

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 409 OF 1998

IN THE MATTER OF THE ESTATE OF KAITANO MAKUTO

LIYENZELO alias KAITANO MAKUTO (DECEASED)

RULING

1. The application for determination is the summons dated 23rd December 2020 for confirmation of grant. The deceased died in 1996. His survivors are said to be 5, being 2 sons and 3 grandsons, and a Blasio Kubai Shikami. The sons are said to be Fabian Murunga Makuto and Rodgers Lumidi, while the grandsons are Felix Kubai Liyenzelo, Maxwel Mbakaya and Sylvester Amwoka Makuto. The property is described as Idakho/Shiseso/383.

2. At the hearing on 24th May 2021, I interviewed the administrator, Fabiano Murunga Makuto. He said that the deceased had 6 children, 3 sons and 3 daughters. The sons were Maurice Otunga, Dismas Liyenzelo and Fabian Murunga. The daughters were Christine Shipeku Makutu, Angeline Aliela and Angeline Shiliango. I was informed that Maurice Otunga died and had had 3 children, of which only 1, Sylvester Amwoka, was alive. I was not informed if the 2 who are dead were survived by a family or children. I was told Dismas Liyenzelo had also died. He had 2 wives and 4 children, being 2 sons and 2 daughters: Felix Kubai, Gloria Mugoni, Maxwel Mbakaya and Bridget Mugala. Christopher Lumidi and Rodgers Lumidi were said to have had bought land from the deceased. I interrogated the administrator with a view to be satisfied that the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules had been complied with.

3. The proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules require the court to be satisfied that the administrator and applicant in the confirmation application had ascertained the persons beneficially entitled to a share in the estate and their shares. From the interaction with the administrator on 24th May 2021, I was not satisfied that he had ascertained the persons who are beneficially entitled to a share in the estate. He needed to disclose whether the 2 children of the deceased who had died had been survived by families or not, so that if they had families, he needed to disclose them. Secondly, out of the 4 children of Dismas Liyenzelo, only 1 was disclosed as a beneficiary, Felix Kubai, the other 3 were concealed. The 3 daughters of the deceased were not disclosed in the application. Rodgers Lumidi is listed in the application as a son of the deceased, yet when the administrator addressed me in open court he did not name him as such, instead he said he had bought land from the deceased. That amounted to misleading the court. Since the administrator did not properly ascertain the persons beneficially entitled to a share in the estate, I shall not proceed to determine the application on its merits. Let the administrator do the right thing, by filing a further affidavit, where he should disclose each and every survivor of the deceased.

4. The deceased died in 1996, that was after the Law of Succession Act had come into force. His estate is available for distribution in accordance with the Act, and not customary law. Under the Act, there is no discrimination as between the sons and daughters of the deceased. Under section 38 they are all entitled to equal share in the estate. That being the case, all the children of the deceased, both male and female must be disclosed, and brought to court. Where any of the children is dead, then their children should also be disclosed and brought, to court both male and female. The daughters have not been disclosed and were not brought to court. The children of the dead children of the deceased were only selectively disclosed, and selectively brought to court, instead of all being disclosed and availed in court.

5. On the shares, I have stated that the deceased herein was survived only by children, as his wife, Sulemina Khasoa, was also deceased. Where an intestate is survived only by children, then, under section 38, they share the estate equally, amongst themselves, both sons and daughters. The distribution proposed only shares out the property amongst the sons, the daughters have not been given their share. It has also left out some of the children of the dead sons of the deceased. The proposals on distribution do not comply with the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules. Let the administrator go back to the drawing board and provide for every survivor of the deceased, sons and daughters alike.

6. Of course, a survivor cannot be forced to take a share in the estate if they are not willing. That would mean that where any of the survivors would like to forgo their share, the right thing would not be to conceal their existence, or to exclude them from the process altogether, but to get them to file an affidavit renouncing that share or waiving that right or entitlement, and to attend court at confirmation to confirm that position.

7. I shall accordingly postpone confirmation of the grant, to enable the administrator comply. The matter shall be mentioned after 45 days, for further directions, after the administrator has done the right thing, as advised and directed above. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF SEPTEMBER 2021

W MUSYOKA

JUDGE