



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMENGA

SUCCESSION CAUSE 814 OF 2009

IN THE MATTER OF THE ESTATE OF HUDSON SHITAMBASI LUMASAI (DECEASED).

JONES NAKHUMICHA SHITAMBASI

FREDRICK ASHIMOSI SHITAMBASI.....PETITIONERS

VERSUS

MARY KASITI SHITAMBASI.....OBJECTOR

AND

1. ISAAC LUMASAYI SHITAMBASI

2. SYLUFANUS LIKWIRU SHITAMBASI.....APPLICANTS

3. EDWIN ALPHAUSE LUVUTSE

R U L I N G

By their application dated 20th July, 2010 the three applicants are seeking orders that they be included in the list of heirs of the estate of the deceased.

The application is supported by the affidavit of Isaac Lumasayi Shitambasi, the 1st applicant. Mr Samba, Counsel for the applicants submitted that the applicants are the deceased's children but were excluded from the list of heirs and that the matter is not res judicata.

Mr Ashimosi, Counsel for the respondent submitted that Mr. Samba advocate is not properly on record as he acted for the objector. The notice of objection was determined in March 2010 and the grant was confirmed. The applicants have not been parties to the suit and cannot be brought in after the grant has been confirmed. They should have applied for provision of dependants under section 26 and rule 45 of the Succession Act. The issue of paternity is in dispute and has to be proved by way of evidence.

I have gone through the proceedings herein and do find that a ruling was delivered on 7th October, 2010. The ruling related to the issue as to whether the objector was the deceased's wife and this was done

after parties had adduced oral evidence. The proceedings of 9th March 2010 before Justice Lenaola indicate as follows:-

“Prior to confirmation of the grant and distribution of the estate, I direct that evidence be taken on the status of Mary Kasiti Shitambasi vis- a- vis the deceased”

The above direction led to the taking of oral evidence and subsequent ruling on 7th October, 2010. Since then, there has been no action on the matter and the grant has not been confirmed. It should be clear that one can be included in the list of beneficiaries and evidence later be adduced to disprove that position. Since the applicants are only seeking to be included in the list of heirs, I do hold that any objection to their inclusion at this stage is premature. When the matter is listed for confirmation of the grant, parties can either agree or disagree on the mode of distribution and dispute the relationship of the deceased to some of the proposed beneficiaries. That would call for the taking of evidence. For the court to shut out the applicants without knowing the basis of their claim at this stage would be tantamount to condemning them unheard.

As to the issue as to whether the application is res- judicata, the court proceedings do not support that allegation as only the issue of Mary Kasiti Shitambasi was heard and determined by the court. Whether Mr. Samba Advocate is wrongly on record for the applicants is a technical issue which does not assist the court in reaching at a proper decision on the dispute.

In the end, I do find that the application dated 20th July, 2010 be and is hereby granted as prayed. Since there is an application for confirmation of grant pending, having been filed on 7th October, 2010, I do order that both the three applicants and the objector do file their respective affidavits as to whether they are in agreement with the proposed mode of distribution or not. Thereafter the matter shall be listed for directions.

In short, the application dated 20th July, 2010 is allowed. Costs shall be in the cause.

Dated at Kakamega this 23rd day of May 2012.

S.J CHITEMBWE
J U D G E