REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 410 OF 1994

IN THE MATTER OF THE ESTATE OF ELISHA NABWAYO INYENDE, DECEASED

JUDGMENT

1. The deceased herein died on 25th March 1988. A letter from the Assistant Chief of Shikoti Sub-Location, dated 29th August 1994, indicates that the deceased was survived by a widow and four sons, being Nora Akhalakwa, Charles Otwero, Tomas Ochango, Abner Atswenje and Peter Andayi. It also mentions a buyer, Lucas Musungu. Representation to his estate was sought vide a petition lodged herein on 15th September 1994. The petition was filed by Charles Otwero Nabwayo, in his capacity as son of the deceased. He was expressed to have been survived by the widow and the four sons mentioned hereabove. He was also said to have died possessed of a parcel of land, being Butsotso/Shikoti/79. A grant of letters of administration intestate was made to him on 1st January 1995.

2. Before the said grant could be confirmed, a Motion, dated 16th May 1995, was lodged herein on 18th May 1995. It was brought at the instance of Abner Moses Atwanje Elisha, as son of the deceased, who sought two principal prayers – an accurate account of all the beneficiaries of the estate of the deceased and a true and accurate list of the liabilities of the estate. He averred that the administrator had not disclosed that the estate of the deceased's late son, Joram Shikuku, was entitled to a share of the estate, and that the children Joram Shikuku ought to have been disclosed as survivors of the deceased that is to say Patrick Kunyanyi, MS, NS, OS, NS and SS. He averred that the said children reside with their mother, the widow of Joram Shikuku, on estate property. He also avers that the administrator had not disclosed that the deceased had given ¾ acre of Butsotso/Shikoti/79 to the CPK Church. He also objected to inclusion of Peter Andayi as a beneficiary as he had already been given a share of the estate *inter vivos*. He is also objecting to the inclusion of Lucas Musungu as a liability, asserting that the deceased had not sold any part of his land to the deceased.

3. The parties thereafter lodged a letter, dated 18th September 2001, at the registry on 19th September 2001 consenting to the following matters, that is to say:-

(a) That all the children of the late Joram Shikuku be awarded the share due to their father;

(b) That Patrick Kunyanyi, the only adult son of the late Joram Shikuku be registered as the proprietor in trust of MS, NS, OS, NS and S of their father's share;

(c) That the name of Lucas Musungu be deleted from the list of liabilities of the estate;

(d) That the land occupied by the church be surveyed and thereafter be allocated to the CPK Church;

(e) That the parties be given time to discuss the issue of Peter Andayi and if they do not compromise, the court to decide the matter; and

(f) That the parties provide the funds for survey of the subject property.

4. The consent comprised in the letter of 18th September 2001 was adopted on 19th September 2001 as an order of the court.

5. Subsequent to that, the administrator filed a summons herein on 15th July 2002, dated 13th June 2002, seeking confirmation of the grant. In the application, the administrator identified five beneficiaries, being Charles Otwero Nabwayo, Tomas Ochango Nabwayo, Abneri Moses Atswenje Nabwayo, Patrick Okunyanyi Shikuku and Peter Andati Nabwayo. It is averred that the deceased had died possessed of Butsotso/Shikoti/79, which measured 34 acres, out of which Butsotso/Shikoti/79 he had sold a portion to the church, identified as Charismatic Episcopal Church of Africa. He proposed that Charles Otwero Nanbwayo gets 5.78 hectares, Patrick Okunyanyi Shikuku 2.34 hectares, Abneri Moses Atswenje Nabwayo 1.32 hectares, Peter Andati Nabwayo 0.50 hectare, Tomas Ochango Nabwayo 3.54 hectares and the Charismatic Episcopal Church of Africa 0.12 hectare.

6. To that application, Abneri Moses Atswenje Nabwayo swore a replying affidavit on 27th July 2004, filed herein on 30th August 2004. He averred that the deceased had died and was survived by four sons, being Charles Otwero Nabwayo, Tomas Ochungo, Abner Atswenje and the late Joram Shikuku. He asserted that the proposed distribution was irregular, saying that the estate ought to be shared equally. He averred that Peter Andati Nabwayo had been given his share of the land during the deceased's lifetime.

7. Directions were given on 14th February 2005, that the matter be disposed of by way of *viva voce* evidence.

8. The hearing commenced on 15th March 2012, with the protestor, Abneri Moses Atswenje Nabwayo, being the first to take the stand. He testified that the deceased's widow had died in 1999. The deceased was said to have had borne eight sons and seven daughters. The sons were identified as Andreano Musembi, Mikanory Okwanda, Luka Musungu, Charles Otwero, Joram Shikuku, Tomas Ochango, Abner Atswenje and Peter Andati. The daughters were identified as Dorcas Luchera, Veronica Leah, Iseri Nyabera, Sarah Indeche, Elimina Ambia, Joan Evita and Rose Anyona. Two of the sons were reported to have died, being Luka Musungu and Joram Shikuku; while the daughters were said to be all married. The deceased left behind a piece of land known as Butsotso/Shikoti/79, which measured 34 acres. He stated that the property ought to be shared out amongst the sons, and he testified that four sons had benefited from *inter vivos* transfers from the deceased, and therefore the four who got nothing should be the ones who ought to share out the land. Those who got land from the deceased before he died were said to be Andreano Musembi, Mikanory Okwanda, Luka Musungu and Peter Andati. Andreano Musembi was given Butsotso/Shikoti/1118, while Peter Andati got Butsotso/Shikoti/1116 (12 acres), Luke Otiato got Butsotso/Shikoti/1115 (10 acres), and Filomone Luyanda was given Butsotso/Shikoti/1117 (16.5 acres). The transfers were effected in 1969. Those who did not, and who should be getting a share now should be Charles Otwero Nanbwayo, Tomas Ochango Nabwayo, Abneri Moses Atswenje Nabwayo and the estate of Patrick Okunyanyi Shikuku. He proposed that they should share the property equally. They are all said to be resident on the subject land, and that there were boundaries marked on the ground.

9. The case for the administrator, Charles Otwero Nabwayo, opened on 11th December 2014. He agreed with the protestor on the fact that the deceased had transferred portions of his land to his first four sons, meaning that what remained was to be shared out amongst the other four sons. He stated that the deceased had even parceled out his land Butsotso/Shikoti/79 amongst the remaining four sons before he died, and each of the four sons entitled to Butsotso/Shikoti/79 knew their boundaries and used to keep them. He said that the proposals he had made in his application honoured those boundaries and acreages. He asserted that the proposals by the protestor were inconsistent with the wishes of the deceased. He said that the sharing by the deceased was done sometime in 1977. The deceased showed them the boundaries, and a surveyor was to come later to determine the acreages. Unfortunately, the deceased died before bringing in the surveyor, and, therefore, before the four sons got titles in their names. He said that the respondent had been allocated land elsewhere and that explained why he had a small allocation.

10. Peter Andati Nabwayo followed. He confirmed that he was amongst the first four sons of the deceased who benefited from *inter vivos* transfers in 1969, the property transferred to him being Butsotso/Shikoti/1116, which measured 12 acres. He supported the proposals by the administrator of the remaining property amongst the remaining four sons. He said that even the remaining land had been shared out on the ground by the deceased amongst the remaining four sons, sometime between 1982 and 1988. The deceased placed boundaries on the land, a surveyor was to confirm the actual sizes of the property. He claimed that out of the sons who had gotten land in 1969, he was the only one given a share of Butsotso/Shikoti/79.

11. Thomas Ochango Nabwayo testified next. He supported the proposals by the administrator. He stated that he got his allocation in 1976. He stated that he got a larger share than the protestor and others. Patrick Okunyanyi Shikuku, the son of Joram Shikuku, testified in support off the administrator's proposals. Charles Omuhaya testified last for the administrator. He was the Chief of East Butsotso Location in Kakamega County. He said that he presided over a settlement of the matter. He essentially confirmed that the deceased had shared out the land on the ground by marking out the boundaries, and the settlement followed the wishes of the deceased, and was signed by, among others, the protestor.

12. At the close of the oral hearing, the parties were directed to file written submissions. There has been compliance by both sides. They have filed written submissions, complete with the authorities that they have relied on. I have read through the written submissions and noted the arguments made therein.

13. From the material placed before me it would appear that the deceased settled his first older sons, with each one of them getting parcels of land that were in excess of ten acres. The four younger sons were not settled as at the date of his death. There is some evidence that he sought to also settle them before he died. Unfortunately that did not happen, and therefore there were no *inter vivos* transfers in their favour. There is unanimity that the remaining parcel of land, Butsotso/Shikoti/79, should be shared out amongst the four. The dispute is on what proportions it should be so shared out. Of course, there are supplementary issues to be addressed, such as whether Peter Andati is entitled to anything out of Butsotso/Shikoti/79, and whether the daughters of the deceased are entitled to anything out of the estate.

14. The deceased herein died in 1988, long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force. His estate fell for distribution in accordance with the provisions of the said law. Section 2(1) of the Act is clear that that Act is the law that governs estates of persons dying after the Act came into force. No will, whether oral or written, was placed before me, and none of the parties alleged that the deceased had died testate. That would mean that he died wholly intestate. His estate therefore has to be dealt with in accordance with Part V of the Act which provides for distribution of the estate of a person who has died intestate.

15. There was mention of fact that the deceased had mapped out Butsotso/Shikoti/79 on the ground amongst five of the sons. I have been urged to distribute the said land strictly following the said subdivisions by the deceased, which were said to reflect his wishes. The position regarding that is that such wishes, if there were there at all, do not amount to a will. The same are also not binding to the court, for they do not amount to *inter vivos* gifts. If anything, they are evidence of failed lifetime gifts. The deceased might have intended to transfer those parcels of land in the proportions as mapped out on the ground, but when he failed to have the property subdivided and the resultant subtitles transferred and registered in the names of the persons that he desired to be beneficiaries, then his scheme failed. Such proposals or schemes by the deceased during his lifetime, that were not carried to fruition, do not bind the court, but they may be considered by the court as a guide. The property of an intestate ought to be distributed strictly in according with the provisions of Part V of the Law of Succession Act.

16. I will dispose first of the matter of the daughters of the deceased. The petition filed herein does not comply with the law as stated section 51(1) (g) of the Law of Succession Act and rule 7(1) (e) (i) of the Probate and Administration Rules, that in cases where the deceased died intestate, like the instant one, the petition should disclose all the surviving children of the deceased and any children of any child of his or hers then deceased. The petition discloses only four sons of the deceased, yet at the oral hearing it emerged that he had eight (8) sons and seven (7) daughters. That would mean that there was non-disclosure or concealment of eleven (11) individuals. Put differently, there was misrepresentation, whether innocent or fraudulent, that the deceased had only four children, all of them sons. Secondly, some of the children were deceased, under section 51(1) (g), the children of such dead children of the deceased ought to have been disclosed.

17. Regarding daughters, there is this misguided notion in Kenya that reference to children in the Law of Succession Act means sons or male children. There seems to be this notion that once female children get married they cease to be children of their father, or they lose the entitlement to be identified as the children of their father, and with that their right to inherit from the estate of their father or mother. The Act itself has no such definition of children, and therefore reference to children must logically mean all the children of the deceased regardless of their gender or marital status. The Law of Succession Act has been described as being very progressive. It is said to have had come way ahead of its time. It provides for equal treatment of all the children of the deceased, male and female, married and unmarried. It does not discriminate, nor differentiate between the sexes. Female children have as much right to inherit from the estate of their deceased father, or mother, as the male children of the deceased. That should be clear to all in the current dispensation.

18. The proceedings before me were carried out with that misguided notion that the daughters of the deceased were not entitled to a share in the estate, since they were female and were married. There is no legal basis to support that proposition. That was a customary notion, which was ousted by the coming into operation of the Law of Succession Act on 1st July 1981. The daughters interest in the estate ranked equally to that of their brothers. They could not just be wished away, as if they were never born. They ought to have been listed in the petition as survivors of the deceased, and in the confirmation as such as envisaged by section 71(2) of the Law of Succession Act and rule 40(3)(a) of the Probate and Administration Rules. It should be left to the daughters to decide whether or not they wished to renounce or forgo or waive their entitlement to a share in the estate, and where they do in fact wish to do so the same must be in writing, in a deed or affidavit duly filed in court. It is not at the discretion of the administrators to decide for the daughters, and it is not within their power to do so. In short, these proceedings have been carried out while excluding a critical constituency of survivors and beneficiaries.

19. Having disposed of the issue of the daughters, the next consideration should be who amongst the sons was entitled to the remaining property, that is to say Butsotso/Shikoti/79. The material placed before me indicates that the older sons of the deceased benefited from *inter vivos* transfers by the deceased. The deceased caused parcels of land to be transferred into their names. I have stated elsewhere that each of them got land in excess of ten acres. Section 42(a), which is in Part V of the Law of Succession Act, requires that where the deceased had during his lifetime given or settled any property to any child then such property ought to be taken into account in determining the share of the net estate finally accruing to such a child. This bespeaks *inter vivos* transfers, what is also referred to as bringing property dealt with *inter vivos* or through testate succession into the hotch potch to facilitate equitable distribution in intestacy. Intestate succession envisages equal or equitable distribution, and this provision is meant to ensure that at the end of it all the beneficiaries are dealt with equally and without discrimination, so that none of them leaves richer or poorer than the other, or gains or benefits more from the estate than the other. Those said to have so benefited were mentioned as Andreano Musembi, Mikanory Okwanda, Luka Musungu and Peter Andati.

20. It would appear that the administrator proposes that Peter Andati should also benefit from Butsotso/Shikoti/79, on the grounds that the deceased had intended that he also benefits from the same. I have already found that the wishes of the deceased regarding Butsotso/Shikoti/79 are not binding, for they amounted to a failed *inter vivos* transfer if at all he had expressed any wishes on the distribution of the said property. Secondly, Peter Andati was given Butsotso/Shikoti/1116, which he admitted was twelve (12) acres. Butsotso/Shikoti/79 is said to be thirty-two (32) acres. There are four sons of the deceased who did not benefit from the *inter vivos* transfers, and there are seven (7) daughters too, and the church. If the said land was to be divided amongst the four sons each would be getting about eight acres. If the daughters are brought into the matrix, each of the eleven (11) children sharing equally would get just under three (3) acres. Either way, the four sons and the daughters would get far much less than what the older four sons got. The situation already presents an unequal distribution in favour of the four older sons, which is contrary to the spirit of Part V of the Law of Succession Act. The *inter vivos* transfers cannot be revisited. The only was to do justice to the sons and daughters who did not benefit from the *inter vivos* transfers is to exclude the older sons from the distribution of Butsotso/Shikoti/79. That should knock Peter Andati out of contention.

21. On the manner of the distribution or sharing out of Butsotso/Shikoti/79, I note that the administrator proposes distribution. He allocates himself 5.78 hectares, the estate of Joram Shikuku 2.34 hectares, the protestor 1.32 hectares, Thomas Ochango 3.54 hectares and gives Peter Andati 0.50 hectare. No explanation is offered in the supporting affidavit for the uneven distribution. Yet, the spirit of Part V favours equal distribution. It was suggested at the oral hearing that the said proposal was founded on the distribution on the ground by the deceased, and therefore it reflected the land as occupied and mapped out on the ground.

22. The deceased herein appears to be survived at this stage only by children. The provision that should apply to distribution of his estate should be section 38 of the Law of Succession Act, which provides:-

> *'Where an intestste 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 be equally divided among the surviving children.'*

23. It is averred that the deceased had sold part of the property to a church. There is unanimity on this. The issue was disposed of by consent, when a consent was recorded on 19th September 2001, to the effect that the land occupied by the church be surveyed and thereafter allocated to the church. At the oral hearing the protestor expressed support for provision to be made to the church.

24. I have already pointed out that the petition filed herein did not comply with the prerequisites of section 51(1)(g) of the Law of Succession Act and rule 7(1)(e)(i) of the Probate and Administration Rules, as a large number of survivors or beneficiaries was concealed from the court or was not disclosed. That is a ground under section 76(a) (b) (c) of the Law of Succession Act for revoking the grant. I do not have before me an application for revocation of the grant, but I do have discretion under section 76 to do so *suo moto*. The matter is that serious. It should suggest to the parties that there are some very serious issues that require addressing before it can be said the environment is conducive for

distribution of the property.

25. I note that this is a very old mtter. The deceased died in 1988. The cause was initiated in 1994, and the estate is yet to be distributed. I shall therefore refrain from revoking the grant, as doing so would set the parties back quite a bit. I shall instead make orders that shall advance a faster disposal of the matter. Section 71 of the Act gives me some tools to achieve just that. Section 71(2) (d) allows me to postpone confirmation of grant to allow the administrator address some of the issues that I have pointed out.

26. In the end I shall make the following orders:-

(a) That the confirmation of the grant herein is postponed;

(b) That in the interim the administrator shall –

(i) include the names of the daughters of the deceased or any children of any dead daughter of the deceased in the schedule or list of the survivors of the deceased for accordance of doubt the names of the daughters are, Dorcas Luchera, Veronica Leah, Iseri Nyabera, Sarah Indeche, Elimina Ambia, Joan Evita and Rose Anyona;

(ii) make provision for the portion of the land that was sold to the Charismatic Episcopal Church of Kenya by the deceased;

(iii) make provision for equal distribution of the remainder of Butsotso/Shikoti/79 between Charles Otwero Nabwayo, Tomas Ochungo, Abner Atswenje, the late Joram Shikuku, Dorcas Luchera, Veronica Leah, Iseri Nyabera, Sarah Indeche, Elimina Ambia, Joan Evita and Rose Anyona; and

(iv) should the daughters, or any one of them, be not interested in taking up a share in the estate they shall file affidavits or deeds renouncing or waiving or declining their share;

(c) that the administrator shall file a further affidavit to address the matters stated in (b) above;

(d) that the matter shall thereafter be mentioned on a date to be assigned at the delivery of this judgement for compliance and further directions.

27. Any party aggrieved by the judgment herein shall be at liberty to move the Court of Appeal appropriately.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31st DAY OF January, 2019

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 7th DAY OF February, 2019

J. NJAGI

JUDGE