



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 992 OF 2011**

**IN THE MATTER OF THE ESTATE OF ALEX APUKA KWEYU (DECEASED)**

**JUDGMENT**

1. This matter relates to the intestate estate of Alex Apuka Kweyu, who died on 4<sup>th</sup> January 2005, according to the certificate of death on record, serial number 294904, dated 30<sup>th</sup> September 2010. According to a letter, dated 27<sup>th</sup> June 2011, from the Chief of Shieywe Location, he died a polygamist, and was survived by 2 widows, 4 sons and 6 daughters. The widows are named as Agineta Ingasiani Apuka and Regina Lichuma. The children are listed as Robert Kusimba, Simon Kweyu, Moi Lichuma, Enos Lichuma, Margaret Achara, Petronilla Auma, Getrude Mukabana, Roseline Khasiala, Lydia Mulukose and Violet Ayuma. 7 individuals are listed as interested parties or buyers, that is to say Flora Adoyo Owiti, Janet Musoga, Munyasa Alfred, Hebart Olocho, Judith Ambani, Morris Anunda Sagala and Muse Khamala. He is said to have died possessed of Butsotso/Shikoti/12740.

2. Representation was sought in this cause, vide a petition lodged herein on 30<sup>th</sup> December 2011, by Agineta Ingasiani Apuka and Regina Nanzala Lichuma, in their capacities as widows of the deceased. They expressed the deceased to have been survived by the individuals listed in the Chief's letter, and to have died possessed of the assets set out in the same letter. Letters of administration intestate were made to them on 27<sup>th</sup> June 2013, and a grant was duly issued, dated 8<sup>th</sup> July 2013. I shall refer to Agineta Ingasiani Apuka and Regina Nanzala Lichuma, collectively, as the administratrices.

3. What is for determination is a summons for confirmation of grant, dated 20<sup>th</sup> November 2014. It is brought at the instance of two administratrices, who I shall refer to hereafter as the applicants. In the said summons for confirmation of grant, the applicants have identified the children and widows of the deceased to be the individuals listed in the Chief's letter, and the assets of the estate to be the assets set out in the same letter. Flora Adoyo Owiti, Janet Musoga, Alfred Munyasa Mukhono, Herbert Olocho, Judith Ambanji, Morris Amunda Sagala and Muse Khamala are listed as dependants of the deceased. It is proposed that the assets be distributed or shared out so that Butsotso/Shikoti/5812 goes to Regina Nanzala Lichuma, while Butsotso/Shikoti/12740 goes to Agineta Ingasiani Apuka, with the children getting nothing. The summons for confirmation of grant was filed simultaneously with a consent to confirmation of grant, in Form 37, filed under Rule 40(8) of the Probate and Administration Rules, dated 20<sup>th</sup> November 2014, and filed on even date. Although the same lists 19 individuals, it was signed by only 5 of them, being the 2 administratrices, and Petronella Auma Apuka, Roseline Khasiala Apuka and Gertrude Mukabana Apuka.

4. The summons came up for hearing on 14<sup>th</sup> July 2015. Whereas the 1<sup>st</sup> administratrix asserted that there was agreement on distribution, Margaret Achara stated that she did not agree with the proposals, saying that her mother's house was not represented. She prayed that the parties be given time to discuss the matter. The 1<sup>st</sup> administratrix asserted that Margaret Achara had been given her share by the deceased, but she had sold the same, and, therefore, she was not entitled to the remaining assets. Margaret Achara asserted that she had not received anything from the deceased. Following that disagreement, the court directed that the matter be canvassed by way of oral evidence, and allowed Margaret Achara to file an affidavit of protest.

5. An affidavit of protest was filed by Magireti Achara Abuka, on 29<sup>th</sup> June 2016, sworn on 22<sup>nd</sup> June 2016. She avers to be a daughter of the deceased. She describes the 1<sup>st</sup> administratrix to be her stepmother, and the 2<sup>nd</sup> administratrix to be the widow of her late paternal uncle, Alfred Lichuma Kweyu. She discloses the actual survivors of the deceased to be Agineta Ingasiani Apuka, Magireta Achara Abuka, Petronilla Auma Apuka, Roseline Khasiala Apuka, Gertrude Mukabana Apuka, Lydia Mulukose Apuka and Violet Ayuma. She expresses that the deceased had died possessed of the two assets disclosed in the summons for confirmation of grant. She states that she disagrees with the distribution proposed by the administratrices, and accuses them of including strangers as beneficiaries, being Judith Ambani and Muse Khamala, and proposes that the names of the two be dropped. She asserts that the law treats all the beneficiaries equally, and that none of them ought to be given special treatment. She proposes that Butsotso/Shikoti/5812 should be devolved upon Regina Nanzala Lichuma wholly, while Butsotso/Shikoti/12740 should be devolved upon Agineta Ingasiani Apuka, to be shared equally between the widow and her six children, that is to say Agineta Ingasiani Apuka, Magireta Achara Abuka, Petronilla Auma Apuka, Roseline Khasiala Apuka, Gertrude Mukabana Apuka, Lydia Mulukose Apuka and Violet Ayuma, at the rate of 0.034 hectare each. It is explained that the deceased had been holding Butsotso/Shikoti/5812 for his late brother, Alfred Lichuma Kweyu, whose family was in full occupation of the said property. She also seeks that the 1<sup>st</sup> administratrix render accounts of the rental income from 6 rental houses from which she has been collecting revenue,

to be shared equally amongst the beneficiaries of the deceased. I shall hereafter refer to Margaret Achara as the protestor.

6. The oral hearings commenced on 17<sup>th</sup> July 2018, with the protestor adopting her affidavit of protest. She was cross-examined by the 1<sup>st</sup> administratrix. She averred that she did not know the persons named in the summons as Judith Ambani and Muse Khamala. She also stated that the 1<sup>st</sup> administratrix had not informed her about how she wanted the estate distributed. She also said that the 2<sup>nd</sup> administratrix had not been given a number for the land that was due to her late husband.

7. The 1<sup>st</sup> administratrix testified on 24<sup>th</sup> March 2021. She stated that when she married the deceased, he had another wife, who left. She gave the name of the said wife as Selpher Awinja. She further stated that the deceased was survived by 6 daughters. The deceased had had 5 sons, but they had all died young, without children of their own. She identified her co-administratrix as the widow of her brother-in-law, whose children she named as Robert Kusimba, Moi Lichuma and Enos Lichuma. It was explained that Enos Lichuma was a child of another mother, from another wife of her brother-in-law. She said that she had listed persons who had bought land from the deceased. She said that the deceased had not given her co-administratrix the land reference number to the land that her brother-in-law was entitled. She said that the deceased had built rental houses, which she described as being in poor condition and not attracting any rent. She said she had not attempted to repair the houses as she feared disputes. On the sales of land by the deceased, she said that she was not given copies of the sale agreements for the land sold by the deceased. She said that she would have liked all the children to get a share of the land, including the protestor. She said that the protestor had been given land previously by the deceased. She said her co-administratrix was entitled to land due to her late brother-in-law, which the deceased had held in trust for him. She proposed that the land could pass directly to the co-administratrix to share it amongst her children, or to the estate of the late brother-in-law so that the parties can thereafter conduct succession proceedings.

8. The 2<sup>nd</sup> administratrix described the deceased as her brother-in-law, and the elder brother to her late husband. She said that her co-administratrix had invited her to the matter so that she could get her number. She said her late husband had another wife, Eunice Lichuma.

9. Angila Nyarotso Lichuma followed. She said that the deceased was her brother-in-law, and that she was a co-wife with the 2<sup>nd</sup> administratrix. She said that she wanted her son to benefit from the property. She also testified that their late husband had not gotten his land from the deceased, who had had the land registered in his name. She said that she did not live on the subject land, but on another that she had bought. She described her child with her late husband as Linus Alila. She explained that she married her late husband after her initial husband died.

10. The rest of the survivors did not testify. They gave unsworn statements. Those who made such statements were Robert Kusimba, Enos Lichuma Alila, Petronilla Auma and Roseline Khasiala, they all said that they were not objecting to the proposals made in the summons for confirmation of grant. Mr. Shivega, for the protestor, submitted that 1<sup>st</sup> administratrix was agreeable to an equal distribution of the property amongst all the beneficiaries.

11. To my mind, the matter is fairly straight forward. It appears that there is common ground that Butsotso/Shikoti/5812 was held in trust by the deceased for his late brother. The parties agreed that the same ought to devolve to his estate. I note that the late brother of the deceased was a polygamist. It is not clear how many survivors there are in his family. He appears to have had married three times, and to have had children with the 3 wives. There is Regina Nanzala Lichuma, Angila Nyarotso Lichuma and Eunice Lichuma. As there is uncertainty as to the actual survivors of the late Alfred Lichuma Kweyu, I shall not order devolution of the subject asset to individual survivors or distribute it amongst them, instead I shall direct that the property pass to the 2<sup>nd</sup> administratrix, to hold the estate of her late husband, pending resolution of issues amongst the estate of the late Alfred Lichuma Kweyu as to the actual survivors.

12. Regarding Butsotso/Shikoti/12740, there is no dispute that this land is what the family of the deceased is entitled to. There is also no dispute on who the survivors of the deceased herein are, that is to say his widows and 6 daughters. The dispute is on distribution. The widow, the 1<sup>st</sup> administratrix, has no issue with the property being shared out so that all the children get a share, including the protestor. To that extent, there is no big quarrel. The other disputed area is with regard to the persons who are not family members, and who the 1<sup>st</sup> administratrix suggests should also get a share of the land. She says they bought land from the deceased, yet she has no documents to support the sales. The protestor has issues with that.

13. This is the way I shall go about it. I shall take it that the deceased denied a polygamist, and section 40 of the Law of Succession Act, Cap 160, Laws of Kenya, shall apply to the distribution of his estate. According to that provision, the property is shared out amongst the houses, in the first instance, and thereafter within the houses in accordance with sections 35 to 38 of the Law of Succession Act. The deceased had 2 houses, that of the 1<sup>st</sup> administratrix and that to which the protestor belongs. The house of the 1<sup>st</sup> administratrix has 1 surviving spouse and 5 children, while the house of the protestor has no surviving spouse but has 1 child. The house of the protestor is the 1<sup>st</sup> house, since her mother was the first wife of the deceased, while the house of the 1<sup>st</sup> administratrix is the 2<sup>nd</sup> house. The 1<sup>st</sup> house comprises of only 1 unit, while the 2<sup>nd</sup> house had 6 units. Butsotso/Shikoti/12740 shall be shared out at the ratio of 1:5. The 1<sup>st</sup> administratrix claims that the persons named in the summons bought property from the deceased but she has provided no proof. I shall direct that the 1<sup>st</sup> administratrix shall allocate the said persons shares from the 5 units due to her house, and thereafter the surplus shall be shared equally between the 1<sup>st</sup> administratrix and her 5 daughters.

14. For avoidance of doubt, section 40 says as follows:

*“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”*

15. The protestor raises issues about rents, and has called for accounts. Not much evidence was led on this. It did not come out clearly where the said rental houses are. The 1<sup>st</sup> administratrix said that the property was in state of disrepair, and she was no longer collecting rent, and that she had feared repairing the property to avoid conflicts. I shall not make any orders whatsoever on the income of the said houses. Instead, I shall direct that when the process of sharing out the property on the ground shall commence, let the portion of the land where these houses stand be given to the 1<sup>st</sup> administratrix, in her capacity as surviving widow of the deceased.

16. The application for confirmation of grant, dated 20<sup>th</sup> November 2014, is hereby disposed of in the terms set out above. The administratrices are hereby confirmed as such, and the estate shall be distributed in terms of paragraphs 11 and 13 of this judgment. Each party shall bear their own costs. Should any party be aggrieved by the decision herein, there is leave, of twenty-eight (28) days, to file appeal at the Court of Appeal. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6<sup>th</sup> DAY OF AUGUST 2021**

**W. MUSYOKA**

**JUDGE**