REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 250 OF 1999

IN THE MATTER OF THE ESTATE OF LAWRENCE KATUMANGA LIKHANGA (DECEASED)

RULING

1. On 21st October 2010, a ruling was delivered herein by Lenaola J, whereby the estate of the deceased was distributed.

2. Subsequently, an application was lodged in the cause, dated 30th May 2011, seeking review of the orders made on 21st October 2010, specifically regarding the share given to Elizabeth Anne Katumanga and consideration of Wilmina Muteshi Katumanga, who had been allegedly left out of the distribution. The grounds of review largely dwell on the position of the said Wilmina, where it is urged that she is an heir who was omitted from distribution. It was argued that she was notified of the application for distribution and her views had not been sought and it had been falsely stated that she was unwilling to be involved in the distribution. It is also stated that the distribution exceeded the acreage of the land.

3. The said application is brought at the instance of Wilmina Muteshi Katumanga. She avers that she attended court only once when the court asked the family to agree, and was surprised to learn that the court had delivered a ruling on distribution. She asserts that the estate of the deceased was distributed without her participation. She avers that the court took into account the testimony of Paul Esohe Katumanga to the effect that she was not entitled to a share because she was married. She denies being married, saying that she was once but, she separated from her husband, who later died. She complains that no one consulted her over interest in the estate, saying that if she were not interested as alleged, she would have sworn an affidavit to that effect. She states that she is a daughter from the second house who was entitled to a share from the estate, whether married or not. She also avers that the land measures only 2.4 hectares while the court shared out 2.62 hectares, which is way in excess of the acreage of the estate. She avers that the court ought to have taken into account that the deceased's eldest son, John Katumanga and his son had benefited from the estate by being allocated Isukha/Shirere/1656 and from the estate, Isukha/Shirere/1659. She complains that the family of John Katumanga unfairly got a large share from the estate.

4. The response to the application is by the second administrator, Paul Esohe Katumanga, through an affidavit sworn on 15th November 2011. He states that the applicants were not telling the truth as they were all aware of what was going on. He argues that they do not have sufficient grounds for challenging the orders. He asserts that their names were in the joint affidavits of the administrators sworn in support of the confirmation application. He asserts that the application was being brought after considerable delay as the ruling was delivered on 21st October 2010 yet the review application was not filed until 13th July 2011. He has gone into the history of the matter showing how their mother, the first administrator, tussled with the first house on administration of the estate, and pleading that their mother could not possibly have had those tussles without their knowledge. He has also delved into what he says were family discussions that led up to the distribution, which meetings the applicants did not attend. He avers that Wilmina Muteshi was even allocated a share of the land. Overall, he argues that the applicants were in the list of beneficiaries that were placed before the court, and they were considered by the court during distribution. He also avers that he could not tell whether or not John Katumanga had been given land free by the deceased or whether he had bought from him.

5. There is also an affidavit sworn by Elizabeth Anne Katumanga on 15th March 2012 in support of the application. She avers that the deceased had demarcated his land, prior to his death, between his two houses, which demarcations she claims still exist. She says that had the court visited the land in question that evidence would not have been ignored, and it was a matter that could be taken up on review. She accuses the second administrator of bringing a stranger called Musa Milimo Shaminikha into the matter, yet he was not a son of the deceased but a neighbour. She asserts that the said person was not entitled to a share in the estate and the court should take away the share given to him. She avers that the share given to him should revert to the second house since the same was on the side demarcated in favour of the second house. She proposes that after considering the portions given to each house, the court should proceed to allocate shares to the children according to their houses. She states that the beneficiaries, apart from Peter Shole, had all settled and developed the portions that the deceased had demarcated to their respective houses, and that it was going to be inconvenient to ask people to shift to other portions.

6. The second administrator swore an affidavit on 19th March 2012 largely responding to the affidavit by Elizabeth Anne Katumanga. He swore a further affidavit on 16th October 2015. On the issue of Moses Milimo Shaminikha alias Moses Milimo Katumanga, he avers that the said person was a son of the deceased born outside of wedlock, and had been recognized as such in a family meeting held on 12th May 2000. He avers that the applicants were party to the proceedings and were represented by advocates, and should have responded to the averments made in his affidavit in support of the confirmation application to the effect that Wilmina Muteshi Katumanga was a married woman who was not interested in taking a share in his father's estate. He also responds to the allegation that the acreage distributed by the court exceeded the actual acreage of the property on the ground. He also argues that distribution of the property based on the houses would have been retrogressive and would have contributed to inequality. He denies being aware that John Katumanga had been given property by the deceased prior to his death, and especially Isukha/Shirere/1656. He adds that even if that were the case, the same did not disentitle such a person from getting a share out of the estate unless there was express waiver of the right by the beneficiary himself. He also argues that the court had become *functus officio* and any aggrieved party ought to move for revocation of the grant. He further avers that the issues raised by the applicants go beyond what the court can address in a review application.

7. The application was first placed before Kimaru J on 13th June 2011, under certificate of urgency, and directions were given then, and later for the filing of replies to the application. The application was argued orally on 31st October 2012 before Jaden J. A ruling was delivered

thereon on 29th November 2012. In the short ruling, the court noted that the proceedings of 21st October 2010 had only involved the applicants and the administrators, yet the eventual outcome could affect all the other beneficiaries. The court expressed doubts as to whether the other beneficiaries had been served instant. It stated that since the application sought review of the orders made on 21st October 2010 it was only prudent that all affected be involved in the process. Consequently, it was directed that the application be heard afresh after all the beneficiaries had been served.

8. Thereafter, the matter was placed before Chitembwe J, who, on 14th November 2013, noted that the orders made on 21st October 2010 were made without the parties giving oral evidence. He opined that although he was required to deliver a riling on the application dated 30th May 2011 a decision based only on documents in the file without hearing the parties would not settle the matter amicably. He also expressed the view that the court ought to visit the land and see for itself the exact position on the ground. Chitembwe J visited the land on 23rd June 2014, but he was not able to hear the application *viva voce* ,as he had directed, following his transfer.

9. The matter thereafter came up for hearing before various other judges, to wit Sitati J in 2015, Mwangi J and Kariuki J in 2016, Njagi J in 2017 and I in 2018. When the matter was placed before Kariuki J on 24th November 2016, it was directed that the parties file written submissions. When the matter was placed before me I reiterated those directions. The parties have complied and have filed their respective submissions, hence this ruling.

10. As can be seen from the above narrative, I have carefully perused through the file of papers before me. It is clear from the record that the deceased died a polygamist, having married twice. He had close to twenty children. The estate was distributed by the ruling of 21st October 2010 on the basis of affidavits only going by the directions given on 28th April 2010 that the parties do file affidavits on distribution within a specified period. The confirmation application dated 28th December 2004, which I believe was the basis of the ruling of 21st October 2010, therefore was not heard orally. The various survivors did not attend court to indicate whether or not they agreed with the proposals made, and to state their own preferences. I believe that it was with that in mind that Jaden J and Chitembwe J were reluctant to dispose of the application of 30th May 2011 before all the survivors of the deceased had been served and heard orally. I note in particular the sentiments expressed by Chitembwe J on 14th November 2013, that the distribution orders were made without the survivors having given oral evidence, and the caution that disposing of the matter purely on the affidavits would not fully and finally settle it.

11. I would like to associate myself with the sentiments by Chitembwe J. I fully subscribe to the view that a confirmation application is by far the most critical process in a succession cause. For the whole essence of a succession cause is distribution of the estate of the deceased. Distribution happens at the confirmation of the grant, and the court ought to get this process right if the matter is to be settled once and for all. That can only happen if the hearing of the confirmation application happens in the presence of all the survivors, and other persons affected, where all their views are taken on board before the court makes a determination one way or the other. That would obviate cases, such as the present, where survivors, who were not allowed to participate at confirmation, come back to court to have the exercise restarted.

12. Chitembwe J had directed that the matter proceeds by way of *viva voce* evidence. That should be the way to go. Determining the matter purely on affidavit evidence, which would not afford the parties opportunity to cross-examine the deponents of the various affidavits, would not settle all the issues arising comprehensively. For example, it is claimed by the applicants that Moses or Musa Milimo is not a son of the deceased, the second administrator asserts that he is. That is not an issue that can be resolved through affidavit evidence. The issues as to whether Wilmina was married or not again cannot be disposed of similarly, and so is the question as to whether John Katumanga had benefited from *intervivos* gifts of land from the deceased. Then there is the issue that the land distributed exceeded the actual acreage. All these are questions that will require that those making the allegations relating to them be subjected to cross-examination so that their allegations are tested, and so that the court can more effectually assess where the truth lies.

13. I need not say more. I cannot prepare a ruling founded only on the affidavits on record. There were directions that Chitembwe J made based on sound grounds. Those directions have not been varied by the Judges who subsequently handled the matter, in terms of them giving concrete reasons for deviating from the said directions.

14. Consequently, I shall cause the matter to be given dates for hearing at which both sides, and indeed any other survivor of the deceased, shall be entitled to be heard orally on the issues raised in the affidavits on record. Hearing dates shall be given at the delivery of this ruling. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF JUNE 2019

W MUSYOKA

JUDGE