



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 109 OF 2001

IN THE MATTER OF THE ESTATE OF ADRIANO SHITOTE MUYEMBERE (DECEASED)

JUDGMENT

1. This matter relates to the intestate estate of the late Adriano Shitote Muyembere, who died on 25th October 1999, according to the certificate of death on record, serial number 506790, dated 3rd February 2000. According to a letter, dated 16th October 2012, from the Chief of Kongoni Location, the deceased was survived by a widow, Teresinah Muteshi Shitote, and 9 sons, Bonface Manyonyi Shitote, Kasani John Adriano, Francis Imbali Adriano, Patrick Mushikhani Shitote, Bernard Mbolo Adriano, Protus Kanali Adriano, Wycliffe Khayumbi Adriano, Fred Ambani Adriano and John Khanali Adriano. There are 3 individuals listed as interested parties, being Caleb Maleya, Francis Sindani and Patrick Agesa, who are said to have had bought 1 acre each. It is not indicated from whom they had bought. It is indicated that the deceased died possessed of a property described as Plot No. 516 Sango Scheme. A certificate of official search on record, dated 27th February 2001, indicates that Kakamega/Sango/516 was registered in the name of the Settlement Fund Trustees on 18th July 1975.

2. Representation was sought in this cause, vide a petition lodged herein on 27th February 2001, by Teresinah Muteshi Adriano and Boniface Manyonyi, Shitote Mawetatu, in their capacities as widow and son of the deceased, respectively. They expressed the deceased to have been survived by 1 widow and 9 sons, being Teresinah Muteshi Adriano, Boniface Manyonyi Shitote, Kasani John Adriano, Francis Imbali Adriano, Patrick Mushukhani Shitote, Bernard Mbolo Adriano, Protus Kanali Adriano, Wycliffe Khayumbi Adriano, Fred Ambani Adriano and John Kanali Adriano. He was said to have died possessed of Kakamega/Sango/516. Caleb Maleya, Francis Sindani and Patrick Agesa were listed as liabilities. Letters of administration intestate were made to them on 20th March 2019, and a grant was duly issued, dated 3rd May 2019. I shall hereafter refer to Teresinah Muteshi Adriano and Boniface Manyonyi, Shitote Mawetatu as the administrators.

3. The application that I am called upon to determine is a summons for confirmation of grant, dated 11th March 2020, brought at the instance of the 2 administrators. They have listed the survivors of the deceased as Teresinah Muteshi Adriano, Bonface Manyonyi Shitote, Jesika Muhonja Kedogo, Bernard Mmbolo Shitote, John Epopo Wekesa, John Welavunukha, Beatrice Lung'ahi, Nicholas Kalika Kijungu, Wycliffe Amutabi Okulo, Jack Kundu Kombo, Protus Kanali Shitote, Centrine Nekoye Waswa, Ian Makondo, Fred Ambani Adriano, Erick Lwoyero Aluda, Wycliffe Kahyumbi Adriano, Ferdinard Muchanga Masimbwa, Fridah Ingoshe Muchalia, Patrick Shitote Adriano, Joseph Okoth Otieno and Alice Nafula Wanyonyi. The estate asset, Kakamega/Sango/516, is shared out evenly amongst the 22 individuals said to be the survivors of the deceased. There is on record a consent in Form 37, dated 11th March 2020, duly executed by the 22 individuals.

4. When the matter came up on 4th November 2020 for hearing, 21 individuals were in attendance. Just for the record, I will mention those who attended court. They were Teresinah Muteshi, Boniface Manyonyi, Joseph Okoth Otieno, Beatrice Lung'ahi, Freda Ingoche, Alice Nafula Wanyonyi, Cetrine Nekeyao, Francis Adriano, Wycliffe Khayumbi, Eric Luyelo Aluda, Fred Ambani, Patrick Shitote, Fian Makondo Kipkosgei, Protas Kanali Shitote, Jack Kundu Kombo, Nicholas Kalika Vujungu, Violet Mukingiri, Bernard Mbolo, John Wela, Jesca Kedogo and John Epopo. I interviewed the administratrix, Teresinah Muteshi Adriano, and she informed me that the deceased had 5 daughters, whose names she gave as Dorca Akala, Cecilia Nyakola, Joyce Shitonye, Monica Masitsa and Florence Masitsa. She also explained that John Kanali Adriano, a son of the deceased, had bought land elsewhere and moved away. Kasani John Adriano was said to have died without survivors. I also interviewed the children of the deceased present, Boniface Manyonyi, Francis Imbali Adriano, Patrick Mushukhani Shitote, Bernard Mbolo Adriano, Protus Kanali, Wycliffe Khayumbi Adriano and Fred Ambani Adriano, who all stated that they supported the proposals by the administrators. I adjourned the matter to allow the administrators time to avail the 5 daughters of the deceased.

5. 3 of the daughters were availed on 26th April 2021. That is to say Florence Masitsa, Joyce Adriano and Dorcas Akala. Florence Masitsa had no objection to the distribution proposed, Joyce Adriano stated that she wanted to get her share, while Dorcas Akala said that she was renouncing hers.

6. What is before me is a summons for confirmation of grant. The deceased died in 1999, long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into operation. His estate, therefore, falls for distribution in accordance with the intestate provisions of the said Act. Confirmation of grants is provided for under section 71 of the Law of Succession Act, which provides as follows:

“Confirmation of Grants

71. Confirmation of grants

(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.”

14. The principal purpose of confirmation of a grant is distribution of the assets. The proviso to section 71(2) 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), which governs applications for confirmation of grant, 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.”

15. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? When the administrators sought representation to the estate, they did not properly ascertain the persons beneficially entitled to the estate. They presented a letter from the Chief, which listed the widow and the sons of the deceased, and 3 individuals, identified as liabilities. It is these 3 sets of individuals, the widow, sons and liabilities that were listed in the petition. It was not disclosed that there existed 5 daughters. When they filed their summons for confirmation of grant they listed 22 individuals, as survivors of the deceased. It was not disclosed how the 22 related to the deceased. They were not differentiated into widows, sons and daughters of the deceased. There is just no telling who these individuals are. The law requires that the persons beneficially entitled be ascertained. Ascertainment envisages identification in terms of names and the relationship between the individuals and the deceased, and their respective claims to the estate. In view of that, it is my conclusion that the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules have only been partially complied with.

16. Additionally, the list of 22 in the confirmation application leaves out some of the individuals that were lifted in the Chief’s letter and the petition, such as the some of the sons of the deceased and the 3 liabilities, that is to say Caleb Maleya, Francis Sindani and Patrick Agesa. No explanations are offered in the affidavit in support for their omission. The administrators obtained representation on the basis of the names of these individuals being beneficially entitled to a share in the estate, the court would be entitled, at distribution, to understand why the names of these individuals were dropped, and why they are no longer entitled to a share in the estate. The administrators cannot just bandy about names of individuals, by including them in some lists, and the removing them from the next lists without any explanations. The court has no way of knowing how the individuals whose names are being thrown around are related to the deceased, and whether they are entitled to anything from the estate, unless the administrators disclose that information.

17. The other aspect of the proviso is that the shares of the survivors or beneficiaries identified must be ascertained. Shares are about the property being distributed. Shares are about the property. There is only one asset, Kakamega/Sango/516. I have seen a certificate of official search relating to it, dated 27th February 2001. The property is 5.6 hectares, and was registered in favour of the Settlement Fund Trustees. That certificate was lodged herein on 27th February 2001, simultaneously with the petition. When the administrators filed their summons dated 11th March 2020, they did not furnish the court with a more up-to-date certificate of official search, and, therefore, I cannot tell whether the ownership of Kakamega/Sango/516 changed since then. If ownership remains as at 27th February 2001, then it would mean the said property belongs to the Settlement Fund Trustees, and not the deceased, and I am being invited to distribute property that does not belong to the deceased.

18. The other aspect of the proviso to section 71(2) and Rule 40(4) is with regard to distribution, the court must be satisfied as to the distribution proposed, in terms of being satisfied that the shares of all the persons beneficially entitled had been ascertained. The shares proposed by the administrators for distribution cannot possibly have been properly ascertained if the persons beneficially entitled to a share in that property were not themselves properly ascertained, and when the property proposed to be distributed does not even belong to the

deceased. The administrators ought to first of all properly ascertain the persons who are beneficially entitled to a share in the estate, in terms of the sons and daughters of the deceased, in the first place, or their successors, for any of them who are dead; and then any persons who might have had acquired an interest in the estate from the deceased; before they present the estate for distribution. They should also ensure that the property is transferred to the name of the deceased, for as it is, the property before me is not a property in the estate of the deceased, for it belongs to the Settlement Fund Trustees.

19. I need not say more. I believe I have said enough to dispose of the application before me. The orders that I shall make are as follows:

(a) That I hereby postpone the summons for confirmation of grant dated 11th March 2020;

(b) That the administrators shall endeavor to clear and settle any dues owing to the Settlement Fund Trustees to facilitate registration of Kakamega/Sango/516 in the name of the deceased, and shall reactivate their application dated 11th March 2020, only after they have done so, and obtained a title deed in his name;

(c) That the administrators shall file a further affidavit, in which they shall specify who the individuals that they propose to distribute the estate of the deceased to were related to the deceased; and

(d) That the application of 11th March 2020 shall be reactivated only after the order in (b), above, has been complied with.

20. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 1ST DAY OF OCTOBER, 2021

W. MUSYOKA

JUDGE