



REPUBLIC OF KENYA



In The Matter of The Estate of Alumasa Lughaho - Deceased (Succession Cause 40 of 1985) [2022] KEHC 12645 (KLR) (22 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12645 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 40 OF 1985**

WM MUSYOKA, J

JULY 22, 2022

JUDGMENT

1. What is for determination in a summons for confirmation of grant dated 4th September 2019. It is brought at the instance of the administrator. Herman Chagula Alumasa. He identifies the sons of the deceased to be Herman Chagula ALumasa, Stephen Alumasa Asena, the late James Saudi, the late Jason Tsisaga, the late Justus Mutiva, Harun Lugaro Alumasa and Ezekiel Lugaho. The deceased is said to have died possessed of N. Maragoli/Chavakali/101 and N. Maragoli/Bukulunya/627. He proposes that N. Maragoli/Chavakali/101 should pass to the estate of the late Jason Tsisaga, while N. Maragoli/Bukulunya/627 should be shared in equal proportions between Herman Chagula Alumasa, Stephen Alumasa Asena, the late James Jandi; and the late Justus Mutiva. There is a consent on distribution in form 37, dated 4th September 2019, executed by all, except Stephen Alumasa Asena.
2. There is a protest by Stephen Alumasa Asewa, vide an affidavit sworn on 26th November 2019. He avers that his consent to the application was not sought, Ezekiel Lugalo has been given nothing, the two parcels of land are occupied by all the survivors and distribution in the manner proposed would render some of them homeless. He proposed that the two parcels of land be distributed equally amongst all the seven sons of the deceased.
3. Directions were taken on 4th December 2019, for disposal of the matter by way of oral evidence.
4. The hearing happened on 24th May 2021. The administrator was the first to take the stand. He stated that the deceased was a polygamist with 2 wives. He had 7 sons. 2 in the first house and 5 in the second house. Three of the sons had died, and were survived by children. He stated that the deceased had distributed his property before he died. He said that the ancestral land was on N. Maragoli/Chavakali/101, and the deceased desired that the last born son, the late Jason Tsisaga be left there; while the rest of the sons shared N. Maragoli/Bukulunya/627. That is Herman, Stephen, Nelson, Edwin and Harun. He said Ezekiel Lugaho had been given land by the deceased during his lifetime, being N. Maragoli/Bukulunya/625. He asserts that distribution should be strictly as per the wishes of the deceased. He said that the deceased had 2 daughters said to be Bilia and Ada Malesi, both of the 2nd house. He said that both got married and have passed on, but they had children.



5. Ezekiel Lugaho Alumasa testified next. He identified the survivors of the deceased to be the seven individuals named by the administrators. He also stated that the deceased died possessed of the two parcels of land named by the administrator. He said that he had been given N. Maragoli/Bukulunya/625 by the deceased, and, therefore, he was not claiming anything from the estate. He said that the deceased had distributed his property before he died. He had given N. Maragoli/Chavakali/101 to the late Jason Tsisaga; while N. Maragoli/Bukulunya/627 was to be shared between Herman, Stephen, the Late James Jandi, Justus Mutiva and Haron Adembekwa. He said the family had sat and agreed on distribution, and even drew charts, and a surveyor came to the ground, and mutations were done. He said that he had no claim to the estate.
6. Gladys Kagai Ngogoto followed. She stated that the deceased was her father in law, she being the widow of his late son, Jason Tsisaga Alumasa. She resided in N. Maragoli/Chavakali/101, since her marriage in 1980. She averred that her late husband was the last born, and it was the desire of the deceased that her husband and his family inherit N. Maragoli/Chavakali/101. She confirmed that the property was never registered in the names of the deceased. She said the other sons of the deceased were meant to share N. Maragoli/Bukulunya/627. She said that she occupied N. Maragoli/Chavakali/101 with protestor. She averred that she had no interest in N. Maragoli/Bukulunya/627. She said the protestor's house was on N. Maragoli/Chavakali/101, and he had no home in N. Maragoli/Bukulunya/627, but utilized N. Maragoli/Bukulunya/627.
7. Asena Edwin testified next. He was a grandson of the deceased, being a son of his son, the late Justus Mutiva. He said that his father was entitled to N. Maragoli/Bukulunya/627. He said that there were boundaries. He said that 5 sons of the deceased were in occupation, naming Harun Adebekwa, Stephen Asena, Justus Mativa, and James Jandi. He said that N. Maragoli/Chavakali/101 should go to the family of Jason Tsisaga. He said Ezekiel had been given land by the deceased before he died.
8. The protestor testified on 30th November 2021. He said that he did not support the distribution proposed by the administrator. He asserted that the deceased had not distributed the land before he died. He proposed equal distribution. He said N. Maragoli/Chavakali/101 was a commercial plot which ought to be shared equally amongst all the children. He asserted that the deceased had not given N. Maragoli/Chavakali/101 to Jason Tsisaga, saying that he had a home on N. Maragoli/Chavakali/101 and all should get a share there. He said that he was not aware whether Ezekiel had been given his share of the estate by the deceased before he died. He confirmed that he farmed on N. Maragoli/Bukulunya/627. He said that there were boundaries, on N. Maragoli/Bukulunya/627, but said that the same were not official. He said that the family of the late Jandi was on N. Maragoli/Chavakali/101, and he and his son were buried there, and his children lived there. He also said that the family of Jason was on N. Maragoli/Chavakali/101. He said all the sons were living on N. Maragoli/Chavakali/101, before some of them moved into N. Maragoli/Bukulunya/627.
9. At the close of the oral hearings, the parties agreed to file written submissions. Both sides have filed. I have read through the written submissions and noted the agreements made.
10. The deceased herein died intestate in 1983, after the Law of Succession Act, Cap 160, Laws of Kenya, had come on 1st July 1981. Part V of the Act, therefore, applies to the distribution of the estate herein. Under Part V, the estate of an intestate is to be shared equally between all his children, in cases where he was not survived by a spouse. The parties did mention that the deceased had 2 wives, but none of them mentioned whether any of them are still surviving. I shall presume that they are deceased. Section 40 of the Act provides how the estate of a polygamist intestate is to be shared out. Section 38 provides how the estate of an intestate who is survived by children but no spouse is to be handled. The property is to be shared equally between the surviving children. The equal distribution envisaged in



section 38 is unaffected by the provisions of section 40, for ultimately section 40 refers to section 38, where all the spouses are dead. Part V refers to distribution amongst the children of the deceased. There is no mention of sons and daughters, whether married or not. That would mean sons and daughters are treated equally as children of the deceased. There is no discrimination or categorization into sons and daughters. Section 41 is also relevant. It deals with the grandchildren of the deceased, whose own parents, being sons or daughters, are dead, the grandchildren step into the shoes of their dead parents, and take the shares that ought to have gone to their dead parents. There is also section 42, which allows the court, at distribution, to take into account any assets that the deceased might have given or transferred to any of his children or spouses or houses during his lifetime. All the provisions that I have referred to are in Part V the Act, and I shall take them into consideration in the distribution of the estate herein.

11. For avoidance of doubt, sections 38, 40, 41 and 42 of the *Law of Succession Act*, states 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”

40. Where intestate was polygamous

(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.

41. Property devolving upon child to be held in trust

“Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”

42. Previous benefits to be brought into account Where-

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild, or house; or



- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

12. Confirmation of grants is provided for on section 71 of the *Law of Succession Act*. The provisions of paramount importance at distribution are the proviso to section 71(2) of the Act and Rule 40(4) of the *Probate and Administration Rules*. Under those provisions, it is required that the administrator should ascertain all the persons beneficially entitled to a share in the estate and should state the respective shares of all the persons identified. The courts have held that the court, at confirmation, ought not to proceed to confirm the grant before it is satisfied that all the persons beneficially entitled to a share in the estate has been identified and their shares ascertained. Of course, the law does not force the persons beneficially entitled to take the shares that they are entitled to, for there is room for them to renounce or waive or vary their entitlement. Such renunciation or waiver or variation should be at the free will of such a beneficiary. It should not be for the administrator to decide for such persons or to assume, for one reason or other, that they are not entitled or willing to take up their share. The persons themselves should file documents to renounce or attend court to bespeak their position on the matter, otherwise the court will be left with no option but allocate to them their entitlement. A right is granted by law. It is not given by individuals. It is automatic, and can only be waived by the persons to whom it accrues. The holder of a right does not have to assert it for it to be acknowledged, it is recognized whether or not asserted.
13. The proviso to section 71(2) of the Act and Rule 40(4) of the *Probate and Administration Rules* provide as follows;
 - “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 the grant shall specify all such persons and their respective shares.”
 - “Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all the persons beneficially entitled to the estate have been ascertained and determined.”
14. Before I get to distribution, I shall first consider whether there has been compliance with the proviso to section 71(2) and Rule 40(4). Should I find that there was no compliance, I shall have to postpone determination of the application until there is full compliance. The law requires me to get such compliance, for me to be satisfied that all the person beneficially entitled have been ascertained and their shares too have been ascertained, and allocated, unless waived by the persons beneficially entitled. It is a matter of justice, and there would be no justice if some of the persons beneficially entitled are left out.
15. Both sides have identified 6 sons as the persons beneficially entitled. These are named as Herman Chagala Alumasa, Stephen Alumasa Asena, the late James Jandi, the late Jason Tsisaga, the late Justus Mutiva and Harun Lugaho. The question is, did the administrator properly ascertain the persons beneficially entitled? I do not think so. The protestor raised the issue of Ezekiel. He is a son of the deceased, that he administration has not listed in his papers as a son of the deceased. It is only at the oral hearing that it emerged that he was left out as he had benefited from a lifetime gift from the deceased. The fact that he benefited from a lifetime gift is not good enough reason not to disclose him. For the court to apply section 42 of the *Law of Succession Act*, there must be disclosure, for how else would



the court know that some assets were distributed by the deceased in his lifetime. The fact that Ezekiel benefitted from a lifetime gift does not mean that he ceased to be a child and a survivor of the deceased. Neither does it mean that he had no interest in the distribution of the estate of his late father, even if that interest is limited to letting the court know that he is not interested in getting a share in the estate as he had benefitted from a lifetime gift.

16. The other issue is that the administrator is distributing the estate among the sons of the deceased only. He had only disclosed the sons in his papers. The protestor is also of the same mindset, that the estate is only available to the sons. It would be inconceivable that a polygamist, with 2 wives, did not have female children. It emerged at the oral hearing, that the deceased did in fact have female children, 2 in number, said to be Bilia and Ada Malesi. The attitude by the partes, who are before me, is that these 2 do not count. Yet they are children of the deceased. I reiterate paragraphs 10, 11, and 12 of this judgment, and state that the *Law of Succession Act* does not discriminate against daughters of the deceased. They have equal right with the sons of the deceased under the Act. It is not up to the sons to decide whether or not the daughters should get a share in the estate, for their right or entitlement to those shares is allocated to them by the law. It is only the daughters themselves who can forgo that right or entitlement. This position is reiterated in Article 27 of *the Constitution*, which vouches for equal treatment of men and women in all appliances of life.
17. The *Convention on Elimination of all forms of Discrimination against Women (CEDAW)*, to which Kenya is signatory, and which is part of Kenyan law, by dint of Article 4(5)(6) of *the Constitution*. The two daughters of the deceased are entitled equally with the sons of the deceased to the 2 assets said to be available for distribution. The law gives them the right or entitlement to that property. It is the duty of this court to see to it that that law is upheld. They are said to be married. I have read and reread, the provisions of the Law of Succession, Act, *the Constitution* and CEDAW document, and I have seen nothing in those instruments which says that marriage takes away the inheritance or succession rights of daughters. I was told that the two are since dead. Again, I have found no provision in the *Law of Succession Act*, *the Constitution* and the CEDAW document of which states that the death of a married daughter extinguishes her right or entitlement to a share in the estate of their dead parent. Under section 41 of the *Law of Succession Act*, upon the death of a child of the deceased, the child or children of the deceased would be entitled to take the share that should have gone to their parent. Section 41 does not talk about sons only. The provision is gender-neutral. It means the children of any dead son or dead daughter of the deceased would be entitled to step into the shoes of their dead father or dead mother, and take what ought to have accrued to such dead father or dead mother.
18. The conclusion to draw from the above is that the administrator has not fully complied with the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules. He has not fully ascertained all the persons beneficially entitled to a share in the estate and ascertained the shares due to all such persons. The daughters of the deceased have not been ascertained and their shares in the estate have not been ascertained. They have not been disclosed in the application, and their shares in the estate have not been ascertained and allocated. Neither, have they filed any documents to show that they waived or renounced the shares, and they were not availed in court for their views to be heard in the matter.
19. Regarding the assets of the estate, the two sides are agreed that N. Maragoli/Chavakali/101 and N. Maragoli/Bukulunya/627 are available for distribution
20. I have concluded that there was no compliance with the proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the Probate and Administration Rules. I am unable to distribute the estate, before there is full compliance. I shall postpone the application, by dint of section 71(2) (d) of the *Law of Succession Act*, to allow compliance. I give the administrator 45 days to ascertain the two daughters



of the deceased, to ascertain their children, and to file a further affidavit on the matter. The contents shall be on the full names of the daughters, whether they are alive, and, if dead, disclose their survivors or children. They shall file affidavits of these individuals on the distribution of the estate, and at the mention of the matter, produce them in court to confirm, that position. I shall only confirm the grant after that has been done.

21. The assets the subject to these proceedings are situated at North Maragoli. The Chief Justice has established a High Court at Vihiga. This cause shall be transferred to that court. The matter shall be mentioned there, for compliance with what I have stated above, and for further directions. It is so ordered.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
22nd DAY OF July 2022**

W M MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant

Mr. Getanda, instructed by Onsando Getanda & Company, Advocates for the applicant

Ms. Shijenje, instructed by ABL Musiega & Company, Advocates for the administrators

