REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 585 OF 2013

IN THE MATTER OF THE ESTATE OF WALTER NDOLO NYARIMA (DECEASED)

JUDGMENT

1. This matter relates to the estate of Walter Ndolo Nyarima, who died on 14th June 2013. According to the letter from the Chief of East Kisa Location, dated 22nd July 2013, the deceased was survived by a widow, Fridah Katibi Amwayi Ndolo; two sons – Dennis Mbala Ndolo and Bernard Katibi Ndolo; and three daughters – Caroline Nandwa Ndolo, Noel Ambiyo Ndolo and Elizabeth Anyoso Ndolo. He was said to have had died possessed of a motor vehicle – registration mark and number KAH 379J Peugeot 405; three pieces of land – Marama/Shirotsa/1420 and Kakamega/Lumakanda/5336 and 5875; shares in Kenya Airways, National Bank, Safaricom and Sheria Sacco; and money in accounts with Sheria Sacco, Equity Bank and Barclays Bank.

2. Representation to his estate was sought vide a petition lodged herein on 31st July 2013 by Fridah Katibi Amwayi Ndolo and Dennis Mbala Ndolo, in their capacities as widow and son, respectively, of the deceased. They expressed the deceased to have had died possessed of the assets and to have had been survived by the persons listed in the Chief's letter referred to in paragraph 1 here above.

3. An objection to the making of grant was lodged at the registry, dated 27th September 2013, by Cynthia Naliaka Watiangu, claiming to be also be a widow of the deceased, with whom she had allegedly had a daughter known as Linah Nafula. The dispute was resolved through a consent recorded in court on 24th February 2013. Fridah Katibi Amwayi Ndolo and Cynthia Naliaka Watiangu were appointed administrators of the estate of the deceased. A grant of letters of administration was issued to the two on 24th February 2014. I shall hereafter refer to the two as the 1st administratrix and 2nd a administratrix, respectively.

4. The 1st administrator thereafter filed a summons dated 24th July 2015 for confirmation of their grant. She listed the persons in the Chief's letter as the survivors of the deceased, and proposed distribution of the assets mentioned in the same letter. There is no mention of 2nd administratrix and her daughter.

5. Predictably, the 2nd administratrix swore an affidavit of protest on 6th September 2016. She complains, in her affidavit, that despite she and the 1st administratrix recording a consent on 24th February 2014, which made her an administrator, the 1st administrator had gone ahead and proposed distribution of the estate without involving her nor making provision for her. She states that she had married the deceased in 1999. She further states that she and the deceased had jointly acquired the assets known as Kakamega/Lumakanda/5336 and 5875, where thy put up a matrimonial home, in which they stayed together until the deceased's demise. She asserts that she had an uninterrupted use of the subject property until the deceased died. She proposes that Kakamega/Lumakanda/5336 and 5875 should devolve upon her, Marama/Shirotsa/1420 she be given to the 1st administrator. She further proposes that she be given the Safaricom shares, half share of the death gratuity, and 20% of the Sheria Sacco shares. She further mentions that the deceased and the 1st administratrix had acquired and developed a plot within Kakamega where she lived. She also filed a statement of her witness, Stephen Musungu Shikame, dated 6th September 2016.

6. The protest elicited a response from the 1st administratrix, through an affidavit that she swore on 6th October 2016. In it she avers that the 2nd administratrix was never married to the deceased. She asserts that the deceased never provided for her welfare. She filed her response simultaneously with a statement of her witness, Frankline Odambi Nyarima, dated 5th October 2016.

7. Directions were given on 5th October 2016 for disposal of the matter by way of oral evidence.

8. The oral hearing commenced on 9th November 2016, with the 2nd administratrix on the witness stand. She testified that the she and the deceased married in 1999, and stayed at Nyahururu as she was working at the Laikipia University. She stated that the two of them bought Kakamega/Lumakanda/5336 and 5875, which they fenced, planted trees and built houses on. She asserted that she contributed towards the purchase of the land. She said that it was the deceased who kept the title deeds. She and the deceased allegedly lived on the said parcels of land until he died. She averred that the 1st administrator knew that she was a wife of the deceased at the time, and that the 1st administrator

accompanied the deceased when he went to visit her parents. She stated that the deceased used to provide for her as his wife, and she produced Mpesa statements to support her contention. She also said that she sent money to one of the deceased's sisters and one of his brothers. She produced photographs that allegedly put the deceased and her together. She stated that she attended the deceased's burial, even though she was not on the programme and was not allowed to speak to the gathering. She asserted that she was more than a friend of the deceased.

9. During cross-examination, she said that she had cohabited with the deceased. To support that contention, she referred to the photographs that she had put in evidence, the MPesa statements and the house that they had allegedly put up together. She testified that out of the two parcels of land, they lived on Kakamega/Lumakanda/5875. She said that she used to live with the deceased, and then again that she used to visit him and take care of him. She said that they bought the two parcels of land. She was present at the purchases, witnessed the sale agreements and contributed to the purchase price. She said she did not produce the sale agreement in court, neither did she have evidence that she contributed to the purchase of the property.

10. Stephen Musungu Shikami testified as the 2nd administrator's witness. He stated that he was a witness when the deceased bought land. On cross-examination, he clarified that the land in question was Kakamega/Lumakanda/5875. The deceased had come accompanied by the 2nd administrator, whom he introduced as his wife. The deceased and the 2nd administrator then fenced the land.

11. The case for the 1st administratrix opened on 23rd May 2017. She testified that she and the deceased contracted marriage at a civil ceremony, and she produced a certificate of marriage to support her case. She said that she was not aware that he had married the 2nd administrator, saying that if he had married her he would have had to seek her permission. She said that she knew that the deceased bought two parcels of land at Lumakanda, but she could not tell the year when that happened. She stated that she did not know that the deceased was staying at Lumakanda with the 2nd administrator. She denied that the 2nd administratrix had a house at Lumakanda. She said that she was not aware that the 2nd administrator sent money to her in-laws, and even stayed with them at some point. She asserted that she did not provide for her as she was an impostor. She said that she was unaware that the deceased had paid dowry for the 2nd administratrix.

12. The 1st administratrix called her brother-in-law, Frankline Odambi Nyarima, as her witness. He testified that the 1st administrator was the only widow of the deceased, as they had paid dowry for her. He identified the 2nd administrator as a friend of the deceased, whom the deceased never introduced to the family as a wife. During cross-examination, the witness conceded that he knew that the deceased worked at several places in Kenya, and he could not tell whether he might have lived at those places with the 2nd administratrix. He said that although the deceased would have had no obligation to inform them of his marriage to the 2nd administratrix, they, as family, would have expected him to do so. He conceded that the 2nd administrator did send him money. He further confirmed that she did attend some funerals at their home, but she never stood up to be introduced. He admitted that the deceased did buy land at Lumakanda, but said that he never lived there. He said that he would have known if the deceased had paid dowry for the 2nd administratrix. He said that it was a worker who lived at the Lumakanda property.

13. At the conclusion of the formal hearing, directions were given for the filing of written submissions. There has been compliance. I have read through the written submissions placed on record, and I have noted the arguments advanced in them.

14. Confirmation of grants is provided for in section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, which states as follows:

> "71. Confirmation of grants
>
> (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.
>
> (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—
>
> (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
>
> (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or
>
> (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
>
> (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:
>
> Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.

(2A) Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to section 66, appoint as administrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion.

(3) The court may, on the application of the holder of a grant of representation, direct that such grant be confirmed before the expiration of six months from the date of the grant if it is satisfied—

(a) that there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application;

(b) that it would be expedient in all circumstances of the case so to direct.

(4) Notwithstanding the provisions of this section and sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that—

(a) there is no dependant, as defined by section 29, of the deceased other than the petitioner;

(b) no estate duty is payable in respect of the estate; and

(c) it is just and equitable in all circumstances of the case, immediately issue a confirmed grant of representation."

15. There are two aspects to confirmation of grants. The first relates to confirmation of the administrators, while the second is about distribution of the estate.

16. The first aspect, which is covered by section 71(2) (a) of the Law of Succession Act, has two dimensions to it. The first relates to the manner of appointment, in terms of whether or not it was done properly. The second relates to the manner of the actual administration of the estate; whether the administrators, upon their appointment as such, went about administering the estate in accordance with the law up to the point of confirmation, and after confirmation whether they would continue to properly administer the estate.

17. On the propriety of the appointment, section 76 of the Law of Succession Act would be relevant, particularly section 76(i) (ii) and (iii). I say it would be relevant because when one looks at section 71(2) (b) (c)(d), it would be clear that where the court is not satisfied as to the propriety of the appointment of the administrator or as to his administration, it may confirm the grant but transfer it to another person. The effect of that would be that the court would revoke the grant made to the administrator, and appoint another administrator and confirm his grant forthwith.

18. For avoidance of doubt, section 76(i)(ii)(iii), provides as follows:

"76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particulars …"

19. With regard to appointment of administrators, the court will confirm the administrators to continue with administration to completion, once it is satisfied that the administrator was properly appointed. Under section 76(a)(b)(c), a grant will be revoked where the process of obtaining the grant was defective, in terms of it not complying with certain procedural requirements, such as where consents that are required are not obtained, or where the person applying for administration is not qualified for appointment or is not competent or is not suitable for appointment. The second dimension of it is where the process is attended by falsities, misinformation, misrepresentation, fraud and

concealment of matter from the court.

20. On the first aspect, on whether the process was defective or not, what requires to be demonstrated is that all the procedural requirements were met. That issue was not raised by any of the administrators. None of them suggested that the appointment of the other was defective in terms of the procedures not being complied with, and therefore their appointment cannot be faulted in any way. In any event, the appointment of the 2nd administratrix was by compromise after she filed a notice of objection to the appointment of the 1st administrator on grounds that she had not disclosed her as a survivor of the deceased.

21. On the issue of the qualification or competence or suitability of the administrators for appointment, I do note that there could an issue as to whether the 2nd administratrix qualified for appointment as administrator. The qualification or suitability or competence of the 1st administratrix has not been called to question. Both sides conceded that she was a spouse of the deceased. There is a marriage certificate on record. There was no allegation nor proof that the civil marriage evidenced by that certificate had been dissolved. Therefore, she qualified, as a surviving spouse, by dint of section 66 of the Law of Succession Act, for appointment as administrator. In fact, she had priority over her children to appointment. There is no evidence that she is not competent to administer the estate, and the question of her suitability should not arise in view of her being qualified for appointment.

22. Is the 2nd administrator qualified for appointment as administrator of the estate of the deceased? That is contested on grounds that the 2nd administrator was not a widow of the deceased for she was never married to him. As the deceased had been married to the 1st administratrix at a formal civil ceremony, and that that marriage had not been dissolved, meant that he could not possibly enter into a formal civil or Christian marriage with the 2nd administratrix. The 2nd administrator has not, herself, alleged that such a marriage existed. When she testified, she did not attempt to establish that she and the deceased had entered into a customary law marriage. She did not claim that dowry was ever paid or any customary law rites performed. All she alluded to was a visit to her parents by the deceased. That aspect of her case was sketchy, she appeared to say that he went there in the company of the 1st administratrix, but with his brothers and uncles. The deceased's brother testified on the side of the 1st administrator and stressed that no customary law marriage was contracted as the 2nd administratrix was never introduced as a wife to the family by the deceased, neither was dowry ever paid, saying that as a brother those are things he would have been expected to know. To the extent that there was no proof of the alleged customary law marriage I would agree with the brother of the deceased.

23. The 2nd administrator's other argument appears to be that there was a marriage that could be presumed from prolonged cohabitation. I understood her to say that she began to cohabit with the deceased in 1999, at her residence at the place where she worked. She did not call any witness from the said place who would have placed the two of them together at the alleged residence. She claimed that they had acquired property together. She alleged that she had contributed to the acquisition of the said property, yet she did not produce any document to support the same. There was no sale agreement. There was no money trail. The sale agreement would have showed that she was a witness to the alleged sale as she alleged. The money trail would have supported her claim that she had contributed to the acquisition of the property. She did not call the person from whom the property was bought, instead she called a person who alleged to have been a witness to the sale. However, in the absence of copy of the sale agreement or memorandum of sale there can be proof that the man was privy to the said sale.

24. She produced MPesa statements as proof that the deceased used to maintain her as one would his wife. The statement covers the period 15th February 2013 to 29th July 2016, although it is not continuous, for there are considerable gaps in between. From that statement it is indicated that a Walter Nyamira sent to the 2nd administrator a sum of Kshs. 1, 400.00 on 15th February 2013, Kshs. 430.00 on 20th February 2013 and Kshs. 2, 500.00 on 16th April 2013. These are the only amounts that the said person sent to her. These are relatively small amounts of money that cannot possibly count for maintenance, and the same cover a period of only about three months. I do not think that much should turn on these payments. Moreover, the deceased herein is a person known as Walter Nyarima, and not Walter Nyamira. It has not been demonstrated that Walter Nyamira and Walter Nyarima refer to one and the same person. In view, however, of what I shall say hereafter in paragraph 25, I shall presume that Nyamira and Nyarima refer to the same person.

25. What perhaps should be of some significance is that from the same statement the 2nd administrator did sent money several times to the siblings of the deceased, especially to Selina Omende Abwogi. There are payments that were made to Frankline Nyamira, who I suppose refers to the brother of the deceased known as Frankline Nyarima. These payments were several, made on divers dates – 12th July 2013, 13th July 2013, 14th July 2013, 3rd August 2013, 15th August 2013, 21st January 2014, 22nd September 2015, 23rd July 2016, 29th July 2016 and 15th August 2016. When Frankline Nyarima testified, he conceded to the payments. He confirmed that the 2nd administrator was indeed a friend of the deceased, who had attended several of the burials on the deceased's side of the family, although she was never formally introduced as a spouse. He did not confirm that the two ever cohabited. I find it to be a matter of some curiosity that a lot of these payments to the siblings of the deceased were made after the deceased's demise on 14th June 2013. It did not come out at the trial as whether or not the same were solicited or not.

26. Overall, I do not find material upon which I can confirm whether or not the 2nd administrator ever cohabited the deceased. There is evidence that the two were close friends, but I doubt whether that friendship crossed the threshold set in *Hortensiah Wanjiku Yawe vs. The Public Trustee* Court of Appeal Civil Appeal No. 13 of 1976. I am not persuaded from the evidence, therefore, that I should presume marriage between her and the deceased. The consequence of that would be that she would not qualify for appointment as administrator of the estate of the deceased, and, for the particular purpose of these proceedings, she does not merit being confirmed as administrator of the estate of the deceased.

27. Distribution of an intestate estate is regulated by Part V of the Law of Succession Act. Priority goes to the surviving spouse, followed by the children. The ultimate destination of the estate is to the children, but they do not take absolutely during the lifetime of a surviving spouse, unless of course the surviving spouse and the children agree otherwise.

28. The proviso to section 71(2) requires that the court be satisfied, before distribution, that the administrator has ascertained all the persons who are beneficially entitled to the estate and has determined the shares of each one of them to the assets. That presupposes that all the assets

available for distribution should also be ascertained before distribution can be proposed, for distribution should be of the assets that are available for distribution.

29. In the instant case, I have held that the 2nd administratrix has not demonstrated that she was ever married to the deceased, neither did she place before me material from which I could presume that there was a marriage out of prolonged cohabitation. The 2nd administratrix is not, therefore, amongst the survivors of the deceased entitled to a share in his estate. There is also the question of her daughter. She raised the issue of the daughter being left out of the list of survivors at the point applying for representation, however, in later proceedings the said daughter was not presented as a child of the deceased who should have been considered for benefit. The 2nd administratrix testified that her daughter was not sired or fathered by the deceased, neither did she claim that the deceased ever assumed any parental responsibility over her sufficient to lead to a conclusion that he either informally adopted her or taken her in as his own child. That, therefore, means that both the 2nd administratrix and her daughter are not survivors of the deceased, and are not entitled to a share in the estate of the deceased.

30. It would mean that we are left with the 1st administratrix and her children. She has proposed that the estate be shared out between her and her children. I have not seen any consents by the children to the proposed distribution, neither is there any protest by any of the children to the proposals. I note though that only the sons are provided for. The daughters are not provided for, and there is no proof that they have consented to the discriminatory distribution.

31. The deceased died in 2013, long after the Law of Succession Act had come into force in 1981. The Act does not discriminate between sons and daughters of the deceased, whether they are married or not. It treats all the children of the deceased equally. There is nothing in that law that suggests that the estate of an intestate should only be shared out between the surviving widow and the surviving sons to the total exclusion of the surviving daughters. Under the provisions of the Law of Succession Act, no distinction is made between male and female children, nor between married and unmarried children. It envisages equal distribution of the estate amongst all the children. That position comes out clearly in sections 35(5) and 38 of the Law of Succession Act, which state as follows:

> "35. Where intestate has left one surviving spouse and child or children
>
> (1) …
>
> (2) …
>
> (3) …
>
> (4) …
>
> (5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.
>
> 36 …
>
> 37 …
>
> 38. Where intestate has left a surviving child or children but no spouse 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 shall be equally divided among the surviving children."

32. Then there is Article 27 of the Constitution, 2010, which envisages equal treatment of both men and women before the law in all spheres of life, including at succession. For avoidance of doubt Article 27 provides as follows:

> "27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
>
> (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
>
> (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
>
> (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
>
> (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
>
> (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."

33. As the daughters have not been provided for in the distribution proposed by the 1st administratrix in her summons for confirmation of grant, there has been non-compliance with the provisions of the Constitution of Kenya, which is the supreme law of the land, with regard to discrimination based on gender. There is also no full compliance with the provisions of the Law of Succession Act, which envisages equal sharing of the estate of an intestate amongst all his children, unless any of the children expressly excludes themselves from benefit by waiving or renouncing their right to inherit. The proposals placed before me, to the extent that they have not been consented to by the daughters cannot be approved by the court.

34. In the end, the final orders that I shall make in this matter are as follows:

a. That I hereby confirm the appointment of Fridah Katibi Amwayi Ndolo as administrator of the estate of the deceased, but I decline to confirm Cynthia Naliaka Watiangu as administrator;

b. That as a consequence of (a) above, I hereby direct the Deputy Registrar to cause the grant of letters of administration intestate dated 24th February 2014 to be rectified to remove the name of Cynthia Naliaka Watiangu as administrator;

c. That I confirm that Fridah Katibi Amwayi Ndolo, Dennis Mbala Ndolo, Bernard Katibi Ndolo, Caroline Nandwa Ndolo, Noel Ambiyo Ndolo and Elizabeth Anyoso Ndolo are the survivors of the deceased for the purpose of distribution of his estate;

d. That in exercise of the power in section 71(2)(b) of the Law of Succession Act, I hereby postpone confirmation of the distribution proposed on grounds that the same is discriminatory against the daughters of the deceased;

e. That I direct the administrator, within forty-five (45) days of this judgment, to place before the court a revised proposal on distribution which makes provision for the daughters of the deceased or provide evidence of renunciation or waiver of inheritance right by the daughters;

f. That the matter shall thereafter be mentioned, on a date to be assigned at the delivery of this judgment, for compliance and further directions;

g. That each party shall bear their own costs; and

h. That any party aggrieved by the orders that I have made herein shall have the liberty, within twenty-eight (28) days, to move the Court of Appeal appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 27thDAY OF September, 2019

W. MUSYOKA

JUDGE