



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 3079 OF 2002

IN THE MATTER OF THE ESTATE OF JOSEPH GICHUKI RIUNGE(DECEASED)

RULING

1. The summons dated 10th July 2015 seeks the inclusion of one Douglas Itotia Riunge, who is dead, as a beneficiary to the estate of the deceased herein, Joseph Gichuki Riunge. Subsequent to the said order being granted, the applicants – Theresa Wanjiro Riunge, Boniface Njunge Gichuki and Josephine Njeri Riunge – pray that their names be substituted as the beneficiaries of the estate of the said Douglas Itotia Riunge.
2. The grounds upon which the application is premised are set out on the face of the application, while the facts in support are deposed in the affidavit of the applicants sworn on 15th July 2015. It is said that the name of the said Douglas Itotia Riunge was inadvertently left out of the petition for grant of letters of administration intestate despite the said name having been listed among the survivors of the deceased in the letter from the area Chief. The applicants would like to be substituted as his beneficiaries since he was not survived by a wife or children. One of their brothers, Francis Mburu Riunge, is said to have indicated that he is not interested in the estate of their dead brother. They have attached copy of a letter from the Chief dated 4th November 2002, which lists the said Douglas Itotia Riunge as survivor of the deceased. There is also copy of a certificate of death indicating that the latter died on 14th June 2001.
3. There is a reply to the application by the respondents. It is an affidavit sworn on 27th January 2015 by Francis Kimani Gichuki and David Muniu Riunge. The deponents are administrators of the estate of the deceased herein. They concede that Douglas Itotia died single and without children, hence the exclusion of his estate from the distribution of the estate of the deceased herein. They express surprise that the applicants are raising the matter at this stage as the issue has never come up previously. They suspect that the application is driven by greed and selfishness. They assert that the applicants are not even administrators of the estate of the said Douglas Itotia Riunge.
4. The application was urged orally on 27th October 2015. It was argued, for the applicants, that the said Douglas Itotia Riunge survived the deceased and his estate was entitled to a share in the estate. It was submitted that since he was not survived by spouse and children, the next in line were his siblings. For the respondents, it was argued that the said Douglas Itotia Riunge was not survived by anyone, and the applicants were not the beneficiaries of his estate.
5. I have perused through the entire record. It is clear that the deceased herein died on 26th September 1991. The letter from the Senior Chief of Limuru Location, dated 4th November 2002, lists Douglas Itotia Riunge (deceased) as one of the survivors of the deceased. The documents launched in court thereafter are silent on the estate of the said Douglas Itotia Riunge, and it would appear that there was then a silent

understanding that the interest of his estate did not have to be taken into account given that he had neither been survived by a widow nor children.

6. From what is before me, it is clear that at this stage of the distributing the estate that the deceased person, the subject of the cause, is survived only by his children, his wives having all died. That being the case then the estate of the deceased falls for distribution amongst his children, both male and female.

7. The aggregate effect of Part V of the Law of Succession Act, Cap 160, Laws of Kenya, is that the estate of a parent who is not survived by a spouse is shared equally amongst his children, whether the person died a polygamist or not. That is the ultimate effect of section 40 of the Act, as read together with sections 35 and 38 thereof.

8. Should the estate devolve only amongst the living children of the deceased? Where the deceased is survived by a child who subsequently dies before the estate is distributed, the estate of such child would be entitled to the share that would have gone to the said child were he alive at distribution. His estate would be entitled to a share equal to that of his siblings.

9. Where such a child was himself survived by a surviving spouse and a child or children, then, by virtue of section 35, his entitlement would go to the said surviving spouse and children. In the absence of a surviving spouse, the share would go to the child or children of the dead child by virtue of section 38. In the absence of such survivors, then the estate or share of the entitlement of the dead child would devolve as per section 39 of the Law of Succession Act.

10. Where the child predeceases the parent, who subsequently dies intestate, the dynamics would change. If the child died single and without children, then his estate would not be entitled to anything from the estate of the parent. However, should the child be survived by their own children, who would then be grandchildren of the dead parent, then it should be the children of the dead child, the grandchildren of the dead parent, who would be considered as the survivors of the parent of their own parent. That is the effect of section 41 of the Law of Succession Act. It is called the principle of representation: the surviving child of a dead child taking the share of their dead parent from estate of the dead child's parent.

11. In the context of the instant cause, the applicants have justification in seeking to have the share of their dead brother devolve upon his estate so that they can thereafter share it. The law allows it. The dead brother died after their father's demise, consequently his estate is entitled to a share in the estate. As he died without spouse and children, the persons entitled to his estate would be the persons mentioned in section 39.

12. The relevant portion of section 39 states as follows;-

'(1) where the 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) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sister, 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...'

13. In the instant case, the estate of the dead brother should go to the persons who fall under the category in section 39(1)(c). The deceased was a polygamist, and therefore brothers and sisters would refer to siblings of the same mother as Douglas Itotia Riunge. The children of the stepmother of Douglas Itotia Riunge, being half-siblings of the said Douglas Itotia Riunge, fall under section 39(1)(d) and they are not

entitled to a share in his estate.

14. I should point out that from the practice that I have seen at the Family Division at Nairobi, estates of dead children are usually not provided for from the estate of their dead parent where such dead children are not survived by spouse and children. This appears to be informed by section 39(1)(c). As the share of the dead child would ultimately be shared equally between all his siblings, it would appear unnecessary for the share to devolve first to the estate of the dead child only to be subsequently shared out equally amongst his siblings. In most cases, the siblings would prefer to omit his estate altogether from distribution as ultimately his share would still be divided equally amongst the surviving siblings at the distribution of the estate of the dead parent.

15. That is not the position here. The deceased died a polygamist. The letter from the Chief indicates that he had married twice. His wives were Esther Wanjiku Gichuki and Sara Njambi. The children in the first house were listed as Francis Kimani Gichuki, Mary Wanjiru and David Muniu; while in the second house the children were Theresa Wanjiru, Francis Mburu, Boniface Njunge, Douglas Itotia and Josphine Njeri.

16. By virtue of section 39(1)(c), the share going to the estate of Douglas Itotia Riunge ought to be shared equally between Theresa Wanjiru, Francis Mburu, Boniface Njunge and Josphine Njeri. As indicated elsewhere, by virtue of section 39(1)(d), Francis Kimani Gichuki, Mary Wanjiru and David Muniu, are not entitled to a share of Douglas Itotia's portion on account of being his half-siblings.

17. In the end I am moved to make the following orders:-

(a) That the estate of Douglas Itotia Riunge shall be listed as a beneficiary of the estate of the deceased and shall be allotted a share thereof in terms of section 38 of the Law of Succession Act;

(b) That his siblings shall access the said share in separate succession proceedings specific to his estate;

(c) That the application for the confirmation of the grant herein dated 3rd August 2015 shall be heard on a date to be given at the delivery of the ruling herein;

(d) That all the children of the deceased shall attend the hearing of the application dated 3rd August 2015;

(e) That any child of the deceased who does not agree with the distribution proposed is at liberty to file and serve an affidavit of protest making alternative proposals on distribution;

(f) That there is leave to the administrators to file a further affidavit suggesting a proposed distribution which accords with the orders made herein, and

(g) That there shall be no order as to costs.

6. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF JUNE, 2016.

W. MUSYOKA

JUDGE