



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO 534 OF 2016

IN THE MATTER OF THE ESTATE OF SAMWEL AMANAKA NGONZE (DECEASED)

JUDGMENT

1. The deceased herein died on 28th October 2015. Representation to his estate was initially commenced in Nairobi HCSC No. 913 of 2016, but that cause was transferred to the High Court at Kakamega by an order made on 17th June 2016, whereupon it was allocated its current number Kakamega HCSC No. 534 of 2016. A letter from the Office of the Chief of Tongoi Location, dated 29th January 2016, indicates that he was survived by two widows, Joyce Opisa Amanaka and Christine Nafula Amanaka, and five sons and six daughters, the sons being Dickson Esikuma, Josiah Ng'onze, Zablon Osoo, Daniel Muchesi and James Baraza, and the daughters being Dorcus Afwande, Dorina Ayitso, Beryl Alice, Victoria Nengo, Brenda Onyeti and Jesca Achando.

2. The petition herein was lodged by the two widows, and they listed themselves and the eleven children as the survivors of the deceased. They also listed Kakamega/W Bunyore/Ebusikhale/2010, W Bunyore/Essa/613, LR No. 8051/18 Luanda Township, Plot No. 41 Umagara Wironere Company Limited and Kikomba Market Stall C70 as the landed assets that he died possessed of. He was also said to have died possessed of shares in ten firms, he had a life insurance policy, pension dues and money in several bank accounts. Letters of administration intestate were made to the two widows on 26th March 2017, and the two were issued with a grant on 21st April 2017.

3. The application the subject of this judgement is the summons for confirmation of grant dated 6th December 2017. It is brought at the instance of Christine Nafula Amanaka. She has identified herself and her co-widow as the survivors of the deceased together with their eleven children. She proposes that the estate be shared between the widows, with nothing going to the children. Her proposal is that she should take Kasarani Plot No. 41, W Bunyore/Ebusikhale/2010, Stall No 70 Gikomba, ½ of Bunyore/Essa/613, the money in the bank accounts at Standard Chartered, Cooperative Bank of Kenya, Commercial Bank of Kenya and Equity Bank, and the shares in Nation, Cooperative bank, Kenya Airways and East Africa Breweries. She proposes that Joyce Opisa Amanaka takes Dandora Plot No 5625, LR No. 8053/18 Luanda, Stall No. 69 Kikomba, ½ of W Bunyore/Essa/613 and shares in National Bank, Standard Chartered Kenya Commercial Bank, Dunlop and Express Kenya.

4. Joyce Opisa Amanaka filed an affidavit of protest to the proposed distribution, and I shall for that reason refer to her as the protestor. She states that she was the first wife having been married in 1968, while her co-wife was married in 1972. She adds that the deceased set up for her a matrimonial home at W Bunyore/Essa/613, while her co-wife's matrimonial home was set up at W Bunyore/Essa/828. She avers that after the deceased died, the applicant and her children abandoned their home at W Bunyore/Essa/828 and forcibly settled on W Bunyore/Essa/613 where they occupied a house belonging to their mother-in-law. She says that that conduct strained relations between the two houses. She states that the deceased left behind three pieces of land at Bunyore registered in his names, being Bunyore/Essa/613, W Bunyore/Ebusikhale/2010 and LR No. 8053/18 Luanda; and three other assets in Nairobi registered in his names being Dandora Plot No 5625, Plot No. 41 Kasarani and another at Kasarani whose number she did not state. She also mentions other assets situate within Bunyore that belonged to the deceased but were not registered in his name, being Bunyore/Essa/720, 828 and 1159, and another whose number she does not disclose. She avers that the deceased settled her and her children on Dandora Plot No 5625, while the applicant and her children were settled on Plot No. 41 Kasarani. She states that the deceased had also bought another plot at Kasarani for the applicant, adding that she had no claim whatsoever to the two Kasarani plots. She states further that the deceased held shares in Jubilee Holdings Limited, Nation Media Group, Cooperative Bank of Kenya, Kenya Airways and East Africa Breweries Limited, and had money in bank accounts in Kenya Commercial Bank and Standard Chartered Bank. She proposed that she and her children should get the following - Bunyore/Essa/613 and 1159, LR No. 8053/18 Luanda, ½ share of W Bunyore/Ebusikhale/2010, Dandora Plot No 5625 and ½ of the shares in the various firms and ½ share of the money in the banks. She proposes that the applicant and her children take Bunyore/Essa/720 and 828, the land at Bunyore whose land reference number is unknown, ½ of W Bunyore/Ebusikhale/2010, the two plots in Kasarani Nairobi, and the ½ share of the shares in the various firms and the money in the banks. She explains that her matrimonial home is on Bunyore/Essa/613, while LR No. 8053/18 Luanda was a property she acquired with the deceased before the applicant was married and that she contributed heavily to its development, and had been receiving rent from the premises both before and after the deceased's demise. She says that Bunyore/Essa/1159 is registered in the name of a late brother of the deceased known as Joab Dickson Ngonze, and that it was always the desire of the deceased that the first house should have that property. She complains that the applicant had proposed distribution of property that did not belong to the deceased, such as the plots at Gikomba.

5. The applicant responded to the protest through an affidavit sworn on 19th February 2018. She avers that the entire family of the deceased resided on Bunyore/Essa/613, saying that Bunyore/Essa/828 did not form part of the estate of the deceased and that she never lived there. She states that Bunyore/Essa/720, 828 and 1159 never belonged to the estate. She said that the protestor could be given LR No.

8053/18 Luanda absolutely so long as she was given W Bunyore/Ebusikhale/2010.

6. The oral hearing of the application happened on 4th December 2018. The first on the stand was the applicant she identified the children in the first house as being Dickson, Dorcus, Dorina, Victoria and Brenda; while her own children were Josiah, Zablun, Jesca, Daniel and James. She stood by the allegations in her application, and asserted that all the assets ought to be shared out equally between the two houses. She explained that the two stalls at Gikomba had been bought by the deceased, and if the protestor had bought any then she ought to provide proof thereof. She said Plot No. 40 Kasarani was hers, having been bought by her, while Plot 41 Kasarani belonged to the deceased having been purchased by him. She stated that Bunyore/Essaba/1159 did not belong to the deceased but to his late brother, who had been survived by a daughter, Miniga Indegwa Amanaka, who was still alive.

7. The applicant called her son, Daniel Muchesi, as a witness. He stated that the family had sat severally on distribution and had nearly reached settlement, but then the protestor started shifting position. He rooted for equal distribution.

8. On her part, the protestor stated that some of her children had since died but had been survived by children of their own. Belma Asami was survived by Irene Akinyi and David Odhiambo, while Victor had been survived by Rina Olwanzo Nanjero and Ryan Amanaka Nanjero. She said that there were three farms registered in the name of the deceased's late brother. She explained that the deceased had sent money to his late brother buy the pieces of land for him. The two were to sort the issue of ownership later but they both died before that could happen. She stood for equal distribution of the assets. On the Gikomba stalls she said that C70 belonged to the deceased, while C69 was hers, she paid for it with her money but the deceased completed the payments. She complained that whereas she had custody of her stall, a son from the applicant's house had forcibly taken over C70.

9. The protestor called one witness, Samson Angolo Timothy Osiru, a cousin of the deceased. He accused the applicant of creating the differences that existed between the two sides of the family.

10. Under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, confirmation of a grant in intestacy serves two purposes. The first one is confirmation of the administrators, in terms of determining whether or not they would continue in office. They would not be confirmed if it is established that their appointment had issues, or where they had failed in their duties. Secondly, the court distributes the estate upon being satisfied that the administrators had ascertained the assets and the person beneficially entitled and the mode they proposed to have the assets distributed amongst all the persons identified as beneficially entitled. In this case, the issue of confirmation of the administrators does not appear to have been raised. No questions have arisen as to improprieties in the manner of their appointment, nor have any allegations of maladministration been made. It would appear that the only issue for me to determine is with regard to distribution.

11. For the purpose of distribution, what is critical is whether the assets and beneficiaries have been ascertained. In this case, the two administrators are agreed on the persons who should be the rightful beneficiaries, that is persons entitled to a share in the estate. There is no dispute on that. The dispute is on what constitutes the estate by way of assets, and the manner in which the estate ought to be distributed.

12. Regarding the assets, both sides have not attached any documents of title to satisfy me that the assets they propose for distribution belong to the estate. I have, however, perused the record before me and noted that they had lodged some documents of title as proof of what the estate comprises of. The documents in question that are in the name of the deceased are in respect of Kakamega/Bunyore/Ebusikhale/2010, LR No. 8053/18 Luanda Township, W Bunyore/Essaba/613, Plot No 41 Kasarani Plot Certificate, 450 shares in Jubilee Holdings Limited, shares in Reli Cooperative Savings and Credit Society Limited, shares in East Africa Breweries Limited, 93 shares in Standard Chartered Bank Kenya Limited, 3200 shares in Kenya Airways, 2000 shares in Cooperative Bank of Kenya, 1200 shares in Dunlop Kenya Limited, 700 shares in National Bank of Kenya Limited, 500 shares in Express Kenya Limited, 13860 shares in Nation Media Group Limited, shares in Kenya Commercial Bank and a pension with Kenya Railways. There are three official receipts issued in 1964 and 1965 under the Land Registration (Special Areas) Act and the Land Adjudication Act in respect of 720/Essaba, 828/Essaba and 1159/Essaba in the names of Joab Ngonze and Dickson Ngonze.

13. The deceased died after the Law of Succession Act had come into force and therefore distribution thereof must be in accord with the said law. He died intestate and therefore the relevant provision should be Part V of the Act. He was a polygamist and distribution must be in accord with section 40, where the court has to take into account the number of children in each house. The first house has eight children, and therefore after adding the widow, make up nine (9) units, while the second house has five children which makes six (6) units after taking into account the widow. For avoidance of doubt section 40 provides as follows -

'(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.'

14. I shall accordingly make the following final orders -

(a) That I declare that the deceased was survived by two widows; being Joyce Opisa Amanaka, who had the following children with the deceased, that is to say, the late Belma Asami (survived by Irene Akinyi and David Odhiambo), Dickson Esikumo, Dorcus Afwande, Doreen Ayitso, Beryl Alice, Victoria Nengo, late Victor Nanjero (survived by Rina Olwanzo and Ryan Amanaka) and Brenda Onyeti; and Christine Nafula Amanaka who had the following children with the deceased, that is Josiah Ng'onze, Zablun Osoo, Jesca Achando, Daniel Muchesi and James Baraza;

(b) That I declare that the property that he has been proven to have died possessed of is Kakamega/Bunyore/Ebusikhale/2010, LR No. 8053/18 Luanda Township, W Bunyore/Essaba/613, Plot No 41 Kasarani Plot

Certificate, 450 shares in Jubilee Holdings Limited, shares in Reli Cooperative Savings and Credit Society Limited, shares in East Africa Breweries Limited, 93 shares in Standard Chartered Bank Kenya Limited, 3200 shares in Kenya Airways, 2000 shares in Cooperative Bank of Kenya, 1200 shares in Dunlop Kenya Limited, 700 shares in National Bank of Kenya Limited, 500 shares in Express Kenya Limited, 13860 shares in Nation Media Group Limited, shares in Kenya Commercial Bank and a pension with Kenya Railways;

(c) That the said property shall be shared out in the ratio of 9:6 or 3:2 in favour of the protestor and the applicant, respectively;

(d) That upon the sharing in terms of (c) above, the landed property shall devolve into the names of the two widows during lifetime, and thereafter to the children in each house in equal shares in accordance with section 35 of the Law of Succession Act;

(e) That the rest of the assets shall, after the sharing in accord with (c) above, pass directly and absolutely to each of the beneficiaries;

(f) That the grant of letters of administration intestate on record is hereby confirmed in those terms;

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

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

(i) 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