



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VIHIGA

SUCCESSION CAUSE NO. 102 OF 2021

(FORMERLY KAKAMEGA HIGH COURT SUCCESSION CAUSE NO. 250 OF 2015)

IN THE MATTER OF THE ESTATE OF ELIZA ISIGI ASAMBA (DECEASED)

RULING

1. This cause is in respect to the estate of Eliza Isigi, who died on 30th April 2005. Her son and daughter, Daniel Agala Kaguluka and Gladys Kareha Asamba, hereinafter referred to as the administrators, petitioned for letters of administration intestate. A letter from area Chief dated 22nd April 2015 was duly filed in this court showing that the husband of the deceased had predeceased her, and that they had a total of eleven children, one of whom, at the time, Kitty Asamba, was deceased but was represented by his spouse Beatrice Musimbi Asamba. On 8th September 2016 the grant was duly made, and on 30th December 2015 the administrators applied for orders that North Maragoli/Kisatiru/1384 and 1385, fraudulently transferred to Seth Asuzu Changilwa, be cancelled and reverted back to the name of the deceased, and that Philip Chabira, Beatrice Musimbi and Seth Asuzu be restrained from interfering with the deceased's estate.

2. On 15th January 2016, Philip Chabira, Beatrice Musimbi and Mary Ongoge Changa filed for revocation of grant, and for prohibitory orders on Maragoli/Kisatiru/1383, 1384, 1385, 1386 and 1387. The summons for revocation was disposed of on 7th February 2020, and the court dismissed the application, directed the administrators to file for confirmation of their grant, complying with all the requirements of section 71 of the Law of Succession Act, Cap 160 Laws of Kenya, and to serve their confirmation application on all the interested parties, and any person dissatisfied by the proposals to be made in that application was to file a protest affidavit.

3. Upon delivery of the ruling on the 7th February 2020, the administrators filed a summons for confirmation of grant, which is the subject of this ruling. They listed the children of the deceased to include: Jane Kaka Asamba, Josephine Kadi Asamba, Mary Ongoge Changa widow to Paul Changa, Beatrice Musimbi Asamba widow to Kitty Asamba, John Gidali Asamba, Josephat Asuga Asamba, Daniel Agala Kaguruka, Isaya Kidaha Asamba, Gladys Kareha Asamba and Fridah Muhonja Asamba. They listed the assets of the estate to include: North Maragoli/Kisatiru/997, 1383, 1384, 1385, 1386, 1387, 1388 and 1389. They proposed distribution as follows; North Maragoli/Kisatiru/1383- Jane Kaka Asamba and Josephine Kadi Asamba; North Maragoli/Kisatiru/1384- Mary Ongoge Changa (widow to Paul Changa); North Maragoli/Kisatiru/1385- Beatrice; Musimbi Asamba (widow to Kitty Asamba); North Maragoli/Kisatiru/1386- John Gidali Asamba; North Maragoli/Kisatiru/1387- Josephat Asuga Asamba; North Maragoli/Kisatiru/1388- Daniel Agala Kaguruka; North Maragoli/Kisatiru/1389- Isaya Kidaha Asamba; and North Maragoli/Kisatiru/997- Gladys Kareha Asamba and Fridah Muhonja Asamba. They attached a signed consent form of the proposed mode of distribution, which was signed by Jane Kaka Asamba, Josephine Kadi Asamba, John Gidali Asamba, Daniel Agala Kaguruka, Isaya Kidaha Asamba and Gladys Kareha Asamba. Those who did not sign the consent form include Mary Ongoge Changa, Beatrice Musimbi Asamba and Josephat Asuga Asamba

4. Philip Chabila Kaguluka filed an affidavit in protest to the proposed mode of distribution on 1st December 2020, dated 30th November 2020. I shall refer to him hereafter as the protestor. He stated that his interest in the estate had not been taken into

consideration by the administrators, that the deceased was the wife of the late Zakayo Kaguluka, who was his biological father, having had him with his second wife, and he was left under the care of the deceased being his stepmother. He stated that the assets of the estate initially belonged to his late father, and were transferred to the name of his stepmother, the deceased herein, to hold in trust for the entire family, since the late father was heavily indebted, and there was risk of losing all his properties to creditors. He annexed a bundle of copies of register extracts or green cards, for Maragoli/Kisatiru/997 and 1176-1186. He stated that Maragoli/Kisatiru/1186 had been subdivided by the late father between his eight sons prior to his demise, but it could not have been effected in the register since the deceased stepmother disappeared with the title. He added that he has never known any other home other than that of his late father, and denied his father buying land in Bulokhoba/Tarik that he later sold to settle debts. He stated that he went to the defunct Sabatia Land Disputes Tribunal in 1997, which ruled that Maragoli/Kisatiru/1382 was to be given to Eliza Isigi Asamba and John Gidali, Maragoli/Kisatiru/1383 to Paul Changa, Maragoli/Kisatiru/1385 to Kitty Asamba, Maragoli/Kisatiru/1386 to Philip Chabila, Maragoli/Kisatiru/1387 to Josephat Asuga, Maragoli/Kisatiru/1388 to Isaiah Kidaha, and Maragoli/Kisatiru/1389 to Daniel Agala. He also said that Maragoli/Kisatiru/ 977, was a market plot, which was to be shared as follows: first room- Paul Changa, second room- Philip Chabila and third room- Kitty Asamba. He stated that the award of the tribunal was filed in court as Vihiga SPM Misc. Case No. 18 of 2005, and was adopted as judgment of the court on 30th March 2005. He stated that the area chief included his name as a son of the deceased and his claim is on North Maragoli/Kisatiru/997.

5. The 1st administrator filed a reply. He stated that the protestor herein was being stubborn, and that even the court had made a finding that he was not a child of the deceased in the ruling of 7th February 2020. He avers that the protestor fraudulently transferred some properties to his name and sold them without consent or knowledge of the administrators. He denied that the deceased was holding the land in trust for the family. He claimed that the protestor, together with the late Kitty Asamba and the late Paul Changa were allocated Kakamega/Bulukhoba/615. With respect to North Maragoli/Kisatiru/997, he avers that the same was sold to Ebrahim Onguo Ambwere on auction but then the deceased recovered the land, and had it registered in her name in the lifetime of the deceased.

6. The court on, 20th May 2021, heard both parties. The beneficiaries present in court were Jane Kaka Asamba, Josephine Kadi Asamba, John Gidali Asamba, Daniel Agala Kaguruka, Isaya Kidaha Asamba and Fridah Muhonja Asamba. Jane Kaka said that she was aware of the proposals and agreed with them, and that she did not support the protestor but the administrators. Josephine Kadi supported the proposals and the administrators but not the protestor. John Gidali agreed with the administrators but opposed the proposal by the protestor. Isaya Kidaha supported the proposal by the administrators and opposed that by the protestor. Fridah Muhonja supported the administrators' distribution but did not support the protestor. Daniel Agala stated that that Beatrice Musimbi died in December 2020 and that she did not have any children. He stated that Mary Ongoge was alive and that Josephat Asuga was ill.

7. Directions were given on 20th May 2020 for filing of written submissions on the limited issue as to whether the protestor was entitled to a share in the estate. Parties complied with the directions by filing written submissions, which I have read through and noted the arguments made.

8. The issues that I have identified for determination, from the pleadings and the written submissions, are whether the protestor was a survivor of the deceased, and what orders are to be made on the summons for confirmation of grant.

9. Based on the facts highlighted in the pleadings of both parties, it is the protestor's claim that he should be considered as a survivor of the deceased, and, therefore, a beneficiary of the estate. He states that the late husband of the deceased was his father, and that his biological mother did not stay for long in the marriage, and he was thus left under the care of the deceased. The protestor has not availed any further evidence to this statement, relating to when he was born, the name of his mother, the time he was left under the care of the deceased, how the deceased took care of him or maintained him. It is not enough to state that the deceased maintained him, he must show proof.

10. I have already rendered myself on this issue in the judgment of 7th February 2020, at paragraph 19 thereof, where I said:

“Regarding the applicant, Phillip Chabira, I note that he was not a biological child of the deceased, and he has not demonstrated that he was a child that she had taken in as her child in terms of section 3(2) of the Law of Succession Act, which, in any event, does not apply to a child being taken in by a woman. There was, therefore, no obligation for him to be listed as a child of the deceased because he was not one.”

11. The administrators have complied with the orders of this court of 7th February 2020, in that they filed the summons for confirmation of grant within the stipulated forty-five days, and most importantly they captured the contents of paragraph 29 of the judgment as directed, which reads in part:

“Instead I shall direct the administrators to ensure that at the time of applying for confirmation of grant they list all the survivors of the deceased, that is to say the surviving sons and daughters of the deceased and where there are any sons or daughters who have died their children, who are the surviving grandchildren of the deceased, or their mothers, the widows of the late sons of the deceased. All the individuals, referred to above should be listed whether or not they are entitled to a share, or whether or not they had benefited during lifetime from inter vivos distributions. The administrators should equally list all the assets of the deceased available for distribution”

12. During the hearing on 20th May 2021, the court heard Jane Kaka, Josephine Kadi, John Gidali, Isaya Kidali and Fridah Muhonja, who all supported the proposal on the mode of distribution. Daniel Agala, the 1st administrator stated that Beatrice Musimbi, widow of Kitty Asamba, died in December 2020 and that they did not have children and that Josephat Asuga was unwell. On the consent, though, it was not signed by Mary Ongoge Change, Beatrice Musimbi Asamba and Josephat Asuga, they did not file any affidavits of protests renouncing their share. I shall proceed and allow the mode of distribution as prayed.

13. In the end, I allow the summons for confirmation of grant, dated 27th February 2020, as the same has satisfied the requirements of section 71 of the Law of Succession Act. The share of the Beatrice Musimbi, once proven that she has died, shall be dealt with in an application for rectification of grant or dissolved to her state. Each party to bear their own costs. any party aggrieved by the orders above has leave of twenty-eight days to move the Court of Appeal appropriately.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER, 2021

W MUSYOKA

JUDGE



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