



REPUBLIC OF KENYA



**In re Estate of William Museve Welabukaya (Deceased) (Succession Cause 346 of 2008) [2022] KEHC 12343 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 12343 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 346 OF 2008  
WM MUSYOKA, J  
JUNE 24, 2022**

**RULING**

1. What I am called upon to determine is a summons for confirmation of grant. It is dated 9<sup>th</sup> April 2021. It is brought at the instance of the administrator, Peter Indoshi Museve. He lists the survivors of the deceased as Peter Indoshi Museve, Werabukaya Museve, Sarah Kwati Museve, Fridah Museve and John Chekata Muchina, it is not indicated how these individuals were related to the deceased. The deceased is said to have died possessed of Kabras/Lukume/158. It is proposed that Kabras/Lukume/158 be devolved to the five individuals as follows: Peter Indoshi Museve 3 acres, Werabukaya Museve 3 acres, Sarah Kwati Museve 3½ acres, Fridah Museve ½ acre and John Chekata Muchina 1½ acres. There is a Form 37, dated 9<sup>th</sup> April 2021, which is not signed by any of the alleged survivors. A copy of official search for Kabras/Lukume/158 has not been attached.
2. The said application was first placed before me on 20<sup>th</sup> May 2021, but none of the parties were in attendance. It came up next on 23<sup>rd</sup> June 2021. Three individuals were in attendance, being Peter Indoshi, Werabukaya Museve and John Chekati. The administrator, Peter Indoshi, informed me that the deceased had three sons and five daughters. The sons were identified as Peter Indoshi, Werabukaya and Lazarus Museve. The daughters were said to be Fridah Museve, Irene Museve, Damari Museve, Phanice Museve and Aiyeta Museve. I was not informed who John Chekati was to the deceased. Werabukaya Museve and John Chekati informed me that they were not objecting to the proposed distribution. I directed that Lazarus Museve and the daughters be availed.
3. At the hearing on 4<sup>th</sup> November 2021, Peter Indoshi, Werabukaya Museve and John Chekati were in attendance, together with Fridah Museve and Beatrice Wayeta. Frida Museve stated that the deceased was her father, and that she was aware of the distribution proposed, and that she agreed with it. She stated that there were five daughters, and she proposed that she be given 1 extra acre, in addition to the ½ acre awarded to the daughters. Beatrice Wayeta stated that the deceased was her father, and that she was aware of the proceedings. She indicated that she wanted to get her share of the estate. After that I adjourned the matter to facilitate the attendance of Lazarus Museve and the remaining three daughters. At the next hearing only Peter Indoshi, Werabukaya Museve and John Chekati were in attendance.



Lazarus Museve and the remaining three daughters were not availed. I then reserved the matter for ruling.

4. As at the date the summons for confirmation of grant, that I am dealing with, was lodged herein, the survivors of the deceased who were presented to me at the oral hearing were his three sons and the five daughters. It was not disclosed whether there was a surviving spouse or not. Where an intestate is survived by children only, as in this case, the estate is distributable under sections 35 and 38 of the *Law of Succession Act*, Cap 160, Laws of Kenya. The shares due to children of intestates, under sections 35 and 38 of the *Law of Succession Act*, are meant to devolve upon the children of the deceased. The reference to children, in those provisions, covers all the children of the deceased, irrespective of their gender. No distinction is made between male and female children, whether married or unmarried. It presupposes equal treatment of such children. The deceased herein had three sons and five daughters. These are the children of the deceased herein for the purposes of succession to his estate. Under sections 35 and 38 of the *Law of Succession Act*, they should take equally.
5. What I have said above regarding the provisions of sections 35 and 38 of the *Law of Succession Act*, should be read together with the provisions of *the Constitution* of Kenya, 2010. Article 27 provides for equality of men and women, and provides for freedom from discrimination against women in all spheres of life. It asserts, at Article 27(1), that every person is equal before the law and has the right to equal protection and equal benefit of the law. Article 27(3) reinforces it, by stating that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres of life. The constitutional principles enshrine the policy and law stated in the United Nations Convention on the *Elimination of All Forms of Discrimination Against Women (CEDAW)*, to which Kenya is a signatory, and has the force of law in Kenya by dint of Article 2(5)(6) of *the Constitution*. Women are to be treated equally with men, and without any form of discrimination, based on their gender, is the bottom-line. The five married daughters of the deceased are women, who should have the benefit of Article 27 of *the Constitution* and the principles spelt out in CEDAW.
6. For avoidance of doubt, sections 35 and 38 say:

- “ 35. Where intestate has left one surviving spouse and child or children
- (1) ... where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-
    - (a) The personal and household effects of the deceased absolutely; and
    - (b) a life interest in the whole of the residue of the net intestate estate
  - (2) ...
  - (3) ...
  - (4) ...
  - (5) ... The whole residue of the net intestate estate shall, on the death, or, in the case of a widow, remarriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

36 ...



37 ...

38. Where intestate has left a surviving child or children but no spouse

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall ... devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

7. In this case, the property of the deceased herein should be distributed under the realm of sections 35(5) and 38 of the *Law of Succession Act*, where only the children are available at the distribution of the estate, in which case they should all take equally, irrespective of gender or marital status. A survivor, however, cannot be forced to take a share in the estate if they are not keen on taking it up. The law allows such survivors to forgo their share by either renouncing or waiving or disclaiming it in writing or by way of stating the fact in open court before the Judge or Magistrate trying the matter. A renunciation or waiver or disclaimer in writing may take the form of an affidavit or deed of renunciation or by the consent on distribution in Form 37, which carries a distribution where the survivor or beneficiary is depicted as taking nothing or nil. The court is empowered, under Rule 40(8) of the *Probate and Administration Rules* to distribute an intestate estate as proposed, without a formal hearing, so long as the survivors or beneficiaries have executed the consent in Form 37. That would mean that the court would have to vary the entitlements under the *Law of Succession Act*, and align them to the renunciations or waivers or disclaimers. Rule 41(1) of the *Probate and Administration Rules* envisages that such survivors or beneficiaries, who have not renounced or waived or disclaimed or varied their entitlement, either by way of affidavit or deed or through Form 37, would attend court, at confirmation, where they would state their position before the Judge or Magistrate.
8. In this case, Form 37 was not signed by any of the children of the deceased, and, therefore, there was no renunciation or variation or waiver or disclaimer of entitlement to a share in the estate. None of the children filed affidavits to renounce or waive or disclaim or vary their entitlement. At the oral hearing of the application, only four of the children, being two sons and two daughters attended court, for the hearing envisaged under Rule 41(1) of the *Probate and Administration Rules*. None of them orally renounced or waived or varied or disclaimed their entitlement. One son and three daughters did not attend court, and, therefore, I was not able to gauge whether they were renouncing or waiving or disclaiming or varying their entitlements.
9. So, what I may make of the failure by the four not to attend court and state their position? Is that indication that they were not interested in taking up their shares in the estate? Does it mean that they had renounced or waived or disclaimed their entitlements? The answer to these questions lie in the decisions in *Christine Wangari Gichigi vs. Elizabeth Wanjira Evans & 11 others* [2014] eKLR and *In re Estate of Joyce Kanjiru Njiru (Deceased)* [2017] eKLR (Gitari J), where it was stated that the failure by children of the deceased persons to participate actively or at all in the probate and administration litigation should not be a disentitling consideration, in the absence of any renunciation or waiver or disclaimer by them.
10. Related to the above is the fact that I was told at the hearing on 23<sup>rd</sup> June 2021, that the deceased had eight children, three sons and five daughters. The confirmation application discloses only five individuals, some of whom are not children of the deceased. Out of the five only three are children of the deceased, that is Peter Indoshi Museve, Werabukaya Museve and Fridah Museve. Sarah Kwati Museve and John Chekati Muchina are not children of the deceased and it is not explained why they are listed as survivors of the deceased, yet a deceased person can only be survived by either a spouse,



a child, a parent, a brother or sister, or a grandchild or nephew or niece. It is not disclosed who these people were to the deceased. The children of the deceased who are not disclosed are Irene Museve, Damari Museve, Phanice Museve, Aiyeta Museve and Lazarus Museve.

11. The other issue of concern is that the property is not equally shared out, yet sections 35(5) and 38 of the *Law of Succession Act* provide for equal distribution amongst the children. The distribution proposed here is uneven. The two sons listed are each allocated 3 acres, while the one daughter disclosed is allocated  $\frac{1}{2}$  acre. The two strangers get  $3\frac{1}{2}$  acres and  $1\frac{1}{2}$  acres, respectively. Irene Museve, Damari Museve, Phanice Museve, Aiyeta Museve and Lazarus Museve are not allocated any shares.
12. I have seen documents on record, which identify Sarah Kwati Museve as a widow of the deceased. Further documents indicate that the deceased died a polygamist, having married two times. The first wife, Benita Wambani Museve, is identified as the mother of Peter Indoshi, Werabukaya Museve, Frida Kasiro Museve, Beatrice Wayeta Museve and Phanice Nelima Museve. Sarah Kwati Museve is identified as the mother of Lazarus Shikwekwe Museve, Irene Khasandi Museve and Damara Wayeta Museve. Further documents indicate that there is another piece of land, allegedly originally owned by the deceased, being South Kabras/Lukume/157, and which appears to have been the subject of a separate succession cause, and which Sarah Kwati Museve asserts was what should be shared out between the members of the first house of the deceased. It would also appear that the same was the subject of Kakamega HCSC No. 375A of 1987.
13. From the material that I have discussed above, it is quite clear to me that the application for confirmation of grant dated 9<sup>th</sup> April has not made full disclosures of several aspects of the estate. It has not been disclosed that the deceased died a polygamist, and his survivors were not listed according to their houses. Two, there has been concealment of some of the survivors of the deceased, for in the said application, the surviving widow and several children of the deceased were not identified. Three, the relationship between the deceased and the alleged survivors was not disclosed. Four, it would appear that the deceased had other property, South Kabras/Lukume/157, which was not disclosed, and in respect of which proposals on distribution were not made. Five it was not disclosed that there was another cause, Kakamega HCSC No. 27A of 1987, relating to an asset of the estate, South Kabras/Lukume/157. An estate can only be distributed after the administrator has properly ascertained the survivors of the deceased and the beneficiaries of the estate, has ascertained all the assets that the deceased died possessed of, and has allocated shares to all the survivors and persons beneficially entitled, unless such persons have renounced their entitlement. That has not been done in this case. The administrators has not properly identified the individuals who survived the deceased or who are beneficially entitled to a share in the estate; he has not properly ascertained all the property that the deceased died possessed of, and, therefore, available for distribution in his estate; and has not identified how all the survivors and beneficiaries are going to share the estate.
14. In the end, I shall make final orders as follows:
  - (a) That I hereby decline to confirm the grant herein, let the administrator address all the issues that I have identified in paragraph 13 of this ruling;
  - (b) That the administrator shall deal with all those issues in an affidavit that he shall file in the next forty-five days;
  - (c) That the confirmation dated 9<sup>th</sup> April 2021 is hereby postponed, and the grant herein shall not be confirmed until the administrator fully complies;
  - (d) That in the event of default, the grant shall be revoked;



- (e) That the Deputy Registrar of the Court shall call for the file in Kakamega HCSC No. 375A of 1987 and have it put together with this file;
- (f) That the matter shall be mentioned after forty-five days for compliance and monitoring;
- (g) That each party shall bear their own costs; 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 24th DAY OF  
June 2022**

**WM MUSYOKA**

**JUDGE**

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

**Mr. Peter Indoshi Museve, the administrator, in person.**

**Mr. Werabukaya Museve.**

**Mr. John Chekati.**

**Fridah Museve.**

**Beatrice Wayeta.**

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