



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

SUCCESSION CAUSE NO. 100 OF 2021

IN THE MATTER OF THE ESTATE OF SAMSON SAINA NAMBSIA (DECEASED)

RULING

1. The matter is for confirmation of grant. The application is dated 15th March 2021. The application is at the instance of the administrator, John Saina Nambisia.
2. The survivors of the deceased are identified as 2, John Saina Nambisia and Benson Shibale Alulu. The deceased is said to have died possessed of Tiriki/Shamakhokho/820. It is proposed that the estate be shared unevenly between John Saina Nambisia and Benson Shibale Alulu. Both have signed a form in Format 37, dated 15th March 2021.
3. When the application was placed before me on 23rd March 2021, I directed that the same be heard on 19th May 2021, and that Azubeta Musimbi, Caroline Imali Alulu and the children of the late Ruth Mmbone all attend court on that day. I also directed that the persons listed in the petition also attend court.
4. Come 19th May 2021, the following individuals attended court: Benson Alolo Shipala, Paul Anusu, Azubeta Musimbi, Jotham Shavanga Tembwa, Johnson Nganzi Mukalushi and Sylvester Seveni Madegwa. I interviewed them in terms of Rule 41(1) of the Probate and Administration Rules, to satisfy myself in terms of the proviso to section 71(2) of the Law of Succession Act, Cap 160, Laws of Kenya, and Rule 40(4) of the Probate and Administration Rules. Azubeta indicated that she was daughter of the deceased, and that she was not getting a share in the estate and she had no objection. She stated that Caroline Imali Alulu was a daughter of the late son of the deceased known as Luka Alulu. She confirmed that she was still alive. Benson Alulu Shipati stated that he was a son of the late Luka Alulu, and that Caroline Imali Alulu was his sister. He stated that he had no evidence that she was not interested in taking a share in the estate. John Saina Nambisia stated that Ruth Mmbone was his sister, and that her children had no problem with the way the estate was proposed for distribution.
5. I have gone through the record. When the matter came up before me on 28th July 2020, John Nambisia had indicated that the deceased had, according to him, 3 children, being Luka Alulu, Samuel Luvembe and himself, John Nambisia. He stated that he also had 2 daughters, being Esbetta Musimbi and Ruth Mmbone. He stated that Ruth Mmbone, Luka Alulu and Samuel Luvembe were dead. Clearly, from that interaction, the administrator was of the attitude that children refer only to sons of the deceased, and excluded daughters, and that explained why he has not made any provision for Azubeta Musimbi and the children of Ruth Mmbone. He has not made any effort to identify the children of Mmbone, nor to bring them to court.
6. When the matter came up again for hearing on 5th October 2020, Azubeta Musimbi was availed. She confirmed what the administrator had told the court. She added that he dead brothers, Luka Alulu and Samuel Luvembe had not been survived by children, which was not altogether true, given that later it was stated that the late Luka Alulu had been survived by Caroline Imali Alulu and Benson Alulu Shipati.
7. The administrator has not done well, in terms of compliance with the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, in that he has not sufficiently ascertained the survivors of the deceased. The children of the late daughter of the deceased, Ruth Mmbone have not been disclosed. I was just told that she had children, and that they had no problem with the proposed distribution. That is not what the law requires. They should have been disclosed by name, and listed in the petition and the summons, and they should have been produced in court to state their position. The administrator does not speak for them, they ought to have spoken for themselves.
8. The deceased died on 24th April 1996, long after the Law of Succession Act had come into force. Distribution of his estate should, therefore, be strictly in compliance with the Law of Succession Act. The deceased died intestate. He was survived by children only, but no spouse. Under section 38, the estate should be shared out equally between the said children, without discriminating between sons and daughters.
9. I am told that the children of the deceased were 5. 2 are now alive, the other 3 died. Of the 2 survivors, Azubeta has renounced her share of the estate in open court. That would mean John Saina Nambisia would be taking his share. Of the 3 dead children, I was informed that Samuel Luvembe did not have survivors, so there is no one to take his share. The other 2, Luka Alulu and Ruth Mmbone, were survived by children. According to section 41 of the Law of Succession Act, the children of the dead children should take the share that should have

accrued to their dead parents. The children of Luka Alulu were identified, so they shall take equally the share due to their father. The children of Ruth Mmbone were not disclosed, the share due to her shall devolve upon her estate, for distribution in a separate cause, initiated under her name by her survivors.

10. No creditors were disclosed, so I shall presume that there were none.

11. I shall accordingly dispose of the application dated 15th March 2021 in the following terms:

(a) That John Saina Nambisia is hereby confirmed as the administrator of the estate herein;

(b) That Tiriki/Shamakhokho/820 shall be shared equally between John Saina Nambisia, the estate of the late Luka Alulu and the estate of the Ruth Mmbone;

(c) That the share due to the late Luka Alulu shall devolve equally to his children, Caroline Imali Alulu and Benson Alulu Shipala alias Benson Alulu Shipati alias Benson Shibale Alulu;

(d) That the share due to the estate of the late Ruth Mmbone, shall devolve upon that estate, to be administered through a succession cause to be initiated by the survivor or survivors of the said Ruth Mmbone;

(e) That a certificate of confirmation of grant shall issue in those terms;

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

(g) 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