



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 304 OF 2015

IN THE MATTER OF THE ESTATE OF JOSAM ANYANGU

SHISAMBA alias ANYANGU SHISAMBA LUKOYE (DECEASED)

JUDGMENT

1. This matter relates to the estate of Josam Anyangu Shisamba, who died on 1st February 2007. According to a letter from the Assistant Chief of Bokola Sub-Location, dated 16th April 2012, the deceased had been survived by his widow, Selipher Nechesa Anyangu, and their sons, Samuel Anyangu Shisamba, Ernest Anyangu Shisamba and Malaki Nyapola Anyangu. The deceased was said to have had died possessed of property known as Marama/Shinamwenyuli/1816 and Marama/Lunza/1273.
2. Representation to his estate was sought vide a petition lodged in Butere SRMCSC No. 35 of 2012, by Samuel Anyangu Shisamba, in his capacity as son of the deceased, on 20th April 2012, he expressed the deceased to have had died possessed of the property and to have been survived by the individuals mentioned in the Assistant Chief's letter that I have mentioned above. Letters of administration intestate were made to him on 5th July 2012. I shall consequently refer to him as the administrator.
3. The administrator lodged an application in Butere SRMCSC No. 35 of 2012, dated 31st March 2015, for confirmation of his grant. He averred in that application that the deceased had settled his three sons on Marama/Lunza/1273, where each had their own home, and proposed that the property be distributed according to how the same was occupied on the ground. He proposed that Marama/Shinamwenyuli/1816, being a developed property, be registered in the joint names of the three sons.
4. The court seized of the matter in Butere SRMCSC No. 35 of 2012 formed the opinion that it had no pecuniary jurisdiction to hear and determine it, and on 4th May 2015 it referred the matter to the High Court. Upon being received at the High Court the matter became HCSC No. 304 of 2015.
5. On 22nd November 2016, a summons was lodged herein, dated 21st November 2016, by Selpher Nechesa, Malack Nyapola Anyangu and Francis Anyanga Shisamba, to be known hereafter as the 1st, 2nd and 3rd applicants. The applicants sought stay of the confirmation application, the addition of Francis Anyanga Shisamba as a beneficiary, adequate provision for Selpher Nechesa and distribution as proposed in their application. It was averred that Francis Shisamba was a grandson of the deceased who had been settled on Marama/Lunza/1273 by the deceased. They propose that the property be shared out as proposed in their application.
6. The administrator responded to the application by his replying affidavit sworn on 3rd February 2017. He avers that the 3rd applicant was his own son, born out of wedlock, and that he was the person who had brought him home and showed him a portion of the land given to him by the deceased. He asserted that his name was not Francis Anyangu Shisamba, but Francis Shisamba Anyanga, saying that Anyanga was his own name. He further avers that he built a house for the 3rd applicant on the said portion where he settled him in 2003, and the 3rd applicant demolished the house in 2009, and moved to another piece of land that he had bought. He explained that he could not include the said 3rd applicant as an heir or survivor for he could only take in the event that his father was not alive. As for the 1st applicant, he avers that as surviving spouse of the deceased, she was entitled only to a life interest in the estate. He stated that the deceased had allocated him a 1.2 ha portion in 1986, and to his two brothers, thereafter, 1.3 ha. He asserts that the boundaries fixed by the deceased were intact to date. He added that the Ibokolo land control board had even been approached for approval to subdivide the land, and had in fact approved the subdivision, and he has attached copies of minutes of the said board, dated 15th March 2001. He averred that Marama/Shinamwenyuli/1816 had also been shared out by the deceased between the three sons, in accordance with the rooms. He stated that the shop could not be demarcated as proposed by the applicants.
7. There is another reply to the application dated 21st November 2016, through an affidavit sworn on 10th April 2017, by the Ernest A. Shisamba. He largely supports the position taken by the administrator in his affidavit sworn on 3rd February 2017.
8. The filing of the application dated 21st November 2016 was completely needless. It was clearly intended to be a response to the confirmation application dated 31st March 2015. According to the Probate and Administration Rules, the response to a summons for

confirmation of grant should take the form of an affidavit of protest. All the averments made in the application dated 21st November 2016, and the affidavit in support, are all issues that could have been averred to in a protest affidavit. The approach taken by the applicants served to prolong the process, since a separate application would suggest that it be disposed of separately from the confirmation application yet it raised issues that should have been addressed within the framework of the confirmation application. I shall accordingly dispose of the two applications simultaneously, treating the application dated 21st November 2016 as the protest to the summons for confirmation of grant. For avoidance of doubt Rule 40(6) of the Probate and Administration Rules says:

“Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.”

9. The administrator then swore another affidavit on 24th March 2017, and filed it herein on 27th March 2017, apparently to comply with directions that the court had given on 14th February 2017. That affidavit carries the same averments as those in his affidavit sworn on 3rd February 2017.

10. The confirmation application was heard orally on 1st July 2019.

11. Malaki Nyapola Anyangu, the 2nd applicant, was the first person to take the witness stand. He averred that the succession cause had been initiated by the administrator without involving him, and when he got to hear of it he filed a caution against the land. He complained that the letter to support the petition was by an Assistant Chief who was not from his area. He stated that he was opposed to the distribution proposed by the administrator. According to him, the deceased had distributed his estate. He had subdivided his property into four portions in 2000, gave three to his sons and retained one to himself. He fixed boundaries and settled each of the sons in their portions. The four of them then went or the land control board for approval to subdivide and transfer the land, but the process collapsed after the deceased and the administrator began to disagree. He further stated that the deceased also gave some land to Francis Shisamba, who was his grandson, being a son of the administrator, born outside wedlock. He stated that the deceased gave Francis Shisamba the land that he had retained to himself. On the plot, he said that he was opposed to joint ownership as the three of them did not agree on anything. During cross-examination he testified that the farm was subdivided into three portions. He stated that the plot was demarcated into portions.

12. The next on the stand was Mishack Mukolwe Amboye. He was a village elder for the area where the deceased came from. He testified that the deceased had told him that the 3rd applicant was his grandson, who had come to live with him till adulthood. He said that the deceased had told him that he had three sons and he had allocated all of them pieces of land. He stated that the 3rd applicant was a son of the administrator. He stated that the deceased had told him that he had subdivided his land into four pieces, gave three to his sons, and retained one, which he gave to the 3rd applicant. He stated that the widow lived with the 2nd applicant, and that was where the deceased was buried.

13. The 3rd applicant followed. He testified that the deceased was his grandfather, being the father of his father. He said that he was born in 1978 and began to live with the deceased in 1980. He conceded that he was born outside wedlock and that he was raised by his paternal grandfather, the deceased. He stated that he stayed with the grandfather for thirty (30) years until he died. He said the deceased gave him a piece of land as a gift or present. He said that the deceased gave him permission to build on the land, which he did in 2001. He said his piece of land was demarcated. He said that it was the deceased who took care of his needs as his father was not involved in his upbringing. He stated that he was not interested in the commercial plot.

14. Selfa Nechesa came next. She stated that she had come to court because of the 3rd applicant. She said that he was given to her as a small child and he stayed with her until adulthood. She said that she and the deceased met all his needs. She stated that the deceased had given his three sons land, but retained a small portion for himself. When the administrator failed or refused to allocate the 3rd applicant a portion to build on, the deceased showed him where to build his house. When that happened the administrator disputed, even though he had been given his own land. She asserted that she wanted the 3rd applicant to be given what the deceased had given him. She stated that her house was on the 2nd applicant's portion.

15. The administrator came next. He stated that the deceased had shared out his land amongst his sons in 2001. He even took them to the land control board, where the deceased was given consent to subdivide the land into three portions. Each of the sons got a portion. He got the smaller portion. He conceded that the 3rd applicant was his son, who he had sired outside wedlock. He stated that his parents had offered to live with him, although he was the one who catered for his needs. He said that he was the one who settled the 3rd applicant where he built his house. He said that when the deceased took them to the land control board he did not allocate himself any portion of the land. On the second piece of land, he testified that the same was developed by the deceased without assistance from any of his sons. The deceased had divided the rooms within the premises amongst the sons. On the process of obtaining the grant, he stated that he had called the 2nd applicant to a meeting before the 1st applicant, but he did not attend the meeting. He then went to the local Assistant Chief, he called them for a meeting before he wrote the letter that was used to initiate the succession cause. He asserted that the 2nd applicant was listed both in the Assistant Chief's letter and the petition. He testified that the 3rd applicant was his son and would allocate him his share. He stated that he had already allocated him his share, which was approximately 1 acre. He said that although the deceased allocated to him land, the same was not transferred to him. He was only showed the boundaries. He said that after the land control board had granted consent, they brought a surveyor to subdivide the land, but the deceased fell ill thereafter and died before transfers could be done. He said that as at the time of his death, the property belonged to the deceased. On the 3rd applicant, he said that he was given the 1 acre by him and not by the deceased. He explained that he did not get to live with the 3rd applicant because his mother, the 1st applicant, had refused to let go of him.

16. Ernest Anyangu Shisamba followed. He stated that the 1st applicant wanted to have life interest over the entire farm. He explained that her house was within the share of the 2nd applicant. He said that the deceased had shared out the land. He moved into his portion in July 1989, while the administrator moved into his thereafter. It was the 2nd applicant who was left at the original homestead with the parents. He stated that a surveyor thereafter came and marked out the boundaries. He said that his share was equal to that of the 2nd applicant. The

deceased thereafter took them to the land control board. The land control board approved the subdivision into 3 portions. The deceased fell ill after that and died, bringing the process to a halt. He denied that the deceased had given his own portion to the 3rd applicant. He stated that the 3rd applicant was not taken to the land control board. He said that the 3rd applicant was settled on the administrator's side and it was the administrator who put him there. He stated that if the 3rd applicant were settled on his side or on the 2nd applicant's side both of them would have complained. He said the commercial plot had been developed by the deceased and he had showed them their respective rooms, and he wished that that matter remains that way.

17. After the oral hearings, the parties were directed to file and exchange written submissions. I can see from the record written submissions filed on behalf of the applicants, but not for the administrator. I have perused through them and noted the arguments made in there.

18. The deceased died in 2004, which was after the Law of Succession Act, Cap 160, Laws of Kenya, had come into operation in 1981. He died intestate, his estate, therefore, falls for distribution in accordance with Part V of the said Act.

19. In a confirmation application the court is called upon to confirm two issues – the appointment of administrators and distribution of the estate. With respect to the appointment of administrators, the court is required to ascertain whether the administrators had been properly appointed. Secondly, the court is required to evaluate whether, upon being so properly appointed, if it does find that they were so properly appointed, the administrators went about administering the estate in accordance with the law. Finally, the court is required to assess whether the administrators, upon confirmation of their grant, would continue to properly administer the estate in accordance with the law. With regard to the third limb, the court will be guided chiefly by the material before it that points to whether the grant had been obtained properly and whether the administrators had administered the estate properly and in accordance with the law up to the point of the filing of the confirmation application.

20. The confirmation provisions further deal with the sort of orders that the court may make. Where the court is satisfied that the grant was properly obtained, and the administrator had been administering the estate in accordance with the law and will continue to do so, it may confirm the administrator to continue in office. Where it is not so satisfied, it may transfer the confirmed grant to someone else. That effectively means that it would revoke the grant held by the administrator seeking confirmation, and make a fresh grant to someone else and thereafter proceed to confirm that fresh grant in a straightaway manner. It may also postpone the confirmation, where it feels that the administrator may need to make certain adjustments to the proposed distribution, or to bring in other persons omitted, or to do any other thing that may be necessary before the estate is distributed.

21. Section 71 of the Law of Succession Act provides as follows:

“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.”

22. What is of interest to me at this point is whether the administrator herein was properly appointed. With regard to that it will be noted that the court will confirm the administrators to continue with administration to completion, once it is satisfied that the administrator was properly appointed. I note that the appointment of the administrator is not seriously contested. The only person who did raise issue with the matter was the 2nd applicant. He said that the cause was initiated in a process that did not involve him. However, I do note that he was listed in the Chief's letter and the petition as a survivor. He is, therefore, not prejudiced. However, there is a surviving spouse, the 1st applicant. She is not complaining though, but I note that her consent was not sought, although she had priority to administration under section 66 of the Law of Succession Act, and her consent should have been obtained as required by Rules 7(7) and 26 of the Probate and Administration Rules. But since she has not raised issue with that it may not be necessary to pursue the issue beyond that.

23. The framework for applications for grants of representation is set out in section 51 of the Law of Succession Act. The most relevant portions, for the purpose of this application, are in subsection (2)(g), which state as follows:

“Application for Grant

51. (1) ...

(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)...”

24. My understanding of section 51(2) (g) is that the petitioner is required to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The administrator herein only disclosed himself, his brothers and their mother. It was not disclosed whether or not there were female children. The fact that the persons disclosed were all sons raises suspicion. It would be critical to know whether or not the deceased had daughters, for they too, being children of the deceased, ought to play a role in the administration and distribution of his estate. Section 51(2) (g) requires that all the children be disclosed, including daughters.

25. The other consideration is whether the administrators, upon their being properly appointed, went about the business of administering the estate in accordance with the law. Again, no one has raised issue with the manner in which the administrator herein has administered the estate. I shall, therefore, presume that he has administered the same in accordance with the relevant law. Is he likely to continue administering the estate in accordance with the law upon his being confirmed as administrator? Again, no one raised issue with his ability to complete administration of the estate in accordance with the law. I shall, therefore, presume that he shall remain capable of administering the estate to completion upon his being confirmed into office as administrator.

26. Having disposed of the first limb of the confirmation application, I should now turn to address the matter of distribution. Distribution of assets raises two issues. The first, and the more critical is about the assets that make up the estate. Succession is all about property, and without property there is no estate for distribution, and the question of succession should not even arise. Secondly, is the matter of the persons who are entitled to a share of the property. The two critical aspects of confirmation are brought in the proviso to section 71(2). That 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 have also been ascertained before distribution can be proposed, for distribution should be of the assets that are available for that purpose.

27. In the instant case, there is no dispute, that the deceased died possessed of two assets, Marama/Shinamwenyuli/1816 and Marama/Lunza/1273. Therefore, the matter of the assets of the estate being ascertained should not be an issue. Having identified the assets and the survivors, the next step should be to propose distribution, for the proviso to section 71(2) requires that the shares of each of the survivors be ascertained. The administrator herein has made a proposed mode of distribution; in which he has shared out the assets between the surviving widow and the sons of the deceased. I have already stated that I am not satisfied that all the children have been disclosed. I shall, therefore, not proceed to distribute the estate before the administrator has satisfied me that he has disclosed all the children of the deceased, male and female, married and unmarried. The law is gender neutral. It expects that all the children of the deceased be disclosed.

28. An issue was raised with regard to the 3rd applicant. It is common ground that he is a son of one of the sons of the deceased, and, therefore, a grandchild of the deceased. Legally, grandchildren are not entitled to benefit so long as their parents are alive, for they access the estate of the deceased through their own parents. They would only be entitled where their own parents are deceased, so that they take the share that ought to have gone to them. It is against that background that the position of the 3rd applicant ought to be considered.

29. It is alleged that the claim of the 3rd applicant is that the deceased had gifted to him a portion of the land that he had retained to himself. The argument is that, although he was a son of the administrator, he was born outside wedlock, and was raised by his paternal grandparents, who bequeathed the subject property to him. His grandmother, the 1st applicant, claims that they treated him as a son and so the deceased allocated him his own portion of the land. That is contested. It is argued that the deceased did not have his own portion land for he had split it into three, and had given the three portions to his sons, and he was, therefore, left with nothing to give the 3rd applicant. It is said that the parents, after the subdivision and sharing out of the land, remained inside the portion that they gave to the 2nd applicant, and, therefore, there cannot possibly be anything available to give to the 3rd applicant.

30. The matter of the deceased having had subdivided his land and shared it amongst his children was harped on by all the three sons. They said that he even obtained the consent of the land authorities to subdivide and transfer the land. He allegedly died before the process of transfer was complete and it was for that reason that title deeds had not been processed. My view of this is that as at the time the deceased died, the property in question was in his name. It formed part of his estate. He had not obtained any transfer of any of it to anyone, and, therefore, the same was intact. The exercise that the children refer to was a failed attempt to distribute the property *inter vivos*. Since the exercise failed, it cannot be argued that this court ought to distribute the property as per that failed effort. It cannot, therefore, be said that any gift was made to any of the survivors, including the 3rd applicant. The property is, therefore, available for distribution amongst all the claimants, if the court shall find them entitled.

31. On the commercial plot, the court can only dispose of it as per percentages or fractions. It will be up to the parties to work out how to share it on the ground. They may get into business formations that would accommodate the sharing, whether by forming a partnership or a limited liability company or as they may please. Should they totally disagree on sharing the final option is to sell the property and share out the proceeds.

32. The grant sought to be confirmed was issued by the magistrate's court in Butere SRMCSC No. 35 of 2012. Upon the cause being called up to the High Court and handled as a High Court cause, the lower court grant was not revoked and a fresh one issued by the High Court. I cannot of course confirm the lower court grant, and, therefore, I shall have to revoke the said grant and direct that a fresh one issues out of this cause.

33. In the end, the final orders that I shall make in this matter are as follows:

(a) That I hereby to revoke the grant that was made in Butere SRMCSC No. 35 of 2012 and direct that a fresh one issues to the administrator out of this cause for I hereby confirm him to continue with administration of the estate of the deceased to completion;

(b) That I hereby postpone confirmation of the grant made under (a) above and direct the administrator to file a further affidavit, in the next thirty (30) days, to confirm whether the deceased had other children, quite apart from the three disclosed so far, and, if there be any such children, he shall name them in that affidavit;

(c) That final orders on distribution of the estate shall follow after compliance with (b) above; and

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

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 11TH DAY OF DECEMBER, 2019

W. MUSYOKA

JUDGE