

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 105 OF 2003

IN THE MATTER OF THE ESTATE OF MANESE OTIENO ESHITUBI (DECEASED)

RULING

1. On 24th July 2020, I delivered a ruling in which I stated that the affidavits lodged in the cause in purported compliance with the directions given in the judgment of 27th February 2020, were not comprehensive, for they omitted to attach copies of the renunciations by the daughters or their affidavits waiving their interests in the estate. The matter was allocated a date for mention to confirm compliance. The matter was mentioned on 1st October 2020, when it transpired that there was no full compliance then, and more time was given to the parties to comply.

2. It was next mentioned on 2nd December 2020, when it transpired that some of the daughters of the deceased had filed their affidavits, while some had not. Four of the daughters were in court, and the court interviewed them so as to gauge their position on the distribution. Caroline Otieno stated that she was not claiming anything from the estate. Frida Otieno indicated that she was not asking for her share in the estate of her father. Christabel Otieno said that she was not asserting her right to a share; and so did Rosebellah Ambetsa.

3. The persons who survived the deceased, and who ought to get a share in the estate of the deceased are listed in the affidavits of the 4th administrator sworn on 30th June 2021 and 20th day of August, 2020. The deceased had five houses. The first house was of the late Phoebe Nyapola and her children were the late George W. Wanguba, Joseph Swaka, Morris Asumwa, Dorica Onindo, Rose Mukhwana and the late Margaret Namai. The late Margaret Namai was said to have been survived by Hassan Onyimbo Ekesa and Asmin Anyona Shaban. The second house was of the late Grace Angulu, whose children were Fredrick Charande, Wilson Afugwa, Livingstone Otinga, Johnstone Nandwa Otieno, Harrison Kamoya, Emily Mukwambo, the late Rosalinda Lukale and the Lorna Mukhwana. The late Lorna or Donah Mukhwana Otieno was said to have been survived by Stanley Namayi Aura and Patrick Lincoln Kachisa Aura. The third house is that of the late Jerita Masava, and comprised of Johnstone Namai Otieno, Reuben Kadhai Otieno, Jona Namai, Sylipha Amambwa, Fatuma Omududu and the Dina Okoth. The late Dina Okoth/Dinah Okoti was survived by Hellen Mukabana. The fourth house is of Mwanaidi Nechesa, who has one child, Ismael Okune. The fifth house is that of Repha Anyolo Otieno, whose children are Alexander Amukambwa, Festo Akwere, Christabel Biere, Frida Otieno, Nerea Otieno, Florence Mung'asia and Rosebella Ambetsa.

4. Only three of the daughters filed an affidavit of renunciation or waiver of their shares in the estate, that is, Fridah Obulemire Otieno, Christabel Lubanga Otieno and Rosebellah Naomi Ambetsa. The affidavit was sworn on the 29th day of September, 2020, stating that they are happily married and that they do not wish to claim anything from the estate of the deceased. The three attended court on 2nd December 2020 and reiterated that position. Caroline Otieno did not swear an affidavit, but she stated her position in court, that she was not taking her share, and that would be sufficient. The rest are yet to. By the rest I mean Emily Mukwambo, Dorica Onindo, Rose Mukhwana, Sylipha Amambwa, Fatuma Omududu, Nerea Otieno and Florence Mung'asia. A number of the daughters of the deceased are dead, and their children are entitled to take the share of their later mothers through the doctrine of representation. These are the late Margaret Namai, the late Lorna Mukhwana, the late Rosalinda Lukale and the late Dina Okoth. Their children, who are grandchildren of the deceased, should also file affidavits or attend court to state their position, as to whether they would take a share in the estate of the deceased or not.

5. On the need for the administrator to disclose all the survivors of any of the deceased's children, the 4th administrator has done so through an affidavit sworn on 20th August, 2020. However, the other administrators have failed to mention the survivors of the late George W. Wanguba and the late Rosalinda Lukale who are now deceased. The two are children of the late Manese Otieno Eshitubi, whose estate is the subject matter of these proceedings. It would be unfair for the court to make a determination, on the distribution of the estate of the deceased, without taking into account the possible existence of persons beneficially entitled to the estate from the said two children of the deceased. The estate solely comprises of a parcel of land, known as Marama/Lunza/247, and there is a chance that the survivors of some of these dead children of the deceased are resident within the said property.

6. The court is mindful of the need and the requirement of the law that all beneficiaries of a deceased person do benefit from the deceased's estate unless and until such interest and/or right is renounced. It is the right of their children, if any, to take to the share of accruing to their late parent, as stated in *In Re Estate of Wahome Njoki Wakagoto* (2013) eKLR (Musyoka J), where it was held:

“Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

7. Before this court can make a final determination on the confirmation of the grant and the subsequent distribution of the estate, the administrators of the estate must fully comply as directed. In particular, they must list the beneficiaries and/or survivors of the late George W. Wanguba and the Rosalinda Lukale, by way of an affidavit, within the next 30 days following the delivery of this ruling.

8. With respect to the matter of the daughters who have not yet renounced or waived their right to a share in the estate it will be well to refer to *Christine Wangari Gichigi vs. Elizabeth Wanjira Evans & 11 Others* (2014) eKLR (Nambuye, Ouko and Mohammed JJA), where the

court said that failure by daughters of the deceased to participate actively in the litigation over the estate of their parents should not be a disentitling consideration, in the absence of a renunciation by them. In *In re Estate of Joyce Kanjiru Njiru (Deceased)* [2017] eKLR (Gitari J), where two of the daughters of the deceased were said to be not claiming a share in the estate and not opposing the proposed distribution, and therefore, not entitled to a share, and hence were not allocated a share in the application for confirmation of grant, the court went on to make provision for them that notwithstanding.

9. What I am saying, in short, is that if the administrators fail to file affidavits by the daughters to renounce or waive their right to a share in their father's estate, and or fail to avail them in court to state their position, it should not be assumed that such daughters have no interest in their father's estate or have impliedly renounced or waived their right by their non-participation. The court will proceed to provide for them, their non-participation notwithstanding, unless or until it sees a document signed by them, where they have renounced their share.

10. There are also a variety of inconsistencies in the names of the persons listed. It is not clear whether Lorna Mukhwana and Donah Mukhwana refer to one and the same person, or whether these are different individuals. The same applies to Dina Okoth and Dinah Okoti. There is need to bring clarity to the same.

11. Finally, it may be well to state that where there is no concurrence, even by just one of the survivors, or where some of the survivors have not been involved in the process, the court will have no option but to apply the applicable law. It was said, by the Court of Appeal, in *Justus Thiora Kiugu, & 4 Others vs. Joyce Nkatha Kiugu & Another* [2015] eKLR (Visram, Koome and Otieno-Odek JJA), that an intestate estate could not legally be distributed in any other way other than by the parties agreeing amongst themselves and filing a consent, or by the court following the provisions of the Law of Succession Act on intestate distribution. It was stated that where the parties were in total agreement, and recorded a consent on the mode of distribution, the court would have no choice but to adopt the consent, and make it an order of the court. In the absence of a written consent on the mode of distribution, the court would have no discretion but to distribute the estate of the deceased as per the provisions of the Law of Succession Act. It was said, in *In re Estate of Juma Shiro - Deceased* [2016] eKLR (Mwita J), that where the beneficiaries had not agreed on the mode of distribution, the court would resort to the provisions of the Law of Succession Act to resolve the issue. See also *In re Estate of MM (Deceased)* [2020] eKLR (Gikonyo J), where there was no total consensus amongst the survivors on distribution, the court was guided by the law, and strictly applied the provisions of the Law of Succession Act.

12. By the directions that I have given so far I am giving the parties the opportunity to agree amongst themselves on a distribution, failing which I shall have no option but to distribute the estate strictly in accordance with the Law of Succession Act. I am giving the parties a final chance to address the issues that I have raised in paragraphs 4, 5, 7 and 10 of this ruling. This is a court of law; it is bound to apply the law. Let the parties do the right thing, by complying with the law, and following the directions of the court to the letter. That has not happened here, and I will not allow or countenance disregard of court orders and directions. In the event of total failure, I shall have no option but to fully apply the provisions of the Act, with the consequence that the parties may have to come back to court asking for review or rectification or other such remedy. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 7TH DAY OF MAY 2021

W. MUSYOKA

JUDGE