



REPUBLIC OF KENYA



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In re Estate of Stanley Shilenje Namayi alias Shilenje Namai (Deceased) (Succession Cause 279 of 2016) [2023] KEHC 20340 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20340 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 279 OF 2016
WM MUSYOKA, J
JULY 21, 2023
IN THE MATTER OF THE ESTATE OF STANLEY
SHILENJE NAMAYI ALIAS SHILENJE NAMAI (DECEASED)

JUDGMENT

1. The deceased herein died on 14th March 2015. There is on record a letter from the Chief of North Butso Location, dated 17th March 2016, disclosing the names of the survivors of the deceased, his assets and his debts. He was said to have had been survived by 3 wives, being Grace, Fanice and Jane; 22 sons, being Erastus, Maurice, Isaac, Stephen, Naphtali, Benson, Samuel, Ruben, Jacob, William, Gideon, Andrew, Ezekiel, George, Smith, Kennedy, Adams, Simon, Paulo, Andati, Katsola, Patrick and Haman Andombi ; and 14 daughters, being Hellen Owano, Ruth Ayuma Nechesa, Sarah Nyahaya, Twayila, Peres, Dumona, Lonna, Prisca, Carolyne, Sella, Lucy Ayuma, Miriam Khaye, Anna Frida Lingondo and Esther Atsing'a. 3 daughters were said to be deceased, being the late Machtilda Jensi, the late Dorcus and the late Tabitha Jensi. The assets are listed as Butso/Ingotse/8, 46, 83, 86, 429, 618, 829, 830, 1020, 1291, 1324, 1439 and 2753, and South Kabras/Lukume/1067. There is a plot at Lukume Market, and land next to Oronje and at Osiko, whose registration details are not given. Some of the land parcels are said to be under sugarcane. Daniel Shilenje, Jackson Songoro and Jonathan Ndombi are listed as debtors. Another debt is recorded against Olushashia land, 3 acres. 4 bank accounts are also listed, with Equity Bank, Kenya Commercial Bank and National Bank of Kenya.
2. Representation to his estate was sought by Rustus IS Namanyi, Grace Shilenje, Fann Anyona Shilenje and Jane Anwanga Shirenje, in their capacities as son and widows of the deceased, respectively, vide a petition filed herein on 1st April 2016. The affidavit, sworn in support of the petition, lists the survivors, assets and liabilities in the Chief's letter. There is a consent, in Form 38, under Rule 26(2) of the *Probate and Administration Rules*, executed by some of the sons and daughters of the deceased. Letters of administration intestate were subsequently made to the petitioners on 6th September 2016, and a grant was duly issued, bearing an even date. I shall hereafter refer to Rustus IS Namanyi, Grace Shilenje, Fann Anyona Shilenje and Jane Anwanga Shirenje as the administrators.



3. I am now tasked with determining a summons for confirmation of grant, dated 13th March 2017, which was filed herein on 13th March 2017, at the instance of Rustus IS Namanyi, Fann Anyona Shilenje and Jane Anwanga Shirenje, who I shall refer hereafter as the applicants. They have listed 3 widows and 21 sons as the survivors of the deceased. They have listed Butso/Ingotse/8, 46, 83, 86, 429, 618, 619, 829, 830, 894, 1020, 1291, 1324, 1439, 1553, 1554 and 2753, South Kabras/Lukume/1067 and 1199, Plot No 19 Likume Market, money in bank accounts with Equity Bank, Kenya Commercial Bank and National Bank of Kenya, and motorcycle registration mark and number KAX 767A, as the assets of the estate available for distribution. It is proposed that the said assets be shared out equally between the 3 widows and the 21 sons. There is a consent in Form 37, under Rule 40(8) of the *Probate and Administration Rules*, executed by 2 widows and 13 sons. Rustus IS Namanyi filed another affidavit, sworn on 13th March 2017, to disclose that the deceased had 4 wives, and to group the 21 sons according to their respective houses.
4. Rustus IS Namanyi, filed a further affidavit, sworn on 9th October 2017, whose effect was to revise the distribution proposed in the application dated 13th March 2017, so that specific landed assets are allocated to specific individuals. The details are in the said affidavit.
5. The 3 widows of the deceased, swore an affidavit on 21st May 2022, disclosing that the deceased had 4 wives, and disclosing all the children of the 4 wives, including the grandchildren of the deceased whose own parents were dead. They have proposed distribution of the estate in accordance with the 4 houses. There is a consent attached, purportedly signed by 29 individuals, but not by another 7 individuals. Rustus IS Namanyi swore an affidavit in response, on 22nd August 2022, essentially on survivors of the deceased, in which he concurs with the widows on some survivors, but disagrees on others.
6. The confirmation proceedings were disposed of by way of viva voce evidence, based on directions that had been given on 13th November 2012.
7. Fann Shirenje was the first to take the stand, on 15th February 2021. She was a widow of the deceased. She explained that the deceased had married 4 times, and, therefore, there were 4 houses. The 1st wife had 10 children, but 3 of them had died; the 2nd wife had 15 children, out of which 3 died; the 3rd wife had 8 children, out of which 2 died; and the 4th wife had 10 children, all alive. She stated that she did not agree with the distribution proposed by Rustus IS Namanyi, saying that the deceased had left each house on its own portion of land, for he had distributed his property before he died. She said some of the children even got title deeds after that distribution, being Erastus, Stephen and Benard. She proposed that everyone remain on the portions they occupied. She also proposed that each widow should be given a distinct share, as opposed to life interest.
8. Grace Amboha Shirenje followed. She said that the deceased had not distributed his property before he died. She said only 2 had been distributed, the one allocated to her, and the other to the 1st wife. The deceased had also given land to some of the older sons. Jane Anwanga Shirenje was next. She said that each survivor of the deceased should get their own separate share.
9. Jonathan Ndombi Namai followed. He was a brother of the deceased. He said that the deceased had distributed his estate before he died. The distribution was said to be in accordance with his wives. He said that he understood the proposals by the widows to be that they wanted to be allocated land according to how they occupied the same on the ground. He said that there was a piece of land given to 2 of the wives. He also stated that each child had their own land, and some even got title deeds. He proposed that the children given land ought to remain on the portions given to them, and it was to those not given land that the court was to distribute. He said that distribution ought not be equal. He asserted that it was him who was entitled to distribute the land, and not the court. He disclosed that



some of the daughters of the deceased had died but had been survived by children of their own. He stated that the proposals by Rustus IS Namanyi would lead to some of the children being uprooted from their land.

10. Rustus IS Namanyi was the next witness. He stated that according to his proposed distribution, each son should get between 4 and 4.5 acres. He said that he would not like to disturb the homesteads of those who had settled in the land. He said that the wives of the deceased did not live on separate parcels of land. He proposed that Plot No 19 Lukume be disposed of to meet administration expenses, as there was no liquidity in the estate to meet such expenses. He said that the deceased had shown some of the survivors land to settle on, but he had not distributed the land. He asserted that the deceased did not give out title deeds to anyone, except himself, Rustus IS Namanyi. He stated that according to their customs girls were not entitled to inherit.
11. The parties filed written submissions, which I have read through and noted the arguments made.
12. Confirmation of grants is provided for in section 71 of the *Law of Succession Act*, Cap 160, Laws of Kenya. Confirmation is about approving the administrators to carry on administration of the estate to completion, and where found wanting, to revoke their grants, and appoint other administrators for that purpose. The second objective is distribution of the estate.
13. On confirmation of administrators, there are 4 administrators, each representing a house. The dispute herein centres on distribution. There is no claim of maladministration, nor incompetence, against any of the administrators, to warrant their not being confirmed.
14. On distribution, 2 things have to be addressed. One, the persons beneficially entitled to shares in the estate, and two, the assets to be distributed. After the persons beneficially entitled and the property available for distribution have been identified or ascertained, the court then considers how the property identified is to be shared out between the persons ascertained as beneficially entitled to a share in the estate.
15. The deceased died in 2015, long before the *Law of Succession Act* came into force in 1981. Distribution of the estate has to be in accordance with the Act. Customary law does not apply, for it was ousted by section 2(1) of the *Law of Succession Act*. The Act allows some exceptions, under section 32, through which customary law applies, under section 33, but those provisions do not apply to estates of persons dying in Kakamega County, for the exceptions do not cover property situate within Kakamega County. There is, therefore, no room at all for application of customary law.
16. The deceased died intestate, without a will, and, therefore, distribution has to follow the provisions of the *Law of Succession Act* on intestacy. These are in Part V of the Act. He died a polygamist, and therefore, the estate shall be shared out in accordance with section 40, which provides on how the estate of a polygamist is to be distributed. First, the property is shared out amongst the houses, according to the number of children in each house, treating any surviving widow in a house as an additional unit. After that the share to each house is distributed depending on the configuration of each house. The 1st house comprises of children only, but no surviving widow, so section 38 shall apply there, so that the share due to that house shall be equal to all the children in the 1st house. The other 3 houses are made up of a surviving widow and her children. In such case, distribution shall follow section 35, so that the share devolves upon the widow in each house to hold during life interest, and subsequently to the children in that house equally, upon termination of life interest. The principle is equal distribution between the children, regardless of their gender and marital status.
17. So who are the persons entitled to a share? The surviving widows and surviving children of the deceased. Where a child of the deceased is dead, then the children of such dead child should take the



share due to their dead parent. That is what section 41 of the [Law of Succession Act](#) provides. The children of a dead child of the deceased step into the shoes of their dead parent and take what is due to the dead parent. Have these individuals been identified? I believe they have. The letter from the Chief is fairly comprehensive, on the widows, sons and daughters of the deceased. The affidavit sworn on 23rd March 2016, in support of the petition, also has a complete list of all the surviving widows, sons and daughters of the deceased. The further affidavit by the widows, sworn on 21st May 2022, is equally comprehensive, for it lists the widows, sons and daughters, and includes even grandchildren, in cases where the children of the deceased died, and were survived by their own children. These are the persons who will ultimately be entitled to a share in the estate.

18. Perhaps I need to pause here, and say something about the entitlement of daughters, to inherit from the estates of their dead parents. I heard it from Rustus IS Namanyi, that according to his customs, daughters are not entitled to inherit. That position belongs to a bygone era. Rustus IS Namanyi lives in the past. The [Law of Succession Act](#) was enacted in 1972, and became operational in 1981. Its provisions on distribution, upon intestacy, which are in Part V of the Act, are gender neutral. They treat sons and daughters, male and female offspring, equally, whether married or not. The estate herein is subject to the [Law of Succession Act](#), and not customary law, for the application of customary law has been ousted by section 2(1) of the Act. Secondly, Kenya ushered in a new constitutional dispensation, in 2010, when a new Constitution was promulgated. Article 27 of the [Constitution](#) outlaws discrimination of any person based on gender. It also commands that women be treated equally in all spheres of life, and that includes succession. Article 2(4) of the [Constitution](#) is also relevant, from 2 angles. One, under Article 2(4), any law, including customary law, which is inconsistent with the [Constitution](#), is null and void, to the extent of the inconsistency. The customs that Rustus IS Namanyi is talking about are inconsistent with Article 27 of the [Constitution](#), to the extent that they advocate an unequal treatment of daughters when it comes to inheritance, by holding that daughters are entitled to nothing out of the estate of their father. That makes those customs of Rustus IS Namanyi void. Two, Article 2(4) declares that any act, by any person, including Rustus IS Namanyi, which contravenes the [Constitution](#), is invalid. Rustus IS Namanyi has placed proposals before the court, which are discriminatory against the daughters of the deceased, for he has totally and completely excluded them from distribution, as if they never existed, or the deceased never had them. That act contravenes Article 27, which outlaws discrimination of women based on their gender, and which commands equal treatment of women with men. The said proposals are invalid, and I shall not take them into account at all. The daughters of the deceased herein shall be treated on equal terms with the sons of the deceased, without any form of discrimination or distinction being made at all.
19. There appears to be no dispute at all on the assets that comprise the estate, and, for the purpose of distribution, I shall work with the list in the letter from the Chief and in the petition.
20. Two contrasting positions were taken by the parties with respect to whether the deceased had distributed his estate prior to his death. One side asserted that he had, the other said he had only shown them where to put up houses. Do I have any evidence that there was *inter vivos* or lifetime distribution by the deceased? He who alleges must prove. The parties made strong allegations, but provided little proof. No iota of evidence was presented, to demonstrate that the deceased had distributed his property before he died. If he had indeed distributed the estate, these succession proceedings would not be necessary. The fact that they exist is testimony that there was no *inter vivos* distribution. Parties initiate succession proceedings on the understanding that the deceased had not settled them during his lifetime, and they come to ask the court to distribute the property on behalf of the deceased based on the applicable law. It is not the case that succession causes are to be initiated over assets that have already been distributed, for it would be duplicitous for the court to distribute what the deceased had distributed before he died. I was told that some children even got title deeds of what was given to them



by the deceased *inter vivos*. Curiously, not a single title deed was placed before me, as evidence that any of the children was settled during the lifetime of the deceased. I shall, therefore, proceed on the understanding that there was no lifetime distribution of the estate.

21. A brother of the deceased was presented by one of the parties as a witness. He asserted that he was the person entitled to distribute the estate, and went as far as asserting that the court was not entitled to distribute the property. He did not cite where he derives authority to do so. I have indicated above, that the estate herein is subject to distribution under the [Law of Succession Act](#). Under that law, the person placed in charge of the property of a dead person is the person known as the administrator. That person is appointed by the court. The brother of the deceased was not appointed by the court to administer this estate. He has no authority over the assets of the estate, and he has no authority to approach the court to ask it to distribute the estate. Under the [Law of Succession Act](#), the estate of a dead person can only be distributed following orders made by a court under section 71. There can be no other lawful distribution, and any attempt to distribute without lawful authority amounts to a crime, according to section 45 of the Act. If he purports to derive authority under customary law, he should understand that jurisdiction under customary law was ousted by section 2(1), of the Act, upon the coming into force of the law in 1981.
22. The parties have not agreed on how to distribute the estate. When that happens, the court applies the law strictly, and that is what I am just about to do.
23. The deceased died a polygamist, and so the estate shall devolve in accordance with section 40 of the [Law of Succession Act](#). For the purpose of distribution, the assets shall be divided into units. The starting point is the number of houses, which depends on the number of wives. The wives were 4, so 4 houses. The 1st house had 10 children, 3 died, but were survived by their own children. The wife in that house did not survive. That house, therefore, was made up of 10 units. The 2nd house had 15 children, 3 died, and were survived by children. The widow in that house is alive. That house comprises of 16 units. The 3rd house had 7 children, 1 died, and was survived by children. The widow in that house is alive. That house has 8 units. The 4th house has 11 children, they are all alive. Their mother is also alive. The house has 12 units. The ratio of distribution of the assets should work out as follows – 10:16:8:12, or 5:8:4:6. It was proposed that one of the assets be sold to raise moneys to complete administration. That sounds reasonable. Administration expenses should be met from the resources of the estate, and not from the individual pockets of the survivors or beneficiaries.
24. The final orders are as follows:
 - a. That the grant made to Rustus IS Namanyi, Grace Shilenje, Fann Anyona Shilenje and Jane Anwanga Shilenje, on 6th September 2016, is hereby confirmed;
 - b. That assets of the estate, listed in the petition, except for Plot No 19 Lukume, shall devolve to the 4 houses of the deceased in the ratio of 10:16:8:12/5:8:4:6,
 - c. That the share due to the 1st house shall devolve upon the children in that house, including daughters, equally; the share due to the other houses shall devolve upon the surviving widows in those houses during life interest, and thereafter to their children, including daughters, equally;
 - d. That a certificate of confirmation of grant shall issue, accordingly;
 - e. That the share due to any child of the deceased who is dead shall be taken by his or her children, including daughters, equally, in terms of section 41 of the [Law of Succession Act](#);



- f. That Plot No 19 Lukume shall be sold, and the proceeds from the sale plied to meet administration and transmission expenses;
- g. That the administrators have 6 months from the date herein, by dint of section 83(g) of the Law of Succession Act, to transmit the estate in terms of the orders above, and to complete administration of the estate herein;
- h. That the matter shall be mentioned, after 6 months, to confirm transmission of the estate, and completion of the administration, so that the court file herein can thereafter be closed;
- i. That each party shall bear their own costs; and
- j. That any party aggrieved, by the orders made herein, has leave of 30 days, to move the Court of Appeal, accordingly.

25. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 21ST DAY OF JULY 2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Masakhwe, instructed by Gabriel Fwaya, Advocate for Grace Shilenje, Fann Anyona Shilenje and Jane Anwanga Shilenje.

Mr. Mukavale, instructed by JJ Mukavale & Company, Advocates for the protestor.

