



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 235 OF 2011

IN THE MATTER OF THE ESTATE OF JOSEPH LISANZA LUKALE, DECEASED

JUDGMENT

1. The deceased herein died on 25th June 2010. A letter from the Chief of Ivihiga Location, dated 13th January 2011, indicates that the deceased was survived by twelve children, being George Wendo Jeki, Elias Madegwa, Abraham Lukoye Lisanza, Gilbert Khamasi, Benjamin Shitsukane, Dickson Amalemba, Mary Muhati Sidati, Janet Muhati Sidati, Phanice Lisanza, Joyce Atema Lisanza, Beatrice Khenyeni and Edith Kinuthia.

2. Representation to his estate was sought vide a petition lodged herein on 29th March 2011. The petition was filed by Elias Moard Mategwa and Janet Munayi Lisanza, in their capacities as son and daughter of the deceased respectively. He was expressed to have been survived by the children listed in the Chief's letter mentioned hereabove. He was also said to have died possessed of Kakamega/Ileho/311 and 1345, and eight (8) head of cattle. Letters of administration intestate was made to Elias Moard Mategwa on 13th June 2012, and a grant to that effect was issued on 5th July 2012.

3. The administrator filed an application dated 24th January 2013, on 25th January 2013, seeking confirmation of his grant. He identified the survivors of the deceased to be the twelve (12) individuals named in the Chief's letter. He proposed that Kakamega/Ileho/311, which measured 4.2 hectares, be shared out so that the sons get 3.2 hectares equally and 0.8 hectare to the daughters to be held in trust by the administrator. The trees on the land were to be harvested and sold and the proceeds shared equally. The logs lying in the compound were to be split into timber and sold by the administrator, and the proceeds utilized for the subdivision of Kakamega/Ileho/311. The eight head of cattle sold by George Jeki were to be vouched for and the value thereof be apportioned amongst those who had not benefited from the sale. Kakamega/Ileho/1345 was to be allocated to whoever would get the portion with the graves of the parents.

4. To the application George Wendo Jeki filed an affidavit of protest. He stated that the deceased had distributed his property during lifetime, and each of the sons had occupied and developed their respective portions. He proposed that a surveyor visit Kakamega/Ileho/311 for mapping out the portions as occupied on the ground by the sons. He averred that the deceased had allocated the huge trees on the land to the daughters and not the land. He claimed that Kakamega/Ileho/1345 was his although registered in the name of the deceased since the purchase money came from himself. He asserted that the property did not form part of the estate and was not available for distribution. He said that he sold the cattle on the instructions of the deceased, and that he gave the proceeds of sale. He averred that the cattle for that reason did not form part of the estate of the deceased. He attached a document that he referred to as minutes of a meeting held on 19th March 2008, during which the deceased distributed his property.

5. Abraham Lukoye Lisanza also filed an affidavit of protest on 16th May 2013. He proposed that the administrator convenes a family meeting for the parties to agree on distribution. He also proposed that Kakamega/Ileho/311 be surveyed on the ground in the presence of everyone before distribution was carried out. He also stated that all the property left behind by the deceased be ascertained for distribution purposes, and that George Jeki account for the cattle that he sold. He proposed too that the gum trees be sold and the proceeds be utilized to cover administration costs and any surplus be shared out equally amongst the children. He proposed that the daughters be given one (1) acre of land, to be registered in their names or to be held in trust by Dickson Amalemba. He proposed that Kakamega/Ileho/1345 be given to the administrator. There are also other protest affidavits by Beatrice Khenyeni Lisanza, Dickson Amalemba Lisanza and Gilbert Khamasi Lisanza, which are word for word the protest by Abraham Lukoye Lisanza.

6. The administrator responded to the protests. He accused the protestors of being opposed to him, and of ganging up to cut down trees on Kakamega/Ileho/311 which they sold as timber and spent the proceeds of sale for their own purposes. He asserted that the trees covered some 2.5 acres as at 19th March 2013. He challenged them to identify the assets that they say should be disclosed. He conceded that those who cut down and sold the trees ought to account for the same and pay reparations. He also agreed that the gum trees be cut down and sold, with the proceeds being applied to defray subdivision costs.

7. Directions were given on 21st August 2013 for disposal of the application by way of *viva voce* evidence.

8. The oral hearing began on 3rd April 2014. George Jeki Wendo was the first on the stand. He stated that the deceased had divided his land before he died. He had allegedly summoned his children for the purpose, but some declined to come home. He produced a document to

support his contention. He stated that beacons were placed on the ground by a surveyor brought on site by the deceased. He said that except for himself and another, his brothers defied the subdivision, and some even sued the deceased over the same. He also testified that the deceased had instructed him to sell the cattle after the herds boy left. He produced copy of the sale agreement on the disposal of the cattle. He proposed that the court distributes the property in accord with the distribution intended by the deceased. He asserted that Kakamega/Ileho/1345 was his own property, that the deceased had bought on his behalf after he gave him money to do so. He was away in Kampala when land adjudication officers came on the ground and the deceased had it registered in his name.

9. Gregory Lwango testified next. He escorted a surveyor to the home of the deceased for the purpose of the subdivision. He stated that the surveyor placed the beacons at the spots indicated by the deceased. He had been sent by Benjamin Shitsukane. He stated that he knew all the children of the deceased, he named Benjamin Shitsukane and George Jeki as being present as the sub division.

10. Benjamin Shitsukane followed. He supported the testimony of George Jeki. He explained that two weeks before the distribution, the deceased had called him and talked to him about it. He had been asked to bring a surveyor. He was not able to attend, but he sent a surveyor. The surveyor did a sketch, and was said to be holding the mutation forms. He said that the daughters were to get some land and the trees.

11. The matter did not proceed beyond 3rd April 2014. The administrator filed various interlocutory applications, which delayed its disposal. When a similar application was placed before me on 7th November 2018, I declined to hear it, instead giving the parties hearing dates for the *viva voce* hearing of the confirmation application.

12. 14th November 2018 was one of the hearing dates. The parties informed me that there had been discussions amongst the children present in court and there was movement towards settlement. It was agreed that I would hear the views of those present and thereafter adjourn the matter to allow for the attendance of the rest. Those present on 14th November, 2018 were George Jeki, Elias Madegwa, Benjamin Shitsukane and Abraham Lukoye. Elias Madegwa, the administrator, stated that he stood by his application, while the rest wanted the daughters to get one (1) acre of the land with the balance being shared equally amongst the sons. Benjamin Shitsukane however added that he was not averse to equal distribution amongst all the children of the deceased including the daughters.

13. The other children were availed on 10th December 2018. They included Jennifer Amalemba the wife of Dickson Amalemba, Janet Munayi and Joyce Atema. Jennifer Amalemba took the position that the property ought to be shared equally amongst the sons; while Janet Munayi and Joyce Atema stated that they favoured equal distribution amongst all the children including the daughters. Mr. Manani, for one of the protestors, stated that he was not opposed to equal distribution amongst all the children, save that the court ought to address the matter of intermeddling with estate property. The administrator too appeared to change his position and to state that he stood for equal distribution amongst all the children of the deceased, pointing out that one of the daughters, Phanice Sinjoki Lisanza, was mentally disturbed.

14. The deceased herein died on 25th June 2010, long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force on 1st July 1981. That would mean that his estate fell for distribution in accordance with the provisions of the Law of Succession Act.

15. There are several proposals on the table. One is that the main property had been distributed during the deceased's lifetime. Those who support that view would like to have that property shared out in accordance with the wishes and desires of the deceased. Evidence was adduced that a surveyor came to the ground and mapped out the parcels, and placed beacons on the ground on instructions of the deceased. According to that proposal the bulk of the land was to go to the sons, with the daughters getting some undisclosed portion and gum trees. The next proposal is that the land is to be shared equally amongst the sons, with the daughters getting one acre to be shared amongst them. The other proposal is that the land be shared exclusively amongst the sons. The final proposal is that the land be shared equally amongst all the children of the deceased.

16. The document through which the deceased was said to have had expressed his wishes or desires on distribution was put in evidence and marked as an exhibit. It is dated 19th March 2008. The document is definitely not a will for it was not executed in conformity with section 11 of the Law of Succession Act. Neither can it pass as the oral will of the deceased, based on the principle stated in *Wambui and another vs. Gikonyo and others* (1988) KLR 445, for the utterances that accompanied the making of the document were made on 19th March 2008 while the deceased died on 25th June 2010, yet an oral will is valid for only three months from the date of pronouncement. The other issue is that the deceased might have had an intention to make *inter vivos* gifts to the children, but the lifetime gifts did not materialize for the deceased did not effect the transfers to the intended beneficiaries before he died, and therefore it cannot be said that what he intended amounted to *inter vivos* gifts. It can only be interpreted to mean that his attempt at lifetime gifts failed. Whatever he intended failed. The court is not bound to consider those intentions or wishes at distribution.

17. As the deceased did not leave a valid written or oral will. It can only mean that he died intestate. The assets that make up his estate are therefore available for distribution in accordance with Part V of the Law of Succession Act. The deceased had been predeceased by his wife, Priscilla Tsisika Lisanza, who died on 10th July 2006. That means that the survivors of the deceased are his children. The applicable provision for distribution of an estate of an intestate survived only by children is section 38, which 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.'

18. The reference to 'child' and 'children' in that provision should not be read as referring only to sons or male individuals. It should be interpreted to cover both male and female, sons and daughters. The notion that daughters, or female children, of a deceased person are not entitled to a share in the estate is not in the provisions of the Law of Succession Act. It is a customary law notion, yet customary law was ousted by the coming into the force of the Law of Succession Act, through section 2(1). The notion that daughters do not deserve a share in the estate of their dead parent belongs to a bygone era. It is an outdated thought for anyone to presume that once a daughter marries she loses her right to inherit, or that she somehow loses her position in the family of her father or mother. The sons do not have a superior claim to the estate, and it is not for them to dictate what the daughters get out of the estate. The prevailing legal position is that a daughter, whether single

or married, stands in the same position as a son with regard to inheritance or succession to her parents' property. The distribution of the main property shall be determined with that in mind. Should the daughters, or anyone of them, wish not to take up their entitlement from the estate, they are at liberty to renounce or waive that right. They cannot just be excluded as if they were never born, or did not exist, or do not count.

19. On the second landed property, Kakamega/Ileho/1345, there is a claim that it is not estate property for it had been bought with money provided by one of the sons and therefore it was his property. The deceased is said to have only caused it to be registered in his name as the son who bought it was not available during land adjudication. No material was placed before me as to when it was bought and from whom for me to assess from the circumstances whether or not what is claimed is true. In the absence of such evidence I can only conclude that the same is estate property to be distributed under section 71 of the Act. It is proposed by some of the children that it should go to the administrator, the others have expressed no opinion on it. In the circumstances I shall deal with it as prescribed in section 38.

20. Regarding the cattle, it is common ground that the same were sold by one of the sons during the lifetime of the deceased. He claimed that he did so under the instructions of the deceased. The majority of the survivors do not support this view. There is a document that he put in as evidence of the sale but the same only shows that the said son sold the cattle, there is no mention of instructions from the deceased, nor mention that the sale purchase money was handed over to the deceased. The said son should account for the money realized from the sale of the cattle.

21. There is also the issue of trees and timber. Some were sold by persons who have been identified during the oral hearing and in the report by the Deputy Registrar. There is the issue of the trees that are yet harvested. There are two proposals, the trees be given to the daughters in lieu of the land, or sale thereof to raise money for administration and the surplus to be shared equally amongst all.

22. In the end I shall make the following orders:-

(a) That the grant is hereby confirmed in the following terms -

(i) Kakamega/Ileho/311 and 1345 shall be shared out equally between George Wendo Jeki, Elias Madegwa, Abraham Lukoye Lisanza, Gilbert Khamasi, Benjamin Shitsukane, Dickson Amalemba, Mary Muhati Sidati, Janet Muhati Sidati, Phanice Lisanza, Joyce Atema Lisanza, Beatrice Khenyeni and Edith Kinuthia;

(ii) The commercial trees on Kakamega/Ileho/311 shall be harvested and sold, and the proceeds therefrom plied to administration expenses with the balance being shared out equally between George Wendo Jeki, Elias Madegwa, Abraham Lukoye Lisanza, Gilbert Khamasi, Benjamin Shitsukane, Dickson Amalemba, Mary Muhati Sidati, Janet Muhati Sidati, Phanice Lisanza, Joyce Atema Lisanza, Beatrice Khenyeni and Edith Kinuthia; and

(iii) The proceeds from the sale of the cattle shall be shared equally between George Wendo Jeki, Elias Madegwa, Abraham Lukoye Lisanza, Gilbert Khamasi, Benjamin Shitsukane, Dickson Amalemba, Mary Muhati Sidati, Janet Muhati Sidati, Phanice Lisanza, Joyce Atema Lisanza, Beatrice Khenyeni and Edith Kinuthia;

(b) that should the daughters, or any of them, be not interested in taking up a share in the estate they shall file affidavits or deeds renouncing or waiving or declining their share;

(c) that George Wendo Jeki shall file accounts for the cattle he sold and reimburse the estate, while Abraham Lukoye shall account for the trees that he cut down and sold, and shall reimburse the estate, and shall surrender any unsold timber in his possession or custody to the administrator; and

(d) the accounts in (c) shall be filed within 30 days;

(e) that a certificate of confirmation of grant shall accordingly issue in the terms stated above.

23. Any party aggrieved by the judgment herein shall be at liberty to move the Court of Appeal appropriately.

DATED, SIGNED and DELIVERED at KAKAMEGA this 10th DAY OF April, 2019

W. MUSYOKA

JUDGE