



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 7 OF 1988**

**IN THE MATTER OF THE ESTATE OF ECHESA ATEYA (DECEASED)**

**JUDGMENT**

1. For determination is the summons for confirmation of grant, dated 26<sup>th</sup> April 2019. The said summons is at the instance of the administrator, Fincent Were Karakacha, who I shall refer to hereafter as the applicant. He avers that the deceased was polygamous, his wives were Philister Khaoya and Marisella Nechesa. That would mean his household comprised of two houses. He had children. With the first wife, Philister Khaoya, he had one son, Karakacha Echesa; and with his second wife, Marisella Nechesa, he had three sons, being Calisto Ateya Echesa, Augustine Barasa Echesa and Joseph Oloo Echesa. He had one piece land, described as N. Wanga/Khalaba/182, which is said to measure 29 acres. It is proposed that the first house be given 12½ acres, with the second house taking the balance. It is proposed that the 12½ acres should be registered in his name to hold in trust for his brothers; the family of Calisto Echesa Ateya to get 7 acres; Agostino Barasa Echesa to get 6.1 acres; and Josephat Oloo Echesa 3 1/3 acres. A survey report is attached, which shows that N. Wanga/Khalaba/182 had been subdivided into N. Wanga/Khalaba/1169 to 1174, and the sub-divisions measured 7.9 acres, 4.7 acres, 6.1 acres, 3.5 acres, 3.7 acres and 1.5 acres, respectively.

2. There is a protest to the proposed distribution. It is by Paul Mulaa Ateya, who I shall refer hereto as the protestor. He avers that the deceased had distributed his estate in 1974 prior to his death in 1983, amongst his four sons. The portion identified as N. Wanga/Khalaba/1169, measuring 7.9 acres was given to Calisto Ateya Echesa. N. Wanga/Khalaba/1170, measuring 4.7 acres was given to Karakacha Echesa. N. Wanga/Khalaba/1171, measuring 6.1 acres went to Agostino Barasa Echesa. N. Wanga/Khalaba/1172, measuring 3.5 acres, was allocated to Josephat Oloo Echesa. N. Wanga/Khalaba/1173, measuring 3.7 acres, was allotted to Peter Otiangala. N. Wanga/Khalaba/1174, measuring 1.5 acres, was said to have been given to Aloice Buluma Echesa. Boundaries were allegedly established, and a survey report, dated 3<sup>rd</sup> August 2010, is pointed at as confirming the actual position on the ground. It is averred that the applicant belonged to the family of Karakacha Echesa, and his share lay in N. Wanga/Khalaba/1170. Peter Otiangala and Aloice Buluma Echesa are identified as purchasers. The families are said to have settled on the land since 1974. Upon his death, the deceased was buried on N. Wanga/Khalaba/1169, while Karakacha Echesa was buried on N. Wanga/Khalaba/1170. The protestor asserts that he does not accept the mode of distribution proposed by the applicant.

3. The administrator responded to the protest, by the affidavit of 21<sup>st</sup> January 2020. He denies that the deceased had subdivided the land amongst his sons in 1974. He reiterates that the deceased had two wives, and, therefore, two houses. The wives were Felista Khaoya Echesa and Marisella Nechesa Echesa. The first house had only one son, Karakacha; while the second house had three sons, Calisto Ateya Echesa, Agostino Barasa Echesa and Josephat Oloo Echesa. He asserts that the deceased was still the absolute proprietor of N. Wanga/Khalaba/182, as at the date of his death in 1983. He further asserts that the deceased had demarcated that land between the two houses, and that the boundaries were clearly marked on the ground. He states that after Calisto Ateya Echesa obtained representation to the estate, secretly, he caused the land to be subdivided, and title deeds issued for the subdivisions. He says that he only learnt of the succession cause when Calisto Ateya Echesa filed Bungoma SPMCCC No. 408 of 2001, to recover the costs that he had allegedly incurred in the instant succession cause. He complains that the distribution in the protest was unequal, for one section of the family gets 4.7 acres, while the other takes a total of 17.5 acres. He says that the proposal includes portions allegedly sold to third parties by Calisto Ateya, being Peter Otiangala and Aloice Buluma Echesa, getting 3.7 acres and 1.5 acres, respectively. He asserts that the titles that the protestor talks about were created irregularly, and were cancelled, and the subdivisions reverted to N. Wanga/Khalaba/182. He says that the sub-divisions were inequitable, and were against the wishes of the deceased when alive. He further avers that the subtitles were created secretly for selfish reasons, but had been cancelled by the court, and could not be a basis for confirmation of the grant. He identifies the rightful heirs as Calisto Echesa Ateya, Karakacha Ekesa Ateya, Augustine Barasa and Josephat Oloo Echesa.

4. The application was canvassed orally, by way of *viva voce* evidence. The applicant was the first to testify. He stated that the surveyors report showed how the land had been settled. He said all the six subtitles were in the name of Calisto. He said that the family of Karakacha lived on N. Wanga/Khalaba/1170, that of Agostino on N. Wanga/Khalaba/1171 and that of Oloo on N. Wanga/Khalaba/1172. He said that N. Wanga/Khalaba/1173 was given to a buyer, Otiangala, who subsequently sold the land to Luvembe. N. Wanga/Khalaba/1174 was also given to a buyer, Aloice Echesa, who allegedly entered the land in 1974, but Simba wa Nyika was the first to enter the land in 1989, then he sold it to Mahindu, who then sold it to Luvembe, who then sold it to Otiangala. He said that the boundaries were marked in 1988, after succession was done by Calisto. He asserted that the succession followed the boundaries fixed in 1974. He stated that the buyers got the land from Calisto. He said Aloice had been staying with Calisto before 1974. He asserted that the deceased did not sell N. Wanga/Khalaba/1173 and 1174, and that it was Calisto who did the sales. He said that he had no copies of the sale agreements. He said that the family of Calisto was on N. Wanga/Khalaba/1174, although the remains of Calisto had been interred on N. Wanga/Khalaba/1169.

5. The protestor testified next. He stated that Aloice Echesa Buluma bought the land from the deceased in 1972, and that there was a sale agreement, and that the buyer moved into the property while the deceased was still alive, and the deceased even assisted the buyer build a house on the land. He stated that the other buyer, Simba wa Nyika, was also brought into the land by the deceased. He settled on the land, and subsequently sold it. He asserted that it was the deceased who sold the two parcels of land. He stated that he stood by the report of the surveyor, and asserted that distribution should be as per that report. He said that there were boundaries on the land. During cross-examination, he said that he had not been born when the land was allegedly shared out in 1974. He asserted that Calisto did not sell land to anyone.

6. Josphat Aneriko Echessa followed. He was a son of the deceased. He said that the deceased shared out the land before he died. He said that he got a small piece, and was satisfied with it. He confirmed that he got a title deed for it. He said that all the other sons got title deeds. He testified that the land was shared out openly by the deceased, and the boundaries were fixed in 1972. He mentioned that the deceased had sold land to Aloice Echesa and Ramadhan Chitechi Imetati alias Simba wa Nyika. Simba wa Nyika later sold that land to Peter Otiangala, who then sold it to two women, and the women got their title deeds. He said that it was after Aloice Echesa bought his land in 1972 that boundaries were fixed for everyone, upon insistence by the buyer. He asserted that the land was not sold by Calisto. He said that the original distribution, on confirmation, should be upheld. He added that he knew Charles Wanjala Ngurete, as an uncle, who had leased land from the deceased in 1974. He worked on the land till 1974, when it was sold to Simba wa Nyika. He said that both Charles Wanjala Ngurete and Simba wa Nyika transacted with the deceased.

7. Marysheila Munyendo Echesa was the last to testify. She was the widow of the late Aloice Echesa Bulimo. She said that the sale happened in 1972, and the land was bought from the deceased. She identified Peter Otiangala as another buyer.

8. This is the third time that this court is being invited to distribute the estate. The grants issued in this matter have been confirmed twice before. The first on 19<sup>th</sup> October 1988 and the second followed on 19<sup>th</sup> November 2012. The grant which was confirmed on 19<sup>th</sup> October 1988 was revoked by an order made on 2<sup>nd</sup> July 2012, when a fresh was to be issued to the applicant in the application dated 6<sup>th</sup> September 2011. The grant of 2<sup>nd</sup> July 2012, confirmed on 19<sup>th</sup> November 2012, was subsequently revoked on 31<sup>st</sup> October 2018, on grounds that it had been confirmed without the consent of all the parties, hence the present application. This is a very unfortunate state of affairs. The deceased died in 1983, and distribution of his estate should have been completed a long time ago.

9. The initial administrator was Calisto Ateya Echesa, appointed on 23<sup>rd</sup> March 1988. His grant was confirmed on 19<sup>th</sup> October 1988. The entire estate devolved upon him as administrator, to distribute it subsequently amongst the other heirs. That is the purport of the certificate of confirmation of grant, dated 22<sup>nd</sup> May 1989. Using that confirmed grant, he caused N. Wanga/Khalaba/182 to be subdivided into the six subtitles: N. Wanga/Khalaba/1169, 1170, 1171, 1172, 1173 and 1174. They were all registered in the name of Calisto Ateya Echesa, of course as administrator, although the registers did not reflect so. N. Wanga/Khalaba/1174 was registered in the name of Alois Echesa Bulimo on 13<sup>th</sup> June 1991; while N. Wanga/Khalaba/1173 was registered in the name of Peter Wabuli Etiangala on 16<sup>th</sup> May 2006.

10. The subdivision of N. Wanga/Khalaba/182 in 1990, appears to be what prompted the filing of the summons for revocation of grant dated 6<sup>th</sup> September 2011, by Karakacha Ekesa Ateya, on grounds that there was no proper disclosure of the family, among others. That application led to the orders of 2<sup>nd</sup> July 2012, which removed Calisto as administrator and replaced him with Karakacha; and paved way for the confirmation orders of 19<sup>th</sup> November 2012. The grant of 2<sup>nd</sup> July 2012 was revoked on 31<sup>st</sup> October 2018, and its confirmation orders of 19<sup>th</sup> November 2012 went with it.

11. The comedy of errors in this matter arises from the fact of lack of inclusivity. The proceedings have all along been conducted in a one-sided manner. The record of 19<sup>th</sup> October 1988, when the grant to Calisto was confirmed, indicates that only the applicant, Calisto, was in attendance. The other heirs or survivors or persons beneficially entitled to the estate were not present. When the application for revocation dated 6<sup>th</sup> September 2011 was filed, directions were not given on its service and disposal. When it came up for hearing on 2<sup>nd</sup> July 2012 and was granted, only Mr. Makali, Advocate, for the applicant, Karakacha, was present. The court did not hear the parties, for there is no record of submissions being taken, nor of evidence being recorded from witnesses. Regarding the summons for confirmation of grant, dated 24<sup>th</sup> July 2012, which culminated in the confirmation orders of 19<sup>th</sup> November 2012, no directions were given on its disposal or on its service on all the heirs and other persons beneficially entitled to a share in the estate. It was filed on 30<sup>th</sup> July 2012, and the court directed that it be fixed for mention on 19<sup>th</sup> November 2012, for directions. On 19<sup>th</sup> November 2012, when it came up, directions were not given, instead the court granted the application. Out of the four sons, only two were in court. It is little wonder, therefore, that a second summons for revocation of grant was filed, dated 11<sup>th</sup> November 2013, which gave rise to the revocation orders of 31<sup>st</sup> October 2018. The administrators did not involve all members of the family in the proceedings, which created suspicion and mistrust, so that the orders granted, could not be sustained as they were obtained in a non-participatory manner.

12. Probate and succession proceedings are about administration and distribution of the property left behind by a dead person. That process must involve all members of the family of the dead person, whether they will ultimately get to a share in that estate or not. That is what the provisions of the Law of Succession Act, Cap 160, Laws of Kenya, and the Probate and Administration Rules envisage. There should be disclosure of all the persons that belong to the family of the deceased, be they male or female, married or unmarried. Section 51 of the Law of Succession Act and Rule 17 of the Probate and Administration Rules are elaborate on that. Then at confirmation of grant, the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules are emphatic – let the administrator satisfy the court that he or she has ascertained all the persons beneficially entitled to a share in the estate. For a person who died after the Law of Succession Act came into force in 1981, like the deceased herein, who died in 1983, that would be the persons entitled under Part V of the Law of Succession Act. Rule 40(6) of the Probate and Administration Rules envisages that those unhappy with the distribution, proposed in the confirmation application, should file affidavits of protest. Such affidavits of protest can only be filed by persons who have been served or notified of the application. Under Rule 41(1) of the Probate and Administration Rules, the court should, at the confirmation hearing, hear the applicant-administrator, the protestor and any other interested person. All these persons can only be heard if they are aware of the matter in the first place.

13. It should be emphasized that probate and succession proceedings are subject to the law of trusts. The property that the grant of

representation vests in the personal representative, under section 79 of the Law of Succession Act, vests the legal title in the property in the personal representative, for the purposes of facilitating the administration. The vesting does not constitute the personal representative the absolute owner of that property. The position of a personal representative, whether an executor or administrator, is that of a trustee. He holds a fiduciary position with respect to the assets of the estate, as well as to the persons who are beneficially entitled to a share in the assets. As a fiduciary he becomes accountable for how he has handled the assets. That account should be to the persons with respect to whom he is a fiduciary. A fiduciary occupies a position of trust, and he must inspire trust and confidence with respect to everything that he does. Trust is about what is just and fair. Justice and fairness does not arise only with respect to the manner in which the assets are distributed, it is also about the entire process, from the beginning to the end. It requires that all who are beneficially interested in the assets of the estate be involved in the whole process, from obtaining representation to distribution. Involvement would mean disclosure of all who are beneficially entitled, in all the documents that are lodged in court, and service upon them of all court processes in the course of the life of the cause. The persons beneficially entitled must be notified when a petition for a grant of representation and a confirmation application is being conceived, and when filed, and of the hearing if any, so that they can file their responses to it if so minded. They must also be notified of any application for rectification of any court process, and any application for revocation of the grant. The entire process affects them, and, as beneficiaries, on whose behalf the administrators act, they have a right to information, from the administrators, concerning everything that happens in the course of the administration. Non-disclosure, concealment of information and exclusion from the process can only breed mistrust and suspicion, and incite the filing of application after application, to challenge whatever process is undertaken or order obtained without involving them.

14. Ever since I got seized of this matter, only the administrator and the “objector” would attend court, with their advocates. The deceased had four sons, but those other sons or their successors never attended court, and it would appear that they were not involved in the process. At least at the oral hearing, one attended and testified, but the other or his successors never attended or testified. I do not, therefore, know his or their positions on the distribution proposed. The proviso in section 71(2) of the Law of Succession Act requires disclosure of all the survivors. The deceased had two wives, there is no disclosure as to whether he had daughters or not with those two wives. So, the proviso has not been complied with, and section 51 of the Law of Succession Act too.

15. So that I do not fall into the trap that my predecessors fell in, I shall not determine the summons for confirmation of grant before me. I shall postpone it, and require compliance with section 51(2)(g) and the proviso to section 71(2) of the Act, and Rule 40(4) of the Probate and Administration Rules.

16. The orders that I make herein are:

**(a) That the summons for confirmation of grant dated 26<sup>th</sup> April 2019 is hereby postponed in terms of section 71(2)(d) of the Law of Succession Act;**

**(b) That the administrator shall file a further affidavit to disclose whether or not the deceased had daughters;**

**(c) That the matter shall then be mentioned after forty-five days for compliance and to hear the daughters of the deceased that will have been disclosed in (b), above, and the successors of the fourth son of the deceased, who were not heard during the oral hearing;**

**(d) That I shall make the final orders on the application dated 26<sup>th</sup> April 2019 upon full compliance with order (b) and (c), above; and**

**(e) That dates for mention shall be given at the delivery of this judgment.**

17. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2022**

**W MUSYOKA**

**JUDGE**

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

**Mr. Murunga, instructed by Messrs. JO Makali & Co., Advocates for the applicant/administrator.**

**Mr. Namatsi, instructed by Messrs. Namatsi & Co., Advocates, for the protestor.**