



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 410 OF 1994**

**IN THE MATTER OF THE ESTATE OF ELISHA NABWAYO INYENDE (DECEASED)**

**RULING**

1. On 7<sup>th</sup> February 2019, I delivered a judgment, dated 31<sup>st</sup> January 2019, wherein I postponed confirmation of the grant, until all the requirements for confirmation of a grant of letters of administration intestate, as espoused in section 71(2) of the Law of Succession Act, Cap 160, Laws of Kenya, and reiterated in Rule 40(4) of the Probate and Administration Rules, had been complied with. Specifically, the daughters of the deceased had not been listed as beneficiaries and, therefore, they had not been provided for. In that judgment, I had ordered the administrator to include the names of the daughters of the deceased in the schedule of the list of survivors, to make provision for the portion of the land sold to the Charismatic Episcopal Church of Kenya, and to distribute the remainder of Butso/79 between all the surviving children of the deceased, including his daughters, unless any of them were not interested and had filed an affidavit renouncing their share. The administrator was to comply with the orders, and file a further affidavit addressing the issues raised.

2. On 21<sup>st</sup> February 2020, the administrator filled a further affidavit, sworn on 20<sup>th</sup> January 2020, pursuant to the orders of the court, stating all the names of the survivors of the deceased, and annexing the sworn affidavits filed by the daughters of the deceased, surrendering their shares to the other beneficiaries. The administrator further confirms that the land being occupied by the church was disposed of by the deceased to the church prior to his demise. He further gives a breakdown of the proposed distribution of the estate of the deceased having included the shares that had been surrendered by the daughters to the deceased to other survivors as follows:

- a) Charles Otvero Nabwayo - 11 acres,
- b) Thomas Ochango - 9 acres,
- c) Abneri Moses Atswenje - 3 acres,
- d) Patrick Okunyanyi – 7½ acres,
- e) Charismatic Episcopal Church - 1 acre,
- f) Peter Andayi - 1½ acres, and
- g) Patrick Imbantu - 1 acre.

3. I have stated above, that the administrator placed on record affidavits sworn by the seven daughters of the deceased, being Rose Anyona Opwaro, Philice Esiri Indakwa, Joena Vita Lutomia, Leah Rukia Maumo, Dorcus Luchera Elisha, Sarah Indeché Ombayo and Elemina Ambia. The said affidavits were sworn on 26<sup>th</sup> November 2019. The duplicate is acknowledged that they were aware of the judgment dated 7<sup>th</sup> February 2019. In their affidavits they surrendered their shares to their brothers, whose names have been indicated in the affidavits.

4. On 27<sup>th</sup> July 2020, an affidavit of protest was filled by Lucas Musungu, where he deposed that one of the sons of the deceased, Thomas Ochango, had sold to him a part of what he expected to get as his inheritance, but the latter was not keen on treating him as a liability in the estate, despite the fact that there was a copy of their sale agreement. The administrator, on 5<sup>th</sup> October 2020, filed a supplementary affidavit, highlighting the agreed distribution as between Lucas Musungu and Thomas Ochango.

5. In the judgment of 31<sup>st</sup> January 2019, I found that the four elder sons of the deceased had benefited from *inter vivos* or lifetime gifts of land, and, therefore, they were not entitled to get a share in the remaining property, that is to say Butso/79. The four sons, who should not be allocated a share in Butso/79, were identified as Adreano Musembi, Mikanory Okwanda, Luka Musungu and Peter Andati, which is a misspelling of Peter Andayi.

6. The persons identified as entitled to a share in the estate, according to the judgment of 31<sup>st</sup> January 2019 are the four younger sons, who did not benefit from the *inter vivos* sharing, and the seven daughters. The four sons are Charles Otwero Nabwayo, Thomas Ochango, Abner Atswenje and the late Joram Shikuku. The seven daughters are Dorcas Luchera, Veronica Leah, Iseri Nyabera, Sarah Indeche, Elimina Ambia, Joan Evita and Rose Anyona. I shall proceed to share out Butso/79 equally between the four sons and seven daughters, in accordance with section 38 of the Law of Succession Act.

7. According to the certificate of official search, dated 30<sup>th</sup> August 1994, Butso/79 measures 34.0 acres. It is not clear what the Charismatic Episcopal Church is entitled to. In the confirmation application, it was allocated 0.12 hectare, which translates to 0.2965 acre. Later filings put the entitlement of the church at 1.00 acre. No explanation has been given for the variation. I shall go by the application, and I shall treat the entitlement of the church to be 0.12 hectare or 0.2965 acre. When 0.2965 is deducted from 34 acres, the balance would be 33.7 acres. When the 33.7 acres are shared equally amongst the eleven children, each would get 3.06 acres.

8. I noted in my judgment of 31<sup>st</sup> January 2019, at paragraph 3, that the son of the deceased, known as Joram Shikuku, had passed on. There is a letter on record, dated 18<sup>th</sup> September 2001, filed herein on 19<sup>th</sup> September 2001, wherein it was agreed that his son, Patrick Kunyanyi, would be take his share for himself, and the other children of Joram Shikuku, being Musembi Shikuku, Ngaro Shikuku, Otsialo Shikuku, Nyenda Shikuku and Shikuku Shikuku. That would mean that the share meant for the late Joram Shikuku should devolve upon Patrick Kunyanyi, to hold on his behalf and on behalf of the other children of his father. The contents of that letter were, on 19<sup>th</sup> September 2001, reduced to an order of the court. I trust that the sons of the late Joram Shikuku are all adults, and I shall, accordingly, devolve the said equally to all of them.

9. The daughters of the deceased in their affidavits have not renounced their shares. What they have done is to take the shares and surrender them to the sons of the deceased that each of the daughters have identified. Rose Anyona has surrendered her share to Patrick Okunyanyi Shikuku and Charles Otwero Nabwayo equally. Philice Esiri Indakwa has surrendered her share wholly to Thomas Ochango Nabwayo. Joena Vita Lutomia has surrendered hers to be shared equally by Peter Andayi Nabwayo and Charles Otwero Nabwayo. The share due to Leah Rukia Maumo has been surrendered wholly to Thomas Ochango Nabwayo. Dorcus Luchera Elisha has surrendered her share wholly to Patrick Shikuku. The share for Sarah Indeche Ombayo goes wholly to Charles Otwero Nabwayo. Elimina Ambia Lisamula has surrendered her share to Charles Otwero Nabwayo. That would mean that from the surrenders Charles Otwero Nabwayo gets an additional 9.18 acres, Thomas Ochango would get an additional 6.12 acres and the late Joram Shikuku 4.59 acres. Peter Andayi, who is not entitled to any sharing of Butso/79, would get 1.53 acres, courtesy of one of his sisters. Abineri Moses Atswenje Nabwayo does not benefit from these surrenders. Overall, it would mean that Charles Otwero Nabwayo gets 12.24 acres, Abineri Moses Atswenje Nabwayo 3.06 acres, Thomas Ochango Nabwayo 9.18 acres, the late Joram Shikuku 7.65 acres and Peter Andayi 1.53 acres.

10. I noted at paragraph 3(c) of my judgment, of 31<sup>st</sup> January 2019, that the parties had consented, by an order that was recorded in court on 19<sup>th</sup> September 2001, that the name of Lucas Musungu be deleted from the list of the liabilities of the estate. Subsequent to delivery of the judgement of 31<sup>st</sup> January 2019 Lucas Musungu lodged, on 29<sup>th</sup> July 2020, an affidavit of protest, sworn 27<sup>th</sup> July 2020, where he asserts to be a liability of the estate, having bought some land from Thomas Ochango. I note that the administrator has attached a document that purports that the two had reached a settlement, to have the share due to Thomas Ochango reduced so as to reflect the claim by Lucas Musungu. My short answer to this is that the court, by the order of 19<sup>th</sup> September 2001 removed Lucas Musungu from the list of the liabilities of the estate. He cannot now contradict that order of the court by asserting, in his affidavit, that he is still a liability. The order of 19<sup>th</sup> September 2001 can only be erased by another order of the court recognizing him as a liability. There is no application before me which invites me to revise that order. Secondly, I see that the administrator has filed an affidavit here, on 6<sup>th</sup> October 2020, which he, the administrator, swore on 5<sup>th</sup> October 2020, saying that the distribution proposed be revisited to reintroduce the said Lucas Musungu as a beneficiary, based on some agreement between Lucas Musungu and Thomas Ochango. I am reluctant to do so. Firstly, the order of 19<sup>th</sup> September 2001 has not been vacated. Secondly, the agreement attached, between Lucas Musungu and Thomas Ochango, is a copy, and Thomas Ochango himself has not sworn any affidavit to acknowledge the said agreement. Thirdly, Lucas Musungu is not a liability of the estate of the deceased, to the extent that he never bought the land from the deceased or from the administrator of the estate. He bought it from Thomas Ochango, and he is a creditor of Thomas Ochango, and, therefore, that is the person that he should look up to, and not the estate. I shall, therefore, not provide for him in the distribution that I shall ultimately make.

11. I note that the administrator has allocated 1 acre to a Patrick Imbantu. I have no idea who this person was to the deceased, or with respect to the estate. His name did not come up at the oral hearing of the confirmation application, and I did not identify him, in the judgment of 31<sup>st</sup> January 2019, as a person beneficially entitled to a share in the estate. In the affidavit of 20<sup>th</sup> January 2020, the administrator has not listed him as one of the children surviving the deceased. His name appears in the distribution schedule in paragraph 8 of that affidavit, but there is no narrative as who he was to the deceased or the estate. I shall not allocate him anything, for he is a stranger to the estate.

12. The final orders are:

**(a) That the grant of letters of administration intestate, made on 1<sup>st</sup> January 1995, to Charles Otwero Nabwayo, is hereby confirmed:**

**(b) That Butso/Shikoti/79 shall be distributed as follows:**

**(i) Charismatic Episcopal Church - 0.2965 acre/0.12 hectare,**

**(ii) Charles Otwero Nabwayo - 12.24 acres,**

**(iii) Abineri Moses Atswenje Nabwayo - 3.06 acres,**

(iv) Thomas Ochango Nabwayo – 9.18 acres,

(v) The late Joram Shikuku - 7.65 acres, and

(vi) Peter Andayi - 1.53 acres;

(c) That the share due to the late Joram Shikuku shall be devolved upon his sons, Patrick Okunyanyi Shikuku, Musembi Shikuku, Ngaro Shikuku, Otsialo Shikuku, Nyenda Shikuku and Shikuku Shikuku equally;

(d) That a certificate of confirmation of grant shall issue to the administrator in those terms;

(e) That the summons for confirmation of grant, dated 13<sup>th</sup> June 2002, is hereby disposed of in those terms;

(f) That each party shall bear their own costs; and

(g) That any party aggrieved, by the orders made herein above, has leave, of twenty-eight (28) days, to move the Court of Appeal, appropriately.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF MAY 2021**

**W MUSYOKA**

**JUDGE**