



**In re Estate of Joseph Mubwabi Sabayi also known as Mbwabi Sabayi (Deceased)
(Succession Cause 600 of 2011) [2023] KEHC 2694 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2694 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 600 OF 2011**

WM MUSYOKA, J

MARCH 24, 2023

**IN THE MATTER OF THE ESTATE OF JOSEPH MUBWABI SABAYI ALSO KNOWN AS
MBWABI SABAYI (DECEASED)**

RULING

1. On September 17, 2021, I delivered a judgment wherein I postponed determination of a summons for confirmation of grant, dated August 19, 2019, and the protest to it, and directed the administratrix to file a further affidavit, to disclose all the children of the deceased, for the dead children to disclose their successors, and to disclose whether any assets had been settled in favour of any of the children during the lifetime of the deceased.
2. A further affidavit has been filed, sworn on July 14, 2022, by Jenipher Musanga, the protestor. The administratrix did not file any affidavit. According to the affidavit by the protestor, the deceased had only 1 wife, the late Lucia Mutubwi, who had 8 children, said to be the late Alfred Konzolo, the late Paul Likhaya, the late John Kisienya Mbwabi, the late Norah Elijah, the late Rose Mutola, the late Anne Lungatso, the late Regina Tisha and Rita Khavetsa. Of the 8 children, only Rita Khavetsa is alive; and of the 7 who are dead, only the late Anne Lungatso did not have children. It is not disclosed whether or not the late Regina Tisha had children, and I shall, for the purposes of distribution, presume her to have had children. The deceased is said to have had only one property, Isukha/Shirere/1251, part of which he was said to have had sold 0.14 hectare to Solomon Musinya, who settled on the portion.
3. The deceased died in 1983, 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 was survived by children with no surviving spouse, and, therefore, the estate is for distribution in accordance with section 38 of the *Law of Succession Act*, which provides for equal distribution of the property amongst the children. A majority of the surviving 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 to step 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 and the protestor indicated that the deceased had shared out his property amongst his sons during his lifetime. No evidence was led to show that the deceased subdivided the land, and got title deeds issued to the names of the respective sons. 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, 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 his sons 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 deceased had daughters. The alleged inter vivos distribution did not appear to have mentioned daughters, yet, 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 fortified 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.
6. 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.
7. 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.
8. It appears that there is agreement that the deceased had sold a portion of the estate, 0.41 hectare, to Solomon Musinya. That sale should be reckoned. The name of a son of the said buyer is given out as the heir to that portion. I do not know whether he is the only child of the buyer. Devolving the share of the dead buyer directly to the son could disinherit other survivors of the dead buyer, and there could also be other claimants to it, that have not been disclosed. The proper thing would be to devolve it to his estate, so that it can be distributed in proceedings in his estate, where all the claimants would have a say.
9. Consequently, I hereby dispose of the application, dated August 19, 2019, and the protest to it, in the following terms:
 - a. That I hereby confirm the administratrix, Enrieta Konzolo Michael, as such, to go on to distribute the estate, on the terms that I will set out shortly, and to complete administration;
 - b. That Isukha/Shirere/1251 shall be distributed as follows:
 - i. 0.41 hectare, to the estate of the late Solomon Musinya; and
 - ii. the remainder, to Rita Khavetsa and the estates of the late Alfred Konzolo, the late Paul Likhaya, the late John Kisienya Mbwabi, the late Norah Elijah, the late Rose Mutola and the late Regina Tisha, equally;
 - c. That a certificate of confirmation of grant shall issue accordingly;



- d. That the matter shall be mentioned after 6 months, to confirm completion of administration, and for closure of the court file herein;
- e. That any party aggrieved by these orders has leave of 28 days to move the Court of Appeal appropriately; and
- f. That each party shall bear their own costs.

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

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant

Mrs. Chungu, instructed by Elizabeth Chungu & Company, Advocates for the administratrix.

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

