



REPUBLIC OF KENYA



**In re Estate of Elisha Otiende Chokunzira (Deceased) (Succession Cause
21B of 1994) [2022] KEHC 11048 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 21B OF 1994**

WM MUSYOKA, J

JULY 22, 2022

IN THE MATTER OF THE ESTATE OF ELISHA OTIENDE CHOKUNZIRA (DECEASED)

RULING

1. The application for determination is dated November 23, 2021. It is brought at the instance of Edward Lingana Otiende, who I shall refer to hereafter as the applicant.
2. The said application seeks rectification of the grant of letters of administration issued on May 18, 1994, to replace the name of the late Aggrey Odanga with that of Edward Lingana Otiende. He also seeks substitution and replacement of the Aggrey Odanga as beneficiary by Pauline Aliviza Otiende, and the late Joshua Sinzore Otiende by Rose Sinzore, and that the grant be confirmed. The applicant is a son of the deceased. He seeks to replace the initial administrator who has since died, to have some of the sons of the deceased who have died substituted as beneficiaries by their loved ones. He would also like the grant confirmed. I shall allow the application on substitution, and herebelow consider where I should confirm the grant or not
3. The applicant has not sought to identify the survivors of the deceased. There is a Chief's letter, dated December 27, 1993, which identifies the survivors of the deceased as Sipora Mudeitsi, Aggrey Odanga Otiende, Joshwa Sinzole Otiende and Milton Chokunzila Otiende. Those same names are listed in the petition lodged herein on January 12, 1994. When the parties appeared before me, on 2February 1, 2022, I was informed that two of the sons had died and two were still alive. The dead ones are Aggrey Odanga and Joshua Sinzole, while those alive are Edward Lingana and Milton Chokunzila. Aggrey Odanga and Joshua Sinzole were survived by families. Their widows, Pauline and Rose, were in court. There was no word on the fate of the widow, Sipora, but I shall presume she has also since passed on. So the survivors and beneficiaries of the estate are the 4 sons of the deceased. I was told that the deceased had no daughters.
4. I was informed the rest of the individuals in the list were buyers of estate land. I was told that Aggrey Otiende had sold portions to Raphael Odongo and John Musakali; Milton Shikunzira sold to Hudson Chinuka. Harun Mugesia bought 3 acres from the deceased, and so did Joshua Milimo. Pauline Odongo confirmed that Aggrey had sold land to Raphael Odongo, but she said she knew nothing



about the sale to John Musakali. Rose Sinzole said that her husband had not sold land to anyone. Edward Lingana said he sold no land to anyone. Yohana Musakali said he bought 2 acres of land from Aggrey.

5. Paragraph 4 above is about persons, other than survivors of the deceased or family members, who claim to have an interest acquired through a sale transaction. The estate herein is that of the late Elisha Otiende Chokunzira. The only sale of land transactions that the probate court can honour are those entered into by the deceased himself, and which he left incomplete. Any sale of land after his death, would be illegal, for the seller would be selling land that does not belong to him but to a dead person. It is an offence under Section 45 of the [Law of Succession Act](#), cap 160, laws of Kenya to deal with the property of dead person without authority, and a transaction done by such a person cannot be honoured by a court because it is tainted with criminality. The persons who bought portions from the sons of the dead man herein should look up to those sons to give them land after the estate has been distributed. Section 83 of the [Law of Succession Act](#) says that land should not be sold before the grant has been confirmed. The grant herein has not been confirmed, so whoever purported to buy land from any of the sons of the deceased violated section 83 of the [Law of Succession Act](#).
6. I was told only two people bought land from the deceased. That is Harun Mugesia and Joshua Mulimo. None of the survivors objected to that, and I shall presume that to be true, although no documentary proof has been provided.
7. Where an intestate, such as in this case, is survived by children, then section 38 of the [Law of Succession Act](#) applies. The property is shared equally, unless the parties agree on an unequal distribution. The distribution proposed herein is unequal. Rose Sinzole has not agreed with it. No reasons have been given for the unequal distribution. Since there is no consensus on the unequal distribution, I shall apply the law, at section 38 of the Law of Succession, and distribute the asset equally.
8. Section 38 says as follows:

“ 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, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.
9. The property to be distributed is Kakamega/Mautuma/945. The acreage is not given. There is a letter from the Ministry of Lands and Housing, dated January 13, 1994, showing that it belongs to Elisha Otiende Chokunzira and that it is 28 acres. I shall distribute as follows, first, the 3 acres sold by the deceased to Harun Mugesia shall be devolved to him, followed by the 1 acre that he sold to Joshua Milimo. Second, the balance shall be shared equally between the estate of the late Aggrey Odongo Otiende, the estate of the late Joshua Sinzole Otiende, Edward Lingana Otiende and Milton chokunzira otiende. Let the widows of the late Aggrey and the late Joshua initiate succession causes in the estates of their late Milton so that the husband’s share due to them can be distributed there. Let Raphael Odongo and John Musakali pursue their claims through those estates, for they have no claims whatsoever against the estate of the late Elisha Otiende Chokunzira. Hudson Chinuka shall seek his share from Milton Chokunzira, for the estate of the late Elisha Otiende Chokunzura does not owe him anything. A certificate of confirmation of grant shall issue. The administrator has 6 months to distribute the estate, and shall come back to court after 6 months to confirm that he has done so. Costs to be borne by the estate. Any one aggrieved has leave of 28 days to move the Court of Appeal, appropriately.



**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF
JULY 2022**

W M MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Edward Lingana

Hudson Chinuka

Pauline Odanga

Milton Chukunzira

John Musakali

Raphael Odongo

Rose Sinzole

