



In re Estate of Charles Shikali Shibaji (Deceased) (Succession Cause 61 of 2022) [2025] KEHC 922 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 922 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 61 OF 2022
SC CHIRCHIR, J
JANUARY 30, 2025**

IN THE MATTER OF THE ESTATE OF CHARLES SHIKALI SHIBAJI (DECEASED)

BETWEEN

MOSES SHIBACHI SHIKALI 1ST PETITIONER

JUSTUS SHIVACHI SHIKALI 2ND PETITIONER

AND

MOREEN ISIAKHO SHIKALI 1ST OBJECTOR

RUTH MIHESO SHIKALI 2ND OBJECTOR

JUDGMENT

1. This cause relates to the Estate of the Late Charles Shikali Shivachi who died on 13th June 1999. Upon his demise, his two sons, Justus Shikali Shivachi and Moses Shikali Shivachi (protestors) petitioned for a Grant of letters of administration intestate for his estate which comprised of L.P No. Idakho/Iguhu/1771, L.P No Idakho /Iguhu/1772 and L.P No Idakho /Iguhu/1774. They declared that they were the only heirs of the deceased.
2. On 4th May 2012, the Grant was issued and was thereafter confirmed on 11th June 2012. Land parcel Idakho/Iguhu/1773 was given to the 2nd petitioner and parcel No. Idakho/Iguhu/1774 went to the 1st petitioner. The last parcel, No Idakho/Iguhu/1771 was to be shared equally between the two.
3. On 31st August 2012, the respondents herein filled summons for revocation of the grant on grounds that the petitioners who were their half – brothers obtained the grant through fraud as they failed to disclose the fact that the deceased was survived by other heirs, and that the deceased had shared out his property prior to his demise.
4. The objection proceedings were heard through viva voce evidence and in a judgment delivered 30th April 2019, Hon. Justice Njagi delivered a verdict in favour of the respondents. He revoked the grant



issued on 9th May 2011 and ordered that the transfer of the land parcels belonging to the estate of the deceased be cancelled and the titles be reverted back to the name of the deceased. He further ordered for a fresh Grant to issue in the names of the two protestors herein and the first respondent.

5. On 24th May 2019, the 1st respondent applied for summons for confirmation of the grant. She proposed the distribution of the estate as follows:
 - a). Parcel No. Idakho/Iguhu/1773 (parcel No. 1773)- to the 1st protestor.
 - b). Idakho/Iguhu/1774 (parcel No. 1774) - to the 2nd protestor and
 - c). Idakho/Iguhu/1771 (parcel No. 1771)- be shared jointly between the two objectors.
6. The protestors filed affidavits of protest to the summons opposing the mode of distribution . The 1st protestor states that that they purchased a different parcel for the objectors and their mother and gave them ksh. 162, 000 which was acknowledged by the 1st respondent. The land parcel is given as Marama/ Lunza/3713 (parcel No. 3713); that they constructed a house for her , and gave them Kshs. 162,000/=; He further states that the respondents have sold the said parcel and also parcel No. 1771.
7. The 2nd protestor states that the respondents sold the land that was purchased for them by the protestors; that having been bought a different parcel, they are disentitled form the benefitting from the estate.
8. The protestors have referred to some agreements evidencing purchase of parcel No. 3713 but the said agreements have not been annexed to the affidavits.
9. The summons and the protest were heard through oral evidence.
10. The matter proceeded by viva voce evidence.

Evidence in brief
11. PW1 was the 1st petitioner/ protestor. He testified that the deceased had given his land to his sons and none to the objectors, namely Moureen Isiaho and Ruth Miheso who are his half-sisters. That the sons to the deceased, had agreed that the respondents would be bought a parcel of land to be held by their mother. That they consequently purchased land parcel No. being Malava/Lwanga/3237(parcel No. 3237). That the 1st respondent demanded for more land and she was given ksh. 162,000 in lieu of land. He further stated that the 1st respondent later sold parcel No. 3237 ; that the respondents also sold parcel No. 1771 to one David.
12. On cross- examination, he stated that the deceased had informed him that parcel No. 1771 was to go to his daughters, but he had no other evidence to back him on that . he admitted that despite having presented evidence of the said purchase earlier to the court the court went ahead and nullified the grant. He further admitted that parcel No. 3237 was never registered in the deceased's name. In reference to the said agreement, he confirmed that there was no clause prohibiting the daughters from accessing their father's land after they had already brought for them 3237 which did not form part of their father's estate.
13. On cross- examination by the court, he stated that after the grant had been confirmed, he and his brother sold the land parcel 1771 to Seth Asuza and that at the moment, no one lived in the parcel of land.
14. The protestors closed their case.



15. DW1 was Maureen Isiaho, the 1st respondent. She adopted her affidavit dated 24/6/2021. She told the court that the deceased was her father and they were three children in their house being herself, Ruth and John who died at a young age. She stated that her father had three wives and from their house, their father gave them land parcel No. 1771 while the protestors were given 1774, 1772, and 1773. She further stated that the protestors sold parcel No. 1771 to one Seth Asuza and she and her sister have now been left with no land. She is not aware of any agreement relating to parcel No. 3237, and that she has not renounced her inheritance.
16. On cross-examination by PW1, she denied receiving any money or having knowledge of the agreement relating to a land in Mutsostso. She further denied filing any affidavit renouncing her right to her inheritance.
17. On cross-examination by the court, she stated that her mother lived and was buried in Khwisero, but when she was married to her father they used to reside in parcel No. 1771.
18. Although the 2nd protestor filed an Affidavit of protest, he did not appear in court to testify.

Protestors' submissions.

19. The protestors reiterate that when the objectors demanded for a share of inheritance the protestors opted to buy for them another piece of land; that the land was registered in the name of Zainab Shisia who is the mother to the objectors. He then referred to an affidavit sworn on 13/11/2012 by the said Zainabu. They further submit that there exists an acknowledgment letter dated 14/5/2014 by the 1st objector herein. He further points out that there is an agreement between James Maumo and the 2nd protestor in respect of the purchase of the land that eventually went to the objector's mother. The agreement is said to have been signed on 13/11/2012. That consequently the objectors denounced their inheritance when they demanded for an alternative land.
20. The protestors then referred the court to various documents said to be in the court record. These are:
 - a). An affidavit by Maureen dated 18/10/2012
 - b). Affidavit by Sainabu Shisia dated 4/12/2012
 - c). Sale agreement dated 13/11/2012
 - d). Acknowledgment letter dated 14/5/2014
 - e). Copy of title deed for Sainabu Shisia
21. It is further submitted that the objectors are estopped from demanding their share of the estate when they had made the family to believe that they were satisfied with parcel that had been bought for them.

Objectors' submissions

22. It is the objectors' submissions that the deceased was a polygamous man and it was not in dispute that the objectors were his children and that they lived with the deceased after their parents separated. They argue that they are entitled to equal rights as children of the deceased and should not be discriminated against.
23. They restate that the estate of the deceased comprised of land parcels Nos: 1771, 1773, and 1774 which was to be devolved to all his children; that the 1st protestor was settled on 1773, the 2nd protestor on parcel No. 1774 and parcel No. 1771 was to go to the objectors herein as the children of the third wife.



24. The objectors state that by their his own admission in court , his father had instructed the 1st protestor to give parcel No. 1771 to the objectors, but which instructions the 1st objector went against.
25. The objector further submit that pursuant to the court orders of 11/9/2020 parcel Nos. 1771, 1773 and 1774 were reverted to the deceased's names ; that since the protestors have admitted that they have taken over parcel No. 1773 and 1774 and that the other beneficiaries had been catered for then parcel No. 1771 should go to the objectors.
26. It is finally submitted that the court should adopt the mode of distribution proposed by the objectors.

Analysis and determination

27. I have considered the pleadings and the evidence tendered on this matter and I have identified the following issues for determination:
 - a). Whether the objectors are entitled to a share to a share of the estate.
 - b. what is the appropriate mode of distribution

Whether the objectors are entitled to a share of the Estate

28. The fact that the objectors are children of the deceased is not in dispute. DW1 admitted as much. The only complaint by the protestors is that the objectors had already benefited from the estate; that following a complaint from them , the protestors purchased land parcel No. Marama / Lunza/3237 which was registered in the name of the objector's mother one Zainabu alias sainabu Shesia. In this regard the protestors have referred the court to various agreements, acknowledgment of funds and a title deed to support these submissions. Much as these documents were referred to in the affidavits , they were never annexed to the Affidavits. And as such ,the objectors were not given the chance to interrogate them or make any response to them. The protestors have listed the same documents in the submissions and alerted the court that they are on record. However submissions are not evidence as was held in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR.
29. Nevertheless , on perusal of the record I have noted that the same documents and arguments were presented before Justice Njagi. The Judge considered them and arrived at the conclusion that he did.
30. Further, and in any event the title deed for parcel No. marama/Lunza/3713 only indicate that the property belonged to Sainabu Shisia Namakhaba . The circumstances upon which she got ownership is not indicated. The purported agreement dated 13/11/2012 was between the the 2nd objector and a third party, and there is nothing to show that the same property was the one that was later conveyed to the objectors' mother.
31. Further, again, even if it is true that the protestors bought land for the objectors' mother , there is nothing to indicate that the property was being held on trust for the objectors so as to disentitle the objectors from further claims against the estate. In effect , there is no evidence that the objectors had renounced their claim against the estate.
32. It is my finding therefore that the objectors had not benefitted from the deceased's estate, neither had they denounced their share. Consequently they are entitled to a share in their capacity as the heirs of the deceased.



What is the appropriate mode of distribution

33. There is consensus between the parties that the deceased's land comprised of title No Idakho/Iguhu/1750. It was divided into 4 portions, namely 1771, 1772, 1773 and 1774. The first protestor told the court for instance that the deceased had given out the three parcels to his sons save parcel No. 1771 in which the deceased resided with the objectors and their mother. The record shows that when the court issued the certificate of confirmation of grant parcels nos. 1773 went to the 2nd protestor, 1774 went to the 1st protestor and 1771 was shared equally between the two. The two objectors herein did not get any share. The 1st objector told the court that their mother has since remarried and her entitlement to the estate has therefore since ceased.
34. The deceased therefore is deemed to have left behind children and no spouse. The distribution of the estate will be as per section 38 of the Law of succession Act. The section provides as follows: 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.
35. It is evident that the protestors have already benefited from the estate, as they were allocated parcels Nos. 1773 and 1774. Searches on the said titles done on 24/2/2011 show that 1773 measures 1 hectare, 1774 measures 1 hectare, while 1771 measures 1.08 hectares. Am however alive to the fact that while parcel No. 1771 is slightly bigger, it is to be shared by two of the heirs, the objectors herein as per their proposal. This would mean that the objectors will end up with 0.5 hectares each. Their respective portions will be smaller, but that is what they have asked for and I have no reason to question their proposal. I accept their mode of distribution as proposed in the summons.
36. In conclusion, I hereby to make orders as follows:
- a). The Grant of letters of Administration issued on 30th April 2019 is hereby confirmed.
 - b). The distribution of the Estate will be as per paragraph 7 of the affidavit sworn on 24th May 2019 by Ruth Muheso, save to add that parcel No. 1771 be shared by the objectors herein in equal portions.
 - c). The protestors, protests are hereby dismissed.
 - d). The petitioners to complete the distribution of the estate not later than 60 days from the date of this Ruling.
 - e). Each party to meet their own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF JANUARY 2025.

S. CHIRCHIR

JUDGE.

