution amongst the four sons of the deceased and the daughter-in-law as follows: Ephraim Musambuli – 0.88 hectare, Abisai Likomba – 0.21 hectare, Daudi Chugi – 0.63 hectare, Hassan Yohana Agibai – 0.51 hectare and Mary Imali Mudembei – 0.42 hectare. An access road was allotted 0.01 hectare. The distribution is apparently informed by the situation on the ground as confirmed by an attached survey report done by Makos Survey Services dated 10th November 2017, and lodged in the record on 20th November 2017. The application is supported by four of the survivors who signed a to distribution dated 20th November 2017. It is only Hassan Yohana Agibai who did not sign the consent. When the matter came up for hearing on 6th November 2018, all five survivors were in attendance, and all supported the proposed distribution save for Hassan Yohana. I gave him time to file an affidavit of protest, and fixed the matter for hearing on 6th November 2018. Come 6th November 2018, he told the court that he had not filed a protest as he had no money.

5. The persons before me are the children of the deceased. I have not been informed about what happened to the widow, and I shall presume that she passed on. That being so then I shall presume for purposes of distribution that the deceased was survived by children but no spouse. The deceased had died intestate. Distribution in such cases is governed by Part V of the Law of Succession Act, Cap 160, Laws of Kenya. Section 38 of the Act applies to the estate of an intestate survived by children only without a spouse, such as in the instant case. For avoidance of doubt the provision states as follows -

'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 be equally divided among the surviving children.'

6. Parties are not necessarily bound by section 38, and can depart from it if they are in agreement. In this case, the administrators propose a departure. They would like the court to distribute the property not equally as envisaged in section 38 but unevenly based on their actual occupation of the land on the ground. Four of the five survivors endorse this, but one did not sign the document. When he was given opportunity to file papers to state his position and to provide a platform for the court to conduct a hearing in order to investigate and interrogate his case, but he did not avail himself of the opportunity. However, the law is very clear, the estate should be distributed according with Section 38 of the Act. No reasons have been given to justify departure from that position, noting equally that the family is not fully agreed on the matter.

7. I shall dispose of the said application in the following terms -

(a) That I hereby confirm the grant on record and order disposal of the estate equally amongst the survivors in terms of Section 38 of the Law of Succession Act;

(b) That a certificate of confirmation of grant shall issue to the administrators in those terms;

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

(d) 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 10th DAY OF April, 2019

W. MUSYOKA

JUDGE