



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 529 OF 2016**

**IN THE MATTER OF THE ESTATE OF ROBERT INGUTIA ALEKA (DECEASED)**

**RULING**

1. The application for determination is the summons dated 12<sup>th</sup> February 2016. It seeks confirmation of the grant made 14<sup>th</sup> February 2020, to Aleka Ingutia, the administrator. In his affidavit, sworn on 12<sup>th</sup> February 2020, he lists persons who had allegedly survived the deceased without disclosing how they were related to the deceased. They are Aleka Ingutia, Daniel Nganga, Haron Amwayi Ingutia, Jackline Nekesa, Julius Opati Abwalaba, Margaret Achongo Alukhome and Norah Andayi Omari. The deceased is said to have had died possessed of Butso/Esameyia/1476. He proposes it to be shared in diverse proportions between the seven of them, so that the same is distributed as follows Aleka Ingutia 1.76 hectares, Daniel Nganga 5.522 hectares, Haron Amwayi Ingutia 0.628 hectare, Jackline Nekesa 1.53 hectares, Julius Opati Abwalaba 0.963 hectare, Margaret Achongo Alukhome 1.003 hectare and Norah Andayi Omari 0.95 hectare.

2. The application was heard on diverse dates between 4<sup>th</sup> November 2020 and 27<sup>th</sup> September 2021. The hearing on 4<sup>th</sup> November 2020 was attended by Aleka Ingutia, Haron Ingutia, Julius Opati, Norah Andayi Omari, William Musebe and Jackline Nekesa. The administrator disclosed that the deceased had two daughters, Rosemary Khasoa Ingutia and Miriam Ingutia. I was told that both had died. Miriam Ingutia was said to have had been survived by children, who had not been involved in the proceedings. He disclosed that a son of the deceased known as David Makokha had died and had been survived by his wife, Jackline Nekesa. Both Jackline Nekesa and a son of the deceased known as Haron Amwayi Ingutia supported the application.

3. At the hearing on 25<sup>th</sup> January 2021, the administrator, Philip Mayeya, Haron Ingutia, Margaret Achungo, Julius Opati, Norah Andayi Omari, Daniel Nganga and Joseph Matwaka Nganga attended court. Joseph Matwaka Nganga, a son of Daniel Nganga Ingutia protested that the man who was in court claiming to be his father, Daniel Nganga, was in fact not the one. He further protested that his father had not been involved in the process. The man claiming to be Daniel Nganga Ingutia confirmed that that was not his name, but Julius Opati Chaunani, and he claimed to represent Daniel Nganga Ingutia, and he was locked up in the court cells for the rest of the day for his antics. Philip Mayeya Masinde indicated that he was a son of a daughter of the deceased known as the late Miriam Ingutia. He said he had a sibling known as Omulama Kweyu, who was also dead. He supported the application. Margaret Achungo said that he had bought land from Aleka Ingutia, and so did Norah Andayi. Aleka Ingutia, the administrator, confirmed that he did not have leave of court to sell the land, and explained that he had problems paying school fees for his children.

4. Daniel Ingutia was served. He attended court on 26<sup>th</sup> May 2021. He explained that the deceased had six children, being Noah Aleka, Daniel Nganga, the late David Makokha, Haron Amwayi, Miriam Ingutia and Rosemary Khasoa. He said that the late David Makokha had four children, being Vincent Makokha and three others. He mentioned that the two daughters of the deceased were dead, Miriam and Rosemary. He stated that Miriam was survived by a son, Philip Mayeya. He stated that Jackline Nekesa was the widow of a late son of the deceased called David Makokha. He said Julius Opati had bought land from the deceased, while Margaret Achungo had bought from Norah Andayi. Julius Opati stated that he bought the land in 1979. Margaret Achungo said she did not buy the land from the deceased, but from his son, Noah Aleka.

5. Confirmation of grants is provided for under section 71 of the Law of Succession Act, Cap 160, Laws of Kenya. The court confirms appointment of the administrators, in terms of section 71(2)(a); and distributes the estate, in terms of section 71(2)(b)(c)(d).

6. There is a proviso to section 71(2), which requires that the court be satisfied of certain things, before it proceeds to confirm the grant. What the court has to be satisfied about relates to ascertainment of the persons beneficially entitled to a share in the estate, and the shares allocated to them. It should only proceed to deal with distribution after the administrator has satisfied it as to the two issues. That provision is reproduced in Rule 40(4) of the Probate and Administration Rules. Before I consider the distribution proposed in the application, I need to be satisfied that the administrator has ascertained the persons beneficially entitled to a share in the estate, and whether the share due to each of those entitled have been identified.

7. The administrator had not properly ascertained the survivors of the deceased, when he mounted his application for confirmation of grant. When he sought representation, he listed four individuals as the surviving sons of the deceased, being himself, Daniel Nganga, David Makokha and Haron Amwayi. The same four had been listed in the letter from the Chief of Butso Location, dated 13<sup>th</sup> July 2016, where

Julius Opati Abasalaba, Margaret Achunga Alukhome and Norah Andayi were named as liabilities. The alleged liabilities also signed the consent in Form 38, dated 27<sup>th</sup> June 2016, which they should not have signed as they did not rank equal with the children of the deceased. At the oral hearing of the summons for confirmation, it transpired that the deceased had other children, the two daughters, now deceased, one of whom had children. The two children of the late Miriam were disclosed at the hearing, and one of them attended court and indicated that he had no objection to the distribution proposed. He said that his brother was deceased. I am satisfied from the disclosures at the oral hearing that all the survivors have been ascertained.

8. On the assets, there is unanimity that the deceased died possessed of only one asset, Butso/Esameyia/1476.

9. The Chief's letter listed three creditors, who were also featured in the consent in Form 38. They have been allocated shares in the confirmation application. At the oral hearing, it emerged that Julius Opati was the only creditor who had bought land from the deceased; the rest of them purportedly bought land from the administrator, Aleka Ingutia. Of the three, therefore, only Julius Opati, isa creditor of the estate. No documents were placed before me of the sale, alleged to have happened in 1979, but there is consensus. So, I shall leave it at that. I shall, therefore, consider and treat Julius Opati as a legitimate creditor of the estate, entitled to be allocated a portion of what he bought from the deceased, in priority over the children.

10. The other two buyers allegedly acquired their alleged interests from a survivor of the deceased. No documents were placed before me as evidence of the sales. No dates of the alleged sales were indicated, and, therefore, I cannot tell whether the sales happened before or after the demise of the deceased. If the sales happened before the demise of the deceased, then the seller was selling property that he did not own, and he could not pass a good title of it to anyone. If it was bought after the deceased had passed on, it would depend on whether or not the seller was the administrator of the estate, for section 79 of the Law of Succession Act vests estate assets in the administrator. So that a person who sells estate assets which do not vest in him would be an intermeddler in terms of section 45 of the Law of Succession Act, as the assets of the estate would not have vested in him. Intermeddling, under section 45(1), amounts to criminality, and an interest acquired in furtherance of a criminal enterprise cannot possibly confer a valid title. Under section 45, an administrator has legal title to the property vested in them by section 79, and he can sell such property, and pass a good title to whoever he sells it to. That has to be read, however, together with section 82, which provides that immovable property, such as land, cannot be sold before confirmation of grant. A sale conducted prior to confirmation of grant cannot be valid or lawful.

11. It is not clear when the administrator herein allegedly sold the land to Margaret and Norah. If it was during the lifetime of the deceased then it was outrightly not a binding transaction, the title did not vest in him then, but in the owner, the deceased herein. If it was after the deceased died, whether the sale would be binding would depend on when the sale happened. If it was before he obtained representation to the estate, then it would be caught up in sections 45 and 79 of the Law of Succession Act, and would be unlawful, for the land would not have vested in him. If it was after he had obtained the grant, by dint of sections 45 and 79, he would have standing to sell, as the assets would have vested in him, subject, of course, to section 82, with respect to confirmation of the grant. The grant has not been confirmed. It is now that it has come up. A sale before confirmation, by an administrator, would, therefore, be unlawful. It can be cured by the administrator getting leave of court to sell, but the administrator herein confirmed that he did not obtain such leave before he sold the land. The said two buyers acquired no interest in the estate. The administrator had no power or authority to sell it to them, at whatever time he sold it to them. Their claim lies properly against the administrator personally, the person that they dealt with, and who purported to sell to them property that he did not have. They should be looking up to him to recover the land or their money. They have no claim against the estate, and they should get nothing from the estate. They should wait for Aleka Ingutia to get his share from the estate, so that he can transfer the share he sold to them after transmission, following confirmation.

12. The other thing that must be ascertained is with respect to the shares allocated to the persons beneficially entitled. The deceased had died in 1987, after the Law of Succession Act had come into force. The estate of the deceased is available for distribution in terms of Part V of the Law of Succession Act. The deceased was not survived by a spouse but by children only. Section 38 applies. It expects that where the survivors are children only, without there being a surviving spouse, they would share the property equally. The distribution proposed is unequal, and no explanations have been given. Daniel Nganga takes 5.522 hectares, compared with his siblings Aleka, Haron and the late David, who are allocated 1.76 hectares, 0.628 hectare and 1.53 hectares, respectively. The disparity between Daniel and his siblings is too huge and should be explained. The allocation to Aleka is smaller because he purportedly sold his interest, but that does not explain why what is allocated to him should be larger than is allocated to Haron and the late David, who did not purport to sell their stake. The distribution is not faithful to section 38 of the Law of Succession Act, and I shall, therefore, not approve it. It works injustice. The surviving son of Miriam, Philip Mayeya, stated that he did not live within the land, and although section 41 of the Law of Succession Act, allows him to have a share in the estate, which should have gone to his mother, he renounced it at the oral hearing, and I shall not make any provision for him.

13. 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.”*

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

**(a) That, for purposes of the confirmation application dated 12<sup>th</sup> February 2020, I have identified the persons beneficially entitled to share in the intestate estate of the deceased to be Aleka Ingutia, Daniel Nganga Ingutia, the estate of the late David Makokha Ingutia, Haron Amwayi Ingutia and Julius Opati Abasalaba;**

**(b) That the survivors of the deceased are Aleka Ingutia, Daniel Nganga Ingutia, the survivors of the late David Makokha Ingutia, Haron Amwayi Ingutia and the survivor of Miriam Ingutia;**

**(c) That the survivor of Miriam Ingutia, Philip Mayeya Masinde, has renounced his interest;**

**(d) That Julius Opati Abasalaba is the sole valid creditor of the estate, and his share shall be allocated to him first before the rest is shared out amongst the children of the deceased;**

**(e) That the other alleged creditors, Margaret Achungu Alukhome and Norah Andayi Omari, are not legitimate creditors of the estate, but of Aleka Ingutia, the administrator, and they are not entitled to a share in the estate and should look up to the person who sold the land to them;**

**(f) That Butso/Esimeyia/1476 shall be shared out as follows:**

**(i) to Julius Opati Abwalaba alias Julius Opati Chaunani 1.76 hectares, and**

**(ii) the balance to be shared out equally between Aleka Ingutia, Daniel Nganga Ingutia, the estate of the late David Makokha Ingutia and Haron Amwayi Ingutia, in keeping with section 38 of the Law of Succession Act; and**

**(g) that grant herein is confirmed in those terms and a certificate of confirmation of grant shall issue in those terms; and**

**(h) That any party aggrieved by these orders has leave of twenty-eight days to move the Court of Appeal appropriately.**

15. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF JANUARY, 2022**

**W. MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, court assistant**

**Aleka Ingutia, administrator**

**Daniel Nganga Ingutia**

**Haron Amwayi Ingutia**

**Jackline Nekesa**

**Julius Opati Obwabalaba**

**Margaret Achongo Alukhome**

**Norah Andayi Omari**