



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 15 OF 2017**

**IN THE MATTER OF THE ESTATE OF JAMES AGGREY OSUNDWA MULAMA (DECEASED)**

**JUDGMENT**

1. On 25<sup>th</sup> July 2020, Kimaru J delivered a ruling where the grant of 19<sup>th</sup> June 2002 was revoked, and a fresh one issued to Alice Akinyi Mulama and Phyllis Monica Mulama. The new administrators were ordered to agree on a mode of distribution of the estate, and thereafter to file for confirmation of their grant, and that, should they fail to agree, each to file their proposed mode of distribution for the court to determine the dispute.

2. The parties did not agree, and a summons for confirmation of grant was filed on 12<sup>th</sup> February 2016, dated 2<sup>nd</sup> February 2016, seeking that the court determines how the assets of the estate were to be distributed. It was at the instance of Phyllis Monica Mulama. She identified the assets as: shares in Mumias Sugar Company Limited, shares in Kenya Airways, Marama/Shinamwenyuli/1097, Plot No. 57 Mumias Township, and motor vehicle KQJ 710. It was proposed that she be given Plot No. 57 Mumias Township, half of the proceeds of harvest from the sugarcane harvested since October 2001 from Marama/Shinamwenyuli/1097, half share of Marama/Shinamwenyuli/1097, half share of the shares in Mumias Sugar Company Limited and Kenya Airways Limited, half share of the proceeds in dividends from the said shares since October 2001 and proceeds from the sale of KQJ 710. I shall refer to Phyllis Monica Mulama hereafter as the applicant.

3. Alice Akinyi Mulama filed her own proposals, through an affidavit, sworn on 22<sup>nd</sup> March 2017. She averred that she married the deceased in 1973, and that they begat seven children, who she named as David Ochieng, Carolyne Afwande, Shadrack Omondi, Norman Chemuti, Anastasia Lucky, Rose Yang and Annette Achieng. She averred that the deceased was previously married to applicant, from whom he was separated by court order in 1970. The two had four children, who she named as the late Stephen Mulama, the late Catherine Mulama, Irene Mulama and Emily Mulama. She averred that applicant thereafter bore other children with other men, after the separation, and she named them as Rachael, Pauline and Jemima. She proposed that she be given Marama/Shinamwenyuli/1097 exclusively, together with her children; and Peter Mulama be given Plot No. 57 Mumias Township. She averred that the applicant had settled on a parcel of land at Evivoko village, Marenyo, Butere, and she ought to be contented with that, and on that account she, the applicant, could have the rest of the assets of the estate. She further averred that the children that the applicant bore after the separation, ought to partake from the estates of their respective fathers. She further averred that, should the court be minded to allocate to the applicant a share in Marama/Shinamwenyuli/1097, she, Alice Akinyi Mulama, be given the portion with the sugarcane. I shall hereafter refer to Alice Akinyi Mulama as the respondent.

4. Peter Mulama Chimuti filed, on 1<sup>st</sup> April 2019, a protest affidavit, sworn on 28<sup>th</sup> March 2019. I shall refer to him hereafter as the protestor. He averred to be a son of the deceased, by a woman known as Gertrude Itinot, who was not married to the deceased. He lived with the deceased and the respondent, until he was chased away after the deceased passed on. He complained that he was not listed in the petition as a beneficiary of the estate, and was not involved in the confirmation process. He asked to be allocated a share in Marama/Shinamwenyuli/1097, from which he had been ejected by the respondent.

5. The confirmation application was disposed of orally. The applicant testified first. She said that the deceased had married two wives, being herself and the respondent. She said that she had seven children, being the late Catherine, Emily, the late Stephen, Irene, Rachael, Pauline and Gertrude. She explained that the late Catherine and the late Stephen died without spouses or offspring. She proposed that the estate be shared out equally between the two houses, and thereafter the widows to share out the property within the houses amongst their own children. She said that the protestor be given his share.

6. At cross-examination, she conceded that she separated from the deceased, by order of the court. She stated that the deceased continued to visit her at her house, and to provide for the children. He even collected the dowry for Irene in 1978. She said that she had three other children after the separation from the deceased, from other relationships, the said children being Rachael, Pauline and Jemimah. She said that she could not tell whether the three were sired by the deceased or not, and said that she was agreeable to their being excluded from distribution. She said that she had a home at Butere. She asserted that the assets which made up the estate were acquired with her assistance, and that it was after the deceased got rich that their marital problems began. She said that although the protestor's mother was not married to the deceased, he was still a son of the deceased. She claimed that he had lived with her, and was entitled to a share. She said that she had heard that the deceased had a plot at Mumias, being Plot No. 57. She also said that the deceased had a printing press.

7. The respondent followed. She testified that when she married the deceased she did not find a wife in the house. She said that the two dead children of the applicant were buried on Marama/Shinamwenyuli/1097. She pleaded ignorance to the existence of Plot No. 57 Mumias. She said that the deceased had only one vehicle, which was old, and which had sold as scrap. On the printing press, she said that the same was sold by the courts after the deceased failed to pay maintenance for the children of the applicant. She explained that there was cane growing on Marama/Shinamwenyuli/1097 when she got married. She asserted that she was not agreeable to equal sharing. During cross-examination, she said that she did not know the protestor, and that he never lived with them. She proposed that the protestor be given Plot No. 57 Mumias. She conceded that she had possession and custody of all the original documents for the assets, except that relating to Plot No. 57 Mumias. She said that Marama/Shinamwenyuli/1097 should not be shared out for security reasons.

8. The protestor was next. He said that he was brought to the home of the deceased in 1975, but the respondent chased her away after the demise of the deceased. He asserted that he was entitled to a share of the ancestral land, Marama/Shinamwenyuli/1097, and that he was not interested in Plot No. 57 Mumias.

9. After the oral testimonies on oath by the applicant, the respondent and the protestor, the court interviewed the rest of the survivors, who made unsworn statements. Annette Achieng and Rose Yang supported the proposals filed by the respondent. Carolyn Afwande, David Wanga and Anastasia Mulama proposed that each beneficiary should be given their own individual share. Norman Chimuti left it entirely in the hands of the court.

10. At the close of the oral hearings, the parties were directed to file written submissions. From the record before me, only the applicant appears to have complied. I have gone through her written submissions, which are complete with the judicial decisions that she relies on, and I have noted her arguments.

11. The deceased died on 21<sup>st</sup> October 2001, long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into operation. His estate is, therefore, for distribution in terms of the provisions of the Law of Succession Act. He died intestate, and, therefore, the distribution should be governed by Part V of the Law of Succession Act. He had two wives, so his estate is subject to section 40 of Part V. Under section 40, the estate of a polygamist is shared out amongst the houses, taking into account the number children and the widow in each house. Thereafter, the assets devolved to each house are shared amongst members of the house depending on the circumstances of each house. Where there is a widow in the house, section 35 would apply, so that the widow takes the personal and household goods absolutely, and enjoys a life interest on the residue of the net intestate estate. Where there is a spouse but no child or children, section 36 would apply, and the widow would take the personal and household goods absolutely, the first Kshs. 10, 000.0 out of the residue of the net intestate estate or 20% of the residue of the net intestate estate, whichever is greater, and a life interest in the remainder. Where there is a child or children, but no spouse, section 38 would apply, and the child would take absolutely, but if there be more than one child, the property is shared equally amongst them.

12. In this case, there are three households. Two of them have surviving spouses or widows. The first house is of the applicant. It has two children. She had four with the deceased, two died young without offspring, their estates are, therefore, not entitled to a share in the estate, leaving the two surviving. The applicant begat three other children during separation. She said that she got them from relationships with other men, and then added that she was not sure whether the deceased was the father of these children, and she was prepared to exclude them from the distribution. I am not persuaded that the three children that the applicant begat after the separation were children of the deceased, and I shall exclude them from the distribution. The second house is that of the respondent. She had seven children with the deceased. I shall treat the protestor as a separate unit, his household comprises of him alone, since there was no spouse. The applicant did not contest his being a survivor of the deceased. During the oral hearing, the respondent denied him, saying she did not know him, yet in her affidavit of 22<sup>nd</sup> March 2017 she had proposed that he be given the Mumias plot. Would she have proposed an allocation to a person she did not know or recognize as a survivor of the deceased? The first house, therefore, had three units, the second eight units and the third one unit. The ratio, for the purposes of distribution under section 40, shall be 3:8:1.

13. The available assets appear to be Marama/Shinamwenyuli/1097 and the shares in Kenya Airways and the Mumias Sugar Company Limited. The motor vehicle was sold, and no one appears to know much about Plot No. 57 Mumias Township. No documents relating to ownership of that property were available. Marama/Shinamwenyuli/1097 and the shares in Kenya Airways and the Mumias Sugar Company Limited are the assets that shall be subjected to distribution in the ratio of 3:8:1.

14. The applicant, in her papers talked about the dividends on the shares. No evidence was led on this, and the respondent was not cross-examined on them, and I shall, accordingly leave it at that. On the sugarcane proceeds, no evidence was led on it, and the contract on cane was sneaked in with the written submissions, and therefore it is not properly on record. The respondent was not cross-examined on the sugarcane contract. It did not come clearly as to who planted the sugarcane, but the respondent appears to be the one on the ground, her entering into contracts with relation to the sugarcane would not be misplaced. On the actual distribution on the ground, she would be entitled to be allocated the portion with the sugarcane. On the motor vehicle, again, not much was said about it at the trial. It was said to be an old one, which was sold as scrap, and the applicant did not press the respondent on it and I shall leave the issue at that.

15. On the land, Marama/Shinamwenyuli/1097, the respondent wanted to have the land given to her absolutely. She appeared to advance two reasons for it. One, security. I am not convinced that persons who are entitled to a share in an estate property should not get their share because of security reasons. Parties are not bound permanently to any property. If after an asset is allocated to them, they find that residing or working on the same is not tenable for any reason, they would be at liberty to sell it and move on to another place. Two, that the applicant had land at Butere. The applicant conceded to that. However, no evidence was led on the ownership of the Butere land. Did it belong to the applicant? Did she get it as a gift from the deceased? Does it have anything to do with the estate? As no evidence was led on the ownership of the said property, I shall presume that it is not estate property, and, therefore, I shall not reckon it in the final orders on distribution.

16. The final orders that I am moved to make in the circumstances are as follows:

**(a) That Marama/Shinamwenyuli/1097 and the shares in Kenya Airways and the Mumias Sugar Company Limited shall be**

distributed between the three households of the deceased in terms of paragraph 12 of this judgment, so that the assets shall devolve in the ratio indicated, with the widows taking during lifetime, and thereafter to the children of the deceased in the houses in equal shares, while the protestor shall take his share absolutely;

(b) That the grant is hereby confirmed in those terms, and certificate of confirmation of grant shall issue accordingly; and

(c) That each party shall bear their own costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 12TH DAY OF NOVEMBER 2021**

**W MUSYOKA**

**JUDGE**