REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO 749 OF 2007

IN THE MATTER OF THE ESTATE OF KATIMBA IMBIAKHA (DECEASED)

RULING

1. What I am tasked with determining is the preliminary objection raised by the administrator, Belia Khayanga Imbiakha, to the summons for revocation of grant by the Susan Nasimiyu Imbiakha, dated 3rd September 2018. The objection is based on a Notice of Preliminary Objection dated 18th October 2018.

2. In the summons dated 18th September 2018, the applicant seeks stay of execution of the orders made previously in the matter, revocation of the grant herein and of the certificate of its confirmation, and redistribution of the estate to include the beneficiaries who had been excluded. In her affidavit in support, she averred that she and her sisters, being Sabeth Katimba, Sarah Katimba, Super Katimba, Catherine C. Katimba and Priscilla N. Katimba were not provided for. She states that the administrator would like to distribute the estate without making provision for them.

3. The Notice of Preliminary Objection raises two points, that the matters raised the summons were *res judicata* in view of the judgment of the Court of Appeal delivered on 24th July 2015 and that of this court delivered on 25th July 2013, and that the applicant had not been enjoined or made a party to the proceedings and hence her application was incompetent. Those are the two issues that I should be considering in this ruling.

4. The preliminary points of law were argued orally on 27th November 2018. Mr. Ondieki for the respondent submitted that the application turned on matters that were *res judicata*. He pointed to the judgement of 25th July 2013, saying that the same distributed the estate in accord with section 40 of the Law of Succession Act, Cap 160, Laws of Kenya, and the interest of the applicant was taken care of in that judgement, she was entitled to a share through her house. The applicant was dissatisfied with the decision and challenged it on appeal, but her appeal was dismissed. He asserted that the applicant should get her share through her house, adding that the court made orders on distribution and there was nothing remaining undistributed. He stated that the property given to the first house, to which the applicant belonged, ought to have be shared out equally amongst members of that house, which includes the applicant. He asserted that the applicant was not being locked out.

5. In response Mr. Manyoni submitted that the applicant was not listed as a beneficiary in those proceeding, and had been left out completely, and she had come to court seeking to have the court establish whether or not she was a beneficiary. He submitted that she was not even served with the confirmation application. On her applying for joinder, he submitted that that was not necessary as she was a beneficiary, a child of the deceased and a person directly affected. He stated that the distribution of 25th July 2013 was only in respect of the persons listed, and not those left out.

6. In the judgement of 25th July 2013, the court noted that the deceased had two wives, the first wife had ten children being three sons and seven daughters, while the second wife had fourteen children, being seven sons and seven daughters. I note that the judgement did not identify the sons and daughters of the deceased by name. In distributing the estate the court took into account both the sons and daughters without discrimination. In the pertinent part of the judgment the court said -

> *'Since the law does not distinguish between the gender of the children I will adopt the second formula. Although both parties are not so much keen on the position of married daughters, I do find that it is their constitutional right to inherit the estate of their deceased father and they are free to relinquish their share to their brothers …'*

7. The court then proceeded to share out the estate to the two houses of the deceased in accordance with section 40 of the Law of Succession Act, and directed as follows -

> *'… Musa Imbiaka Katimba, Zakayo Ikhabi Katimba and Shadrack Nyongesa Katimba shall be registered on the 29 acres share on behalf of the first house. The petitioner Belia Khayanga Katimba and her son Jonathan Burudi Katimba shall be registered on the titles of the shares for the second house on their own behalf and on behalf of the other beneficiaries. Any beneficiary is at liberty to relinquish his or her share to any other beneficiary.'*

8. A certificate of confirmation of grant was issued on 20th August 2013 capturing distribution in the terms of the judgement of 25th July 2013. It reflected that the persons in whose names the titles were to be registered in were to share the said assets equally with the beneficiaries in the respective houses. The beneficiaries in the respective houses were not indicated in the certificate.

9. I agree with Mr. Ondieki, the issues raised in the summons before me were dealt with comprehensively by the court in the judgement of 25th July 2013. The property was devolved to the names of specific individuals who were to hold the assets on behalf of the members of their respective houses. The applicant is a daughter of the deceased. The court held that the daughters, whether married or not, were entitled to a share in the estate, and were at liberty to renounce their shares if they were so minded. The court did not identify the children by name, but it suffices that the houses were identified and it was ordered that the property allocated to each house ought to be shared out equally amongst all the members of each respective house, including the daughters. The applicant has not demonstrated that the said orders did not apply to

her, or that they excluded her. To my mind they cover all the children of the deceased in each house, be they sons or daughters. The property was devolved upon the named individuals to hold in trust for the rest, and the same to be shared out at a later date equally amongst all entitled. The summons is therefore inviting me to deal with the same issues that were dealt with in the judgement of 25th July 2013. All these matters are now water under the bridge, and are *res judicata*.

10. On the question as to whether the applicant ought to have sought to be joined first to these succession proceedings before mounting the summons before me, I would say that the position stated by Mr. Manyoni is the correct one. The applicant is a daughter of the deceased. She is a beneficiary, and is entitled to bring applications in the cause of the deceased without having to apply for joinder as she is directly affected. There is therefore no merit in the second limb of the objection.

11. In view of everything that I have said so far, I do hereby uphold the objection with respect to the first limb and find that the summons dated 3rd September 2018 is not tenable as it dwells on matters that are *res judicata*, but I decline the objection on the second limb of the Notice of Preliminary Objection dated 18th October 2018. In the upshot the summons dated 3rd September 2018 is incompetent on the grounds of being *res judicata*, and the same is hereby struck out with costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10th DAY OF April, 2019

W. MUSYOKA

JUDGE