



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION APPEAL NO. 8 OF 2018**

**(An appeal arising from the decision of Hon. F. Makoyo, Senior Principal Magistrate (SPM) delivered on 25<sup>th</sup> September 2018 in Butere SPMSCS No. 7 of 2011)**

**MAUREEN MUTUBA.....1<sup>ST</sup> APPELLANT**

**JOSEPH ODINGO WERE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**WILSON OWITI WERE.....RESPONDENT**

**JUDGMENT**

1. These proceedings relate to the estate of Keya Omolo alias Micah Were, who died on 10<sup>th</sup> November 1985. According to a letter dated 24<sup>th</sup> January 2011, from the office of the Assistant Chief of Mutoma Sub-Location, which shows that the deceased had married 3 wives, 2 died but 1 was alive, but her name was not disclosed. He was said to have had 9 children, presumably by the 3 wives, being Wilson Owiti Keya, Richard Sakwa Keya, Jackson Shabanji Were, Samwel Wycliffe Were, Francis Kangu Were, John Abuti Abuyabo, Joseph Adongo Were, Stephen Aliaro Were and Javan Mutuba Were. Javan Mutuba Were was said to be deceased, but survived by a daughter, Maurine Mutuba.

2. A petition was lodged, in Butere PMSCS No. 7 of 2011, on 1<sup>st</sup> 2011, by Wilson Owiti Keya, in his capacity as son of the deceased, seeking representation to the intestate estate of the deceased. He listed in the petition, as the survivors of the deceased, the persons named in the letter by the Assistant Chief, referred to in paragraph 1 above, save for the widow. He expressed the deceased to have had died possessed of property described as Marama/Shinamwenyuli/55. The filing of the cause was publicized in the *Kenya Gazette* of 15<sup>th</sup> April 2011. Letters of administration intestate were duly made to the petitioner on 10<sup>th</sup> August 2012, and a grant was subsequently issued on even date. I shall hereafter refer to the petitioner, Wilson Owiti Keya, as the administrator.

3. The administrator filed a summons for confirmation of his grant on some unknown date, for the summons on record does not bear a court stamp, and it is itself not dated. The persons listed as survivors, in the unsworn affidavit, filed in support of the summons, are the persons listed in the letter by the Assistant Chief. The property was proposed to be shared out at uneven proportions between the 8 surviving sons of the deceased, that is excluding the late Javan Mutuba Were.

4. The undated application was placed before Hon. Shimenga, Resident Magistrate, on 4<sup>th</sup> July 2014, when only the administrator was present in court, and it was directed that all the persons beneficially entitled to the estate be present, and it was put off to 17<sup>th</sup> July 2014. On 17<sup>th</sup> July 2014, the matter was again placed before Hon. Shimenga, who noted that all the beneficiaries had not attended court, and directed that the area Chief writes a fresh list of beneficiaries, to include any deceased sons and daughters of the deceased. That was complied with, for a letter dated 23<sup>rd</sup> July 2014, from the office of the Chief of Marama Central Location, was lodged in record, indicating the 3 wives of the deceased to be the late Florence Shieunda, Phelesia Owate and the late Lucia Nechesa. He was said to have had 8 sons, being Wilson Owiti Keya, Richard Sakwa Keya, Jackson Were Keya, Samuel Were Keya, Francis Kangu Keya, John Abuti K, Joseph Odongo Keya and Stephen Aliaro Were; and 5 daughters, being the late Beatrice Ambia, Gladys Mukhomi, Jemima Manyasa, Irene Sokomi and Roselyne Odongo.

5. At the next appearance, on 24<sup>th</sup> July 2014, the administrator was present in court, with the following individuals: Roseline Odongo, Josephine Sokomi, Jemima Manyasa, Gladys Mukhobu, Beatrice Ambia, Maureen Mutuba, Stephen Aliaro Keya, John Abuti Abuyabo, Wycliffe Samuel Were, Francis Kangu Were and Jackson Shabanji Were. Hon. Shimenga interviewed all of them. The 3 daughters present renounced their right to a share in the estate, and so did a granddaughter, Maureen Mutuba. The sons present indicated that they had no objection to the proposals made in the confirmation application. Hon. Shimenga then adjourned the matter to 25<sup>th</sup> July 2014, for the rest of the children to be availed. On 25<sup>th</sup> July 2014, Joseph Odongo Were, Joseph Shikanda Nasio and Richard Sakwa were in attendance. Hon.

Shimenga interviewed them. The sons, Joseph Odongo Were and Richard Sakwa Keya, stated that they had no objection to the proposals. The grandson, Joseph Shikanda Nasio, representing his mother Beatrice Ambia, said that he had no interest in the property.

6. After Hon. Shimenga was satisfied that all the persons beneficially entitled had appeared before the court, and after she had interviewed all of them and recorded their respective positions on the distribution proposed, she went ahead to have the grant confirmed, and to approve distribution as per the proposals in the supporting affidavit. A certificate of confirmation of grant was subsequently issued, on 11<sup>th</sup> August 2014, distributing the estate to the 8 sons, as had been prayed in the undated summons for confirmation of grant.

7. Subsequent to that, the administrator lodged a summons in Butere PMCS No. 7 of 2011, on 2<sup>nd</sup> August 2018, dated 2<sup>nd</sup> August 2018, allegedly seeking rectification of errors on the certificate of confirmation of grant issued after the grant was confirmed, to place the correct acreages on record. That application was placed before Hon. Shimenga, on 2<sup>nd</sup> August 2018, and a date was given for its hearing, in the presence of all the beneficiaries. On 30<sup>th</sup> August 2018 Francis Kangu Were, Richard Sakwa, Were Aliaro Stephen, Wycliffe Samuel Were, John Abuti Abuyabo and the administrator, were in attendance. Hon. Shimenga interviewed them, and they all indicated that they had no objection to the proposed changes. Since not all the beneficiaries were in court, the court directed that the court would only order rectification upon the others being produced. The matter was then stood over to 6<sup>th</sup> September 2018. On 18<sup>th</sup> September 2018, only one person was in attendance, Maureen Mutuba, who said that her father had died, but she had not been allocated the portion that was due to him. She, however, changed her stance after the administrator pointed out that she had, on 24<sup>th</sup> July 2018, given her consent to a distribution which excluded her from benefit. She said that what the administrator had stated was true, and she elected not to insist. Following that Hon. Makoyo, Senior Resident Magistrate, allowed the changes as all the beneficiaries had confirmed them.

8. On 28<sup>th</sup> September 2018, another summons for rectification was lodged in Butere PMCS No. 7 of 2011, by the administrator, for correction of errors on the acreages. When the said summons was placed before Hon. Makoyo on 28<sup>th</sup> September 2018, he directed that it be heard on 11<sup>th</sup> October 2018, in the presence of all the beneficiaries. The hearing eventually happened on 13<sup>th</sup> November 2018, when Wilson Owiti Keya, Maureen Mutuba, Jackson Shabanji Were, Richard Sakwa Keya, Francis Kangu Were, Wycliffe Samuel Were, Joseph Odongo Were and John Abuti Abuyabo were in attendance. They were all interviewed by Hon. Makoyo, and all said that they had no objection to the changes proposed. Following that confirmation, Hon Makoyo proceeded to order that the grant be confirmed as per the proposals in the applications dated 2<sup>nd</sup> August 2018 and 25<sup>th</sup> September 2018.

9. It is the orders made on 13<sup>th</sup> November 2018 that prompted the initiation of the instant appeal, through a petition of appeal filed herein on 18<sup>th</sup> December 2018, of even date. From my understanding of the grounds of appeal listed, the key issues are:

- a. Whether all the persons beneficially entitled to a share in the estate were brought on board;
- b. Whether it was established whether the persons beneficially entitled were satisfied with the share proposed to them;
- c. Whether the consent on distribution was filed;
- d. Whether the court erred in distributing the estate without bringing all the beneficiaries on board; among others.

10. The appeal was first placed before me on 28<sup>th</sup> October 2020, I gave directions to the effect that the same be disposed of by way of written submissions. By then the respondent had already filed his submissions, and I gave the appellants 14 days to comply. I allocated the matter 28<sup>th</sup> January 2021 as the date for confirming filing of written submissions by the appellants. Come 28<sup>th</sup> January 2021, only the respondent attended court, the appellants were not in court, neither was their advocate Mr. Luchivya, despite the date having been given in open court, on 28<sup>th</sup> October 2020, in the presence of Mr. Otsyeno, who had held brief for Mr. Luchivya. The appellants had also not filed written submissions by that date.

11. I have read through the written submissions lodged herein by the respondent, I have noted the arguments made therein.

12. I understand the appellants to be raising the issue that not all the beneficiaries of the estate of the deceased were disclosed and involved in the process. There are two points that I need to make here in answer to that. Firstly, when the confirmation application was filed and placed before the court, Hon. Shimenga directed the Chief for the area where the deceased hailed from to file a fresh list of beneficiaries. When that list was filed, the two appellants attended court, on 24<sup>th</sup> July 2014 and 25<sup>th</sup> July 2014, and none of them ever informed the court that the Chief's letter of 23<sup>rd</sup> July 2014, had not disclosed all the survivors of the deceased, or all the persons beneficially entitled to a share in the estate. They never disclosed to the court the names of any person that they felt had been left out. Secondly, after the Chief's letter was filed, there was opportunity for the two appellants to file an affidavit of protest, in terms of Rule 40(6) of the Probate and Administration Rules, if they felt that the distribution proposed was not agreeable to them. No one in all the sessions that were conducted before Hon. Shimenga and Hon. Makoyo ever raised the issue that not all the beneficiaries had been disclosed nor involved in the process, and no one ever filed any document to allege that anyone had been excluded from the process.

13. The court trusts that the persons who are disclosed by the parties and the Chief are the rightful beneficiaries, unless the contrary is established. No one contradicted what was placed before the court by the administrator and the Chief, and no objections of any nature were raised by anyone. The court, therefore, acted properly, based on what it had before it. It is not the function of the courts to carry out investigations on who the rightful beneficiaries are, it relies on the administrators and government agencies, and all the other parties in the matter. There was no other basis upon which the court could decide whether or not the persons before it were the rightful beneficiaries. The two appellants raised no issue at all with regard to that.

14. On whether the court took time to establish whether the persons beneficially entitled to a share in the estate were satisfied with the shares allocated to them, I do note that the first appellant was interviewed on 24<sup>th</sup> July 2014, by Hon. Shimenga, and she said that she did not wish

to inherit the land, adding that it could be divided as per paragraph 5 of the affidavit in support of the summons for confirmation of grant. She was again interviewed on 18<sup>th</sup> September 2018, by Hon. Makoyo, when she said that her father had died, but she had not been given the portion due to him. When the respondent pointed out what she had said before Hon. Shimenga on 24<sup>th</sup> July 2014, she backtracked, and confirmed that she had consented to the distribution on 24<sup>th</sup> July 2018, and went on to say she would not insist. Another interview was conducted by Hon. Makoyo on 13<sup>th</sup> November 2018, where she likewise said that she had no objection to the changes that were being proposed to the distribution. The proposals were that nothing was being allocated to her father's estate, which meant that she was not to get a share in the estate. The same case applies to the second appellant, Joseph Odongo Were. He was intervened by Hon. Shimenga on 25<sup>th</sup> July 2018, when he said that he had no objection to the distribution proposed in the summons for confirmation of grant. When changes were proposed to the said distribution, he was once again interviewed, by Hon. Makoyo, on those changes, on 13<sup>th</sup> November 2018, and he said that he had no objection.

15. The record before me is quite clear that the court did give opportunity to all the persons beneficially entitled to express themselves on whether they were satisfied with what was proposed at distribution, and none expressed dissatisfaction. Hence, the court cannot be faulted for coming to the conclusions that it came to with regard to the issue as to whether all were satisfied with what was proposed.

16. The other thing is about the consents by persons beneficially entitled. Rule 40(8) of the Probate and Administration Rules envisages the filing of a consent on distribution in Form 37. None was filed in this matter. Was that fatal to the distribution proposed? No. It was not. The court went round the issue of lack of the consent in Form 37 in three ways. One, by requiring the Chief to file a fresh list of all the persons beneficially entitled. Two, requiring that all such persons beneficially entitled to the estate attended court at confirmation of grant, and they all did attend court. Three, by interviewing them on the distribution proposed, to confirm whether or not they consented to the same. In this case, they all confirmed that they had consented. The fact, therefore, that no consent in Form 37 was filed was not fatal. Indeed, the personal attendance of the parties at confirmation is superior to any written consent that is lodged in court. If any of the persons interviewed did not agree with the proposed distribution, they ought to have informed the court so, for nothing prevented them from doing so. After all, the court was carrying out that exercise to afford them a say on the matter. If they chose to keep quiet, instead of voicing their concerns, they cannot now turn around and blame the court for lost opportunity. If they had expressed their unhappiness with the proposals, the court would have heard their objections, and made a finding on the issue. Now that that issue was not raised at the confirmation hearing, it cannot now become an issue for determination on appeal.

17. The other argument was that the trial court erred in evaluating the proposal by the administrator before bringing all the beneficiaries on board. I have already dealt with this here above. The court did bring everybody on board. If there are some unnamed persons that were not brought on board, the trial court cannot be blamed for that. It was up to the appellants to alert the court that not everyone was on board. The judges who sit over these cases do not come from the same families or communities with the parties, and, logically, it should not be expected that they would, somehow, know who is the rightful beneficiary and who is not. The court called for a report from the Chief on the rightful beneficiaries. The Chief complied with that court directive. When the list was lodged in court, no one complained. I do not see what else the court could have done in the circumstances.

18. The second aspect of that is the evaluation and analysis of the proposals, made by the administrator, by the court. The court did not do any analysis or evaluation. There was no need for it to. The parties had reached consensus on the distribution, by each one of them, upon being interviewed by the judges, confirming that they had no objection to the proposals. There was nothing to evaluate or analyse. The court merely endorsed what the parties proposed as there was unanimity.

19. I have dealt with the matter of Maureen Mutuba above. She was disclosed as a person beneficially entitled to a share in the estate, by dint of being a grandchild of the deceased, whose father had died. The estate of her father was not allocated a share in the proposals placed before the court. When she was called upon by the two judges, on three occasions to react to those proposals she said that she had no objection to them. That meant that she was comfortable with the proposal that she would not a share from the estate. She was not left out, for she was involved in the process, but she chose, when the interviewed, to let go of what was due to her father from the estate.

20. The trial court is accused of going by the word of the administrator, which was riddled with falsehood. The court goes by the documents that are placed before it. The administrator placed proposals before the court on the distribution of the estate. When the application first came up before Hon. Shimenga, the administrator appeared all alone. Whereupon the court did not hear him, instead it was ordered that he should come back to court on another day with all the beneficiaries, and an order was made requiring the Chief to file a list of beneficiaries. Never mind that there was already a letter on record by the Assistant Chief on the same. The Chief provided a list. The beneficiaries attended court. None of them disputed the list filed by the Chief. None of them had the presence of mind to file an affidavit of protest to contest the proposals by the administrator. When they were given a platform by the court to speak out on the proposals, they all said that they were not objecting. It was up to the appellants, and the other parties, to speak out, if what was placed before the court amounted to lies and falsehood. They did nothing, and the trial court cannot be accused of relying on lies and falsehood, in the absence of a counter-narrative, by those that are now accusing the court of not doing justice.

21. On the issue of John Abuyabo, again no one raised any issue, despite being given the opportunity to, as to whether he was a rightful heir or not. When his name was included in the proposals, and were placed before the court, and the court invited the parties to attend court, to confirm its contents, all chorused that they had no objections to any of the contents of the documents placed before the court. There was, therefore, consensus on the matter of John Abuyabo, to the extent that all those interviewed, who included the appellants herein, said they had no objections.

22. It is also argued that the court made final orders before all the persons named in the letter from the Chief of 24<sup>th</sup> November, 2011 were heard. Firstly, there is no letter on record from a Chief dated 24<sup>th</sup> November 2014. What is on record are two letters, one dated 24<sup>th</sup> January 2011 and the other dated 23<sup>rd</sup> July 2014. Whichever letter is the subject of this ground, the fact is that the trial court gave a chance to the parties to appear in court on five occasions, to state their positions on the matters before the court. Those who attend court took advantage of that opportunity. Those who did not take advantage of the chance cannot blame the court. In any event, it is the appellants who are complaining, yet they took advantage of the opportunity by attending the court, they were given a chance to address the court, they addressed the court, and what they said was recorded. They cannot complain on behalf of anyone who did not come to court during the five sessions.

23. There are allegations that the administrator concealed material from court, and that there was forgery. I have already stated that none of the two appellants raised any objection to anything that had been placed before the court. The 1<sup>st</sup> appellant addressed the court on three occasions, and she did not, in any of them, allege that the administrator was concealing anything from the court or was relying on forged material. She equally did not file any documents, for the court to consider those allegations. The trial court could not, therefore, be expected to determine whether there was concealment of matter or reliance on forged documents, when those allegations were not even made by anyone in the circumstances. The issues of forgery and concealment of matter was never before the court, so the court cannot be accused on relying on documents that were forged, or determining matters when there was no full disclosure.

24. The appeal before me is wholly misconceived. There is no iota of merit in it. It is for dismissal, and I hereby dismiss the same. Being a family matter, I shall order that each party bears their own costs. There is leave, of twenty-eight (28) days, for anyone who may be aggrieved by the dismissal, to move the Court of Appeal, appropriately. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF JUNE, 2021**

**W. MUSYOKA**

**JUDGE**