



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**SUCCESSION CAUSE NO.389 OF 2009**

**AMINA ARUMBA MUSA .....DECEASED**

**AND**

**ELIZABETH IKHUYA SHIAMENEKHA .....PETITIONER**

**VESUS**

**MOSES MILIMO SHIAMENEKHA .....RESPONDENT**

**R U L I N G**

1. What is before me for determination is the Chamber Summons dated 17/11/2014 which seeks orders:-
  1. THAT the Title Deed issued in the name of LINET IBALLAH and MARY IDERA SHIAMINIKHA be revoked, annulled and/or cancelled and be reverted back to original (sic) and
  2. THAT costs be provided for.
2. The application is supported by the affidavit of Moses Milimo Shyamenekeha, the Objector/Applicant who contends in his affidavit dated 17/11/2014 that he is both an administrator and a beneficiary of the deceased's estate and the 1<sup>st</sup> born child to the Petitioner/Respondent. He avers that the Petitioner did not notify him of the process of obtaining the Grant of Letters of Administration Intestate, nor of the Summons for Confirmation of the same. He contends further that as a result of his not having been in the picture of the succession proceedings the Petitioner went ahead and transferred the deceased's estate to two persons:- Linet Iballah and Mary Idera Shiaminikha. It is the applicant's case that the deceased who was his grandmother left her estate to her three beneficiaries:- the objector/applicant, Jenipher A. Shimenga and Elizabeth Ikhuya Shiaminikha.
3. The application is opposed vide the replying affidavit sworn by Elizabeth Ikhuya Shiaminikha. The deponent avers that:-
  - She is the sole surviving heir of her late mother, Amina Arumba Musa alias Rebecca Arumba.
  - The objector/applicant is her son and ranks after her in the hierarchy of command of beneficiaries to the deceased's estate with no legally recognizable interest in the deceased's estate.
  - Jenipher A. Shimenga, who is not a relative is not entitled to any share of the deceased's estate.
  - In her capacity as the sole surviving beneficiary of the deceased's estate, she did not require consent from anybody else before she could file these proceedings.
  - The transmission of the deceased's estate to Linet Iballah and Mary Idera Shiaminikha was within her powers.
  - The deceased never left behind a will of any kind.

- There is no good reason disclosed by the objector/applicant to warrant cancellation of the new title deed.

The Petitioner therefore prays that the Chamber Summons by the objector/applicant be dismissed.

4. The Summons came up for hearing on 01/07/2015. During the call-over and time allocation, the objector/applicant was in Court, but at the actual hearing of the matter at 11.30am, he was nowhere and did not respond to his name which was called out several times before the party present in Court was allowed to proceed. During the hearing, Mrs. Muleshe, Counsel for the Petitioner, urged the Court to dismiss the Summons with costs to the Petitioner.
5. I have carefully considered the Chamber Summons dated 17/11/2014 and note that the objector/applicant did not present himself in Court to canvass his application. Time allocation was taken in his presence and his failure to face his mother, the Petitioner, over the same is a clear indication that he did not wish to pursue the application. For the above reason, I could, and do hereby dismiss the application for want of prosecution.
6. Secondly, the law provides that the children of a deceased person rank in priority after the spouse when it comes to benefitting from a deceased person's estate. In this regard, Section 36 of The Law of Succession Act is relevant to the extent that where a deceased person has left a surviving spouse, then such spouse is entitled as set out under Section 36(1) (a) (c) including the proviso thereof Section 38 provides for a situation where a deceased has left a surviving child or children but with no spouse. The Section reads:-

**“38. 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 be equally divided among the surviving children.”**

7. Section 41 of the Act deals with property devolving upon a child being held in trust while Section 42 provides that previous benefits shall be brought into account in determining the share of the net estate finally accruing to the child, grandchild or house. In the case of: **In the matter of the Estate of Dorcas Njeri Githuku (deceased) – Nairobi High Court Succession Cause No.1968 of 2002**, the deceased was survived by one child, a married daughter and the Court held that she was her sole survivor and therefore the person entitled to the estate of the deceased under Section 38.
8. In the instant case, the Petitioner has shown that she is the deceased's only surviving child and in the circumstances she is the one who is entitled to the deceased's estate. Her son, the Objector herein does not rank anywhere, except through the Petitioner. If the Objector had been a brother to the Petitioner, other considerations would have come into this matter and he would have had a share in the deceased's estate, but not otherwise.
9. For the above reasons, I find no merit in the applicant's Chamber Summons dated 17/11/2014 and accordingly dismiss it. The Petitioner/Respondent shall have the costs of the application.

Orders accordingly.

**Ruling delivered, dated and signed in open Court at Kakamega this 23<sup>RD</sup> day of SEPTEMBER 2015.**

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Present in Court for Objector/Applicant

Mrs Muleshe (present) for Petitioner/Respondent

Mr. Solomon Lagat - Court Assistant