



REPUBLIC OF KENYA



In re Estate of Rosalina Hellen Ajando Mulindi (Deceased) (Succession Cause 1180 of 2012) [2023] KEHC 3885 (KLR) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3885 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 1180 OF 2012**

WM MUSYOKA, J

APRIL 28, 2023

**IN THE MATTER OF THE ESTATE OF ROSALINA HELLEN AJANDO
MULINDI (DECEASED)**

RULING

1. On June 14, 2019 I delivered a ruling, wherein I appointed an additional administrator, and directed the administrators to apply for confirmation of their grant, listing all the survivors of the deceased, directed those who wished to renounce their share to file documents to that effect and those who did not agree with the proposals made in that confirmation application to file their protests.
2. 2 summonses for confirmation of grant were filed, dated October 22, 2021 and May 10, 2022.
3. The summons for confirmation of grant, dated October 22, 2021, is brought at the instance of Ruth Luziri Mulindi King. I shall refer to her hereafter as the applicant. The deceased is expressed to have been survived by 5 children, being 2 sons and 3 daughters, namely Henry Amadalo Mulindi, Ruth Luziri King, Sobbie Apungu Zebedee Mulindi, Margaret Ingado Mulindi and Betty Malesi Shaiga Mulindi. Then there is a stepson, Benard Mugangu Mulindi. 4 grandchildren are also listed, being Philip Mulanda John, Jacqueline Ajando Arkle, Eric Vuyanzi Harding and Benard Luvaha Mulindi. 5 step grandchildren are also listed, being Fredrick Luvaha, Kelvin Mahila Mung'asia, Sophie Malesi, Sharon Kigadi and David Mmbwanga. 4 assets are listed as what is available for distribution: North Maragoli/Lusengele/180, Kakamega/Kedoli/1178, Kakamega/Kedoli/1179 and North Maragoli/Lusengeli/952. It is proposed that North Maragoli/Lusengele/180 should devolve equally upon Ruth Luziri Mulindi King, Margaret Ingado Mulindi and Betty Malesi Shaiga Mulindi; Kakamega/Kedoli/1178 equally to Philip Mulanda John, Jacqueline Ajando Arkle, Eric Vuyanzi Harding and Benard Luvaha Mulindi; Kakamega/Kedoli/1179 equally to Benard Mugangu Mulindi, Fredrick Livaha, Kelvin Mahila Mung'asia, Sophie Malesi, Sharon Kigadi and Davis Mmbwanga; 50% of North Maragoli/Lusengeli/952 equally amongst Henry Amadalo Mulindi, Philip Mulanda John, Jacqueline Ajando Arkle and Eric Vuyanzi Harding; and the whole of the other 50% of North Maragoli/Lusengeli/952 to go to Ruth Luziri Mulindi King, Henry Michael Mulindi, Margret Ingado



- Mulindi, Benard Luvaha Mulindi, Betty Malesi Shaiga Mulindi and administration/legal/surveyor/transfer fees.
4. There is a supporting Form 37, on consent on distribution, duly signed by Ruth Luziri King, Henry Michael Mulindi as representative of Sobbie Apungu Zebedee Mulindi, Margaret Ingado Mulindi, Betty Malesi Shaiga Mulindi, Benard Mugangu Mulindi, Philip Mulanda John, Jacqueline Ajando Arkle, Benard Luvaha Mulindi, Kelvin Mahila Mung'asia, Sophie Malesi, Sharon Kigadi and David Mmbwanga. Eric Vuyanzi Harding, Fredrick Luvaha Mulindi and Henry Amadalo Mulindi did not sign the Form 37. There is also a document attached to the affidavit in support of the application, signed by Henry Amadalo Mulindi, Ruth Luziri King, Henry Michael Mulindi as representative of Sobbie Apungu Zebedee Mulindi, Margaret Ingado Mulindi, Betty Malesi Shaiga Mulindi, Benard Mugangu Mulindi, Philip Mulanda John, Jacqueline Ajando Arkle, Benard Luvaha Mulindi, Kelvin Mahila Mung'asia, Sophie Malesi, Sharon Kigadi and David Mmbwanga. Eric Vuyanzi Harding and Fredrick Luvaha Mulindi have not signed the said document.
 5. The summons for confirmation of grant, dated May 10, 2022, is at the instance of Benard Luvaha Mulindi. He is a co-administrator with the applicant. I directed, on May 26, 2022, that this application be treated as a protest to the application dated October 22, 2021. Consequently, I shall refer to Benard Luvaha Mulindi as the protestor. In the affidavit supporting his affidavit, he identifies the children of the deceased as the late Henry Amadolo Mulindi, the late Mary Uside, Ruth King Mulindi, the late Sobbie Mulindi, the late Indiazi Mulindi, Margret Ingado, Betty Jaika Mulindi, Benard Mugangu Mulindi, Isaac Mulanda Mulindi and the late Aggrey Mung'asia Mulindi. The children of the late Henry Amadalo Mulindi are identified as Emmanuel Mulindi, Rose Amadalo and the late Gladson Lidiema. The children of the late Mary Uside are identified as Jackline Arkle and Philip Arkle. The late Seth Vuyanzi had only 1 child, Eric Vuyanzi Herding. The late Luke Indiazi had only 1 child, the protestor herein, Benard Luvaha Mulindi. The children of the late Sobbie Mulindi are Henry Mulindi, Julie Mulindi and Christine Mulindi. The estate of the deceased is said to comprise of Kakamega/Kedoli/1179 Kakamega/Kedoli/1178, Kakamega/Kedoli/31, North Maragoli/Lusengeli/180, Kakamega/Lusengeli/161 and North Maragoli/Lusengeli/952, and that the said property was initially registered in the name of her late husband, David Mulindi Mbwanga, and devolved to her upon distribution of the estate of her late husband, vide confirmation orders made in Nairobi HCSC No 3112 of 2004. He avers that the vast estate of her late grandfather, the late David Mulindi Mbwanga, was devolved to only 2 of his survivors, that is the deceased herein, Rosalina Hellen Ajando, and the late Henry Amadala Mulindi. He asserts that the deceased herein, Rosalina Hellen Ajando, was only entitled to a life interest in the assets that make up estate of her late husband, David Mulindi Mbwanga. He states that the stepchildren of the late David Mulindi Mbwanga were not considered when the estate of Rosalina Hellen Ajando was initially distributed in 2014, hence the setting aside of those orders in 2017. The stepchildren that he talks about are Benard Mugangu Mulindi, Isaac Mulanda and Aggrey Mugasia Mulindi. He proposes distribution of the estate as follows: Kakamega/Kedoli/1179 equally to the 2 sons of Benard Mugangu and the children of the late Aggrey Mugasia Mulindi (Fredrick Livaha, Kelvin Mhila Mung'asia, Sophie Malesi, Sharon Kiguli and David Mmbwanga); Kakamega/Kedoli/1178 to be shared equally amongst Margaret Ingado Mulindi, the children of the late Mary Arkle Mulindi (Jackie Arkle and Philip Arkle) and the child of the late Seth Vuyanzi Mulindi (Eric Vuyanzi Harding); Kakamega/Lusengeli/180 to Benard Luvaha Mulindi, the only son of the late Luku Indiazi Mulindi; Kakamega/Lusengeli/161 to Ruziri Mulindi King and Betty Malesi Shaiga, equally; and North Maragoli/Lusengeli/952 to be sold and the proceeds of sale shared equally amongst all the beneficiaries. It is averred that the late David Mmbwanga, the husband of the deceased herein, had settled some of his children prior to his death, being: Isaac Mulindi on



North Maragoli/Lesengeli/159, the late Henry Amadalo Mulindi on North Maragoli/Kedoli/163 and the late Sobbie Mulindi on North Maragoli/Lusengeli/192.

6. The 2 applications came up on May 26, 2022, for hearing. Several beneficiaries were in attendance, being Margaret Mulindi, Jacqueline Arkle, Sharon Mung'asia, Benard Mulindi, Davis Mbwanga, Benard Mugangu Mulindi, Kelvin Mahila, Betty Malesi and Sophie Malesi. They addressed me on the 2 applications, but they did not make statements on oath or give evidence. I only heard them to comply with Rule 41(1) of the [Probate and Administration Rules](#). Margaret Mulindi, Jacqueline Arkle, Sharon Mung'asia, Davis Mbwanga, Kelvin Mahila, Betty Malesi, Sophie Malesi, Ruth Mulindi and Julie Mulindi supported the proposals in the application dated October 22, 2021; while Benard Mulindi and Benard Mugangu Mulindi, were in support of the proposals in the application dated May 10, 2022. I was invited to determine the applications based on the proposals on record. I directed the parties to file and serve written submissions. I have written submissions by the protestor, but not by the applicant. The purported written submissions are just a regurgitation of the averments made in the application dated May 10, 2022. The only thing of some interest is that the submissions are signed by individuals who now claim that they support the proposals by the protestor. Those claiming to now support the said proposals, apart from the protestor, are Benard Mugangu Mulindi, Jacqueline Ajando Arkle, Sophy Malesi Mung'asia, Sharon Kigadi Mung'asia, Davis Mmbwanga Mung'asia, Kelvin Mahila Mung'asia and Betty Malesi Mulindi.
7. The parties hereto have not done justice to this matter. In the first place the protestor appears to entertain the notion that this is also about the estate of his late grandfather, and the husband of the deceased herein, David Mulindi Mmbwanga. Both sides have dragged into this matter individuals who are not entitled to shares in the estate herein, but in the estate of the late David Mulindi Mmbwanga. Both sides should be very clear on who is entitled to a share of the estate herein. Those entitled would be the children of the late Rosalina Hellen Ajando Mulindi. The said children are the late Henry Amadolo Mulindi, the late Mary Uside, Ruth King Mulindi, the late Sobbie Mulindi, the late Indiazzi Mulindi, Margret Ingado, Betty Jaika Mulindi, Benard Mugangu Mulindi, Isaac Mulanda Mulindi, the late Seth Vuganzi and the late Aggrey Mung'asia Mulindi. Some of the children of the deceased are dead, and what is due to them should devolve to their children, in terms of section 41 of the [Law of Succession Act](#), Cap 160, Laws of Kenya. Any other person who is not within that circle is not entitled to a share in the estate, and should not be provided for.
8. There was talk of stepchildren of the deceased, who were also identified as stepchildren of the late David Mulindi Mmbwanga. Whether the said stepchildren are of the deceased herein or of the late David Mulindi Mmbwanga they would have no right to a share of the property herein. The deceased died intestate, and under intestacy, entitlement to inherit is based on blood relationship. The stepchildren of the deceased would have no blood connection with the deceased, hence they would have no entitlement in intestacy to a share in her estate. If the said stepchildren are stepchildren of the late David Mulindi Mmbwanga, and not the deceased, they would equally have no claim to the estate of the deceased for the same reasons, they are not her blood relatives. The parties have made no effort to show why non-blood relatives of the deceased should be allocated shares in her estate.
9. The other consideration is about the assets or property that is being proposed for distribution. The administrator and the protestor have no consensus on what the estate comprises of. They are on all fours on some assets, but not on others. Even then, none of them has attached copies of documents of title to demonstrate that the assets that they are inviting me to distribute do in fact belong to the deceased, for the court can only distribute what truly belongs to the deceased, and, secondly, that it must be demonstrated that even that which belongs to the deceased is free property, in terms of it not being encumbered one way or the other. The court cannot distribute property that does not



belong to the deceased, nor what belongs to the deceased but is not free for one reason or other, either because it is subject to an encumbrance, or restriction, or ownership is disputed. The administrators have an obligation to demonstrate that the assets they are proposing for distribution actually belong to the estate, and even then that they are free and available for distribution. None of the parties hereto, the administrator and the protestor, has attached copies of documents of title to the assets they are proposing for distribution. It is not enough to just list assets, claim them to belong to the deceased or the estate, and to expect the court to assume that what is asserted is true, without any supporting documentation. What is proposed for distribution is land, the parties ought to have attached the latest certificates of search to indicate the current statuses of the said assets. Without those documents making orders on distribution would be equivalent to jumping blindly into a pool.

10. The assets that the applicant has listed for distribution are North Maragoli/Lusengele/180, Kakamega/Kedoli/1179, Kakamega/Kedoli/1178 and North Maragoli/Lusengeli/952; while the protestor has listed Kakamega/Kedoli/1179, Kakamega/Kedoli/1178, Kakamega/Kedoli/31, North Maragoli/Lusengeli/180, Kakamega/Lusengeli/161 and North Maragoli/Lusengeli/952. Both sides agree on the assets proposed by the applicant, but the protestor has a longer list, which now includes Kakamega/Kedoli/31 and Kakamega/Lusengeli/161.
11. I have taken time to go through the record to determine whether these assets belong to the estate of the deceased. There is the green card for Kakamega/Kedoli/31. It shows that this property no longer exists, for its register closed on April 17, 2001, upon the title being subdivided into Kakamega/Kedoli/1178 and Kakamega/Kedoli/1179. Kakamega/Kedoli/31 was registered in the name of the late David Mulindi Mmbwanga in 1975, and at the time of its subdivision, the said late David Mulindi Mmbwanga was still alive. As Kakamega/Kedoli/31 does not exist, it is not available for distribution.
12. What about Kakamega/Kedoli/1178 and Kakamega/Kedoli/1179? Do they form part of the estate? Are they available for distribution? After the late David Mulindi Mmbwanga passed on, Nairobi HCSC No 3112 of 2004 was initiated for the purpose of the administration and distribution of his estate. Kakamega/Kedoli/1178 and Kakamega/Kedoli/1179 were among some of the assets in his estate that were distributed by the court in that cause on February 1, 2006. Both Kakamega/Kedoli/1178 and Kakamega/Kedoli/1179 were devolved upon Henry Amandalo Mulindi. There is a certificate of confirmation of grant, issued out of Nairobi HCSC No. 3112 of 2004, dated 1st February 2006, to that effect. That distribution of 1st February 2006 was tinkered with in 2016. The certificate of confirmation of grant of February 1, 2006, was rectified on April 27, 2016 and amended on October 28, 2016, to have Kakamega/Kedoli/1178 and Kakamega/Kedoli/1179 devolved upon Ruth Luziri Mulindi King, instead of Henry Amandalo Mulindi. As it is, Kakamega/Kedoli/1178 and Kakamega/Kedoli/1179 are not assets in the estate of the deceased herein, and they are not available for distribution in this cause. These assets have either been transmitted to the name of Ruth Luziri Mulindi King, or are awaiting transmission to her name from the estate of the late David Mulindi Mmbwanga, as per the certificate of confirmation of grant of February 1, 2006, rectified on April 27, 2016 and amended on October 28, 2016, in Nairobi HCSC No 3112 of 2004. It cannot be that Kakamega/Kedoli/1178 and Kakamega/Kedoli/1179 would be available for distribution in this cause when it has already been distributed in Nairobi HCSC No 3112 of 2004, to someone other than the deceased herein, and what they await is their transmission to the name of that other.
13. According to the certificate of confirmation of grant of February 1, 2006, rectified on April 27, 2016 and amended on 28th October 2016, issued out of Nairobi HCSC No 3112 of 2004, the assets that devolved to the estate of the deceased herein, out of the estate of her late husband, were Kakamega/Lusengeli/161, Kakamega/Lusengeli/180 and Maragoli/Lusengeli/952. These would be the assets that would make up her estate. However, for them to be distributed in these confirmation proceedings,



it must be demonstrated that they have been transmitted to the name of the deceased as at the date the distribution is proposed. As I have said above, and which I shall repeat here, the applicant and the protestor have not filed documents to demonstrate that Kakamega/Lusengeli/161, Kakamega/Lusengeli/180 and Maragoli/Lusengeli/952 were transmitted from the name of the late David Mulindi Mmbwanga, to that of the deceased, in terms of the certificate of confirmation of grant of February 1, 2006, rectified on April 27, 2016 and amended on October 28, 2016, and issued out of Nairobi HCSC No 3112 of 2004. No title deeds nor registration documents relating to them, in the names of the deceased, have been presented. No certificates of search have been filed, nor green cards, to demonstrate that the said assets were ever transmitted to her name. If transmission was not done, then it would mean, the said assets are still in the name of the late David Mulindi Mmbwanga, and not that of the deceased, and are, therefore, not yet available for distribution. It was the business of the administrators to cause the transmission of the assets from the name of the late David Mulindi Mmbwanga to that of the deceased. The failure on their part to do so amounts to a failure of administration. It is premature to invite me to distribute these assets, when the administrators have not yet done their duty, of bringing these assets to the estate of the deceased from the estate of the late David Mulindi Mmbwanga.

14. I have closely perused the record before me and I have come across a certificate of search in respect of Maragoli/Lusengeli/180, which is also known as Kakamega/Lusengeli/180. The certificate is dated April 4, 2012, and was filed herein the same year, at the initiation of this cause. As at that date, South Maragoli/Lusengeli/180, which is also known as Kakamega/Lusengeli/180, was still in the name of the late David Mulindi Mmbwanga. It would appear that the administrators have done nothing, since 2012, to have the said property transferred or transmitted to the estate of the deceased herein from the estate of late David Mulindi Mmbwanga. They ought to have that done before they proposed distribution, and they should get that done before they can think of having the estate distributed. The same obtains with respect to Kakamega/Lusengeli/161 and South Maragoli/Lusengeli/952.
15. The protestor appears to have issues with the manner the estate of the late David Mulindi Mmbwanga was distributed in Nairobi HCSC No 3112 of 2004, and equally appears to be trying to litigate them in the instant cause, in the estate of the widow of the said David Mulindi Mmbwanga. Such issues are not for resolution in this matter. If the protestor is keen on having them dealt with, with finality, then he should move the court in Nairobi HCSC No 3112 of 2004. The instant cause is in respect of the estate of the late Rosalina Hellen Ajando Mulindi, and it has nothing to do with the estate of the late David Mulindi Mmbwanga.
16. It is clear from the record before me that the parties are disagreed fundamentally on distribution. This is a matter that should have been taken through an oral hearing, to enable all the issues to be thrashed out. Distribution of the estate cannot be done at this stage. Let the administrators do the right thing first. The applications for confirmation of grant, dated October 22, 2021 and May 10, 2022, are hereby postponed, in terms of section 71(2)(d) of the *Law of Succession Act*, to enable the administrators address the issues that I have raised above. For avoidance of doubt, let them have Kakamega/Lusengeli/161, Kakamega/Lusengeli/180 and Maragoli/Lusengeli/952 transmitted from the name of the late David Mulindi Mmbwanga to that of the deceased herein, in terms of the certificate of confirmation of grant dated February 1, 2006, rectified on April 27, 2016, and amended on October 28, 2016, and issued out of Nairobi HCSC No 3112 of 2004, before the 2 applications can be relisted for hearing. Upon the said transmissions being done, there is liberty to file further affidavits on distribution.
17. The assets that are alleged to make up the estate of the deceased herein are all situated within the Maragoli area of Vihiga County. I shall, accordingly, order that the cause herein be transferred to the High Court of Kenya at Vihiga, for finalization.



18. 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. TTM Aswani, Advocate for the applicant.

Mr. Chitwah, instructed by DC Chitwah & Company, Advocates for the protestor.

