



REPUBLIC OF KENYA



KENYA LAW
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**IN THE MATTER OF THE ESTATE OF CHEBUKWA MUYUMBA WATITA (DECEASED)
(Succession Cause 768 of 1994) [2022] KEHC 13449 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 768 OF 1994
WM MUSYOKA, J
SEPTEMBER 23, 2022**

RULING

1. The deceased died on June 1, 1986. The letter from the chief of Lumakanda location is, dated March 28, 1994. He was said to have been survived by 1 widow, Raheli Recho Muyumba, and 8 sons, being Zakayo Juma Muyumba, Julius Makokha Muyumba, Daniel Bukolo Muyumba, Francis Soita Watita, Jafred Mugalama Muyumba, Paulo Shiganda Muyumba, Julius Wale Muyumba and Moses Khwantenje Muyumba. He was said to have died possessed of Kakamega/Lumakanda/22. Representation was sought and obtained by Zakayo Juma Muyumba, in his capacity as son of the deceased. I shall refer to him as the administrator. He listed the 9 individuals in the chief's letter of March 28, 1994, and indicated that died possessed of the right to sue to recover Kakamega/Lumakanda/22, 8 head of cattle, building material and fencing material. Letters of administration intestate were made on August 15, 1995, and a grant was duly issued, dated October 9, 2003.
2. The application for me to determine is the summons for confirmation of grant, dated May 4, 2021. The survivors are still the 9 individuals. The asset listed for distribution is Kakamega/Lumakanda/22. It is proposed that it should devolve upon Zakayo Juma Muyumba. There is a consent on distribution on record, dated May 4, 2021, purported by signed by the 9 survivors. Then there are affidavits, in complementary terms, all sworn on November 19, 2021, by Raheli Rachel Muyumba, Paulo Shiganda Muyumba, Jafred Mugalama Muyumba, Julius Wale Muyumba, Julius Makokha Muyumba and Moses Khwantenje Muyumba, to express agreement with the consent on distribution dated May 4, 2021.
3. Rule 41(1) of the *Probate and Administration Rules* requires me to hear the administrator, any protestors and the survivors, and other persons beneficially entitled to a share in the estate. Although the administrator informed me, on January 24, 2022, that the deceased had no other survivors, apart from the 9 listed in the chief's letter of March 28, 1994, the petition and the confirmation application, he went on to say that the deceased had 4 daughters. These 4 were not featured anywhere in the filings. They were said to be Rispa Muyumba, Erica Muyumba, Grace Muyumba and Alice Wayieko Muyumba. 4 daughters were presented before me on April 27, 2022, being Nanzala Muyumba, Rispa Muyumba, Nasimiyu Muyumba and Wayieko Muyumba. Nanzala Muyumba said she was not aware



of the distribution proposed, and stated that she wanted to get her share. Rispa Muyumba, Nasimiyu Muyumba and Wayieko Muyumba all said that they were aware of the proceedings and the proposals, and said they had no objection to Kakamega/Lumakanda/22 being devolved wholly upon Zakayo Juma Muyumba.

4. Let me say something about daughters. The *Law of Succession Act*, cap 160, Laws of Kenya, does not discriminate against them. Indeed, the dispositive provisions in part v of the Act do not categorize the children of the deceased into sons and daughters, or male and female. They simply provide for distribution of the property amongst the children, meaning sons and daughters. I mean in particular sections 35 and 38 of the Act. The said 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.”

5. The above provisions find support in article 27 of the *Constitution*, which decrees that men and women be treated equally, and outrightly outlaws discrimination based on gender. The relevant portions of article 27 of the *Constitution* assert:

“Equality and freedom from discrimination

27(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.



- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms;
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) To give full effect to the realization of the rights guaranteed under this article, the state shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
- (7) ...
- (8) ...”

6. The provisions in the [Law of Succession Act](#) and the [Constitution](#) state what are international standards. These are set out in the [United Nations Convention on the Elimination of Discrimination Against Women \(CEDAW\)](#), and the Kenyan law is a reflection and adaptation of those standards. CEDAW, to which Kenya has acceded by ratification, forms part of the law of Kenya, by dint of that ratification, but also on account of article 2(5)(6) of the [Constitution](#). According to article 2(4) of the [Constitution](#), any law which is inconsistent with or contradicts the [Constitution](#) is void. The said provisions state:

“2(4) Any law, including customary law, that is inconsistent with the [Constitution](#) is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

7. The effect of it all is that daughters of a dead person should be treated equally with the sons. They should share whatever property the deceased died possessed of. The law does not favour the sons over the daughters. There is nothing in the law that says or provides that when the owner of property dies, the same should devolve exclusively to the sons. It says that daughters have equal rights to the sons. Equally, the law requires that the daughters should be disclosed when the administrator seeks representation to the estate. That is the purport of section 51(2)(g) of the [Law of Succession Act](#), which says:

“An application shall include information as to – in cases of total or partial intestacy, the names and addresses of all surviving spouse, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.”

8. The same is required by the proviso to section 71(2) and rule 40(4) of the [Probate and Administration Rules](#). The administrator, at confirmation, is required to ascertain all the persons beneficially entitled to



shares in the estate of the dead persons. Such persons include the daughters. Where such ascertainment is not done, the court ought not go on to distribute the estate. See *In the Matter of the Estate of Ephrahim Brian Kavai (deceased)* Kakamega HCSC No 249 of 1992 (Waweru J) (unreported) and *In re Estate of Benjamin Ng'ono Mbatia (deceased)* [2019] eKLR (Musyoka J). The proviso to section 71(2) and rule 40(4) of the [Probate and Administration Rules](#) says:

“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 the grant shall specify all such persons and their respective shares.”

“40(4). 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.”

9. From the persons disclosed in the papers and at the oral hearing, the deceased was survived by a widow, 8 sons and 4 daughters. The widow, 7 of the sons and 3 of the daughters have renounced, or waived, forfeited, or forgone their entitlement to a share in the estate. It is allowed in law, for a beneficiary cannot be compelled to take up their share against their will. See *In the Matter of the Estate of Elizabeth Wanjiku Munge (deceased)* [2015] eKLR (Musyoka J) and *In re Estate of Simon Ikandi Gitunga (deceased)* [2022] eKLR (Cherere J). It is also the law that where the parties agree on a mode of distribution which departs from part v, the court has no option, but to go by that agreement. but where there is no agreement, even by just one of the persons entitled, then there would be no discretion, and the court has to distribute strictly in accordance with part v. See *Justus Thiora Kiugu & 4 others v Joyce Nkatha Kiugu & another* [2015] eKLR (Visram, Koome & Otieno-Odek JJA) and *In re Estate of Juma Shiro (deceased)* [2016] eKLR (Mwita J). In this case, 12 individuals have reached agreement, but 1 is not in agreement with them. She has not waived or renounced or forfeited her share. That being the case, I shall share the property equally amongst the survivors who have expressed that they would take their entitlement that is to say, Zakayo Juma Muyumba and Nanzala Muyumba. By dint of section 38 of the Act, Kakamega/Lumakanda/22 shall be shared equally between the 2.
10. The filings herein point to the deceased having been survived by a widow. That is what the chief's letter, the petition and the confirmation application say. According to section 35(1) of the Act, where there is a surviving spouse, the estate ought not be devolved directly to the children, for the surviving spouse is entitled to life interest. I note, though, that the surviving spouse herein signed the consent in form 37 on record and the affidavit of November 19, 2021. I shall treat her as having renounced her right to the life interest.
11. The final orders that I make herein, in view of the above, are:
 - (a) That I hereby confirm Zakayo Juma Muyumba as the administrator of the estate herein;
 - (b) That Kakamega/Lumakanda/22 shall devolve upon Zakayo Juma Muyumba and Nanzala Muyumba in equal shares as per section 38 of the [Law of Succession Act](#);
 - (c) That the grant is confirmed in those terms, and a certificate of confirmation of grant shall issue in those terms;
 - (d) That costs shall be borne by the estate; and
 - (e) That any party aggrieved by these orders has leave of 28 days to move the Court of Appeal, appropriately.



12. 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.

Zakayo Juma Muyumba.

Francis Soita.

Nanzala Muyumba.

Daniel Mukoto Muyumba.

Rispa Muyumba.

Nasimiyu Muyumba.

Wayieko Muyumba.

Raheli Rachel Muyumba.

