



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Succession Cause 27 of 1993

**IN THE MATTER OF THE ESTATE OF TAMBA SHILOKHO a.k.a. PAUL TAMBA
SHILOKHO (DECEASED)**

ROSELINE INDASI NATEMINYA.....APPLICANT

VERSUS

BARNABAS ROBERT TAMBA.....1ST PETITIONER/RESPONDENT

**JEREMIAH PATRICK TAMBA.....2ND
PETITIONER/RESPONDENT**

RULING

1. The deceased herein, Paul Tamba Shilokho died on 7th November 1990 at Isukha, Kakamega and although an initial grant of Letters of Administration was made on 27th August 1993, a fresh grant was later made on 13th October 2010 whereby Isaiya Mushila Tamba and Patrick Jeremiah Tamba were appointed as Administrators of the estate, jointly.
2. What is left to be done as regards the estate is the issue of distribution of the deceased's assets and from the record, two issues need to be clarified quickly. The first is this; I have seen the search certificates dated 20th November 1992 and which were annexed to the Petition filed on 4th February 1993. They indicate as follows;
 - (i) Land Parcel Number Isukha/Muranda/1162 was registered in the names of Paul Tamba Shilokho on 27th January 1987.
 - (ii) Land Parcel Number Isukha/Murhanda/967 was registered on 9th July 1973 in the names of Damba Shilokho but which land parcel, parties agree was transferred to Alfred Murunga Tamba by Damba Shilokho.
 - (iii) Land Parcel Number Isukha/Murhanda/314 was registered in the names of Damba Shilokho on 9th July 1973.

(iv) Land Parcel Number Isukha/Murhanda/366 was registered in the names of Damba Shirokho on the same day as (iii) above.

3. I have no doubt that Paul Tamba Shilokho is the same person as Damba Shirokho and since there is no dispute in that regard, I will hold the four parcels of land belonged to the deceased in this cause and are the only ones available for distribution, save what I will say about three of them later in this Ruling.

4. Secondly, having read the rival Affidavits on distribution, I am satisfied that the deceased left behind the following persons as his survivors;

(i) Roseline Indasi Nateminya

(ii) Isaiah Mushila Tamba

(iii) Rebah Achitsa Tamba (deceased)

(iv) Sarah Sussy Sipeji Tamba

(v) Reuben Musiha Tamba

(vi) Barnabas Robert Tamba

(vii) Truphosa Bunoro Tamba

(viii) Zilpah Zieli Tamba

(ix) Jeremiah Patrick Tamba

5. I will take the above list as exhaustive of all persons who are entitled to the estate (including the survivors of Rebah Achitsa Tamba). However Adriano Tamba, Dafina Tamba, Rosa Tamba, Fridah Tamba and Oliver Njeri are also said to be children of the deceased and I will revert to the issue of their status vis-à-vis the estate later.

6. Having addressed those two issues, I now have before me a proposal by Roseline Indati Nateminya contained in her Supporting Affidavit sworn on 21st February 2011 and at paragraph 7 thereof, she states that titles Nos.1162 and 366 have already been transferred to Reuben Musiba Tamba and Isaiah Tamba Mushira and although she referred to search certificates indicative of that fact none was annexed to her Affidavits aforesaid. She then proposes at paragraphs 3 and 6 that the only land left for distribution is title number 314 which measures 11.8 hectares and which she proposes to be distributed amongst all the ten (10) children of the deceased save those who took titles numbers' 967, 1162 and 366, and

7. The rival module of distribution is contained in an Affidavit sworn on 7th January 2011 by Patrick

Jeremiah Tamba and in it, he has also made the point that only title number 314 is available for distribution. He however adds that it is one Barnabas Robert Tamba who has instigated the proceedings filed by Roseline Indagi Nateminya with a view to him obtaining more land than all his step-brothers. Further that whereas only five (5) persons occupying the land i.e. himself, Isaiah, Reuben, Barnabas and Prucket, he is agreeable to the land being redistributed so that the three occupants who are from the same house as Roseline should have their share reduced so that whereas he, and Prucket, should get 2.36 hectares, Isaiah, Reuben and Barnabas should get 2.23 hectares and thereby creating 0.40 hectares, to be given to Roseline Indati Nateminya.

8. With those two proposals before me, it is obvious that what Patrick proposes is that one of the daughters of the deceased should get a share of the estate but that Rosaline, being the one who sought a share of it hived should get only 0.40 hectares, which shares was to be hived off what he proposed to give Rosaline's biological brothers.

9. I note from the record in that regard that Barnabas Tamba swore an Affidavit on 27th April 2010 and in it he stated at paragraphs 6 and 7 thereof that as *“they had erred in law by failing to include”* their sisters in the succession proceedings and that he had talked with his sisters who had agreed to join the proceedings and upon doing so, his brothers turned against him and formed a grudge as a result thereof.

10. On the law, the deceased died intestate and therefore Section 40 of the Law of the Succession Act Cap. 160 Laws of Kenya would apply. It provides as follows;

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effect and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38. “

11. A clear reading of the above Section would show that there is no distinction between daughters and sons or married or unmarried children of a deceased intestate who was also polygamous man. It is agreed in this case that the deceased had three houses and of interest is the fact that Adriano, Difina (*deceased*), Rosa Tamba, Fridah Tamba, and Oliver Njeri all came from the 1st house and from the record, it would seem that none of them is interested in the remainder of the estate and in distributing the estate herein, I will only take into account the interests of the remaining two houses and also specifically on the distribution of title number 314.

12. Having so said, what module of distribution is lawful? Clearly, the one by Patrick is unrealistic, selfish and wholly unlawful. The right of a child to inherit his/her father's estate is not fettered, more so when one reads Articles 27(4) and 60(f) of the Constitution. They provide as follows;

“Article 27 (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.

“Article 60 (1) – Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles-

- (a)...
- (b)...
- (c) ...
- (d)...
- (e) ...

(f) Elimination of gender discrimination in law, customs and practices related to land and property in

land; and

(g)...”

13. By purporting to seek this court’s help in discriminating against his sisters and step-sisters in their entitlement to the remainder of his deceased father’s estate, Patrick is asking this court to commit an illegality. The court refuses to do so and will instead uphold the Constitution as set out above – see also Samson Kiogora Rukunga vs. Zipporah Gait Rukunga [2011] eKLR per Kasango, J.

14. I further take the view that the proposal by Rosaline meets the expectations of the law as set out above and is also fair and reasonable taking into account all the circumstances of this case.

15. In the event, I will order that title number Isukha/Murhanda/314 be distributed equally among the following persons;

(i) Roseline Indasi Nateminya

(ii) Isaiah Mushila Tamba

(iii)Rebah Achitsa Tamba – (deceased)

(iv)Sarah Sussy Sipenji Tamba

(v) Reuben Musiha Tamba

(vi)Barnabas Robert Tamba

(vii)Truphosa Bunoro Tamba

(viii)Zilpah Zieli Tamba – married

(ix) Jeremiah Patrick Tamba

16.As regards Rebah Isiji Achitsa, her share to be transmitted to Wycliffe Luvembe and Catherine Kamukha Edwin Shisaina jointly.

17.The grant issued on 13th October 2010 should now be confirmed in the above terms and each party will bear its own costs.

18.Orders accordingly.

I. LENAOLA

JUDGE

**DELIVERED, DATED AND COUNTER-SIGNED BY L. KIMARU, JUDGE AT KAKAMEGA
THIS 5TH DAY OF JULY, 2011**

**L. KIMARU
JUDGE**

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