



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 575 OF 2008

IN THE MATTER OF THE ESTATE OF SAMSON LIKHOTO ESHITUBI (DECEASED)

RULING

1. The applications for determination are dated 7th May 2016 and 6th February 2017.
2. The application of 7th May 2016, is premised on section 71(2) of the Law of Succession Act, Cap 160, Laws of Kenya, and Rule 40(1) of the Probate and Administration Rules. It is brought at the instance of Gamaliel Eshitubi Samson and Abadi Akwera Litokho, and seeks confirmation of the grant herein. The deceased is said to have been survived by a widow, Refa Aseka Litokho. He was said to have had eleven sons and one daughter. The sons are named as Gamaliel Eshitubi Samson, the late Francis Amukambwa Litokho, Abadi Akwera Litokho, George Murunga Litokho, James Okwomi Ndege, Emmanuel Amukambwa Litokho, Elphas Namayi Litokho, Patrick Imbundu Litokho, Benson Aswani Litokho, Nathan Eshitubi Litokho and Obedi Nguni Litokho. The daughter is Mirriam Nechesa Amakati. Two daughters-in-law are listed, being Sara Ouko Asumwa and Beatrice Anamasa; and two grandsons, Harrison Onyango Namayi and Lukas Otieno Namai. The estate is said to comprise of Marama/Lunza/141 and 239, measuring some 18 hectares or 45 acres. It is proposed that Marama/Lunza/239 be distributed between the eleven sons, the daughter, surviving spouse, the two daughters-in-law and the two grandsons (as one unit), equally, so that each would take 2.95 acres. There is provision for 0.75 for access road. It is proposed that Marama/Lunza/141 devolve upon Emunuku Primary School. There is a consent in Form 37, executed by eleven of the survivors. I shall hereafter refer to Gamaliel Eshitubi Samson and Abadi Akwera Litokho as the applicants.
3. The applicants then filed a further affidavit, sworn on 21st November 2016, essentially to revise the distribution proposed in the supporting affidavits, to cater for persons who had allegedly bought portions of the land from some of the survivors. Gamaliel Eshitubi Samson and Abadi Akwera Litokho had allegedly sold some 1.1 hectares or 2.75 acres to Stephen Obwamu Mbayi. Francis Amukambwa Litokho had sold 0.4 hectare or 1.0 acre to Stephen Obwamu Mbayi, and Violet Maloba Omeno 0.8 hectare or 2.0 acres. George Murunga Litokho had sold to Violet Maloba Omena and Dinah Maloba Ochieng 1.2 hectares or 3.0 acres. The revised proposed distribution works out as follows: Gamaliel Eshitubi Samson - 1.575 acres, the late Francis Amukambwa Litokho - 0.20 acres to go to Beatrice Abisaki Amukambwa, Abadi Akwera Litokho - 1.575 acres, George Murunga Litokho - nil as his share goes to Violet Maloba Omena and Dinah Maloba Ochieng, James Okwomi Ndege – 2.95 acres, Emmanuel Amukambwa Litokho - 2.95 acres, Elphas Namayi Litokho – 2.95 acres, Patrick Imbundu Litokho and Refah Aseka Litokho – 2.95 acres jointly, Benson Aswani Litokho – 2.95 acres, Nathan Eshitubi Litokho – 2.95 acres, Obedi Nguni Litokho – 2.95 acres, Mirriam Nechesa Amakati- 2.95 acres, Sara Ouko Asumwa – 2.95 acres and Beatrice Anamasa – 2.95 acres. In the revised distribution the two grandsons do not feature. Copies of the agreements of sale of land are annexed.
4. The application elicited a protest from Vincent Namayi Amukambwa, vide his affidavit, sworn on 3rd October 2016. His principal complaint appears to be that he is unhappy that his father, Francis Amukambwa Litokho, who had been an administrator had not been substituted as administrator. He also proposes that the share due to his father ought to be devolved to him to hold in trust for himself and his brothers: Alfred Omutimba Amukambwa, Samson Litokho Amukambwa, Chris Akwera Amukambwa, Evans Owibanda Amukambwa and Kelvin Litokho Amukambwa. He also asks that the share of the late Patrick Imbundu Litokho be determined. I shall refer to Vincent Namayi Amukambwa as the 1st protestor.
5. Vincent Namayi Amukambwa filed a further affidavit of protest on 6th December 2016, ostensibly in response to the affidavit by the applicants sworn on 21st November 2016. He avers that the deceased was a polygamist, and at the time he died in 1984 he was survived by four of his wives, and that the four administrators were appointed to represent each of the four houses. He still raises issue that his father, who represented one of the houses had died, but was not substituted as administrator. The rest of the contents of the affidavit regurgitate the contents of the affidavit of 3rd October 2016.
6. There is another affidavit of protest, sworn on 11th October 2018, by Jeridah Murunga Mbayi. She is a daughter-in-law, by virtue of being the wife of his son, George Murunga Litokho, who she describes as mentally incapacitated. She complains that her husband had not been allocated anything in the distribution proposed by the applicants, yet the whole of the portion due to him had been given to Violet Maloba, who was claiming a purchaser's interest. She asserts that Violet Maloba had purchased that portion from Gamaliel Eshitubi Samson and Abadi Akwera Litokho, and not from her husband, and that the proceeds of sale were shared between the two of them, and her husband got

nothing. She states that her husband ought to be allocated his rightful share. I shall refer to Jeridah Murunga Mbai as the 2nd protestor.

7. The other protest is filed by Emmanuel Amukambwa Litokho, a son of the deceased. He avers that he did not authorize anyone to sell any parcels of land belonging to the estate to anyone. He states that the deceased had allocated Marama/Lunza/141 to Emunuku Primary School, and the school was to raise money to assist the deceased pay off a loan due to AFC, and, therefore, the land was not donated to the school as alleged by the applicants. He complains that some of the persons listed as beneficiaries were in fact strangers. He points out that Refah Aseka, the surviving widow had been listed as a beneficiary yet she had forfeited her share to other beneficiaries. He avers that his brother, the late Patrick Imbundu Litokho, had survived the deceased, but had not been survived by a wife nor children, and he was asserting entitlement to the share that accrued to him. He says that he should get two plots. He proposes that the estate should be shared equally between Gamaliel Eshitubi Samson, Mirriam Amakati Nechesa, Vincent Namai Amkambwa, Abed Akwera Litokho, George Murunga Litokho, Emmanuel Amkambwa, the late Patrick Imbundu Litokho, Obed Ingwe Litokho, Elfias Namayi Litokho, Benson Aswani Litokho, Nathan Eshitubi Litokho, Sarah Ouko Asumwa, Beatrice Anamasa Namai, James Okwomi Ndege and Harrison Onyango Namayi, with some provision for access roads and pathways. He would like Emunuku Primary School to be made to pay for the market value of Marama/Lunza/141, to be shared equally amongst the survivors, but a title deed for the school should only be processed after the school settles the debt in full. He has attached documents which show that the late Patrick Imbundu Litokho died on 25th April 2012. There are documents that he has attached which are in the Luhya dialect, and whose contents I am unable to understand. I wonder why an English translation was not provided. I shall refer to Emmanuel Amukambwa Litokho as the 3rd protestor.

8. The 1st protestor swore a second protest affidavit on 22nd October 2019, which agrees with the proposals on distribution made by the 3rd protestor. He attaches several copies of minutes of family meetings, and a certificate of death in respect of his father, Francis Amukambwa Litokho. Elfias Namayi Litokho, Obed Ingwe Litokho, Sarah Ouko Asumwa, Beatrice Anamasa, Zaina Ashioya Tolo, Benson Aswani Litokho, Refah Aseka Litokho swore affidavits on 19th and 20th October 2019, where they made proposals on distribution, that are aligned to those made by the 3rd protestor.

9. There are several affidavits on record supporting the position by the 1st protestor. These are by Chrispine Akwera Amkambwa, Emmanuel Amukambwa Litokho, Silvia Omulubi Amkambwa, Emily Atemba Amkambwa, Benson Aswani Litokho, Jackline Owano Amkambwa, Refah Aseka Litokho, Obed Ingwe Litokho, Sarah Ouko Asumwa, Beatrice Anamasa, Samson Litokho Amkambwa, Elfias Namayi Litokho and Zaina Ashioya Tolo.

10. The application, dated 6th February 2017, seeks substitution of the late Francis Amkambwa Litokho by Vincent Namai Amkambwa as administrator of the estate of the deceased herein. It should be a simple straightforward application, where he should simply demonstrate that the said administrator is dead, hence the application for substitution. Instead, he has gone on to dwell on matters that are not germane to substitution. I shall refer to Vincent Namai Amkambwa as the applicant with respect to that application.

11. Chrispine Akwera Amkambwa swore an affidavit on 18th October 2019, filed herein on 24th October 2019, in support of the proposed substitution. Emmanuel Amukambwa Litokho supports the application too, through his affidavit sworn on 19th October 2019. That application is also supported by Silvia Omulubi Amkambwa and Emily Atemba Amkambwa, vide affidavits sworn on 18th October 2019, and by Benson Aswani Litokho, Jackline Owano Amkambwa, Refah Aseka Litokho, Obed Ingwe Litokho, Sarah Ouko Asumwa, Beatrice Anamasa, Samson Litokho Amkambwa, Elfias Namayi Litokho and Zaina Ashioya Tolo, vide affidavits sworn on 19th and 20th October 2019 and 7th December 2020, respectively.

12. Directions were taken, for the canvassing of the two applications by way of written submissions. The parties hereto have filed detailed written submissions, complete with the judicial opinions that they rely on. I have read through them and noted the arguments that they have made in them.

13. I will start with the substitution application, dated 6th February 2017. I have not seen any opposition to it. Multiple affidavits were sworn by members of the household of the late Francis Amkambwa Litokho, in support of Vincent Namai Amkambwa being appointed as his substitute. I shall accordingly allow the said application.

14. With regard to the application dated 7th May 2016, the same is for confirmation, which is governed by section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, 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.”

15. In confirmation applications, there are two principal factors for the court to consider: appointment of administrators and distribution of the estate. On appointment of administrators, the only issue that arose relates not so much to the applicants, but to substitution of late Francis Amkambwa Litokho, as administrator. I have dealt with it in paragraph 13 here above. He shall be substituted by Vincent Namai Amkambwa as such.

16. 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.”

17. 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 the applicants have properly identified all the survivors of the deceased. The only dispute revolves around Patrick Imbundu Litokho. He survived the deceased. The deceased died in 1984, while Patrick Imbundu Litokho died in 2012. His estate would be entitled to a share in the estate, the fact that he did not have a child or a spouse notwithstanding. The other issue is about persons who had allegedly bought land from the estate. All these sales happened after the deceased had died, either before representation to this estate was obtained, and obviously before the grant herein was confirmed. The said sales were unlawful, and unenforceable, since the persons who sold the assets had no capacity to sell the land. The buyers acquired no interest in the estate, and they were, therefore, persons who were not beneficially entitled to shares in the estate.

18. 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. The matter of shares should take us to the assets of the estate. It is common ground that the deceased owned Marama/Lunza/141 and 236. It is also common ground that Marama/Lunza/141 was occupied by Emunuku Primary School. It is common ground that the said property ought to devolve upon the school. On the arrangement that was there between the school and the deceased, the position is unclear. One side claims that the deceased donated the land to the school, while the other claims that the school should have paid for it. No documents were placed before me in support of either case. Whatever the case, the land should devolve to the school, should the correct position be that it was sold to the school, then the administrators will be at liberty to sue the school for civil debt to recover the purchase price.

19. As to whether the shares that the persons identified as beneficially entitled had been ascertained, I believe there is sufficient compliance, save for what I have said above about the alleged buyers. The surviving widow has sworn an affidavit where she has stated that she has forgone her interest and that the property is to be shared out equally amongst the children, and for those who are dead, it is agreed that their widows and grandsons would take their shares, save for the late Patrick Imbundu Litokho, who had no wife nor children. His share should devolve to his estate, to be distributed in succession proceedings initiated in his estate. Similarly, the share due to the late Francis Amkambwa Litokho, shall devolve upon his estate, to be distributed in a succession cause initiated in the matter of his estate. There is though the issue of Zaina Ashioya Tolo. She swore an affidavit on 7th December 2020, averring to be a daughter of the deceased. No one has contested her claim. She says she is of the same mother with Miriam Nechesa Amakati. I find that she is a daughter of the deceased, and she is entitled equally with the other children of the deceased. The estate is being distributed amongst the children, or their successors, section 38 of the Law of Succession Act shall apply, so that the estate is shared out equally amongst all of them.

20. Having taken into account everything, the applications dated 7th May 2016 and 6th February 2017 are disposed of as follows:

(a) That I hereby appoint Vincent Namai Amkambwa administrator of the estate herein, in the place of the late Francis Amkambwa Litokho, and the current grant shall be amended to reflect him as one of the administrators;

(b) That Marama/Lunza/141 shall devolve upon Emunuku Primary School, and should the said school be owing the estate any moneys, with respect to how it acquired the land, the same shall be recovered by the estate through an ordinary suit to be commenced by the administrators for civil debt;

(c) That Marama/Lunza/239 shall be distributed equally between Gamaliel Eshitubi Samson, Mirriam Amakati Nechesa, Zaina Ashioya Tolo, the estate of the late Francis Amukambwa Litokho, Abed Akwera Litokho, George Murunga Litokho, Emmanuel Amkambwa, the estate of the late Patrick Imbundu Litokho, Obed Ingwe Litokho, Elfas Namayi Litokho, Benson Aswani Litokho, Nathan Eshitubi Litokho, Sarah Ouko Asumwa, Beatrice Anamasa Namai, James Okwomi Ndege and Harrison Onyango Namayi, and with provision for access roads and pathways;

(d) That the share to devolve to Harrison Onyango Namayi, shall be held by him and in trust for himself and his siblings;

(e) That any person who purported to buy land belonging to the estate from any of the sons or children of the deceased after the demise of the deceased in 1984 shall pursue their claim against the sons or children of the deceased who sold the same to them;

(f) That the grant herein is hereby confirmed in those terms;

(g) That a certificate of confirmation of grant shall issue to the administrators accordingly; 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 10TH DAY OF DECEMBER, 2021

W MUSYOKA

JUDGE