REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 875 OF 2015

IN THE MATTER OF THE ESTATE OF FREDRICK SHIKUKU MUKABANA (DECEASED)

RULING

1. On 22nd May 2020, I delivered a ruling on a confirmation application dated 23rd may 2017, which I declined to determine and postponed it instead, and directed the administrators, based on section 71(2)(d) of the Law of Succession Act, Cap 160, Laws of Kenya, to file further affidavits to do the following:

(a) List the family of the deceased according to his wives, indicating whether the wives were alive and the number of children of each wife, dead or alive;

(b) Disclose all the children, whether sons or daughters, whether single or married;

(c) For children of the deceased who were themselves dead, list their own children;

(d) List creditors of the estate, including buyers of estate land, attaching copies of the sale agreements; and

(e) If the deceased had left behind any wills, place the same before court.

2. The administrators have complied with those directions, for they lodged in this record several affidavits, addressing the issues raised in paragraph 1 here above. I shall not recite the contents of those affidavits, for they are on record. What I shall do instead is to mine the information given in those affidavits to address each of the issues that had been left unclear, leading to the postponement of determination of the confirmation application.

3. The first issue is on the family of the deceased, to assist me understand the persons who survived the deceased, and who are, therefore to be allocated shares in the estate. From what I can see from the affidavits, the deceased had four wives, being, in their order of seniority, Phanice Mutende Shikuku, Mary Namaemba, Florence Nasimiyu and Mary Nekesa. Phanice Mutende Shikuku had eighteen children, ten died young, and those who reached maturity were the late Charles Okute, Jared Omutanyi, Shem Maloba, Matayo Ongoma, the late Javan Aswani, Fronica Shikuku, Elina Shikuku, Pricilla Shikuku and Alice Shikuku. The late Charles Okute had married two wives, Beatrice Ayuma and Gladys Makokha Okute; while the late Javan Aswani is said to have had been survived by a son, Fredrick Shikuku. Mary Namaemba had only one child, Peter Muyonga. Florence Nasimiyu had seven children, two of whom died before attaining maturity, leaving the late Musa Omukunda, Augustine Mukhwana, Everlyne Anyanzwa, Rael Anyera, Lina Mukhwana and Nalonja Shikuku. The late Musa Omukunda was survived by a widow, Elizabeth Mmboga. Mary Nekesa had eight children, two died young, and those who reached majority age were Jacob Mukubana, Elina Shikuku, Dianah Mapesa, Tabitha Angolo, Eseri Anyanzwe and Agnes Mukono.

4. The second and third issues are covered in the disclosures that I have recited in paragraph 3 above. The only addition is that all the daughters of the deceased were married save for Alice Shikuku from the first house. Curiously, one of the affidavits also lists Rael Anyera, of the third house, as unmarried.

5. The fourth issue is on the creditors of the estate, especially persons said to have had bought portions of land from the deceased during his lifetime. The creditors are listed as Charles Kulalu Ndukuyu, Laban Anathema Kedevede and Richard Nyikuri Barasa. Copies of handwritten sale agreements are attached to some of the affidavits as proof of the sales. One is between the deceased and Charles Kulalu Ndukuyu, dated 15th July 1994, for 1½ acre, which was paid in full. The buyer was to avail a form for subdivision. The other is between the deceased and Laban Kedevede, dated 8th March 2003, for 1 acre, which had not been paid in full by 29th May 2003. The third agreement is between Charles Okute Shikuku and Richard Nyikuri Barasa, dated 7th June 2004, for ½ acre.

6. The fifth issue is on the wills. Although the parties talked of many wills, only one document has been exhibited to one of the affidavits, as proof of the alleged will. The date of its making is unclear. It starts off with the figure 1996 and ends with the date of 28 th August 2001. It is not clear whether it was made in 1996 or 2001.

7. Based on the material on record I feel I am now fully equipped to distribute the estate of the deceased.

8. I will start with the matter of the will. The argument was that the deceased had made wills which had distributed the estate, and that the exercise that I am about to embark on ought to be based on those wills rather than on the provisions in Part V of the Law of Succession Act. Validity of a will is a matter of law. The applicable law depends on when the wills were made. That is the effect of section 2(1)(2) of the Law of Succession Act. If the will was made after 1st July 1981, when the Law of Succession Act became effective, then the provisions of the said Act would apply. If, however, the wills were made before the Law of Succession Act became effective, then, by dint of section 2(2) of the Law of Succession Act, the law to apply would be that which governed the making of wills, which was the African Wills Act, then Cap 169, Laws of Kenya, as read together with the Indian Succession Act of India, Act X of 1865. As indicated above, only one document has been placed before me. I am not too clear on when it was executed by the deceased. It bears two signatures. One against his old national identity card numbers, and a second one against his new national identify card numbers. It would appear that the first signature was done in 1996, when he held the old identity card with the old numbers, and the second signature was appended in 2001 after he got a new generation national identity card with new numbers, and also to capture details of sales of land that appear to have happened after the execution of 1996. Of course, all this is judicial speculation, as no evidence has been led on the matter. Either way, the purported will was made after the 1st July 1981.

9. Section 11 of the law of Succession Act deals with the mechanics of making a valid will, the provision states as follows:

> ***"11. Written wills***
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> *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;*
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> *(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."*

10. From these provisions, what is clear is that for a written will, for what is before me is purported to be a written will, must be signed by the maker, also known as the testator, in this case the deceased herein. Is the document before me signed by the deceased? The writing at the end of the document bears the name of the deceased, and two similar signatures, which I presume to be of the deceased. Based on that one can conclude that the document was properly executed by the deceased.

11. The other vital requirement is that the same ought to be signed by the deceased in the presence of two or more independent and competent witnesses, who shall thereafter also affix their signatures. Was the document before court signed by the deceased herein in the presence of two or more independent and competent witnesses? I cannot tell from the face of it whether there were persons present when the deceased appended his signature, for the document makes no reference to witnesses. Secondly, it does not bear any other signature except that of F Shikuku, who I presume is the deceased herein.

12. The other consideration is whether the document itself was intended to be the will of the deceased. A will disposes of the estate of the maker, or, to put it differently, it carries directions on how the maker would like his property distributed upon his demise. The question is, is this what the document on record purports to do? The heading of the documents is "1996 HISTORIA YA FREDRICK SHIKUKU MUKABANA PLOT 141 HAPA CHEKALINI LOC KOROMAITI SUB LOC." That translates to "1996 HISTORY OF FREDRICK SHIKUKU MUKABANA PLOT 141 HERE AT CHAKEKALINI LOC KOROMAITI SUB LOC." The document does not describe itself as the will of the deceased, but as a historical record of the life of the deceased. It talks about his birth, education, employment, family life, marriage, children and how he had distributed his land amongst his children. He gives directions on what should happen in the event he gets more children, whether with his wives, or with other women outside of wedlock. Can it pass as the will of the deceased? To the extent that it gives directions on disposal of property after death, even if those provisions only capture a section of the family, the document can pass as the will of the deceased, so long as it satisfies all the other parameters.

13. From the discussion above, it would appear that the document does meet some of the requirements for validity of a will, and it does not meet some other requirements. For the will to be valid it ought to meet all the requirements of section 11, particularly two relating to execution by the maker and attestation. The document herein was executed by the deceased, whether in 1996 or 28th August 2001, but it bears no evidence that that execution by the deceased was witnessed or attested by two or more independent and competent witnesses. There are no other, signatures on the document, purported to be of attesting witnesses, and therefore the document cannot possibly pass as the will of the deceased on account of lack of attestation. See *HWM vs. KM* [2017] eKLR (Achode J), *In re Estate of Stephen Magembe Gwaka (Deceased)* [2019] eKLR (Majanja J) and *In re Estate of the Late Samson Kipketer Chemirmir (Deceased)* [2019] Ndung'u J).

14. Having found that the document purported by the administrators to be the will of the deceased is not in fact a valid will, I shall treat this as a case where the deceased died intestate, for he did not leave behind a will which could provide basis for distribution of his estate according to his wishes. The deceased died on 10th December 2004, and, therefore, his estate falls for distribution in accordance with the Law of Succession Act. Since he died intestate, the intestacy provisions in Part V shall apply.

15. I will start by first taking into account the interests of the creditors. Under Part V of the Law of Succession Act, the estate available for distribution is the net intestate estate, which means the balance of the estate after the debts and liabilities of the estate have been settled. Section 83 of the Act prioritizes debts over distribution, which should follow after payment of all the expenses of administration and debts of the estate. The material placed before me, by way of sale agreement, disclose that the deceased sold a portion of his land, that is to say Kakamega/Chekalini/141, to two individuals, to Charles Kulalu Ndukuyu in 1994 and Laban Kedevede in 2003. The sale to Richard Nyikuri Barasa of 2004 was not between the deceased and the alleged buyer, but between the late Charles Okute Shikuku and that buyer. Richard Nyikuri Barasa, is therefore, not a liability of the estate herein, for he did not buy any land from the deceased, he should look up to the person who sold him land, and that is the estate of the late Charles Okute Shikuku, of course, after distribution of the estate herein. I shall, therefore, not reckon Richard Nyikuri Barasa in the distribution that I shall be making in this ruling. I shall only provide for Charles Kulalu Ndukuyu and Laban Kedevede. The document referred to as the will of the deceased mentions land that had been donated to the Salvation Army Church. I shall equally take that into account. There is no mention of Domitillah Ayuma, and no documents have been placed on record relating to her, and I shall, therefore, make no provision for her whatsoever.

16. The second consideration, after taking out what is due to the persons and entities identified above as creditors, is how the balance is to be shared out amongst the surviving family of the deceased. The deceased died a polygamist, and therefore distribution of his estate shall follow the provisions of section 40, which provides for how the estate of a polygamist is to be shared out. For avoidance of doubt, that provision states as follows:

> ***"40. Where intestate was polygamous***
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> *(1) Where an intestate has married more than once under any system of lawpermitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.*
>
> *(2) The distribution of the personal and household effects and the residue of thenet intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38."*

17. The effect of section 40 is that the estate of a polygamist is distributed according to the houses, with each house representing a widow and her children, if any. Distribution takes into account the number of children in each house. The distribution happens in first instance between the houses, ad thereafter whatever is allocated to each house is shared out amongst the members of each house according to sections 35 to 38, depending, of course, on the individual composition of each house. The administrators did not disclose, in their affidavits filed after the ruling of 22nd May 2020, whether any of the wives survived the deceased. I shall, therefore, presume that none of them survived, and I shall proceed to distribute the property amongst the children. The law, at section 38, envisages that the estate is shared equally amongst the children, so I shall direct equal sharing amongst the children.

18. The administrators stressed that all the daughters of the deceased were married, save for only one in the first house, although they also identified another in the 3rd house as unmarried. It is important to disabuse the administrators, at this point, of the notion that daughters of a deceased person are not entitled to a share in his estate. There is no such thing in law. The Law of Succession Act does not provide for it. It envisages distribution amongst the children of the deceased, and it makes no distinction whatsoever between the male and female children of a deceased person. Whether or not a daughter of the deceased is married is also not a factor. A child of the deceased, whether male or female, is entitled to equal treatment at distribution, under the Law of Succession Act, regardless of their marital status. The law which allows discrimination of daughters, when it comes to inheritance or succession, is customary law. However, customary law does not apply here. The coming into force of the Law of Succession Act had the effect of ousting the application of African customary law to estates of persons who died after the 1st July 1981. The deceased herein died after the 1st July 1981, and, therefore, the customary law, that would have been applied to his estate stood ousted. Even in cases where customary law applied, by dint of section 2(2) of the Act, with respect to estates of those dying before 1st July 1981, the application of African customary law has been blunted by Article 27 of the Constitution of Kenya, 2010, which categorically outlaws discrimination based on gender, among others. The fact that some of the daughters of the deceased herein were married is a matter of no consequence. The daughters of the deceased herein have equal right to a share in the estate with their brothers.

19. The law, of course, cannot force persons who are not willing to inherit to take up the shares due to them. The law makes provision for renunciation or waiver or disclaimer. That is to say that persons who have a right or entitlement to a share in the estate of a dead person have a right to renounce that right, or waive or disclaim the entitlement. They do not have to take up their share if they are not interested in the same, and the court cannot force them. The renunciation or waiver or disclaimer can be in writing or can be made orally in court. None of the daughters herein have filed any written renunciations or waivers or disclaimers, either by way of affidavits or deeds or renunciation. When I required attendance of daughters, some did come to court, and stated that they were not interested in taking up their shares. I shall treat such as having renounced or waived or disclaimed their entitlement. Some said that they were keen on their entitlements. Some did not come to court at all, and, therefore, I do not have their views on the matter. The other way of going about it, is that instead of renouncing or waiving or disclaiming their entitlements, a beneficiary may also ask for a variation, so that instead of taking up their entitlement, they may cede or give it to another beneficiary. I note that none of the daughters have suggested a variation in favour of any of the other beneficiaries.

20. I need to say more about those daughters of the deceased who did not attend court to state their position on the distribution. Often courts hold that where a daughter has not come to court to stake their claim to the estate, or who have generally kept quiet, or not participated in the proceedings, to have either renounced their right, or expressed disinterest, or to have acquiesced in not being provided for, and then go ahead to exclude such daughters from benefit on that account. Other courts hold that the law makes provision for daughters of the deceased, and the fact that they have not come to court or filed papers or are silent or have not participated in the proceedings, should not be an excuse to deny them their right or entitlement. The same is granted to them by statute, and it cannot be taken for granted, except where they have stated in writing or before the court orally that they would not take up their entitlements. I hold the latter view, that the right to a share is given by statute, and it can only be taken by the express consent of the beneficiary, either in writing or orally in court.

21. Very often daughters do not participate in these proceedings because the administrators do not inform of or involve them in the

proceedings, and the proceedings go on without the daughters having any idea of the existence of any such proceedings. My view is that the court is bound by the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, to ensure that all the persons beneficially entitled to a share in the estate are ascertained, and are brought forth so that their views on distribution are taken into account. The court ought not presume that persons beneficially entitled to shares have renounced their interests simply because they have not spoken out. When faced with silence from such persons, the best thing for the court to do should be to make provision for them, rather than assume that they have no interest. That positon was well articulated in *Christine Wangari Gachigi vs. Elizabeth Wanjira Evans & 11 others* [2014] eKLR (**Nambuye, Ouko & J. Mohammed JJA**) and *In re Estate of Joyce Kanjiru (Decesaed)* [2017] eKLR (Gitari J), where it was stated that failure by daughters of a deceased person to participate actively in succession litigation should not be a disentitling consideration in the absence of a renunciation by them. In *In re Estate of Joyce Kanjiru (Decesaed)* [2017] eKLR (Gitari J), two of the daughters were said by the administrators to be not claiming a share and not opposing the distribution proposed, without any proof of their say so, but the court nevertheless made provision for them.

22. The other issue that was raised was that the deceased had distributed his property before he died. The deceased appeared to confirm that in the document that the administrator attempted to have me treat as his will. However, there is no evidence that the deceased excised any portions from the land and had them registered in the names of the deceased. The effect of that is that the intention to gift these children with such land, if there was such an intention, did not crystallize, and, therefore, amount to gifts *inter vivos* or during the lifetime of the deceased. They remain as nothing more than an intent the deceased had over such gifting which was not carried to effect. The persons who are relying on such unfulfilled gifts have nothing tangible to hold on to for the failed gifting did not confer upon them any legal rights which this court can enforce. At best, such gifting amounts to nothing more than licenses granted to them, by the deceased, to till the land, pending excision and registration of the subdivision in their names. Those licenses expired when the deceased died before he had registered those portions in their names, and the court shall have no regard for the same. The parties, of course, are at liberty to reckon the same when distributing the property on the ground, given that the intended beneficiaries may have developed the same in the expectation that the deceased would actualize the gifts during his lifetime for the same to crystalize. See *Christine Wangari Gachigi vs. Elizabeth Wanjira Evans & 11 others* [2014] eKLR (**Nambuye, Ouko & J. Mohammed JJA**), *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).

23. I have noted that in some cases the administrators have not indicated the children of the late children of the deceased, instead they have only indicated their surviving spouses. Grandchildren do not take directly where their own parents are alive, but, by dint of section 41 of the law of Succession Act, they can take directly from their grandparents' estate, where their own parents are dead, through the principle of substitution or representation. See *In restate of Veronica Njoki Wakagolo (Deceased) [2013]* eKLR Musyoka J*), In re Estate of Floernce Mukami Kinyua (Deceased) [2018]*eKLR (T.Matheka J) *and Cleopa Amutala Namayi vs. Judith Were[2015]* eKLR (Mrima J) However, that principle, in section 41, does not apply to children-in-law, for they are not blood kin of the deceased, and they do not have a direct claim or stake in the estate except through the estate of their dead spouses. They cannot be provided for directly from the estate of their dead parent-in-law, and they can only access the share due to their dead spouses upon obtaining representation to their estates, in which case they would be claiming as administrators as opposed to spouses of the dead spouses. That is how I shall deal with the estates of the dead children of the deceased, where I have been given names only of their surviving spouses. They will have to obtain representation to the estates of their late husbands, and have the property due to their late husbands distributed in their estates.

24. I believe that I have said enough. Let me now identify the persons to the children of the deceased to whom I shall be distributing the balance of the estate after the shares due to the creditors have been settled. All the sons of the deceased shall be catered for. Three of the sons are dead. For the late Charles Okute Shikuku and the late Musa Omukunda Shikuku, I have been given the names of their spouses. The shares due to them shall devolve upon their estates, and their widows shall have to initiate succession causes in those estates for distribution of the property inherited as between them and their children. For the late Javan Aswani, I was given the name of his son, Fredrick Shikuku, his share shall devolve directly upon the son, by virtue of section 41 of the Law of Succession Act. All the daughters of the deceased are entitled to a share in the estate, whether married or unmarried, but some have renounced or waived or disclaimed their share. Those who have done so shall be excluded. These are Elina Shikuku, Fronica Shikuku and Pricilla Shikuku. The daughters who have not expressed any view at all, one way or the other, whether they participated in these proceedings or not, shall all be provided for.

25. How is the property to be distributed? It is proposed that Marama/Buchenya/811 be devolved upon Shem Maloba Shikuku, and there appears to be consensus on that. Kakamega/Chekalini/141 should be shared out equally amongst the rest of the children, who have not renounced their interest, of course, after the creditors have been settled out of Kakamega/Chekalini/141. The creditors to be settled are Charles Kulalu Ndukuyu, Amaheno Laban Kedevede and Salvation Army Church.

26. That the final orders are as follows:

(a) That Marama/Buchenya/811 shall devolve wholly upon Shem Maloba Shikuku;

(b) That Kakamega/Chekalini/141 shall be shared as follows:

(i) Charles Kulalu Ndukuyu 1½ acres, Amaheno Laban Kedevede 1 acre and Salvation Army Church 142-30-35 feet;

(ii) the balance after (i), above, equally between the late Charles Okute Shikuku, Jared Omutanyi Shikuku, Shem Maloba Shikuku, Matayo Ongoma, Fredrick Shikuku Aswani, Alice Shikuku, Peter Muyonga, the late Musa Omukunda, Augustine Mukhwana, Everlyne Anyanzwa, Rael Anyera, Lina Mukhwana, Nalonja Shikuku, Jacob Mukubana, Elina Shikuku, Dianah Mapesa, Tabitha Angolo, Eseri Anyanzwe and Agnes Mukono;

(c) that the shares due to the late Charles Okute and the late Musa Omukunda shall devolve upon their estates, whereupon their survivors shall initiate succession causes in those estates for distribution to the persons beneficially entitled, including any purchasers, such as Richard Nyikuri Barasa, who allegedly bought land from the late Charles Okute;

(d) that the grant herein shall be confirmed on those terms, and the Deputy Registrar shall process a certificate of confirmation of grant accordingly;

(e) that each party shall bear their own costs; and

(f) that any party aggrieved, by the orders made above, has leave of twenty-eight days to move the Court of Appeal appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER 2021

W MUSYOKA

JUDGE