



**In re Estate of James Cheto Luta alias Cheto Luta (Deceased) (Succession Cause 351 of 2009) [2023] KEHC 3883 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3883 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 351 OF 2009**

**WM MUSYOKA, J**

**APRIL 28, 2023**

**JUDGMENT**

1. The deceased herein died on November 26, 1983. A letter from the Senior Assistant Chief of Chekasa Sub-Location, dated June 28, 2006, indicates that he was survived by 5 individuals, being Kaskon Cheto, Francis Luta Cheto, Timothy B. Cheto, Jeremiah Cheto and Munjalu Shimbuku, their relationship with the deceased is not disclosed.
2. The petition for representation was filed in the cause on 26<sup>th</sup> June 2009, by Jacob Meshack Luta, in his capacity as a son of the deceased. He listed 6 individuals as survivors of the deceased, being 1 widow, Belita Liluka Cheto, and 5 sons, being Jacob Meshack Luta, Jeremiah Cheto, Zebetayo Simiyu Cheto, Timothy Burundi Cheto and Kaskon Cheto. Kakamega/Shamberere/379 is the property that the deceased is said to have died possessed of. Charles Munjalu Shumbuku is listed as a liability. Letters of administration intestate were duly made on August 19, 2009, and a grant was duly issued, dated September 4, 2009. I shall refer to Jacob Meshack Luta, hereafter, as the administrator.
3. What is up for determination is a summons for confirmation of grant, dated 6<sup>th</sup> March 2012. It is brought at the instance of the administrator. He is expressed to have been survived by 1 widow, 5 sons and 1 daughter, being Perita I. Cheto, Jeremiah Cheto, Timothy Burudi Cheto, Francis Luta Cheto, Jacob Meshack Luta, Zebetayo Simiyu Cheto and Florence Yakubu Akoyi. Charles Munjalu Shumbuku is listed as a purchaser. 2 assets are listed as what is available for distribution: South Kabras/Shamberere/379 and 456. It is proposed that South Kabras/Shamberere/379 is shared as follows: Jeremiah Cheto 3.6 acres, Timothy Burudi Cheto 3.6 acres, Francis Luta Cheto 4.0 acres and Charles Munjalu Shumbuku 1.0 acre; and South Kabras/Shamberere/456 as follows: Jacob Meshack Luta 4.0 acres, Zebetayo Simiyu Cheto 2.0 acres and Florence Yakubu Akoyi 1.0 acre. There is a supporting Form 37, on consent on distribution, of South Kabras/Shamberere/379 and 456, duly signed by Jeremiah Cheto, Timothy Burundi Cheto, Francis Luta Cheto, Charles Munjalu, Jacob Meshack Luta and Zebetayo Cheto.
4. An affidavit of protest was filed herein, by Perita Khajiti Wanaswa, sworn on 28<sup>th</sup> March 2012. I shall refer to her hereafter as the protestor. She claims on behalf of her late son, Kaskon Tito, who died during the pendency of the succession proceedings. She also claims that she was not recognized as a



- beneficiary. She asserts that her son was entitled to equal share of the land with the other sons. She says that the deceased was survived by 6 sons, being Jeremiah Cheto, Timothy Cheto, Francis Luta Cheto, Jacob Cheto, Zebedayo Cheto and Kaskon Cheto. She says the estate was 21.2 acres, out of which her son should get 3.5 acres.
5. Directions were given on October 1, 2013, for disposal of the application by way of oral evidence.
  6. The oral hearings commenced on December 3, 2020. The administrator was the first on the witness stand. He stated that the deceased was his father. He had 1 wife, Berita Iruko Cheto, who died in 2019. The deceased was said to have had 6 children, being Francis Luta Cheto, Jacob Meshack Luta, Timothy Burudi Cheto, Jeremiah Cheto, Zebetayo Simiyu Cheto, Erina Mutakale, Mary Cheto and Kaskon Cheto. He disclosed that 2 of them had died, Erina Mutakale and Kaskon Cheto. He said that Kaskon Cheto died without children. He said that the deceased died possessed of South Kabras/Shamberere/379 and 456. He stated that the deceased had not sold any portion of the land to anyone, and, therefore, the estate was not indebted to anyone. Regarding the protestor, he said that she only surfaced after Kaskon Cheto died, and that she was married to a Wanaswa Mukokolo, of Musanga.
  7. During cross-examination, he confirmed that he recognized the late Kaskon Tito as his brother, but not a child of his mother, Berita Iruko Cheto, for he was born out of wedlock, to Perita Khatiti, the protestor. He died in 2009, after the cause was filed. He said that he was not married, and did not have children, and that his mother, the protestor, was his closest blood relative. He said that they did not agree that the protestor be brought into the case to take the share due to Kaskon Tito. He said that he had not allocated anything to the estate of Kaskon Tito, and the protestor could not get a share in the estate, for she was married to someone else, and had a home elsewhere.
  8. Zablon Luta Inguche followed. He was a nephew of the deceased. He said that Kaskon Tito was a child of the deceased, by the protestor. He said that Kaskon was not married, did not have children, and his mother was his closest biological relative. He said that he was entitled to a share in his father's estate.
  9. Gideon Njilimani Murunga was next. The deceased was his neighbour. He said that Kaskon Tito was a child of the deceased, born outside of wedlock to the protestor. He saw the protestor for the first time after Kaskon died. He said that Kaskon had a house in the compound of the of deceased, and was entitled to a share in the estate of his father. He was not married and did not have a child, and when he died he was buried within the estate.
  10. The case for the protestor opened on 21<sup>st</sup> February 2022, when she testified. She described the deceased as her husband. She said that they had 1 child, Kaskon Tito Lutta. She claimed the share due to her late son, Kaskon. She said that she was the one who raised him, after she separated from the deceased, and he went back to his father after circumcision, when he was 6 years old. She said that after Kaskon died, he was buried in his father's land, on the portion that was meant for him. She said that he had no wife, and no children. She said that she was claiming the share due to the late Kaskon Tito, as his mother.
  11. The deceased died in 1983, after the *Law of Succession Act*, cap 160, Laws of Kenya, had come into force. His estate is, therefore, for distribution in accordance with the *Law of Succession Act*. He died intestate, and, therefore, Part V, on intestacy, should apply to the distribution of the estate. Distribution would depend on whether he was survived by a widow and children. There is no dispute that he was survived by children, but his widow, has since passed on. The protestor was not his spouse, but claims on behalf of her late child, with whom she got with the deceased outside wedlock.
  12. The disclosure of the survivors of the deceased has been haphazard. From the filings and the oral testimonies, the children of the deceased have emerged as Jeremiah Cheto, Timothy Burudi Cheto, Francis Luta Cheto, Jacob Meshack Luta, Zebetayo Simiyu Cheto, Florence Yakubu Akoyi, Erina



Mutakale, Mary Cheto, and Kaskon Cheto. Erina Mutakale and Kaskon Cheto are said to have died. Kaskon Cheto survived the deceased but died thereafter. There is no disclosure as to whether Erina Mutakale survived the deceased or not. Consequently, I find and hold that the deceased was survived by 6 sons and 2 daughters. From the material on record it would appear that Erina Mutakale did not survive the deceased. I shall, therefore, be distributing the estate amongst the 6 sons and 2 daughters. Kaskon Cheto survived the deceased, and his share shall go to his estate.

13. The letter from the Chief identifies Charles Munjalu Shimbuku as a beneficiary. In the petition, the said Charles Munjalu Shimbuku is listed as a liability. In the summons for confirmation of grant, Charles Munjalu Shimbuku is allocated 1.0 acres, and he is among the persons who have signed the consent on distribution, in Form 37, under Rule 40(8) of the *Probate and Administration Rules*. Curiously, at the oral hearing of the summons for confirmation of the grant, the administrator claimed that the deceased had not sold his land to anyone, and he was not indebted to anyone. I find it curious, as it was the administrator who introduced the name of Charles Munjalu Shimbuku into the petition and the summons for confirmation of grant, and even got him to sign Form 37, only to renounce him at the oral hearing. Charles Munjalu Shimbuku did not participate in the proceedings, and I did not hear his side. I shall presume that he bought a share of the estate from one of the children of the deceased, and he should look up to whoever sold the portion to him, and get his share from that person after confirmation of the grant, and transmission of the estate thereafter. I shall distribute the estate without reckoning him.
14. The other issue relates to the protestor. She is the mother of the late Kaskon Cheto. She claims on his behalf. It is not disputed that the deceased sired the late Kaskon Cheto, what is in dispute is whether the protestor got that child in her capacity as a wife, or whether he was born outside wedlock. Whatever the case, the protestor has not asserted to be a widow of the deceased. She only claims the share that should have gone to her late son. She has not obtained representation to his estate, and she has no locus standi to claim on his behalf. The estate of the late Kaskon Cheto is entitled to a share in the estate, as he survived the deceased. I shall devolve his share to his estate, to be distributed in succession proceedings initiated in his name, by whoever survived him. The protestor is not entitled to a share in the estate in her own right, as she has not claimed to be a widow of the deceased, neither has she led evidence to that effect.
15. The deceased had 2 daughters Florence Yakubu Akoyi and Mary Cheto. In the distribution proposed, only Florence Yakubu Akoyi has been allocated a share. She is allocated a share far less than what the sons get. She did not sign the consent on distribution in Form 37. The other daughter, Mary Cheto, has not been provided for. She has not signed Form 37, and I have not seen a document, in the record, where she has renounced her beneficial interest. The deceased died after the *Law of Succession Act* had come into force, on 1<sup>st</sup> July 1981. The estate is for distribution in accordance with Part V of the Act, therefore; where sons and daughters are entitled equally.
16. 2 assets are available for distribution, being South Kabras/Shamberere/379 and 456. As the survivors are children only, with no surviving spouse, distribution shall be in terms of section 38 of the *Law of Succession Act*, which provides for equal distribution between the children. The distribution proposed is unequal, and no explanation has been given. Some of the survivors have not been provided for, have not signed the consent on distribution and have not filed a renunciation. When that happens, the court applies the law strictly, by distributing the property equally.



17. For avoidance of doubt, section 38 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 be equally divided among the surviving children.”

18. The orders that I am moved to make in the circumstances are as follows:

- a. That for purposes of the confirmation application, dated 6<sup>th</sup> March 2012, I have identified the persons beneficially entitled to share in the intestate estate of the deceased as Jeremiah Cheto, Timothy Burudi Cheto, Francis Luta Cheto, Jacob Meshack Luta, Zebetayo Simiyu Cheto, Florence Yakubu Akoyi, Mary Cheto and the late Kaskon Cheto;
- b. That South Kabras/Shamberere/379 and 456 shall be shared out equally between Jeremiah Cheto, Timothy Burudi Cheto, Francis Luta Cheto, Jacob Meshack Luta, Zebetayo Simiyu Cheto, Florence Yakubu Akoyi, Mary Cheto and the late Kaskon Cheto;
- c. That the share due to the late Kaskon Cheto shall devolve upon his estate, to be administered and distributed in succession proceedings initiated in his name;
- d. That the grant herein is confirmed in those terms, and a certificate of confirmation of grant shall issue accordingly; and
- e. That any party aggrieved by these orders has leave of twenty-eight days, to move the Court of Appeal, appropriately.

19. It is so ordered.

**JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 28TH DAY OF APRIL 2023**

**WM MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Appearances**

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

**Mr. Elung'ata, instructed by Elung'ata & Company, Advocates for the protestor.**

