



REPUBLIC OF KENYA



**In re Estate of Festus Amiani Lungatso (Deceased) (Succession Cause
281 of 1989) [2023] KEHC 18244 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 281 OF 1989**

PJO OTIENO, J

MAY 30, 2023

IN THE MATTER OF THE ESTATE OF FESTUS AMIANI LUNGATSO (DECEASED)

BETWEEN

ANTHONY SHIVACHI AMIANI 1ST APPLICANT

ELIZABETH TSHIKHUNGU SHIHANDE 2ND APPLICANT

AGGREY SHITANDAYI LISILI 3RD APPLICANT

AND

ALEXANDER LUMUMBA AMIANI 1ST RESPONDENT

PHOEBE ANDEGA INDIEKA 2ND RESPONDENT

KENNEDY BAHATI 3RD RESPONDENT

JUDGMENT

1. All beneficiaries of the estate agreed to mediate and did reach a settlement coded in the mediation settlement agreement dated November 26, 2021. When filed in court, the same was adopted as an order of the court on the May 20, 2022. The gist of the agreement was recorded to be that:-
 - ”2. That the parties have agreed that all the children of Festus Amiani Lungatso have participated in the mediation.
 3. That the parties have agreed that the following be appointed as administrators:-
 - i) Phoebe Andega Indieka
 - ii) Alexandar Lumumba Amiani



- iii) Anthony Shivachi Amiani
 - iv) Elizabeth Tsikhungu Shihande
4. That the parties have agreed that land parcel Isukha/Ileho/1437
- (a) be surveyed to determine its acreage.
 - (b) be redistributed afresh.
 - (c) The following are the beneficiaries of the land parcel Isukha/Ileho/1437:
 - 1. Alexandar Lumumba Amiani - ID No xxxx
 - 2. Mary M. Amiani - ID No xxxx
 - 3. Alice Akonya Akhonya - ID xxxx
 - 4. Margaret Masitsa Amiani - ID No xxxx
 - 5. Kennedy Bahati Amiani - ID No xxxx
 - 6. Gladys Museni Amiani - ID No xxxx
 - 7. Aggrey Shitandayi Lisili - ID No xxxx
 - 8. Antony Shivachi Amiani - ID No xxxx
 - 9. Elizabeth Stiskhungu Shihande - ID No xxxx
 - 10. Adelaide Libuyi Shiyenze - ID xxxx
 - 11. Phoebe Andeka Indiaka - ID xxxx
5. That the parties have agreed that the liability namely John January Kiluko Mahond – ID No xxxx bought land from the daughters of Festus Amiani Lungatso measuring 2 acres from Phoebe Andeka Indiaka, Mary Mwisiachi Amiani, Alice Akonya Akhonya, Margaret Masitsa Amiani, Gladys Museni Amiani and Adelaide Libuyi Shiyenze who sold him their share of 2 acres.

That the parties have agreed on this settlement voluntarily.

Signed by:-

- 1. Alexandar Lumumba Amiani - ID No xxxx
- 2. Mary M Amiani - ID No xxxx
- 3. Alice Akonya Akhonya - ID xxxx
- 4. Margaret Masitsa Amiani - ID No xxxx



5. Gladys Museni Amiani - ID No xxxx
6. Aggrey Shitandayi Lisili - ID No xxxx
7. Elizabeth Stikhungu Shihande - ID No xxxx
8. Antony Shivachi Amiani - ID No xxxx
9. Kennedy Bahati Amiani - ID No xxxx
10. Adelaide Libuyi Shiyenze - ID xxxx
11. Phoebe Andeka Indiaka - ID xxxx

In the presence of:-

Rev Charles S Mutola – Mediator

November 26, 2021”

2. After the consent was adopted as an order of the court, two administrators lodge their summons for confirmation of grant and made a proposal on how to distribute the estate. Attached to the Summons was a consent on distribution which was however signed by only three and not all the beneficiaries.
3. In that summons the petitioners proposed that the estate be shared out as follows:-

Name	Description of property	Share of heirs
Jeridah Khasoa Amiani	Isukha/kambiri/342	Whole
Phoebe Andeka Indieka Mary Mwisiachi Alice Akonya Akhonya Margaret Masitsa Amiani Gladys Museni Amiani Adelaide Liboyi Shiyenze	Isukha/Ileho/1285	To hold equally
Fred Mukabwa Amiani	ISukha/Ileho/964	Whole
Tobias Mabwa Okendo	Isukha/Ileho/1075	Whole
Anthony Shivachi Amiani Alexander Lumumba Amiani Kennedy Bahati Amiani Aggrey Shitandayi Lisili Elizabeth Tsikhungu Shihande	Isukha/Ileho/1437	To distribute equally

4. When served, the 1st and 2nd administrators filed a replying affidavit and opposed its mode of distribution on the basis that the same did not accord with the mediation settlement agreement first as



much as it did not have the blessing of all the administrators who did not participate in making such proposal. They also contended that the deceased had made and left behind a Will written in Kiluhya but which they translated into English. It was contended that the Will bequeath to different people different assets some of which; that property Isukha/Ileho/1437 was nominated to be shared among beneficiaries but the deceased sold a portion of it measuring 4 Ha prior to his death. The protestors assert that the deceased was married to two women and that pursuant to a certificate of confirmation of Grant dated September 26, 2011, the estate property was distributed and transferred to; Phoebe Andega Indieka, Elizabeth Tsikhungu, Kennedy Bahati Amiani, Alexander Lumumba Amiani and Aggrey Shitandayi Lisili. They then accused the signatory to the proposed mode of distribution as people who attempted to dispose the estate property and exhibited a letter from the area Chief to that effect adding that the older siblings had been advanced money by the deceased to buy the deceased to buy their own parcels of land so that Isukha/Ileho/1437 was reserved for Alexander Lumumba Amiani and Kennedy Bahati Amani who were then minors. The protestors therefore contend that the estate be distributed as evident in the expressed wishes of the deceased.

5. To that replying affidavit a further affidavit was filed sworn by Anthony Shimenga Amiani whose effect was that the mediation agreement did not serve all issues in controversy but only agreed on who became administrators and that a property of the estate be surveyed to ascertain and confirm its size. The deponent further alluded to an initial agreement by which title No Isukha/Kambiri/342 was to go to Jerida Khasoa Amiani, Isukha/Ileho/964 to go to Fred Mukabwa Amiani while Isukha/Ileho/1075 was to be taken by Tobias Mabwa Okendo, a purchaser, which was not accepted by the Respondents at the Mediation Sessions.
6. The Deponent identifies the net estate as at the time of initial confirmation of grant to have been five properties being Isukha/Kambiri/342, 1285, 964, 1075 and 1437 while maintaining that no distribution was agreed upon in mediation and that upon revocation of the grant, the entire estate reverted and became available for redistribution. He then underscored the impropriety with which the grant was obtained and confirmed and prayed that the estate be distributed as proposed by him.
7. Aggrey Shitandayi Lisili and Elizabeth Tsikhungu Shihande also swore an affidavit which, save for the names of the deponents, were word for word of Antony Shimenga Amiani's affidavit.
8. The last affidavit to be filed in the matter was that jointly sworn by the protesters, Alexander Lumumba Amiani and Phoebe Andega Indieka whose mainstay was the assertion that the further affidavits were untruth and intended to mislead them if looked at against the court records, then expressed surprise why the applicants were content to abide by some of the wishes of the deceased while disregarding the rest.
9. The protest was directed to be canvassed by way of viva voce evidence and at the ensuing proceedings the objector presented evidence adduced by two witnesses while the petitioner adduced evidence by one witness.
10. In his evidence, the 1st objector reiterated their averments in the Affidavits filed with a stress by the 1st objector being that the deceased expressed to him the wish that land parcel No Isukha/Ileho/1285 goes to the six girls while Isukha/Ileho/437 goes to the sons. When cross examined he told the court that he was born in 1945 and the deceased expressed to him the alleged wishes in the year 1957 while he was alone with the deceased.
11. The second objector, also reiterated the position of the 1st objector while underscoring that the three parcels of land being Kambiri/342, Ileho/964 and 1075 have no contestation and that Ileho/1285 should go to the girls while Ileho/1437 goes to the boys.



12. On being cross-examined he told the court that as at the date of the death of the deceased, he was 3 years and that he had no reason why girls should get smaller share than the boys save that boys have established homes on Ileho/1437 while Ileho/1285 is vacant.
13. For the petitioner, her evidence contained in the replying affidavits and further affidavit sworn on September 27, 2022 and October 24, 2022 was that parcel No Ileho/1285 was given to her by the deceased after he paid school fees for his children as evidenced by the exhibit AP 1. For parcel No Ileho/1437 the petitioner took the position that the deceased had given to her a portion measuring two (2) acres which she has since sold then exhibited documents to demonstrate that the land was intended to be subdivided by the deceased into seven portions and each of the seven beneficiaries.
14. However in cross-examination, she admitted that the alleged wishes of the deceased are not shown to have been made in the presence of any witnesses then made a concession that for the sake of equal distribution he was prepared to cede his interests in Ileho/1285.
15. Both sides have equally filed respective submissions. For the objector/applicant, the submissions are dated December 7, 2022 while those by the petitioner are dated December 1, 2022. In those submissions, the applicants stress the fact that the mediation settlement agreement adopted by the court settled that parcel No ILEHO/1437 be resurveyed and be distributed afresh and that the sale of two (2) acres out of the said land to John January Kiluko Mahon be recognized. For the Objector, the issues for determination are two being; whether the Mediation Settlement Agreement address distribution of the entire estate and whether that was a valid will.
16. Contrary to what was stated on oath both in the Affidavits and oral evidence that parcels Nos Isukha/kambiri/342, Ileho/964 and 1075 were not subject to contestation, the Objector assets that the same were irregularly distributed without his consent. It is thus contended that all the assets due to the estate are due for distribution afresh.
17. On whether there was a valid will in the document marked as AP-1 in the Replying Affidavit, the Objector contends that by dint of section 11, *Law of Succession Act* as interpreted *in Re Estate of Johana Ngoto Wandemi* [2016] eKLR there was no valid Will as the same was not attested as required. On distribution it was reiterated that the Objectors have occupied Ileho/1437 and invested heavily upon it by considerable development hence the daughter can get the Ileho/1285 then invites the Court to exercise its extensive powers under Section 73 of the Act and make orders as are necessary for the ends of justice and to prevent abuse of process.
18. For the Respondent, it was underscored that the Mediation Settlement Agreement agreed on the number of beneficiaries from people to be administrators and that Ileho/1437 be resurveyed and redistributed first and that the Objectors participated fully at the Mediation Sessions. The Respondents take the singular issue for determination to be whether the distribution should be equal and assert that it should be in accordance with the wishes of the deceased as disclosed in the document marked (AP-1).
19. In making such Submissions the Respondent places reliance in Section 38 of the Act and the decision in *Stephen Gitonga M'Murithi -vs- Faith Ngira Mriti* [2015] eKLR that the principle applicable where the deceased leaves children without a spouse to be that the sharing is equally done. It was equally pointed out that even where there exist hostility between the beneficiaries, equality still prevails and in such cases the property is best sold and proceeds shared equally. Reliance was placed on *Re Estate of Peter Gathogo* [2020] eKLR for the submissions that since ILEHO/1285 measures only 2.5 acres and thus unreasonable to be subdivided into eleven (11) parties, the same ought to be sold and proceeds shared equally.



Issues, Analysis and Determination

20. Having perused the Affidavit sworn by parties, the evidence taken and Submissions filed, the issues for determination would be two; whether there was a Will and what formula needs employment on distribution.
21. In the end, the Respondents tacitly appear to abandon the question whether there was a Will and surrenders to the fact that this remains an intestate succession and the estate needs to be shared equally. For sake of reinstatement of the law the Court must comment on the allegation that the deceased left a Will.
22. The law remains settled that a Will must conform to the dictates of Section 11 of the Act. The law requires that for a Will to be a valid, the testator must have been mentally sound to make it and it must conform to the formal requirements including being attested by at least two witnesses who saw the testator sign the Will. There is no contention here by the Respondent that the Will met the statutory requirements. However, in their Submissions, there is a tacit surrender of the existence of testacy when the Respondent repeatedly assert that the sharing be equal. It is therefore the determination by this Court that the document marked PA-1 and attributed as the Will of the deceased does not qualify as a valid Will and therefore, the deceased died intestate.
23. On the appropriate formula for distribution, the law dictates that in all events, equality between the children is mandatory save that benefits obtained by any or some of the children by way of advancement be taken into account. Even that taking into account is part of intention to achieve equality. In seeking to achieve that dictate no distinction is made about gender, age, mental status or whether one was born out of wedlock. *In Re estate of Solomon Ngatia Kariuki* [2008] eKLR the Court said:-

“The Law of Succession Act does not discriminate between the female and male children married or unmarried daughters of the deceased person when it comes to the distribution of the estate. All children of the deceased are entitled to stake a claim to the deceased’s estate.”
24. It is to this Court plain that there can never be a justification to give to four boys 9.01 Ha. Isukha/Ileho/1437 and to seven girls Isukha/Ileho/1285 measuring only 2.5 Ha.
25. In addition, merely that the boys have stolen the march on the sisters by occupying the land and developing the same should not be the sole reason why the same boys must get what they have enjoyed unfairly for now a period in excess of twenty years. For the sake of fidelity to the law, it is the position of the Court that taking advantage of the pendency of a Cause in Court to develop a property of the deceased is never a justification to stake a higher claim but should be a measure of how much one has derived from the estate to the disadvantage of others and be taken into account at the time of distribution.
26. Having determined that the estate be distributed, equally, the Court must then determine what constitutes the net estate for such distribution. Because both sides, all beneficiary, agree that estate property already transferred to third parties, being Isukha/Kambiri/342, Isukha/Ileho/964 and 1075 remain registered in the names of Jeridah Khasoha Amiani, those three properties are not available for distribution.
27. That leaves only Isukha/Ileho/1437 and 1285 as the property to be shared equally among the children of the deceased. In that equal sharing however, and in terms of the Mediation Settlement Agreement, two acres out of Isukha/ Ileho/1285 shall go to the admitted liability called John January Kaluko Mahond.



28. Accordingly, a Certificate of Confirmation of Grant shall issue as follows:-
Isukha/ Ileho/1437 to all the eleven (11) beneficiaries to share equally upon survey.
29. From Isukha/ileho/1285, shall be excised two acres and registered in favour of John January Kiluko Mahod and the residual shall be due to all the beneficiaries in equal shares.
29. To avoid further necessity to handle other applications for substitution of beneficiaries, it is directed that any deceased beneficiary's share be registered in the name of the administrators in trust of children of such beneficiaries to be disclosed by the administrators. Such disclosure be by an Affidavit filed by the Administrators within fourteen (14) days from today. Once so registered, the administrators shall transfer to those entitled within six (6) months from today.
30. Mention on October 16, 2023.

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 30TH DAY OF MAY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Andati for the Applicants/Objector

Mr. Omondi for the Respondent/Petitioner

Court Assistant: Polycap

