REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 370 OF 2006

IN THE MATTER OF THE ESTATE OF OBUYA NDUNDE (DECEASED)

RULING

1. The certificate of death serial number 866574, dated 6th October 2005, indicates that the deceased to whose estate this cause relates, was known as Obuya Ndunde person, who died on 20th July 2004.

2. Representation to the intestate estate of the deceased was sought in this cause by Isaiah M. Opuya, in his purported capacity as a son of the deceased, through a petition that was filed herein on 12th July 2006. He listed himself and seven other individuals as the survivors of the deceased. The said individuals being Isaiah M. Opuya, Shem Harambee, Musungu Obuya, Wilfred Kitelesi Obuya, Shango Obuya, Duncan Lumumba Obuya, Benjamin Obuya and Juma Obuya. It is not indicated how these individuals were related to the deceased. The deceased was expressed to have died possessed of assets known as West Kenya Market Plot No. 1572 and S/Kabras/Bushu/2563. Letters of administration intestate were made to him on 15th September 2006, and a grant was duly issued, dated 9th July 2007. I shall hereafter refer to Isaiah M. Opuya as the administrator.

3. On 19th January 2009, a summons for revocation of the said grant, dated 13th January 2009, was lodged herein, brought at the instance of Miriam Obuya. She complains of four keys things. Firstly, that several children of the deceased were excluded from the schedule of survivors, and she names those excluded as Isaac Shitialo Obuya, Jafeth Weranala Obuya, Lazarus Ndunde Obuya, Joseph Mukangai Obuya, Wale Obuya, Sanji Obuya and Levi Obuya. Secondly, that although the deceased had been survived by widows, the said widows had been left out. The three widows left out included herself, that is to say Miriam Obuya, and her co-wives, Jeska Wayesa Obuya and Mary Anjelina. Thirdly, she states that two assets of the estate had been left out, being S. Kabras/Bushu/1241 and 1811. Fourthly, that one asset was wrongly described, being West Kenya Market Plot No. 1572, its actual land reference number is S. Kabras/Shamberere/1572. She argues that the administrator was not, in her view, a proper person to administer the estate.

4. The application dated 13th January 2009 has never been determined. What the court did on 16th February 2011 was to give directions that the parties do file affidavits on distribution within given timelines. I suppose that by so giving directions the court desired that the parties move to distribution of the estate rather than engaging on applications that serve to delay finalization of the matter. Needless to say that the issues that arise in revocation applications are subsumed in a confirmation application since one of the issues that the court is called upon to decide is whether to confirm the administrator to complete administration of the estate or not

5. Although I have talked of a confirmation application above, none was filed in this cause. The directions were for the filing of affidavits proposing distribution of the estate. The parties did not file a summons for confirmation of grant, instead they filed affidavits on distribution as directed. With respect, I must state that I find that to be an unusual approach to distribution. The Law of Succession Act, Cap 160, Laws of Kenya, does not envisage the filing of such affidavits which are not grounded on any application. Distribution of an estate is proposed in applications that are filed under section 71 of the Law of Succession Act by the grant-holder. Any party who does not agree with the proposals by the grant-holder is the allowed by Rule 40(6) of the Probate and Administration Rules to file an affidavit of protest to state his case and probably make his own proposals, depending, of course, on the nature of his proposals. The matters that would be taken into account by a court faced with a distribution proposal are addressed in sections 71 of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules. Dealing with proposals that are in affidavits not anchored on a formal application could present challenges with regard to whether section 71 and Rules 40 and 41 would apply. These provisions are in mandatory terms and it would appear that a grant ought not to be confirmed unless there has been filed a summons for that purpose.

6. Be that as it may. I shall handle the affidavits on distribution that have been placed on record as if they were anchored on an application for confirmation of grant, and I proceed to subject them to the tests set out in section 71 of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules.

7. There is only one affidavit on distribution, filed on 8th March 2011, by Miriam Obuya, sworn on 7th March 2011. The deponent lists the assets that the deceased allegedly died possessed of as S. Kabras/Bushu/1241, 1811 and 2563, and S. Kabras/Shamberere/1572. She does not identify the survivors of the deceased, that would mean the persons beneficially entitled, instead she proposes distribution to certain individuals without indicating how they were related to the deceased. She proposes that S. Kabras/Bushu/2563 be shared out equally between Isaya Opuya, Shem Harambee Obuya, John Madioni Obuya, Benjamin Obuya, Bernard Bosco Obuya, Dickson Wale Obuya, Festo Sanji Obuya, Lenny Obuya and Juma Obuya. She proposes that S. Kabras/Bushu/1241 should devolve wholly upon Japheth Obuya; while S.

Kabras/Bushu/1811 is to devolve upon Isaac Obuya, Lazarus Obuya, Jose Obuya and Miriam Obuya. She allocates S. Kabras/Bushu/1572 to herself, Jesca Obuya and Mary Obuya.

8. No directions were ever given on the disposal of the affidavit on distribution. It would appear that the parties on their own motion filed written submissions, which they invited me, on 22nd July 2019, to consider. There are two sets of written submissions on record. One was filed by the administrator, dated 12th July 2017; while the other was filed by Jessica Obuya, dated 9th October 2017. I have read through them and noted the arguments made therein.

9. In a confirmation application, the court is called upon to address two issues – the appointment of the administrators and the 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—*
>
> > *(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."*

10. The principal purpose of confirmation of a grant is distribution of the assets amongst the persons who are beneficially entitled. The proviso to section 71(2) requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to shares in the estate and properly identified the shares due to them. It is stated emphatically that the court shall not confirm the grant before it is so satisfied. In the circumstances, there would be no need for the court to address the matters that fall under section 71(2) if what is envisaged in the proviso has not been complied with. 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."*

11. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with in the instant case? I do not think so. None of the parties have given a clear picture as to who the actual survivors of the deceased were. Yet, I am required to distribute the estate amongst them. Survivors fall in different classes and categories as their entitlements under Part V of the Act are different, for example surviving spouses are entitled differently from surviving children.

12. The administrator did not disclose that the deceased had been survived by spouses; that was disclosed by one of the spouses in the revocation application. She also disclosed children that the administrator had suppressed. The widow, however, did not give a breakdown of the children of the deceased from each widow or from each house. The deceased died a polygamist. The estate should be distributed in accordance with section 40 of the Law of Succession Act. For the court to be in a position to distribute the estate in accordance with that provision the number of children from each of the three, or more, houses should be given, and their names disclosed against each house. For avoidance of doubt, section 40 of the Law of Succession Act provides as follows:

> *"40. Where intestate was polygamous*
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> *(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.*
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> *(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." (emphasis added)

13. It is common ground that only the sons of the deceased have been disclosed. I doubt whether it is possible that from all his three wives the deceased did not get daughters. It is not disclosed whether or not he had daughters, yet section 51(2) (g) of the Law of Succession Act requires such disclosure. The deceased died in 2004, after the Law of Succession Act had come into force in 1981, and that meant that, according to section 2(1) of the Law of Succession Act, the estate fell for distribution in accordance with the provisions of the Law of Succession Act, and specifically Part V thereof since the deceased died intestate. The distribution envisaged under Part V is equal amongst all the surviving children of the deceased, be they male or female, married or unmarried. It should be emphasized that the Law of Succession Act is gender neutral. Reference in it to children should not be construed to be to male children only, but rather to both gender. The parties have an obligation to disclose all the children of the deceased regardless of their gender. It cannot be emphasized more that section 51(2) (g) of the Law of Succession Act, which provides for applications for representation, envisages that all the surviving children of the deceased ought to be disclosed. A daughter of a deceased person is a child. She must be disclosed if the deceased had such a child. Section 51(2)(g) states as follows:

"*51(2) Every application shall include information as to—*

> *(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;"*

14. The administrator has a duty to comply with the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules. I do not think that he has complied with it. I cannot possibly proceed to determine the matter of the distribution of the estate in any way before the administrator complies with the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules.

15. In the end, I shall make the following orders and give the following directions:

(a) That I hereby postpone making orders on distribution of the estate herein, in terms of section 71(2)(d) of the Law of Succession Act;

(b) That I direct the administrator to file a further affidavit in which he shall list the names of the children of the deceased, including daughters, if the deceased had any, in accordance with the wives or houses of the deceased;

(c) That any of the other parties are at liberty to file such affidavit;

(d) That the further affidavit in (b), above, shall be filed within twenty-eight (28) days;

(e) That the matter shall be mentioned thereafter on a date to be given at the delivery of this ruling; and

(f) That I shall make final orders on the distribution once the administrator, or any other party, complies with (b) above.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8TH DAY OF NOVEMBER 2019

W. MUSYOKA

JUDGE