



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 446 OF 2011

IN THE MATTER OF THE ESTATE OF KIMAYO s/o SHIBEYI alias KIMAYO SHIBEYI (DECEASED)

RULING

1. The deceased person the subject of these proceedings died on 15th February 1972.
2. Representation to his estate was sought by George Shakaba Hunter through a petition lodged herein on 1st July 2011. The petitioner expressed himself as a son and the sole survivor of the deceased, who died possessed of an asset known as Kakamega/Shinyalu/447. Objection proceedings were brought in the cause by Raphael Katambani Matikina, claiming to be a nephew of the deceased, and describing the petitioner as another nephew of the deceased. The objection was resolved by consent of the parties on 20th June 2012, when it was agreed that representation to the estate be made to the petitioner and the objector jointly. A grant of letters of administration intestate in those terms was made to the two on 13th January 2013.
3. What I am called upon to determine is an application dated 23rd November 2012 for confirmation of the grant. The same is brought at the instance of George Shakaba Hunter. The persons listed as survivors of the deceased are George Shakaba Hunter and John Hunter Amboyi, said to be grandson and son, respectively, of the deceased. It is proposed that the sole asset be registered in their joint names.
4. There is an affidavit of protest on record, sworn by Raphael Katambani Matikina on 22nd January 2013. He attaches copy of another affidavit of his sworn on 7th June 2012. What emerges from these affidavits is that Raphael Katambani Matikina is a nephew of the deceased, the deceased having been a brother of the second administrator's father. He states that the deceased had two brothers, being Joseph Shitiabayi Shibeyi and Paul Amboyi Shibeyi. Raphael Katambani Matikina's father was Joseph Shitiabayi Shibeyi, while Paul Amboyi Shibeyi was the father of John Hunter and the grandfather of the first administrator, George Shakaba Hunter. He proposes that the property ought to be shared out equally between the brothers of the deceased, that is to say Joseph Shitiabayi Shibeyi and Paul Amboyi Shibeyi, but as the two brothers of the deceased are dead the property ought to be shared out amongst the next surviving relatives.
5. I have not come across a response to the affidavit by Raphael Katambani Matikina.
6. The parties have filed written submissions to advance their respective cases. I have read through them and noted the arguments advanced in them. I am disappointed though that some of them state matters of facts that have not been averred in the affidavits on record.
7. Confirmation of grants is provided for under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya. Before a grant can be confirmed the court should be satisfied as to the identities and shares of all persons beneficially entitled.
8. In the instant case, I am not satisfied as to the identities of all the persons entitled. The deceased herein died intestate, and therefore the persons entitled ought to be those envisaged in Part V of the Law of Succession Act. The survivors of an intestate in order of priority include spouses, children, parents, siblings, nephews and nieces, and other relatives. In this case it has not been categorically stated, by any of the parties, whether the deceased ever had a spouse or children. The letter from the Chief of the deceased's local area is equally unhelpful.
9. The initial petitioner described himself in his petition as a son of the deceased, but in his application for confirmation of grant he describes himself as a grandson of the deceased. The co-administrator describes him as a nephew of the deceased, yet from the family chart that he places before the court, the petitioner appears to be a grandnephew of the deceased. The petitioner lists his father as an heir, which would mean in the scheme of things in Part V of the Act, his father, John Hunter, had a superior claim to the estate than him.
10. More crucially, it would appear that there could be other persons equally entitled to a share in the estate of the deceased quite apart from the parties that are before me. I shall accordingly not go on to confirm the grant before me. Section 71 gives me the discretion to postpone the application pending issuance of further citations or otherwise. I shall therefore postpone confirmation to allow the parties herein clarify issues as to the persons that survived the deceased, and therefore those who are entitled to a share in the estate.
11. I shall direct the Deputy Registrar, as I hereby do, to write to the Chief of Shibuye Location, Shinyalu, Kakamega County, directing him to furnish the court with the following information -

- (a) Whether the deceased had a spouse or spouses, and if so provide her name or their names, stating whether she is or they are alive;
- (b) Whether the deceased had a child or children , and if so provide their names, stating whether or not they are alive;
- (c) Whether the deceased had grandsons, and if so state their names and whether they are living or dead;
- (d) Whether the deceased had brothers, and if so state their names and whether they are living or dead;
- (e) Whether the deceased was survived by nephews, and if so state their names and whether the same are alive or dead; and
- (f) Whether the deceased was survived by grandnephews, and if so state their names and whether they are alive or dead.

12. In compliance with paragraph 11 above, the Chief shall have the liberty to draw a family chart, or tree, to bring out the identities of the persons who survive the deceased herein to date. The matter shall be heard after thirty (30) days when the Chief shall present his report, and he or she may be cross-examined thereon. The date for hearing shall be fixed at the delivery of this ruling.

DATED, SIGNED and DELIVERED at KAKAMEGA this 27th DAY OF September, 2018

W. MUSYOKA

JUDGE