



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Joseph Mapesa Nakuku (Deceased) (Succession Cause
356 of 1998) [2023] KEHC 2697 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2697 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 356 OF 1998
WM MUSYOKA, J
MARCH 24, 2023**

RULING

1. On September 17, 2021, I postponed determination of the application for confirmation of grant, dated November 28, 2019, and directed the administrator to take a variety of steps, to bring the application within compliance with the proviso to section 71(2) of the [Law of Succession Act](#) and Rule 40(4) of the [Probate and Administration Rules](#).
2. The specific directions were as follows:
 - (a) Disclosure as to when the dead children of the deceased passed on, and who had survived them;
 - (b) Disclosure as to when Arinoli Makwali Nyapola purchased a portion of Butsotso/Ingotse/556 and from whom, supporting the same with documentation;
 - (c) Disclosure of material from any of the daughters of the deceased renouncing or waiving their entitlement to a share in the estate of the deceased;
 - (d) Disclosure of material demonstrating that Butsotso/Indangalasia/415 was ever registered in the name of Bernard Khasakala; and
 - (e) Any other relevant matter.
3. In compliance with those directions, a number of affidavits have been filed. One is by Janepher Chiteli Akhahoya, sworn on November 24, 2021; the other is by Hezron Kaunda Mapesa, sworn on November 25, 2021; and the last one is by Hezron Kaunda Mapesa, sworn on February 15, 2022.
4. In her affidavit, Janepher Chiteli Akhahoya, avers that she was the widow of Akhahoya Mukoya, who was the original proprietor of Butsotso/Ingotse/583, which measured 23 acres. She explains that her late husband had taken a loan from the Agricultural Finance Corporation, and had used the property as collateral. As he was unable to service the loan, he approached Hezron Kaunda Mapesa to service the same, on the understanding that he would sell to him a portion measuring 4 acres. That happened, and Hezron Kaunda Mapesa was sold 4 acres in 1984. She was unable to trace a copy of the sale agreement.



5. In his first affidavit, Hezron Kaunda Mapesa, avers that the deceased had 4 wives, being Rael Barasa, Agneta Akhalakwa, Rebecca Mungoni and Berneta Khatondi. All the said wives are dead. The deponent has listed the survivors of the deceased in each house. The survivors in the first house, of Rael Barasa, are Charles Okutoyi, Adrian Imbiakha, the late Micah Kanambo, Christine Vahoya, Wilbroda Nyakoa, Wilfrida Ayieko and Leonida Majani. It is alleged that the deceased gave Butsotso/Ingotse/552 to Charles Okutoyi, Butsotso/Indangalasia/416 and 417 to Adrian Imbiakha and Butsotso/Ingotse/556 (4.6 acres) to the children of the late Micah Kaanambo. It is claimed that the daughters from that house, being Christine Vahoya, Wilbroda Nyakoa, Wilfrida Ayieko and Leonida Majani renounced their entitlements, but no evidence of the renunciations has been attached.
6. The house of Agneta Akhalakwa is said to have had 3 children, being Hellen Ayuma, Veronica Nyakoa and Hezron Kaunda Mapesa. It is claimed the 2 daughters denounced their share, but no document has been attached. It is said that Hezron Kaunda Mapesa was given 4.6 acres of an undisclosed parcel of land.
7. Rebecca Mungoni is said to have had 6 children, being Basilita Haroya, Lucy Mapesa, Peninah Obare, Bernard Khasakala, Julius Musungu and Mary Atemba. Basilita, Lucy, Julius and Mary are dead. Julius is said to have died young. The survivors of Basilita Haroya and Mary Atemba are said to have had renounced their entitlements, yet no documents have been attached. Lucy is said to have died during the pendency of these proceedings, and to have had renounced her entitlement in the first confirmation application. However, the orders made in that application were set aside, and the filings in that application can no longer be reckoned. Peninah Obare is alive, and is said to have renounced her entitlement, yet no documents have been placed on record. Bernard Khasakala is alive, he is said to have been given Butsotso/Ingotse/1110, measuring some 4.1 acres, and not Butsotso/Indangalasia/415 as alleged.
8. Berneta Khatondi is said to have had 4 children, being John Majoni, Peter Amalemba, Owen Bulimu, David Okore, Dorah Nasenya, Imelda Sikuta, Salome Murunga and Protus Luseno. John Majoni, Peter Amalemba, Owen Bulimu and David Okore are said to have died young. Dorah Nasenya, Imelda Sikuta and Salome Murunga are said to have been awarded 1 acre, out of an undisclosed parcel of land, which they are to share equally. Protus Luseno, the protestor, is said to be entitled to 3.6 acres out of that undisclosed parcel of land.
9. Arinoli Makwali Nyapola is said to have had bought ¼ acre from an undisclosed parcel of land from Berneta Khatondi, vide an agreement dated June 21, 2002. Hezron Kaunda Mapesa is said to have purchased 4 acres out of an undisclosed parcel of land from Akhoya Mukoya, which he later sold, and it is asserted that that land did not form part of the estate of the deceased.
10. Attached to that affidavit are several documents. I shall only recite those that are relevant to these proceedings. There is an official search certificate for Butsotso/Ingotse/552, whose proprietor is Okutoyi Mapesa, registered on 7th October 1968. There is an official search certificate for Butsotso/Indangalasia/416, registered in the name of Adriano Imbiakha Mapesa, on August 13, 1970. There is an official search certificate for Butsotso/Indangalasia/417, which register was closed on November 12, 2007, after subdivision into new numbers, Butsotso/Indangalasia/4733 and 4734. The proprietor of Butsotso/Indangalasia/417 before the subdivision is not indicated, and the proprietors of the subdivisions, that is Butsotso/Indangalasia/4733 and 4734, are not disclosed. There is a certificate of official search for Butsotso/Ingotse/1110, which is a subdivision from Butsotso/Ingotse/569. The proprietors of Butsotso/Ingotse/1110 are indicated as Benard Khasakhala Mapesa, Kanoti Makale Mutuli and Erastus Apeniko Aseka, effective from June 23, 2004. The register for Butsotso/Ingotse/1110 was closed on May 18, 2005, after its subdivision to Butsotso/Ingotse/2468, 2469 and



2470. There is a green card for Butso/Indangalasia/415, which indicates that it was originally registered in the name of Otwes Akataba on January 9, 1969, then it was transferred to Otwes Akhata, Daud Otwes Khatara and Prisca Weyanga Andikuli on February 28, 1994, then on May 8, 2018 it was transferred to Vincent Wanga Nandukule. There is a handwritten document, purported to be a sale agreement, dated June 1, 2001, over the sale of Butso/Ingotse/556, between Arinoli Makwali Nyopola and Pereneta Khatondi Mapesa. Daniel Khasakhala is indicated as the person who drew the agreement.
11. The second affidavit by Hezron Kaunda Mapesa is supplementary to the earlier one. It gives further details on Butso/Ingotse/583. He says he bought 4 acres out of that land, from Khaoya Mukoya, but there were no documents. He avers that the said Khaoya Mukoya had obtained a loan from the Agricultural Finance Corporation, and that he, Hezron Kaunda Mapesa, bought the 4 acres, through repaying the balance of that loan for Khaoya Mukoya. He asserts that that land does not form part of the estate of the deceased. He has attached a statement of account for Khaoya Mukoya, from the Agricultural Finance Corporation, showing payments made in 1982 and 1983. There is also a pay-in slip of October 31, 1983, showing a deposit by HK Mapesa, into that Agricultural Finance Corporation account.
 12. Has the administrator complied with the directions that I gave on September 17, 2021? Regarding disclosure of the children of the deceased who have since died, there is disclosure, inclusive of the children who survived them. Regarding the sale to Arinoli Makwali Nyopola, of Butso/Ingotse/556, there is disclosure of a sale agreement of 2001, between him and Berneta Khatondi. Regarding renunciations by children or grandchildren of the deceased who are waiving their entitlements to inherit, there is no compliance, for none of them have filed a renunciation or a consent on distribution. Regarding evidence that Butso/Indangalasia/415 was at one time registered in the name of Benard Khasakhala, there is no compliance, for the green card on record does not bear the name of the said Benard Khasakhala.
 13. So, do I have material upon which I can go ahead to distribute the estate of the deceased? The petition filed herein on July 1, 1998, listed only one asset as making up the estate of the deceased, being Butso/Ingotse/1110. A certificate of official search of July 7, 1998, showed it to be still in the name of the deceased. After confirmation of the initial grant, on March 25, 2004, the said property was transmitted to Benard Khasakhala Mapesa, Kanoti Makale Mutuli and Erastus Apeniko Aseka. I ordered cancellation of that transmission in my ruling of August 15, 2019. So, Butso/Ingotse/1110 is an asset in the estate, available for distribution. It was also alleged that Butso/Ingotse/556 had been left out, yet it was still in the name of the deceased. A certificate of official search lodged herein on January 28, 2002, dated October 11, 2001, indicated the registered proprietor of the property as Mapesa Nakuku, since October 7, 1968. It would, therefore, appear that the only assets available for distribution are Butso/Ingotse/556 and Butso/Ingotse/1110, as these are the only ones that appear to be in the name of the deceased.
 14. Who are entitled to shares in Butso/Ingotse/556 and Butso/Ingotse/1110? The deceased had 4 wives. It emerges that 2 of the sons of the deceased had property registered in their names during the lifetime of the deceased, being Charles Okutoyi Mapesa, B/I/552, in 1968, and Adriano Imbiakha Mapesa, B/I/416, in 1970. It is alleged that these 2 were settled by the deceased inter vivos, but I have no proof of it. The applicant has not attached copies of the green cards for B/I/552 and B/I/416. Charles Okutoyi Mapesa and Adriano Imbiakha Mapesa have not sworn affidavits to that effect, and I cannot make a presumption that these were inter vivos gifts from the deceased, without concrete evidence. Who knows, Charles Okutoyi Mapesa and Adriano Imbiakha Mapesa, or their survivors or successors, may show up after the grant has been confirmed, and transmission done, to claim that the same was



done without hearing them, and that B/I/552 and B/I/416 were not in fact inter vivos gifts. It is not for nothing that the law requires that all the survivors of the deceased be brought on board before final orders on distribution are made. I cannot tell whether or not Charles Okutoyi Mapesa and Adriano Imbiakha Mapesa have claims to Butsotso/Ingotse/556 and Butsotso/Ingotse/1110.

15. Butsotso/Ingotse/556 is still in the name of the deceased, but the applicant claims that the family of the late Micah Kanambo had been allocated 4.6 acres out of it. I have seen no evidence of the alleged gifting by the deceased. There is also a claim that Arinoli Makwali Nyapola bought 1 acre out of Butsotso/Ingotse/556. However, the alleged sale happened after the demise of the deceased, and the asset had not vested in the person who allegedly sold it to him, and he should, ideally, wait to get his share from the person who sold it to him, after the grant herein is confirmed, and transmission done. Likewise, Butsotso/Ingotse/1110 is registered in the name of the deceased, but it is claimed that Benard Khasakala was given 4.1 acres out of it. I have seen no proof of the alleged gifting by the deceased. It is alleged that Dorah Nasenya, Imelda Sikuta and Salome Murunga were gifted 1 acre, but it is not disclosed from which parcel of land, as between Butsotso/Ingotse/556 and Butsotso/Ingotse/1110. It is also claimed that Protus Luseno was given 3.6 acres, but there is no indication from which of the 2 parcels of land, Butsotso/Ingotse/556 and Butsotso/Ingotse/1110, the same was to come from. It is similarly claimed that Hezron Kaunda Mapesa had been gifted 4.6 acres, but there is no indication concerning the parcel of land from which they were to come from, and no proof of the gifting by the deceased has been provided.
16. As it is, there is still information to be made available before the court can proceed to distribute the estate, inclusive of the applicant fully complying with the directions of September 17, 2021, and availing the renunciations or consents by the children of the deceased, or their survivors or successors, that they would not be taking up their shares in the estate.
17. There were questions about Butsotso/Indangalasia/415, about whether it was ever registered in the name of Bernard Khasakala. The green card that has been placed on record shows that this property never was registered in the name of the deceased, and it never came to the name of Bernard Khasakala.
18. The applicant has also mentioned Butsotso/Ingotse/583. I never referred to it in my previous rulings, and I did not give any directions on it. From what I have seen from the papers placed on record, the same is not estate property, and it should not be dragged into these proceedings.
19. I am unable to give final orders in this matter, for the reasons given above. Let the parties fully comply with the directions of September 17, 2021, and let them involve all the survivors of the deceased in the process, be they sons or daughters, or their heirs, survivors or successors. It is so ordered.

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

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Mango, instructed by DSG Mango & Company, Advocates for the administrators.

Mr. K'Ombwayo, instructed by M. Kiveu, Advocate for the protestor.

