



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 438 OF 1994

IN THE MATTER OF THE ESTATE OF AINEA MUCHUSU BUSULA (DECEASED)

JUDGMENT

1. This matter relates to the estate of Ainea Muchusu Busula, who died on 10th September 1987. According to a letter from the Chief of Central Kabras Location, dated 6th July 1994, the deceased had married twice, and had children with his two wives. His wives were said to be Damara Muchisu and Susan Muchisu, while their sons were Philip Busule, Meshack Shikenga, Thomasi Muchisu, Nyongesa Muchisu, Shitanda Muchisu and Musa Muchisu. The deceased was said to have died possessed of Kakamega/Malava/545.
2. Representation to his estate was sought vide a petition lodged herein on 21st September 1994 by Damara Muchisu, in her capacity as widow of the deceased. She expressed the deceased to have had died possessed of Kakamega/Malava/545 and to have had been survived by the individuals named in the letter of the Chief referred to in paragraph 1 here above. Letters of administration intestate were made to her on 20th February 1995, and a grant was duly issued, dated 29th March 1996.
3. A summons for revocation of the said grant, dated 28th October 2003, was lodged herein on even date, by Susana Muchisu, to be hereinafter referred to as the applicant. The grounds upon which the application was premised and the factual background to the application are given in the affidavit in support of the application, sworn by the applicant on the same date. Whereas she did not complain about the factual background to the estate of the deceased, save for adding Alex Muchisu to the list of the sons of the deceased, she was unhappy that her consent had not been obtained before the petition was lodged in the cause. Her case was that the grant was obtained on the basis of concealed facts.
4. The administratrix responded to the application through an affidavit that she swore on 11th July 2005. She denied concealing information from the court, but conceded that the consent of the applicant had not been obtained. She explained that consent was not sought or obtained on account of bad blood between the two families. She stated that she had disclosed all the members of the family of the deceased, adding that if there was any exclusion then the same occurred on account of a typing error.
5. The application was determined in a ruling that was delivered on 24th March 2006, wherein the applicant was appointed a co-administratrix of the estate with Damara Muchisu. I shall accordingly refer to the two as administratrices, Damara Muchisu being the 1st administratrix and Susana Muchisu as the 2nd administratrix.
6. Thereafter, the 2nd administratrix lodged a summons herein on 15th March 2010, for confirmation of the said grant. She expressed the deceased to have had been survived by the individuals named in her summons for revocation of grant dated 28th October 2003, and to have died possessed of Kakamega/Malava/545. She proposed that the said property be shared out between the two widows so that the 1st administratrix took 2.5 acres, while the 2nd administratrix took 3.00 acres.
7. Directions were given for service of the application on all the beneficiaries. There are numerous affidavits of service evidencing service of the application. I have ploughed through the file of papers before me, and the only affidavit in response that I have come across was sworn by Philip Busula Muchisu on 22nd January 2013. He averred to be a son of the deceased and the 1st administratrix. He mentioned his brothers from the 2nd administratrix as Meshack and Thomas. He stated that the deceased had two wives, each of whom had three sons. He expressed that he was opposed to the distribution proposed by the 2nd administratrix. He averred that the deceased had only one asset, Kakamega/Malava/545, which he proposed to be shared out equally between the two widows who should thereafter distribute the same amongst their sons. He asserted that the deceased had not distributed the land before he died, and denied that the 2nd administratrix had been given three acres of it at that time.
8. Directions were given on 2nd April 2014 for disposal of the application by way of oral evidence, where the parties were to call witnesses. The oral hearing commenced on 22nd May 2017, with the 2nd administratrix applicant on the witness stand. She testified that the deceased had distributed his land before he died, and he did so with the assistance of elders. She said the land was divided between her and her co-wife, the 1st administrator. She stated that when the elders sought to subdivide the property between the two widows after the deceased's death she informed them that the deceased had already shared out the property. She testified that the deceased left behind six sons, three of

whom were hers. She also stated that she had four daughters. She mentioned that her co-wife had three sons and three daughters, one of whom had died. She stated that she wanted the court to give each of the widows a title deed so that they could thereafter distribute the property amongst their children. She also alleged that the deceased had left a will. She said that the deceased had only one parcel of land, which was occupied by the two widows, who were separated from each other by a road. She asserted that each widow already had their own share according to how the deceased had distributed the property. She said that she had set apart a half acre for her daughters who were yet unmarried. She said that she had no interest or claim to the portion of the land that had been given to her co-wife by the deceased.

9. Samson Nyongesa Shihuma testified on 10th December 2018 as a witness for the 2nd administratrix. He described himself as a village elder, who knew the deceased and his two widows. He said that the deceased had in 1975 told him that each of his wives were to cultivate one side each of the subject land. He died in 1987, and left Charles Nasimiya to distribute amongst his two wives. The said Charles Nasimiya did so and also died. He said that each widow cultivated on their own portion of the land together with her children. He said that what remained was for a land surveyor to go to the ground and share out the property amongst the children. He said that the deceased distributed his property through his brother Charles Nasimiya.

10. The 1st administratrix took to the witness stand on 3rd July 2019. She confirmed that she and her co-administratrix were the widows of the deceased. She could not tell the total number of children that the deceased had, which can be granted given that she appeared elderly to me at the time she testified. She stated that the deceased had only one piece of land. She said that her co-administratrix had refused to agree on distribution. She asserted that she was the first wife, and that it was not the younger wife who shared out the land, adding that the 2nd administratrix had refused to let her share out the land. She claimed that the 2nd administratrix had given herself most of the land, leaving her with only one (1) acre.

11. She called Busula Philip as her witness. He confirmed that the deceased had two wives. The 1st administratrix had five children and the 2nd administratrix had seven, one of whom had died. He testified that the deceased had only one piece of land which had been split into two portions by a road. He stated that he preferred the property to be shared out between the sons as the two widows were elderly. He proposed equal sharing between the sons. He stated that not all the daughters of the deceased were married, adding that one of them was blind. He accused the 2nd administratrix of uprooting sisals that had been planted by the elders, and of refusing to cooperate with their side of the family. He said he was unaware that the deceased had given directions on the sharing of the land. He named the children of the 1st administratrix as Philip Busula, Meshack Shikanga, Thomas Muchisu, Agnes Nalyaka and Zipporah Muchisu; the 2nd administratrix's children were said to be Daniel Nyongesa, Alex Shitanda, Musa Muchisu, Rabeka Muchisu, Agnetta Muchisu, Nanzala Muchisu and Shikungu Muchisu.

12. The matter before me is for confirmation of the grant that was made on 24th March 2006 to the two administratrices. The deceased died in 1987, after the Law of Succession Act had come into force in 1981. The administration and distribution of his estate, therefore, fell under the provisions of the said Act.

13. The legal framework for confirmation of grants is set out in section 71 of the Law of Succession Act, which state as follows:

“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.

(2A) *Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to section 66, appoint as administrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion.*

(3) *The court may, on the application of the holder of a grant of representation, direct that such grant be confirmed before the*

expiration of six months from the date of the grant if it is satisfied—

(a) that there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application;

(b) that it would be expedient in all circumstances of the case so to direct.

(4) Notwithstanding the provisions of this section and sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that—

(a) there is no dependant, as defined by section 29, of the deceased other than the petitioner;

(b) no estate duty is payable in respect of the estate; and

(c) it is just and equitable in all circumstances of the case, immediately issue a confirmed grant of representation.”

14. There are two aspects to confirmation of grants. The first relates to confirmation of the administrators, while the second is about distribution of the estate. On the first aspect, which is covered by section 71(2)(a) of the Law of Succession Act, there are two dimensions to it. The first relates to the manner of appointment, in terms of whether or not it was done properly. The second relates to the manner of the actual administration of the estate; whether the administrators, upon their appointment as such, went about administering the estate in accordance with the law up to the point of confirmation, and after confirmation whether they would continue to properly administer the estate. On the issue of appointment there is no dispute. Neither is there any issue on the manner the estate has been administered.

15. The second aspect of the confirmation process is the distribution of the estate. The proviso to section 71(2) requires that the court be satisfied, before distribution, that the administrator has ascertained all the persons who are beneficially entitled to the estate and has determined the shares of each one of them to the assets. That presupposes that all the assets available for distribution should also be ascertained before distribution can be proposed, for distribution should be of the assets that are available for distribution. Just like the first aspect, there is no dispute here as to the survivors of the deceased and the assets available for distribution.

16. The only dispute appears to revolve around how the estate is to be distributed. Distribution of an intestate estate is regulated by Part V of the Law of Succession Act. Priority goes to the surviving spouse, followed by the children. The ultimate destination of the estate is to the children, but they do not take absolutely during the lifetime of a surviving spouse, unless of course the surviving spouse and the children agree otherwise. Any other relatives only take where there is no surviving spouse nor children. Section 35 of the Law of Succession Act states as follows:

“35. Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—

(a) the nature and amount of the deceased’s property;

(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse; (c) the existing and future means and needs of the applicant and the surviving spouse;

(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will; (e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and

(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children. Where intestate has left one surviving spouse but no child or children."

17. Going by the provisions of section 35, as the deceased herein was survived by spouses, the children cannot take directly. Priority will have to go to the spouses, who will be entitled to life interest with the children taking only after the determination of the surviving spouses life interest in the manner stated in section 35.

18. The deceased was a polygamist having had married twice. His estate, therefore, ought to be distributed in line with the law governing the distribution of the intestate estate of a polygamist. The law on that is section 40 of the Law of Succession Act, which provides as follows:

"40. Where intestate was polygamous

(1) Where an intestate has married more than once under any system of law permitting 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 the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38."

19. I understand that provision to say that the polygamist's estate has to be distributed amongst his family by taking into account the number of households in the family, and the number of children in each household. The estate is then distributed or shared out amongst the households taking into account the number of surviving spouses and children in each household. The deceased had two wives, and children with each one of them. The 1st administratrix had five children, being three sons and two daughters, one of whom is dead; while the 2nd administratrix had seven children, being three sons and four daughters. It is not clear when the daughter of the first house passed on, and whether she was a minor or a major at the point of her death. I shall take it that the first house had five children, while the second house had seven children. Adding the two widows as additional units it means that the first house had six units and the second house eight units, making a total of fourteen units. The ratio of sharing should work out at 6:8 or 3:4.

20. The 2nd administratrix talked of the deceased having had shared out his property during lifetime. That was contested by the other side of the family. I am not persuaded that there is adequate evidence to support that contention. In any event, it would appear to me that if ever there was any such sharing the same was about how the land was to be utilized during the deceased's lifetime, and not about absolute sharing. If the deceased had intended to divide his property during lifetime, he would have had effected *inter vivos* transfers. The land in question is registered land. Division and sharing of such land should have been effected through the provisions of the relevant land legislation. Since no *inter vivos* gifts were made by the deceased, it follows that his estate has to be disposed of strictly within the provisions of Part V of the Law of Succession Act.

21. I note that the administratrices talk only of the sharing of the property between themselves and the sons. None of them suggests that the daughters of the deceased ought to get a share out of the estate. Yet, the deceased died after the Law of Succession Act had come into force. The said law does not discriminate between the male and female children of the deceased when it comes to sharing of the estate of their deceased father. It envisages equal treatment of the genders and equal distribution of the estate as between them. That spirit of equal treatment and equal sharing comes out quite clearly in sections 35(5) and 38 of the Law of Succession Act. The said provisions state as follows:

"35. Where intestate has left one surviving spouse and child or children

(1) ...

(2) ...

(3) ...

(4) ...

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

36 ...

37 ...

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.”

22. These provisions in sections 35(5) and 38 apply to section 40, which provides, at subsection (2), that the “distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

23. Therefore, under the Law of Succession Act, all the children of the deceased, be they sons or daughters, be they single or married, are entitled to a share in the estate of their departed father. The sharing should not be confined to the sons and the widows. Equally, the sharing to the daughters should not be dependent on the generosity or charity of the sons and widows. It is a matter of right. It cannot be taken away at the whim of the sons or the widows. The daughters should not get a share of the estate at the will of the other categories of beneficiaries. The daughters are at par with the sons with respect to entitlement to a share in the estate. The only time the daughters should not get a share in the estate is where they had renounced or waived their right to a share in the estate. That waiver or renunciation must be in writing or through a pronouncement or statement made orally in court before the presiding judicial officer. It should never be presumed that the daughters are not interested in the estate. They must be factored as a matter of law, until such time that they have waived or renounced their right. It is unacceptable that they are treated as if they do not exist. There is nothing on record with regard to this estate indicating that the daughters of the deceased had renounced or waived their share to the estate. They did not attend court to state their position. It is not clear to me whether they were ever made aware of the proceedings. Generally, they have been treated as if they never existed nor mattered, yet the law provides that they are entitled to a share in the estate.

24. The rights of daughters, as stated in sections 35 and 38 of the Law of Succession Act, are reinforced by Article 27 of the Constitution of Kenya, which provides for equal treatment of all in the eyes of the law regardless of their gender and other differentiating factors. Any disregard of sections 35 and 38 of the Law of Succession Act has to contend with the constitutional protections in Article 27. No one can override the supreme law of the land. For avoidance of doubt Article 27 of the Constitution states as follows:

“27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same”

25. In view of what I have stated above, I shall dispose of the application dated 15th March 2010 in the following terms:

(a) That I hereby confirm Damara Muchisu and Susan Muchisu as the administratrices of the estate of the deceased;

(b) That I hereby declare the said Damara Muchisu and Susan Muchisu as the surviving spouses of the deceased; and Philip Busula, Meshack Shikanga, Thomas Muchisu, Agnes Nalyaka, Zipporah Muchisu, Alex Shitanda, Musa Muchisu, Rabeka Muchisu, Agnetta Muchisu, Nanzala Muchisu and Shikungu Muchisu as the surviving children of the deceased;

(c) That the estate of the deceased shall be shared out between the two houses of the deceased at a ratio of 3:4 in terms of section 40 of the Law of Succession Act;

(d) That thereafter the property in each house shall devolve upon the surviving widow during lifetime and thereafter to the children in equal shares;

(e) That the reference to children in (d) shall include the daughters of the deceased;

(f) That a certificate of confirmation of grant shall issue accordingly in those terms;

(g) That each party shall bear their own costs; and

(h) That any party aggrieved by the orders that I have made herein shall have the liberty, within twenty-eight (28) days, to move the Court of Appeal appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF OCTOBER 2019

W. MUSYOKA

JUDGE