



REPUBLIC OF KENYA



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**In re the Estate of Elkana Lindundu (Deceased) (Succession Cause
243 of 2007) [2022] KEHC 13495 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13495 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 243 OF 2007
WM MUSYOKA, J
SEPTEMBER 23, 2022**

IN THE MATTER OF THE ESTATE OF ELKANA LINDUNDU (DECEASED)

RULING

1. This cause relates to the estate of Elikana Lindundu, who died on 30th November 2007. A letter from the Chief of East Kabras Location, dated 26th February 2007, shows that the deceased was survived by 2 widows, Rosa Mmboka Elikana and Everline Nyamina; and 6 sons, Filimon Elikana, Jafred Elikana, Benson Elikana, Joseph Elikana, Geoffrey Elikana and Patrick Elikana. Representation to the estate in intestacy was granted to Rosa Mmboka Elikana, on the basis of that information, on 11th September 2007, and a grant was duly issued to her, dated 30th September 2007. The deceased was said to have died possessed of only one property, being South Kabras/Chesero/926. The said grant was confirmed on 2nd July 2014, on an application dated 19th September 2011. South Kabras/Chesero/926 was distributed between the 2 widows and 4 sons, that is to say Rosa Mmboka Elikana, Everline Nyamina, Filimon Elikana, Jafred Elikana, Joseph Elikana and Patrick Elikana. That excluded Benson Elikana and Geoffrey Elikana. A certificate of confirmation of grant was duly issued, in those terms, dated 10th July 2014.
2. A summons for revocation of grant was subsequently filed, by Filimon Ayieko, on 15th March 2016, of even date. His principal argument was that the initial administratrix had not disclosed all the survivors of the deceased and assets of the estate. He did not give a list of the survivors of the deceased, but he came up with a longer list of beneficiaries. He also listed 3 more assets, in addition to South Kabras/Chesero/926. The new assets are Kolongolo/Kolongolo/Block 2/Biketi/41, 121 and 233. An oral hearing was conducted on 13th December 2018. The deceased had 3 wives, and 12 of his children had not been disclosed in the petition. I delivered a judgment on that application, revoked the grant and gave directions on disclosure of all the survivors of the deceased. The family was not able to agree on new administrators, and on 27th April 2021, I appointed fresh administrators, being Flora Elikana, Filimon Ayieko and Jafred Lukusa. I directed them to file a summons for confirmation of their grant within 45 days.



3. The application for confirmation of grant was filed on 14th January 2022, of even date. The deceased was said to be survived by 2 widows, Flora Elikana and Safina Elikana; 8 sons, Philimon Ayieko, Jafred Lugusa, Joseph Nagwaka, Evans Lidundu, Jafred Lugusa II, John Alwanda, Jacob Nyahera and Emmanuel Elkana; 3 daughters, Andesia Elkana, Zipporah Elikana and Adiamuka Elikana; and 1 daughter-in-law, Anne Aluda. Distribution proposed was of the 4 assets, being South Kabras/ Chesero/926, Kolongolo/Kolongolo/Block 2/Biketi/41, 121 and 233, in diverse proportions. There is Form 37, signed only by the applicant, Philimon Ayieko.
4. I had the matter mentioned several times, in a bid to get the survivors to attend court to state their respective positions on the matter, given that the consent on distribution, in Form 37, on record, was executed by the administrator/applicant alone, who, ideally should not even sign the form, if the proposals in question are his own. Only a handful of the survivors attended court, and, therefore, I never got to interview them, in terms of Rule 41(1) of the *Probate and Administration Rules*. The courts have said that they are not bound to distribute intestate estates strictly in terms of Part V of the *Law of Succession Act*, estates of persons who are subject to it, by dint of having died after the Act had come into force, like in this case, and where all the persons beneficially entitled have consented or agreed on a mode of distribution, which departs from Part V. The court would have no option, but to approve such distribution. However, whether there is no consensus or agreement, amongst the persons beneficially entitled, the court would have no option but to distribute the estate strictly in accordance with Part V. See *Justus Thiora Kiugu & 4 others vs. Joyce Nkatha Kiugu & another* [2015] eKLR (Visram, Koome & Otieno-Odek JJA) and *In re Estate of Juma Shiro (Deceased)* [2016] eKLR (Mwita J).
5. The mode of distribution proposed by the administrator/applicant departs from Part V of the Act, to the extent that it does not conform to sections 35, 38 and 40 of the *Law of Succession Act*. It does not provide equally for all the survivors, for some of them get shares that are larger than what others get, contrary to the spirit of Part V. The surviving widows are not allocated life interest, but whole shares. Lack of consensus would mean that I have to strictly apply the principle stated in *Justus Thiora Kiugu & 4 others vs. Joyce Nkatha Kiugu & another* [2015] eKLR (Visram, Koome & Otieno-Odek JJA) and *In re Estate of Juma Shiro (Deceased)* [2016] eKLR (Mwita J).
6. The deceased died a polygamist. He was said to have had married three times, and to have had children with all his three wives. Distribution to his estate ought to follow the provisions of section 40, as read with sections 35, 38 and 41 of the *Law of Succession Act*. These provisions state as follows:

“ 35. Where intestate has left one surviving spouse and child or children

- (1) Subject to the provisions of section 40, 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 residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.
- (2) ...
- (3) ...
- (4) ...



- (5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, 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.

39 ...

- 40 (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 Where reference is made in the 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 wo, being female, marry under that age, and for all or any of the issue of any child of the intestate who predeceased 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 deceased.”

7. The administrator/applicant has not, in the application, grouped the survivors or persons beneficially entitled to a share in the estate according to their respective houses. Consequently, it would not be possible for me to distribute the estate strictly in terms of section 40 of the *Law of Succession Act*. As a consequence, I shall have to postpone determination of the application dated 14th January 2022, to allow the administrator/applicant file a further affidavit, grouping all the widows and children of the deceased, both sons and daughters, according to their respective houses, to enable me apply section 40 to the estate. The affidavit shall be filed within 30 days. The matter shall be mentioned thereafter for compliance and further directions. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 23RD DAY OF SEPTEMBER 2022

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Philimon Ayieko.



Jafred Elikana.

Anna Alavakoya.

Joseph Makwaka.

Evans Lindundu.

