REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 616A OF 2007

IN THE MATTER OF THE ESTATE OF MARIMU LESHEKA alias MARIKU MALIMU LESEGA (DECEASED)

JUDGMENT

1. On 10th April 2019, I delivered a judgment in which I declined to revoke the grant herein, and instead directed the administrators to file a summons for confirmation of their grant within set timelines. I also directed the persons who had filed the summons for revocation of grant to file affidavits of protest to the confirmation application, in the event they were not happy with the distribution proposed.

2. The administrators, Wilson Lwigado and James Sunguti Malimo, complied with those directions, by filing, on 8th May 2019, the summons for confirmation, dated 7th May 2017. They disclosed that the deceased had married twice, and had children with his 2 wives. The wives were identified as Ziporah Imbala and Loice Musavi, both now deceased. The family of the late Ziporah Imbala was said to comprise of 2 sons, the late Gabriel Luseka Malimo and the late Daniel Bernard Malimo. The two late sons are said to have been survived by their wives, Norah Omari and Gladys Bernard. The children of the late Loice Musavi are said to be the late Laban Lutiali Malimo, James Sunguti Malimo, Moses Achevi Malimo, Isaac Muyeshi Malimo, African Divine Church, Daniel Bernard Maliomo and Wilson Lwigado Malimo. There is also a daughter-in-law, Josphine Materu. The assets said to make up the estate are Isukha/Shinyalu/441 and 467. It is proposed that Isukha/Shinyalu/441 be shared between Norah Omari, Gladys Bernard, Josphine Materu, James Sunguti Malimo, Moses Achevi Malimo and African Divine Church; Isukha/Shinyalu/467 is to devolve upon Gladys Bernard and Wilson Lwigado Malimo. There is filed together with a consent on distribution, dated 5th May 2019, simultaneously with the summons, which is signed by the late Gabriel Luseka Malimo, Norah Omari, Gladys Bernard, James Sunguti Malimo, African Divine Church and Wilson Lwigado. There are also copies of the identity cards for James Sunguti Matimo and Wilson Lwigado Malimo. There is also copy of a document said to be a translation from Luhya to English of a document which purported to be the will of the deceased.

3. An affidavit of protest was filed against the application by Moses Achevi Malimo and Isaac Muyeshi Malimo, sworn on 11th July 2019. They have identified the children of the 2 wives of the deceased. The children from the 1st house are said to be the late Martin Tsipesa, the late Dorcus Wilunda, the late Gabriel Luseka Malimo, Agnes Mulei, the late Daniel Bernard Mulima, Jenifer Khasoa and the late Siph Malimo. The children from the 2nd house are said to be Wilson Lwigado, the late Laban Lutiali, James Sunguti, the late Sucy Mulei Malimo, Jenet Shilehi, the late Sieba Andayi Maliomo, Moses Achevi Malimo and Isaac Muyeshi Malimo. They identify the assets that the deceased died possessed of to be Isukha/Shinyalu/441 and 467. They propose that Isukha/Shinyalu/441be given Gabriel Luseka Malimo, Daniel Mulima Malimo, Laban Lutiali Maliomo, James Sunguti Maliomo and Moses Achevi Malimo; and Isukha/Shinyalu/441 to Wilson Lwigado Malimo, Daniel Mulima Malimo and Isaac Muyeshi Malimo. They aver that some of the sons and daughters of the deceased were dead, and had been survived by children, who ought to take the shares that were due to their parents. They aver that according to tradition, it is the last born son who ought to remain in the parents' homestead, hence Isaac Muyeshi Malimo ought to remain on Isukha/Shinyalu/467. They aver that they were not consulted when the petition was filed, and their consent was not obtained. They also allege that some of the signatures appearing in the Form 37 filed simultaneously with the application were forged.

4. The application was heard orally. Wilson Lwigado testified first as PW1. He largely regurgitated the contents of his affidavit, and some the facts set out in the protest. He asserted that the deceased had made a will in 1979, which, he deposited in court in 2007, when they sought representation. He said the same was reduced into writing by the local Assistant Chief, and that he, PW1, was present when the said will was made. He asserted that the deceased signed the will, and that he, PW1, did not sign it. He asserted that they would not distribute the estate twice, and that their proposals were in line with the will of the deceased. He said that he did not wish to go contrary to how the deceased wished. He denied that Gabriel, Daniel, Laban, James and Mopses were in occupation of Isukha/Shinyalu/441; and said that Isaac was in possession of Isukha/Shinyalu/467 by force. He further said that Daniel worked on both Isukha/Shinyalu/411 and Isukha/Shinyalu/467, while, he, PW1, worked on Isukha/Shinyalu/467. He stated that Isaac's land was in Isukha/Shinyalu/441, and his boundaries were intact, and his position was next to the church. He stated that Mosses was not working on the portion meant for Isaac, and that he had moved to Isaac's portion by force. He asserted that Isaac was born on Isukha/Shinyalu/467, and by the time the deceased died, he had not moved Isaac to Isukha/Shinyalu/467. He said Isaac lived on Isukha/Shinyalu/ Isukha/Shinyalu/467, with his wife and children, and his hoses were there. He said that the deceased had given each an equal share, even though occupation on the ground was not equal. He stated that he had shared out Isukha/Shinyalu/441 and Isukha/Shinyalu/ Isukha/Shinyalu/467 equally between the sons. He confirmed that his sisters Agnes Mulehi, Jennifer and Janet Sijehi were alive, but he had not listed them as beneficiaries since they were married, He confirmed that they had not sworn any affidavits to renounce their entitlements.

5. James Sunguti Marimo testified as PW2. He stated that Isaac was born on Isukha/Shinyalu/467 and lived there with his family, and never lived on Isukha/Shinyalu/441. He said that it was the deceased who decided that Isaac moves out of Isukha/Shinyalu/467. He stated that both

Isaac and Moses were inside Isukha/Shinyalu/467. He said that the deceased shared out his property according to the houses, and the 1st house got bigger shares. He asserted that they were distributing the property according to how the deceased had shared it out.

6. Nathan Mwori Lusuli testified as PW3. He said that he knew about the will. The deceased distributed his property by that will, in the presence of the elders, and that they shared out the land according to the houses, during cross-examination, he said that he was not present when the will was being made. He said that he had never seen the will. He said that the deceased distributed his property in the 1970s.

7. Musa Achebi Malimo testified as DW1. He stated that before the deceased died, he had showed them where and how to live and settle. He explained that Isukha/Shinyalu/441 was allocated to Gabriel Luseka and Daniel Malimo from the 1st house; and Laban Lutiali, James Sunguti and moss Achevi from the 2nd house. the deceased was also said to have set aside a place for worship, the church which stands on the land. The deceased then settled Daniel Mialimo from the 1st house, and Wilson Lwigado and Isaac Muyeshi from the 2nd house, on Isukha/Shinyalu/467. He stated that Daniel was settled on both parcels. He said that Isaac was on 467, but the applicants wanted him to move to 441. He asserted that Isaac was the last born, and both parents were buried on Isukha/Shinyalu/467, and traditionally he ought to settle where the parents are buried. During cross-examination, he asserted that the deceased had settled his family on the 2 parcels before he died. he further asserted that he did not die testate. He said that Wilson Lwigado and Isaac were on 467. He said that there were boundary markings on the ground. He said he would have recognized the will if it had been read at the burial of the deceased. he said that the 1st house had no issues. He said that he was present when the deceased distributed his land. He said that in the 2nd house there were 5 daughters and 3 sons. He said that Wilson did not buy 467, and did not have title deed to the property. He said the deceased distributed the property with the assistance of his brothers.

8. Isaac Muyeshi testified next as DW2. He said that the deceased left him on Isukha/Shinyalu/467, which he occupied with Wilson and Daniel, while the other brothers are all in Isukha/Shinyalu/441. He said that he did not wish to be moved from Isukha/Shinyalu/467, where he had built a house. He said he did not know whether the deceased had left a will. He said that he did not sign the petition, and was not involved in the process of the obtaining representation.

9. What is for determination is a summons for confirmation of grant. In confirmation applications, there are two principal factors for the court to consider: appointment of administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

> *"Confirmation of Grants*
>
> *71. Confirmation of grants*
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> *(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*
>
> *(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—*
>
> *(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or*
>
> *(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or*
>
> *(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or*
>
> *(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:*
>
> *Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares."*

10. I will start with the first issue, appointment of administrators. Were the administrators properly appointed? I dealt with that in my judgment of 10th April 2019, and concluded that they were not. I concluded that their grant was ripe for revocation, but I refrained from revoking it, for the sake of speeding up the distribution of the estate. For the same reasons, I shall not revisit the issue, even though I am required by section 71(2)(a) of the Law of Succession Act, to address it, again, for the sake of having his estate distributed and administration completed, for the deceased died in 1984, and this cause was initiated in 2007, and it is a pity and shame that the estate is yet to be distributed to date.

11. The principal purpose of confirmation of grant is distribution of the assets. The proviso to subsection (2) of section 71 requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

"Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons entitled to the estate have been ascertained and determined."

12. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? On the first limb of the proviso, as to whether the applicants have identified all the persons beneficially entitled, I find that they have not. In the petition they only disclosed themselves and the other sons of the deceased, and for the sons who had died, their widows. They repeated the same thing in the confirmation applications that they have filed herein. Yet, the deceased also had daughters in the 2 houses. The deceased died in 1984, after the Law of Succession Act had come into force on 1981. His estate fell for distribution in accordance with the Law of Succession Act, which does not discriminate between sons and daughters, and not under customary law, which discriminates between sons and daughters. The administrators were bound to disclose the daughters of the deceased, the fact that they did not meant that the proviso to section 71(2) and Rule 40(4) were not complied with. The administration, therefore, only catered for a section of the family of the deceased.

13. The other item for ascertainment, according to the proviso to section 71(2) and Rule 40(4), is the shares due to each of the persons beneficially entitled to shares in the estate. The matter of shares should take us to the assets of the estate. There is no dispute that the deceased owned only 2 assets, Isukha/Shinyalu/441 and 467, and, therefore, the assets have been properly ascertained.

14. As to whether the shares that the persons identified as beneficially entitled had been ascertained, there is no compliance. In the first place, the daughters of the deceased have not been disclosed, and they have, therefore, not been allocated shares in the estate. As stated above, the deceased died after the Law of Succession Act had come into force. His estate is for distribution in accordance with the Act and not customary law, for customary law has been eclipsed by the Act by did not of section 2(1) of the Act. Sons and daughters of the deceased are equally entitled to inherit, regardless of whether married or not. They should have been brought on board and allocated shares in the estate. It is not for the sons to decide whether daughters should get a share in the estate or not. The rights of daughters are is stated in the Law of Succession Act, the Constitution and the Convention on the Elimination of All Forms of Discrimination Against Women. They should have been allocated their share at distribution, unless they, of their own freewill, choose to renounce or waive or forgo the right. Secondly, some of the sons and daughters of the deceased are dead. The administrators have not made a proper disclosure of which of these children are dead, and who survived them. The persons who survived them have not been brought forth and involved in this process. The fact of death of a child of the deceased does not extinguish their right to inherit. Section 41 of the Law of Succession Act provides that their share passes to their children. So, where a child of the deceased died, their children step up to take what should have accrued to their parents. So, such dead children of the deceased ought to be disclosed, and so should their survivors. The failure to disclose them, means that the administrators have failed to properly ascertain persons beneficially entitled to a share in the estate, and have also failed to allocate to such persons the share die to them in law, and especially Part V of the Law of Succession Act.

15. Since the proviso to section 71(2) and Rule 40(4) have not been complied, I ought not go ahead to consider the proposals on distribution. The administrators shall have to comply first with those provisions before I can consider their proposals on distribution, as well as those by the protestors. I can only distribute the estate after all the persons beneficially entitled to a share in the estate have been disclosed.

16. I was told that the deceased had died testate for he had left a written will. A document was filed simultaneously with the summons for confirmation of grant. That document is not the purported will, but a translation of the same from Luhya to English. A document purporting to be the translation of a will from its original language to English cannot be equivalent to the will itself. It cannot substitute the will. It is just but a document to assist the court appreciate the terms of the will. So a copy of the translation is not the will itself. I was told the original will itself was deposited in court. I have thoroughly perused through the file before me, and I have not come across the original will, but there is a Photostat copy of the purported original will in Luhya, which was lodged herein on the 25th November 2010. Secondly, the document that has been placed before me bears only the signature of the deceased, and that just one of the attesting witness. According to the translation document, the will was thumb-printed by the deceased, Mark Malimo Luseka, and was witnessed by Fabian Anami.

17. The deceased died in 1984, after the Law of Succession Act had come into force in 1981. The validity of wills made after 1st July 1981 is determined on the basis of section 11 of the Law of Succession Act, which provides as follows:

"11. No written will shall be valid unless-

(a) The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

18. The validity of a written will is dependent on whether it is properly signed by the maker or the testator, and whether it is properly attested by two competent and independent witnesses. The translation document suggests that the original was signed by the deceased. Of course since the original will was not produced, I was not able to see it, neither were the protestors able to see it, for them to say whether or not they recognized the signature on the document as that of the deceased. If the signature in the original will was that of the deceased, then it can quite safely be concluded that the 2said will was executed by the deceased in compliance with section 11 of the Law of Succession Act. See *In re Estate of Lucy Wangi Muraguri* [2015] eKLR (Musyoka J). If, however, the signature was disputed, then the same would have required that the same be subjected to forensic examination by a handwriting or document examiners, for an opinion as to its authenticity. See *Elizabeth Kamene Ndolo vs. George Matata Ndolo* [1996] eKLR (Gicheru, Omolo and Tunoi JJA), *In re Estate of the Late Samson Kipketer*

Chemirmir (Deceased) [2019] eKLR (Ndung'u J), *Iskorostinskaya Svetlana & another vs. Gladys Naserian Kaiyoni* [2019] eKLR (W. Korir J) and *In re Estate of Augustine Muita Kahare (Deceased)* [2019] eKLR (Musyoka J).

19. On attesting witnesses, the law requires that the testator ought to sign the will in the presence of 2 or more competent and independent witnesses, who must be able to see him sign it. The objective is that in the event of the execution of the will being contested, the attesting witnesses can be called to court to give evidence on what transpired, and more specifically on whether they saw the deceased sign the document. The attesting witnesses are required, after witnessing or seeing the testator sign or make his make on the document, to also sign the document themselves, or to affix their mark. The translation document suggests that the original will bears only one signature by an attesting witness, that of Fabian Anami. The signature of 1 witness is not adequate, since section 11 requires a minimum of 2 attesting witnesses, and that would mean that there is no compliance, and, therefore,the will was not validly attested. See *HWM vs. KM* [2017] eKLR (Achode J), *In Re Estate Onesmus Ikiki Waithanwa (Deceased)*[2008] eKLR (Kasango J), *Gulzar Abdul Wais vs. Yasmin Rashid Ganatra & another* [2014] eKLR (Lesiit J), *In re Estate of Chandrakant Devchand Meghji Shah (Deceased)*[2017] eKLR (Thande J), *In the Matter of the Estate of Susan Kanini Kilonzo (Deceased)* Nairobi HCSC No. 2669 of 2002 (Koome J)(unreported), *In re Estate of Kidogo Lolmetetek Olormor (Deceased)*[2020] eKLR (Ougo J) and *In re Estate of Stephen Magembe Gwaka (Deceased)*[2019] eKLR (Majanja J).

20. Finally, the applicants herein are the ones who initiated the succession cause herein in intestacy. They initiated the cause in 2007, on the basis that the deceased had died intestate. Letters of administration intestate were made to them in 2007. I have not come across a copy of the same, but the record indicates that Daniel Barnet Malimo collected a copy of the grant on 29th November 2007. At that time, they did not talk about the deceased having made a will. The issue of the existence of this will first came up in 2010, after the protestor and others brought an application for revocation of the 2007 grant in intestacy, complaining that they had been sidelined and excluded from the succession process. When the applicants mounted the application for confirmation of their grant in intestacy, they did not disclose why they did not petition for a grant of probate of the will 1979, when they first came to court in the matter of the estate of the deceased. They did not also explain when they discovered the existence of the will, and who had custody of it all this while. The coincidence of the disclosure of the will after other survivors of the deceased came forth to say that there was a scheme to disinherit them by the applicants suggests that the alleged will their creation to have the estate distributed in a manner favourable to them. The conclusion on the will, therefore, is that the same isnot valid, and, therefore, the deceased did not die testate. His estate is for distribution in intestacy.

21. The other thing that I was told was that the deceased had distributed his estate prior to his death amongst his sons. That would explain why the daughters were excluded. I was told there were markings on the ground, of the boundaries, and that both sides claim that they propose distribution strictly in accord with the wishes of the deceased or as the deceased had distributed the property. What this suggests is that the deceased had made *inter vivos* distribution of the estate. A complete *inter vivos* distribution would mean that the deceased obtained the consent of the relevant land control board to subdivide the 2 parcels of land, so as to create separate sub-files for registration in the names of the sons. That, apparently, did not happen, for the 2 parcels of land are still in the name of the deceased. Of course, courts have pronounced that if the deceased did all what was necessary for transfer of the property to the beneficiaries, and died before he could do the final act, then the court ought to treat that as an *inter vivos* transaction. The deceased apparently did nothing that suggests that he intended to make any *inter vivos* transfers in favour of his sons. All what he appears to have had done was to show them where to put up homes and where to till the land. He did not obtain consents to subdivide and transfer the land to them, and he did not execute any transfer documents in their favour. It cannot, therefore, be argued that he intended to make any *inter vivos* transfers to them, but died before he could do the final act of transferring the property to their names. Consequently, there was no *inter vivos* distribution, and the estate herein shall have to be distributed strictly in accordance with Part V of the Law of Succession Act. See *In re Estate of Gedion Manthi Nzioka (Deceased)* [2015] eKLR (Nyamweya J), *Lucia Karimi Mwamba vs. Chomba Mwamba* [2020] eKLR (Gitari J) and *In re Estate of Nyachieo Osindi (Deceased)* [2019] eKLR (Ougo J).

22. Having taken into account everything, I shall only make partial orders, as follows, on the application date 7th May 2019:

(a) That I hereby postpone determination of the application dated 7th May 2019;

(b) That I direct the administrators to make a full disclosure of all the sons and daughters of the deceased, including those who are dead, and a full disclosure of all the children of such dead sons and daughters of the deceased;

(c) That after making the disclosures in (b), above, the administrators shall allocate to all the sons and daughters of the deceased their due share in the estate;

(d) That should any child of the deceased, whether a son or a daughter, or any child of a dead son or a dead daughter of the deceased, be not interested in taking a share in the estate of the deceased, let the administrators file affidavits sworn by such son or daughter of the deceased, or child of any dead son or daughter of the deceased, renouncing or waiving their entitlement to a share in the estate;

(e) That I shall only distribute the estate herein upon the administrators fully complying with the directions that I have given above;

(f) That the matter shall be mentioned on a date to be obtained at the registry for compliance and further directions;

(g) That each party shall bear their own costs; and

(h) That any party aggrieved by the orders that I have made herein has leave of twenty-eight (28) days to move the Court of Appeal appropriately.

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

W MUSYOKA

JUDGE