



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 235 OF 2013

IN THE MATTER OF THE ESTATE OF

TORKISS GIMASSE LIHAMBBA.....DECEASED

AND

BUTLER ATONYA.....PETITIONER

VERSUS

EVERLYNE AFANDI.....APPLICANT

JUDGMENT

1. There is only one issue of determination in this matter. It is how the deceased's estate should devolve to her three children herein.
2. The deceased herein, TORKISS GIMASSE LIHAMBBA alias TORKIS GIMASSE passed on on 13/05/1999 and was survived by her three children namely: -
 - a. BUTLER ATONYA- SON
 - b. EVERLYNE AFANDI- DAUGHTER
 - c. HOSKINS AMISI KISIA- SON
3. This Court issued a joint Grant of Letters of Administration Intestate to BUTLER ATONYA and EVERLYNE AFANDI on 17/02/2014. Originally BUTLER ATONYA had petitioned as the sole administrator of the estate of his mother but in the cause of those proceedings his sister EVERLYNE AFANDI filed an objection challenging that BUTLER ATONYA should not be made the sole administrator of his mother's estate. By an Order of the Court made on 06/02/2014, the Court directed that both the Petitioner and the Objector be made joint administrators of their mother's estate. That is how the grant was eventually issued in their joint names.
4. On 25/03/2014, the Objector who is also a joint-administrator filed a Summons for Confirmation of the Grant. It is dated 11/03/2014. Upon service, the Petitioner filed Replying Affidavit on 31/7/2014 in opposition to the proposed mode of distribution.
5. For avoidance of doubt, the Objector in her Summons for Confirmation had proposed an equal distribution of the estate among the three children of the deceased. The estate comprises of the parcel of land known as BUTSOTSO/SHIKOTI/547 measuring 6.5 Acres or thereabout. The Petitioner however holds a different proposal. Citing the need to remain together as a family and for posterity purposes, he proposed that the property be registered in the joint names of all the

three children. He further feared that other beneficiaries are bent on selling the land whereas his brother, Hoskins Amisi has small children whom he does not take care of them too well and they also need a place to call home.

6. The matter proceeded by way of oral submissions based on the affidavit evidence. At the hearing on 02/12/2014, the other brother and child of the deceased, HOSKINS AMISI KISIA attended Court and supported the Objector's position on equal distribution of the estate.
7. I have carefully perused the record together with the Summons for Confirmation of the Grant and the affidavit in support alongside the Replying Affidavit. I have also considered the oral submission made at the hearing of the application. It is now for this Court to determine how the deceased's estate ought to devolve unto her three children herein.
8. The prevailing situation in this matter is well captioned under Section 35(5) of the Law of Succession Act. The said Section 35(5) states as follows: -

“35(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 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.”

9. The spirit under the said section 35(5) of the Law of Succession Act is equal distribution of the estate amongst the children of the deceased. Despite many disputes on whether the distribution ought to be equal or equitable by taking into account issues for instance ages, gender, financial status of the children the provisions of the law have all along and very clearly envisaged equal distribution for the word used in section 35(5) is “**equally**” and not otherwise. That can be the only plain meaning of the provision which is in mandatory terms. And, since all the deceased's children hereto are adults, the Court may not have to invoke Article 53(2) of the Constitution of Kenya, 2010. Equally the issue of the need for the family to stay together and for posterity thereof by ensuring that the land is not sold to third parties are but not for consideration by this Court in the plain wording of the law. In any event and as the Objector submitted, a party would be at liberty to sell its share of the estate and since all the three children would have equal shares, the allegation of others remaining landless does not therefore arise.

Even in the cases of where some of the beneficiaries are minors still their shares would be determined and then be held in their trust. I therefore find the Objectors and the other beneficiary's proposal that the estate be shared equal among the three children to be fair and reasonable.

10. Finally this Court therefore makes the following Orders in respect of the deceased's estate comprised of the parcel of land known as BUTSOTSO/SHIKOTI/547: -

A: The property shall be distributed in the following manner:

- a. BUTLER ATONYA – Son - 1/3 SHARE
- b. EVERLYN AFANDI – Daughter - 1/3 SHARE
- c. HOSKIN AMISI KISIA- Son - 1/3 SHARE

B: A Certificate of Confirmation of the Grant do issue forthwith.

C: The Lands Registrar and the Surveyor, Kakamega County to ensure compliance and to issue separate titles to those distinct portions of land as indicated in A hereinabove.

D. As the parties are a family, each party do bear its own costs of these proceedings as well as the costs of the distribution of the estate herein.

Orders accordingly.

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 12TH DAY OF FEBRUARY 2015.

A. C. MRIMA

JUDGE