



**In re Estate of Tubula Lisaka Ahindikha alias Lisaka Ahindikha (Deceased)
(Succession Cause 804 of 2009) [2022] KEHC 11422 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11422 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 804 OF 2009
WM MUSYOKA, J
JULY 29, 2022**

RULING

1. This is one of the matters that I took over from F Amin J. It was due for ruling on 10th May 2022. It was handed over to me on 16th June 2022.
2. What is for determination is a summons for confirmation of grant, dated 12th January 2022. It is brought at the instance of one of the administrators, Anjelina Nyanga who I shall refer her to as the applicant. She proposes distribution of the estate amongst four children of the deceased, being the late Joseph Ikhalachi, Pascal Ngala, The late Moris Njomo and Anjelina Nyanga. The asset said to be available for distribution is Idakho/Shiseso/233. It is shared out between 3 of the said children as follows: to estate of the late Joseph Ikhalachi – 2.35Ha, to Pascal Ngala – 2.35Ha and Anjelina Nyanga – 0.16Ha. Road access is allocated 0.1Ha. It is proposed that the shares devolved upon the estate of the late Joseph Ikhalachi and Pascal Ngala are to be child in trust for the children of the two sons by the applicant.
3. The applicant has not explained why she proposes that the shares due to the two sons be held in trust by her. The late Joseph Ikhalachi is dead. The record indicates that he had children, but there is no disclosure as to whether he had been survived by a widow. It is not disclosed whether representation to his estate had ever been obtained. The record indicates that Pascal Ngala got lost. It is not disclosed when he got lost, and whether the court had even made a presumption that he was dead. He has children, who have disclosed herein, and one of them is the co-administrator of the estate with the applicant, that is Alex Tubula, it would appear that Alex Tubula is adult, hence his appointment as administrator. It is not clear why the applicant should hold the share in trust, if there is no proof that Pascal Ngala is dead, and some of his children are adult. The record indicates that Moris Njomo died without issue.
4. When the applicant sought revocation of the grant made to the widow, Indretta Lunani Lisaka, on 19th November 2010m, though her application dated 8th August 2019, she disclosed that the deceased had died a polygamist. He had married two wives; Indretta Lunani Lisaka and Anne Muremelo, both now



deceased. The first wife had 5 children, who she listed as Rita Khasoa, Rose Mapesa, Linet Tubula, Joseph Ikhalachi and Petronilla Mutsala. The second wife had only one child, Anjelina Nyanga.

5. Several issues arise from the discloser in the affidavit of the applicant, sworn on 8th August 2019, in support of the application dated 8th August 2019. Some of the people disclosed in that revocation application, as children of the deceased, are not disclosed in the consideration application dated 12th January 2022, and they are not allocated any shares in the estate of the deceased. I am talking about the 4 daughters of the deceased in the first house, that is to say Rita Khasoa, Rose Mapesa, Linet Tubula and Petronilla Mutsala. They have been completely left out of the distribution process. I do not know why, for no reasons are administered in the confirmation application for their exclusion, and they have their rights to shares in the estate. They have equal rights to shares with the applicant, who is herself a daughter of the deceased, and to the sons of the deceased Part V of the Law of Succession Cap 160 Laws of Kenya, envisages equal treatment of daughters with the sons. Sections 35(5) and 38 of the Laws of Succession act are particularly clear on this.
6. Section 35(5) and 38 of the Law of Succession state as follows;
 - “Where an 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 an 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. The other issue is that some of the individuals listed in the confirmation application as sons of the deceased were not listed in the revocation application as children of the deceased, and they were not allocated to any of the two wives of the deceased, Indretta Lunani Lisaka and Anne Muremelo. Am talking about. Am talking about the late Moris Niomo and Pascal Ngala. How are they children of the deceased? Who was their mother? The applicant has not disclosed the circumstances made which she ascertains them as children of the deceased in the confirmation application, and not in the revocation application.



8. The third issue arising from the disclosures in the revocation in that having died a polygamist, the estate of the deceased ought to be shared out in accordance with section 40 of [Law of Succession Act](#). The distribution envisaged in section 40 on the number of children in each house. So there must be disclosure of all the children of the deceased, grouped according to the houses. The applicant has not done so, and there is no compliance with what section 40 envisages.
9. Section 40 of the Law of Succession Act says:-
- (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
 - (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”
10. Everything that I have said above is enough to demonstrate that the applicant has not fully ascertained all the survivors of the deceased and the beneficiaries of the estate of the deceased and has not identified their shares as required by the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the [Probate and Administration Rule](#), which state as follows;-
- “71(2) Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares”
- “40(4) where the deceased had died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.
11. Fourth, when the matter came up for hearing on 1st March 2022, the applicant had not availed Rita Khasoa, Rose Mapesa, Linet Tubula and Petronila Mutsala, so that the court could hear their views under Rule 41(1) of the [Probate and Administration Rule](#) on the distribution proposed. Rule 41(1) of the Probate and Administration says as follows;
- (1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative”
12. I shall not confirm the grant at this stage until the applicant addresses all the issues that I have raised above.
13. The final orders are;
- a. That the deputy registrar shall comply with the order by F Amin J of 10th February 2021, by writing, or causing to be written, the letter to the Assistant Chief of Shimanyila sub-location on the issues a rise in that order;
 - b. That the applicant shall file a further affidavit addressing all the issues raised in paragraph 3,4,5,7 and 8 of this ruling;



- c. That the affidavit in (b) shall be filed in the next 30 days; and
- d. That the matter shall be mentioned thereafter for compliance, on a date to be given at the delivery of this ruling, and for further directions

14. It is so ordered.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29th DAY OF JULY 2022

W.M. MUSYOKA

JUDGE

