



REPUBLIC OF KENYA



In re Estate of Francis Masanganjila Andala (Deceased) (Succession Cause 105 of 2011) [2023] KEHC 2699 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2699 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 105 OF 2011**

WM MUSYOKA, J

MARCH 24, 2023

IN THE MATTER OF THE ESTATE OF FRANCIS MASANGANJILA ANDALA (DECEASED)

RULING

1. On December 10, 2021, I delivered a ruling, wherein I postponed determination of a summons for confirmation of grant, dated September 23, 2019, and directed the administrators to file a further affidavit, to disclose all the persons beneficially entitled to the estate, including daughters of the deceased.
2. A further affidavit has been filed, sworn on May 20, 2022, by Anareya Mukoya Masanganjira, who identifies herself as the surviving widow of the deceased. According to the affidavit, the deceased had 2 wives, Anareya Mukoya Masanganjira and Roselida Khitesheli. The children of the late Roselida Khitesheli are Tindi Masanganjila, the late Felister Owano Mukhwana, the late Sulumena Queen, Charles Khayinga Masanganjila, Teresa Khalayi, Salme Khakasa and the late Fronika Tova. The children of Anareya Mukoya Masanganjira were the late Nashon Andala Masangajila, the late Alfred Mukavana Masanganjila, Wellington Masanganjira, Milka Atieno Masanganjira, Christine Nafula, Donald Reagan Masanganjira and Sarah Abwaka. The deceased is said to have had only 1 property, Butso/Indangalasia/552, part of which he was said to have had sold 0.15 hectare to Gabriel Agwata Oduong, who allegedly settled on the portion.
3. The deceased died in 2008, after the *Law of Succession Act*, Cap 160, Laws of Kenya, had come into force. He died intestate, and, therefore, the estate is for distribution in terms of Part V of the *Law of Succession Act*. He died a polygamist, the estate is, therefore, for distribution in accordance with section 40 of the *Law of Succession Act*, which provides for distribution amongst the houses, based on the number of children in each house, and adding the surviving spouse as a unit to the house to which she belongs, and thereafter to each of the houses based on the composition of each house. Some children of the deceased are dead, and section 41 of the *Law of Succession Act*, which provides for children of dead children of the deceased stepping into the entitlement or inheritance rights of their dead parents, should apply. However, since such children have not been disclosed, the shares due to the dead parents shall devolve upon their estates, to be shared out in succession proceedings to be mounted in their names.



4. The administratrix has indicated that the deceased had shared out his property amongst the 2 houses during his lifetime, in her affidavit of May 20, 2022; and amongst the sons but excluding the daughters, according to her affidavit of June 23, 2021. No evidence was led to show that the deceased subdivided the land, and got title deeds issued to the respective sons or houses. Equally, no evidence was led to show, in the event no title deeds were ever processed, that the deceased got consent of the relevant Land Control Board, to effect such subdivision and transfer the subtitles to the sons or houses, but died before he could do that. The property is still in the name of the deceased. If the deceased wished to distribute it amongst the sons or houses during his lifetime, he did not carry out that wish, and the alleged distribution is of no effect, and the property is still available for distribution in these proceedings. There were no gifts inter vivos, as none have been proved.
5. The distribution proposed is amongst 1 child of the late Roselida Khitesheli, and 7 individuals from the house of Anareya Mukoya Masanganjira, including the alleged buyer. The total acreage to be taken by the house of the late Roselida Khitesheli, according to those proposals, is 1.14 hectares, while the other house takes 3.14 hectares.
6. The distribution proposed does not include the daughters of the deceased, yet the deceased had daughters. Under the Law of Succession Act, daughters are entitled to inheritance equally with the sons. The only time daughters should not get a share is where the daughters themselves, or their successors, should they be dead, renounce that share, either in writing or orally in court. That position is supported by Article 27 of the Constitution, which outlaws discrimination of women in all spheres of life, including succession, and Article 2(4), which renders any act, which is inconsistent with the Constitution, null and void.
7. None of the daughters of the deceased, or their heirs or successors or survivors, have participated in these proceedings. I do not know, and I cannot tell, whether or not they were involved or notified of them. However, lack of participation of any party to probate proceedings is not to be deemed as acquiescence to disinheritance. The mere fact that the daughters did not participate in the proceedings, or were not involved, does not somehow diminish or extinguish their rights, and, by the authority of Christine Wangari Gichigi vs. Elizabeth Wanjiru Evans & 11 others [2014] eKLR (Emukule, J) and In re Estate of Joyce Kanjiru Njiru (Deceased) [2017] eKLR (Gitari, J), the daughters ought to be provided for nevertheless.
8. I have not seen any document on record, by any of the daughters of the deceased, or their survivors or successors or heirs, renouncing their entitlement to a share of the estate. Consequently, I shall provide for them in the distribution of the property the subject of these proceedings.
9. It is not clear whether there is agreement that the deceased had sold a portion of the estate, 0.15 hectare, to Gabriel Agwata Oduong. There is evidence, though, supporting the said sale, and the same ought to be reckoned. It would appear that the portion sold was to be treated as a portion due to the house of Anareya Mukoya Masanganjira, going by her affidavit of May 20, 2022, where the alleged buyer is counted among the children in that house.
10. I am guided by the authority in Justus Thiora Kiugu & 4 others vs. Joyce Nkatha Kiugu & another [2015] eKLR (Visram, Koome & Otieno-Odek, JJA) and In re Estate of Juma Shiro (Deceased) [2016] eKLR (Mwita, J), that in the absence of a consensus on distribution, the court should be guided by the law, in this case the Law of Succession Act. There is no evidence of any consensus on distribution, which departs from what the Act provides, for there is no such document, duly executed by all 17 individuals, who are shown to be beneficially entitled to a share in the instant estate.



11. As indicated above, the deceased was a polygamist. Section 40 applies. The house of the late Roselida Khitesheli had 7 children, making a total of 7 units. The house of Anareya Mukoya Masanganjira had 7 children, according to her affidavit of May 20, 2022, and 8 children, according to her affidavit of June 23, 2021. I shall go by the latest affidavit, and take it that she had 7 children. When she is added to that list, as a surviving widow, together with the buyer, the total would be 10 units for that house. The entire estate, therefore, comprises of 17 units, for the purposes of section 40 of the *Law of Succession Act*
12. Consequently, I hereby dispose of the application, dated September 23, 2019, in the following terms:
 - a. That I hereby confirm the administrators, Anareya Mukoya Masanganjira and Charles Khayinga Masanganjira, as such, to go on to distribute the estate, on the terms that I will set out shortly, and to complete administration;
 - b. That the estate shall be shared out in the ratio of 7:10 between the houses of the late Roselida Khitesheli and Anareya Mukoya Masanganjira;
 - c. That Butsotso/Indangalasia/552 shall be divided into 17 units, to be distributed as follows:
 - i. 7 units, to the house of the late Roselida Khitesheli; and
 - ii. 10 units, to the house of Anareya Mukoya Masanganjira;
 - d. That the 7 units in the house of the late Roselida Khitesheli shall be shared between Tindi Masanganjira, the late Felister Owano Mukhwana, the late Sulumena Queen, Charles Khayinga Masanganjira, Teresa Khalayi, Salme Khakasa and the late Fronika Tova, equally;
 - e. That the 10 units in the house of Anareya Mukoya Masanganjira shall be shared out as follows:
 - i. 0.15 hectare, to Gabriel Agwata Oduong, and
 - ii. the remainder, to devolve upon Anareya Mukoya Masanganjira, during her lifetime, and thereafter to the late Nashon Andala Masanganjira, the late Alfred Mukavana Masanganjira, Wellington Masanganjira, Milka Atieno Masanganjira, Christine Nafula, Donald Reagan Masanganjira and Sarah Abwaka, equally.
 - f. That a certificate of confirmation of grant shall issue, accordingly;
 - g. That the matter shall be mentioned after 6 months, to confirm completion of administration, and for closure of the court file herein;
 - h. That any party aggrieved, by these orders, has leave of 28 days to move the Court of Appeal, appropriately; and
 - i. That each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 24th DAY OF March, 2023.

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant

Mr. Shitsama, instructed by Shitsama & Company, Advocates for the administratrix.

Mr. Khayumbi, instructed by JJ Khayumbi & Company, Advocates for the administrator.

