REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 343 OF 2013

IN THE MATTER OF THE ESTATE OF ANDREA MUTUKA (DECEASED)

JUDGMENT

1. According to the certificate of death on record, serial number 252970, dated 24th January 2013, the deceased herein, Andrea Mutuka, died on 24th June 2012. Representation to his estate was sought by Elisha Makokha Shamala, in his capacity as a purchaser, in a petition that was lodged herein on 23rd May 2013. The deceased was expressed to have had been survived by the eight individuals stated, in the consent in Form 38, to be the sons and daughters of the deceased. They were Paul M. Mutuka, Reuben M. Kombo, Peter Mutuka Mateche, David Lwile Mutuka, Elimina M. Muyuka, Elisita S. Andolo, Christine A. Malemba and Sabedi A. Mutuka. The deceased was expressed to have had died possessed of five parcels of land parcels of land, being Isukha/Kambiri/1797, 1798, 2072, 2073 and 2105, Elisha Makokha Shamala was listed, in the liabilities column, as a creditor. Letters of administration intestate were eventually made to Elisha Makokha Shamala, on 10th March 2014, and a grant was duly issued, dated 14th March 2014. I shall hereafter refer to Elisha Makokha Shamala as the administrator.

2. A summons for revocation of grant was filed on 25th April 2015, by Reuben Mutuka Kombo, of even date, principally on grounds that the administrator had failed to apply for confirmation of his grant, after expiration of the six months allowed in law. The applicant conceded, in the application, that the administrator had, on 7th August 2012, bought a portion of the land of the estate from the deceased. A copy of a sale agreement of even date, was attached to the affidavit of the applicant. The applicant argued that the family had resolved, on 12th September 2012, that the administrator would seek representation with the applicant, but the former chose to go it alone, after which he became evasive. The revocation application was resolved on 15th November 2016, when it was dismissed by Mwita J., and the administrator was directed to apply for confirmation of his grant within fourteen days.

3. The administrator complied with the orders of 15th November 2016, by lodging, herein, a summons for confirmation of grant, dated 5th December 2016, filed on 6th December 2016, which application is for determination in these proceedings. He has listed the survivors of the deceased to be the eight individuals named in the petition. The property proposed for distribution is Isukha/Kambiri/1797, 1798, 2072, 2073 and 2105. The said summons provides for a schedule for distribution of the estate as follows: -

a) Isukha/Kambiri/1797, 1.66 hectares, to Elisha Makokha Shamala;

b) Isukha/Kambiri/1798, 0.24 hectares, to Reuben Mutuka Kombo and Tebla Khaesia Kamwani;

c) Isukha/Kambiri/2072, 1.25 hectares, Peter Mateche Mutuka and Beatrice Naliaka Mateche;

d) Isukha/Kambiri/2073, 0.39 hectares, David Lwile Mutuka; and

e) Isukha/Kambiri/2105, 0.02 hectares, Christine Anyona Amalemba, Elimina Masitsa Muyuga and Philisters Shisinde Andalo.

4. No consent, in Form 37, was filed, under Rule 40(8) of the Probate and Administration Rules, duly signed by the beneficiaries.

5. The application was heard on 6th October 2020. Twelve individuals were in attendance, being Reuben Mutuka Kombo, Elisha Makokha Shamala, Peter Mateche Mutuka, Felistus Shisinde Motoka Andalo, David Lwile Mutuka, Elimina Masitsa Muyuka, Christine Anyona Amalemba, Tebla Ayeshe Reuben, Beatrice Naliaka Mateche, Bernard Lumbasya Reuben, Felix Isota Mateche and Betta Makamu Mateche. Mr. Manyoni informed me that the application was not opposed. Reuben Mutuka Kombo, Peter Mateche Mutuka and David Lwile indicated that they were not aware of the proposals that the administrators had made; while Elimina Masitsa, Felista Shisinde and Christine Anyona indicated that they supported the proposals.

6. In view of the survivors who had stated that they were unaware of the proposals, I opted to take oral evidence from them.

7. Reuben Mutuka Kombo was the first on the witness stand. He said that he was unaware that the administrator held that office, and that he rejected the proposals made in the summons for confirmation of grant. He described the property the deceased died possessed of as Parcel No. 97, and that he did not know the property being distributed. He said that Isukha/Kambiri/1797 was registered in the name of the deceased on 16th December 2008, while Isukha/Kambiri/2105 had been excised from Parcel No. 97, after some individuals bought portions of the land before the deceased died. He described one purchaser as Josephine, who had bought some land from Andrea Mutuka, before the deceased died. He said that he knew nothing about Isukha/Kambiri/1798 and 2073, but said that Isukha/Kambiri/2072 was excised from Parcel No. 97. He stated that the deceased had nine children, being Maria Nyakoa, Paul Musina, Reuben Mutukaa Kombo, Peter Mateche Kombo, David Lwile Mutuka, Elimina Masitsa, Felisita Shisinde, Christine Anyona and Sabedi Ikunza Mutukaa. During cross-examination, he conceded that he had brought a revocation application. He identified the administrator as a purchaser. He stated that the family had sat and agreed on the said buyer being appointed administrator of the estate. He said that the deceased had given him a piece of land, but he asserted that the same was not Isukha/Kambiri/1798. He said each of the three sons had parcels of land, where they had settled with their families. He stated that he was not aware that the daughters of the deceased had been allocated any shares.

8. David Lwile Mutuka testified next. He confirmed that the deceased had the nine children named by Reuben Mutuka Kombo, adding that Sabet Kukunza had passed on. He identified the property that the deceased had as Isukha/Kambiri/421, which later changed to Isukha/Kambiri/1797, which was subsequently subdivided into Isukha/Kambiri/2072 and 2073. He testified that the family had settled on Elisha Makokha Shamala as administrator, but complained that when the administrator sought representation they were not involved. He stated that he opposed the proposals on distribution, and added that he wanted a surveyor to come on the ground, to determine occupation of the land on the ground. He asserted that the deceased had shared out the land. He said that the deceased had showed the sons their portions, and marked them with boundaries, saying that it was only a surveyor who could determine the exact extent of his land. He said that none of the sons had encroached on each other's land. He said that the survey work should have preceded the exercise, to map out the extent occupied by each of the sons. He admitted that some persons had bought the land.

9. Peter Mateche Mutukaa took the stand next. He agreed with the administrator on the persons who had survived the deceased. He could not tell the land reference number of the land of the estate of the deceased. He said the administrator was not a son of the deceased, and he did not trust him. He said that he did not go to the Chief to get a letter for succession purposes. He stated that the daughters of the deceased were married, and the deceased had received their dowry. He said that the land for the daughters was what was sold to the administrator. He said that he was shown his portion of land by the deceased before he died. He said no one had interfered with his portion, and that it was the administrator who was trying to interfere. He asserted that the daughters ought not get a share, for they sold their share to the administrator.

10. The administrator was the last to testify. He stated that he had shared out the land according to how the deceased had shared it out amongst the children, both sons and daughters before he did. He could not recall, off head, the land reference details of the land, but said that he did not work on the proposals alone. He described the deceased as his uncle, a brother of his father. He explained that after the deceased died, the children approached him, as the chair of the burial committee, for the burial of the deceased. After the deceased had distributed his property amongst his children, he left a portion of 0.3 hectare, which the children agreed to have sold to cater for the deceased's funeral expenses. He said that the children asked him to buy the 0.3 hectare, which he accepted. It was agreed that for him to get the 0.3 hectare he was to become the administrator of the estate. He stated that the children had informed him that the deceased had brought a surveyor, the late Peter Mwombe, who drafted the subdivisions. He stated that the sons had agreed on him being the administrator, and they had also agreed on the distribution. He said that he got into a sale agreement with the sons, since they could not be trusted. He stated that the sons had sold their respective shares, and that exposed their wives and children. He stated further that the deceased had also given land to his daughters. He said that the sons had tried to get him to sell the daughters share, which he had refused. He explained that that was why they were against him. He said that he did not take a surveyor to the land, as the deceased had already done that.

11. From the pleadings, affidavits and oral testimonies, I have identified only two issues for determination, that is whether the grant ought to be confirmed and how the estate should be distributed.

12. In confirmation applications, there are two principal factors for the court to consider, appointment of administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

> "*Confirmation of Grants*
>
> *71. Confirmation of grants*
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> *(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—*
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> *(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 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 person 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? There is a no letter on the record from the Chief, or his assistant, indicating the individuals who survived the deceased. In the petition, eight individuals are listed as survivors of the deceased. It is the same eight individuals who are listed in the summons for confirmation of grant as survivors. At the hearing of the confirmation application, an additional survivor was disclosed. There is generally no dispute as to who the survivors of the deceased are, nine children, one of whom has since passed on. An issue was raised that the administrator had not filed a letter from the Chief. The Chief's letter is not a mandatory requirement of the law, it is not provided for in the Law of Succession Act nor in the Probate and Administration Rules. The failure to file the Chief's letter is not fatal. See *Musa v Musa* [2002] 1 EA 182.

16. The other aspect of the proviso is that the shares of the survivors or beneficiaries identified must be ascertained. In the affidavit sworn in support of the application, I note that the administrator had identified the shares of nine individuals. These nine comprise of himself as a creditor, three daughters of the deceased, three sons of the deceased and two persons whose relation with the deceased is not disclosed. At the oral hearing it transpired that the deceased had nine children. Out of the nine children, only seven have been provided for in the application, which would mean that three of the children were not catered for, and it is not explained why they were left out. Those not catered for are Maria Nyakoa, Paul Musina and Sabet Ikunza. I note that the three did not file any consents in Form 37, nor deeds of renunciation.

17. It is clear from the filings that the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules were not complied with. Some of the survivors of the deceased were left out of the proposed distribution. Going by the proviso to 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, the applicant has not ascertained the shares for those individuals, and, therefore, the matter is not ripe for confirmation.

18. For emphasis sake, the said proviso, by way of repetition, says:

"*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."*

The said provision is reinforced by Rule 40(4), which, I hereby recite once more, for emphasis, says:

"*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."*

19. Part V of the Law of Succession Act governs intestate succession, where intestacy happens. In intestacy, distribution would take several forms, depending on: whether the deceased was survived by a spouse and children, section 35; or by a spouse without children, section 36; or by children but no spouse; section 38; or by no spouse nor children, section 39; or was a polygamist, section 40.

20. It was not disclosed whether the deceased was a polygamist or a monogamist, to assist the court determine whether section 40 of the Law of Succession Act applied to distribution of the estate. It was not disclosed in the petition, whether the deceased was survived by a spouse, neither did that emerge at the trial. What came out clearly, however, is that the deceased was survived by the nine children disclosed at the trial. I shall presume that the deceased was not survived by a spouse, but was survived by children. That would mean that distribution of his estate should be be founded on section 38 of the Law of Succession Act, which provides as follows:

"*38. Where intestate has left a surviving child or children but no spouse*

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."

21. The estate of an intestate survived by children but no spouse is distributed, according to the above provision, with the estate being distributed equally amongst the children. The persons entitled to a share would be all the children of the deceased, irrespective of their gender. Where any of the children are dead, then their share would pass to their children, according to section 41 of the Law of Succession Act. The sons talked of the daughters being married. I need to make it clear that the marital status of the parties is not a factor that would exclude anyone, daughters included, from taking a share in the estates of their departed parents.

22. At the oral hearing the administrator told the court that the children agreed to sell to him 0.3 hectare of the estate, and that they entered into an agreement to that effect. In the distribution proposed in the application, the administrator allocated to himself1.66 hectares. He did not explain that difference in acreage at the oral hearing.

23. The sons of the deceased, at the oral hearing, raised an issue as to the assets that made up the estate, and, therefore, available for distribution, even though they did not make a serious effort to place on record the assets that, in their view, in fact, made up the estate. The administrator did not provide evidence of what the estate comprised of, for he did not attach any documents of title with respect to the property that he was proposing to distribute. However, at the time he sought representation, he had attached certificates of official search with respect to the five assets that he claimed belonged to the estate. The searches certificate for Isukha/Kambiri/1797, dated 8th May 2013, shows that the said property was registered in the name of the deceased on 4th October 2007. The said register was closed on 18th July 2012, following its subdivision into Isukha/Kambiri/2072, 2073 and 2105. That for Isukha/Kambiri/1798, dated 8th May 2013, shows that the same was registered in the name of the deceased on 4th October 2007. The certificate for Isukha/Kambiri/2072, dated 17th May 2013, shows that the same was registered on 19th July 2012, after the deceased's death, and that it was a subdivision from Isukha/Kambiri/1797. The certificate for Isukha/Kambiri/2073, dated 17th May 2013, shows that the same was registered in the name of the deceased on 19th July 2012, after his death, and it was a subdivision from Isukha/Kambiri/1797. The certificate for Isukha/Kambiri/2105, dated 17th May 2013, shows that the deceased was registered as proprietor on 19th July 2012, after his death, and that it was a subdivision of Isukha/Kambiri/1797.

24. What the above means is that there is an issue about the assets that the administrator is proposing for distribution, and that there could be a point in what the sons raised at the oral hearing. The documents that I have referred to in paragraph 23, here above, indicate that Isukha/Kambiri/1797 no longer exists, and its register was closed on 18th July 2012, after the property was subdivided as indicated above. The administrator should not, therefore, have proposed it for distribution. The transfers happened two weeks after the deceased died, it may be necessary to explain the circumstances of the transfers, to clear the air of suspicion, which, perhaps explains why the sons do not trust the administrator. That would mean that the property available for distribution are four titles, being Isukha/Kambiri/1798, 2072, 2073 and 2105

25. It would be clear that the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules were not complied with, to the extent that the proposed distribution did not cater for all the children of the deceased, and that the distribution proposed did not conform with the distribution prescribed in section 38 of the Law of Succession Act. The other thing is that children of the deceased not provided for did not consent to the proposed distribution, nor attend court to state their position on it. The matter was, therefore, not ripe for confirmation, and the application ought to be postponed in terms of section 71(2)(d) of the Law of Succession Act.

26. As stated elsewhere here above, at confirmation, apart from distribution, the court is also concerned with confirming the administrators of the estate. The sons were emphatic that they were not happy with the administrator. They gave varied reasons, but none of the reasons had anything to do with maladministration. It emerged from the oral hearing that the family sat and agreed that the administrator was to apply for representation. It cannot, therefore, be argued that the sons were unaware that the administrator was to petition for representation in the estate. In any event, one of the sons mounted an application for revocation of the grant made to the administrator, but the court was not convinced that a good reason existed to have it revoked, and it confirmed the administrator as such. The applicant in that application did not raise issue with the manner the administrator was managing the estate, neither did he point at any defects in the manner the grant was obtained, nor any of the issues raised at the trial. I am not persuaded that a case has been made out for me not to confirm the administrator.

27. The final orders to make in this matter are:

a) That the Summons for Confirmation of Grant, dated 5th December 2015, filed on 6th December 2015, is hereby postponed, in terms of section 71(2)(d), for the reasons given in the body of the judgment;

b) That the administrator is hereby directed to file a further affidavit, in which he shall fully comply with the proviso to section 71(2) and Rule 40(4) of the Probate and Administration Rules, propose distribution that complies with section 38 of the Law of Succession Act, where necessary get the survivors not taking any shares to file consents or renunciations;

c) That in the same affidavit, the administrators shall explain why non-survivors such as Beatrice Naliaka Mateche and Tebla Khaesia Kamwani are allocated shares in the estate, and if they claim to have had bought assets of the estate, documentary evidence ought to be provided of the said transactions;

d) That the administrator shall also address the issues addressed in paragraphs 23 and 24 of this judgment;

e) That the matter shall be mentioned, on a date to be given at the delivery of this judgment, for compliance and further directions;

f) That each party shall bear their own costs, this being a family matter; and

g) That any party aggrieved by the orders made herein does have leave hereby to move the Court of Appeal, appropriately, within twenty-eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF DECEMBER, 2020

W MUSYOKA

JUDGE