



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 736 OF 2011

IN THE MATTER OF THE ESTATE OF SHEM OMUHONJA (DECEASED)

JUDGMENT

1. On 11th October 2012, the court herein revoked a grant that had been made in Maseno SPMSC No. 10 of 2009 to Johnstone Otemba John on 18th May 2009 and made a fresh grant to Welson Shem Oluoch, who I shall hereafter refer to as the administrator, and directed him to apply for confirmation of his grant. The orders made in Maseno SPMSC No. 10 of 2009, confirming the revoked grant, were set aside and the subject property, being West Bunyore/Embali/951 and 1656 was ordered to be reverted back to the estate.
2. In compliance with the said application, the administrator lodged herein, on 6th October 2014, a summons for confirmation of grant, dated 5th August 2014. He identifies himself as the sole survivor of the deceased, on account of being a son of the deceased. He ascertained West Bunyore/Embali/951 and 1656 as the assets available for distribution, and proposes that the two of them wholly devolve upon himself.
3. Johnstone Otemba John, the initial administrator in Maseno SPMSC No. 10 of 2009, filed an affidavit of protest on 19th October 2015, sworn on even date. I shall hereafter refer to him as the protestor. He avers to be a grandson of the deceased. He explains that the deceased had four sons, being John Khatika, Peter Afia, Martin Etsimile and the administrator. Of the four, he avers, only the administrator was alive. He states that the late John Khatika was his father, and he had died before the distribution of the land in question was done. He explains that the family of the late Martin Etsimile was in occupation of W/Bunyore/Embali/1656. He states that W/Bunyore/Embali/951 was to be shared equally by the late Peter Afia, the late John Khatika and the administrator. He asserted that on the ground he was in occupation of the property that was allocated to his late father. He explains that the property in dispute was what was occupied by his late uncle Peter Afia who died without a wife or children. He states that the original arrangement was that he would live with the said Peter Afia till his death, which he did and even took care of his funeral expenses when he eventually died. He was in turn to take the portion that was due to him. He avers that after the death of Peter Afia, the administrator began to interfere with the share of Peter Afia. They called in elders, who resolved that the portion be shared out between the two of them. He proposes distribution of the estate: so that Jefresi Aluso Okechi takes West Bunyore/Embali/1656 for the family of Martin Etsimile; West Bunyore/Embali/951 goes to Nelson Shem Oluoch and Johnstone Otemba John. He proposes that the share of the late Peter Afia in W/Bunyore/Embali/951 be shared out equally between himself and a son of the administrator called Shem Opati.
4. The administrator filed another affidavit in court on 27th January 2016, sworn on 26th January 2016, in which he proposes another mode of distribution. He has identified the persons who he says should share the property. He has not given an indication as to how these people are related to the deceased. They are himself, the protestor, Daniel Oluoch Shem, Shem Olieti Omuhonja, Joshua Oluoch Shem, Ben Oluoch Omukhulu, Jefris Aluso Etsimile, Fanis Oyieli Etsimile, Roseline Etsimile, Rispa Etsimile, Gladys Oranga Etsimile and Tumaini Nabale John. He proposes that that the protestor takes $\frac{1}{4}$ of West Bunyore/Embali/951 and the remaining $\frac{3}{4}$ be shared equally between himself, Daniel Oluoch Shem, Shem Olieti Omuhonja, Joshua Oluoch Shem and Ben Oluoch Omukhulu. He proposes that West Bunyore/Embali/1656 be shared out in undefined shares between Jefris Aluso Etsimile, Fanis Oyieli Etsimile, Roseline Etsimile, Rispa Etsimile, Gladys Oranga Etsimile and Tumaini Nabale John.
5. He swore yet another affidavit on 14th October 2016, which he filed in court the same day. It is expressed to be a reply to the affidavit of the protestor of 19th October 2015. He agrees with the protestor on the relationship between himself and the protestor and the deceased. He also agrees with him regarding the deceased having four sons, three of who have since died. He also concedes that the late Peter Afia died and was not survived by a spouse or children. He states that the father of the deceased had been given two parcels of land in 1956, which he subsequently sold to Ochingwa Amamialo and Janice Omolo, whereupon he relocated to Tanzania. He resurfaced sometime in 1977, with the protestor, after the deceased had died and was buried. The father of the protestor then died in 1980, when the protestor was still of tender years, and it fell upon the administrator to raise him. He states that the late Martin Etsimile had occupied West Bunyore/Embali/1656, but the same had not been given to him, hence the same was available for distribution. He asserts that the protestor was not entitled to a share in West Bunyore/Embali/951 as his father had been given his share of the family wealth, which he sold. He asserts that he was the only person entitled to the said property. He states that the allegation that the protestor should get that land on account of having taken care of the late Peter Afia did not wash. He claims that he was the one who took care of the late Peter Afia and paid for his burial expenses. He also states that West Bunyore/Embali/1656 is yet to be shared out. He asserts that the proposal by the protestor ought to be disregarded as he was not a son of the deceased.
6. On 4th April 2019, the administrator visited the court registry and obtained 18th July 2019 as the hearing date. Come the said day, he was

not in court, but the protestor was. The matter proceeded with the protestor and his witness testifying. .

7. According to the testimony of the protestor the deceased had distributed his land amongst his four sons, but the land was not surveyed on the ground but each of the four had their shares. He asserted that West Bunyore/Embali/951 was given to John Khatika, Nelson Shem and Peter Afia. He stated that there were boundaries on the ground. He testified that Martin Etsimile had been given West Bunyore/Embali/1656. He was said to have had died on that parcel of land and his wife too died there and the remains of the two were buried on that land. He states that the land was in occupation by his children. West Bunyore/Embali/951 was said to be used by the children of John Khatika and Nelson Shem. Peter Afia was said to have died without a wife and children. He said that Peter Afia had raised him as his own child. He said that elders had sat and decided that he should take his share, with the other half of the land going to the administrator. He said that the administrator chased him out of the land, and put his own son in occupation. That happened after Peter Afia died in 2003. He stated that most of the persons listed in the administrator's affidavit of 26th January 2016 were grandchildren of the deceased, some of them being children of the administrator. He stated that distribution should be as per the sons of the deceased. He stated that the children of the administrator should take the administrator's estate. He proposed that West Bunyore/Embali/951 should be given to him and his brothers, the second portion to the administrator and the third portion due to Peter Afia should be given to him and Shem Olieti the son of the administrator. He said that West Bunyore/Embali/1656 should be given to the family of the late Martin Etsimile. He said that he had no claim to that property.

8. His witness, Jefresi Aluso Okechi, was a granddaughter of the deceased, being a son of the late Martin Etsimile. She testified that the deceased had shared out his land amongst his four sons. She said that his father had been given West Bunyore/Embali/1656, he lived there, died there and was buried on that portion of land, and so was her mother. She said that the other brothers of the deceased were on the other parcel of land, West Bunyore/Embali/951. She said that she wanted West Bunyore/Embali/1656 to be put under her name. She said that they were five daughters and she wanted to hold the said property in trust for the rest of her sisters. She also said that they could also get a share of what the late Peter Afia was to get out of West Bunyore/Embali/951.

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

(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 is distribution of the assets. The proviso to subsection (2) of section 71 is 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 had properly identified the share due to them. The proviso is emphatic that the grant shall not be confirmed before the court is so satisfied. Therefore, there is no need for me 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.”

11. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? I do not think so. Neither the administrator nor the protestors have given a clear picture of who the actual survivors of the deceased were. It is common ground that the deceased had four sons. It is not disclosed whether or not he had daughters, yet section 51(2) (g) of the Law of Succession Act required such disclosure. The deceased died in 1974, which was before the Law of Succession Act came into force in 1981, and that meant that, according to section 2(2) of the Law of Succession Act, the estate fell for distribution in accordance with the law and customs which applied before 1st July 1981. The deceased died intestate, and, the parties being Luhya, it is presumed that he died a Luhya, and Luhya customary law of succession applied to the distribution of his estate. However, the same section 2(2) applies Part VII of the Act to the estates

subject to section 2(2). Section 51 of the Act is resident within Part VII. For avoidance of doubt those provisions state as follows:

“2(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

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

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(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;

(h) ...”

12. It cannot be emphasized enough that section 51(2) (g) of the Act 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. The Law of Succession Act is gender neutral and, therefore, reference to children should not be read to mean male children, it, of necessity, include any female children.

13. Apart from that, it is common ground that three sons of the deceased had themselves died. In a scenario where children of a deceased person are dead, whether the death occurs before or after that of the deceased, if such dead children had children of their own then those children ought to be disclosed. The Act does not have any provision that directly addresses the matter, but the common law has the principle of representation or substitution, where the surviving children step into the shoes of their dead parent and take the share that would have gone to their dead parent. It would be representation as the child represents their dead parent or substitution as they substitute their dead parents. The law on this is obliquely stated in section 41, but its spirit is also found in sections 39 and 51(2) (g) of the Law of Succession Act. The provisions state as follows:

“39. Where intestate has left no surviving spouse or children

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

(a) ...

(b) ...

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) ... (emphasis added)

41. Property devolving upon child to be held in trust

Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate. (emphasis added)

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;” (emphasis added)

14. The children of the deceased who have themselves died in this case were identified as John Khatika, Peter Afia and Martin Etsimile. It is common ground that two of those dead sons of the deceased had married and had children, while one of them died without children. None of the parties have attempted to give the court a clear picture of how many children each of these dead sons had nor disclosed their names. Some names were listed but they were not assigned to any of the dead sons. The administrator, being the applicant, had a duty to comply with the proviso to section 71(2) of the Act. I do not think that he has complied with it. I cannot possibly proceed to determine the summons for confirmation of the grant in any way before the administrator complies with the proviso to section 71(2) of the Act. It must be emphasized that grandchildren of the deceased whose parents are alive play no part at all in the distribution of his estate, and, therefore, none of the children of the administrator ought to feature in the distribution of the instant estate.

15. In view of what I have stated above, I shall make the following orders and give the following directions:

- (a) That I hereby postpone confirmation of the grant 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 daughters of the deceased, if the deceased had any, and the names of all the children of the late John Khatika and the late Martin Etsimile;**
- (c) That the protestor is also at liberty to file such an 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 application dated 5th August 2014 once the administrator or the protestor complies with (b) above.**

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8th DAY OF November 2019

W. MUSYOKA

JUDGE