



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 366 OF 2001

IN THE MATTER OF THE ESTATE OF CLEMENT ITOLONDO LIKHUTU (DECEASED)

JUDGMENT

1. According to the certificate of death on record, serial number 600847, dated 17th July 2001, the deceased herein, Clement Itolondo Likhutu, died on 22nd February 1988. According to the letter from the Senior Chief of Khayega Location, dated 27th July 2001, the next of kin and the inheritors of his estate were Ernest Iraboka Mukavale and Elijah Luchitia Mukavale. The property he died possessed of is described as Lugose/Isukha/28. Representation to the estate of the deceased was granted to the two, on 22nd July 2002, and a grant was issued, dated 24th July 2002. Ernest Iraboka Mukavale passed on, and Elijah Luchitio Mukabale was confirmed on 26th March 2019 as administrator. I shall hereafter refer to him as such.

2. What I am called upon to determine is a summons for confirmation of grant, dated 3rd August 2016, filed herein on even date. It is brought at the instance of the administrator. It is founded on an affidavit that the administrator swore on 3rd August 2016. The persons listed as surviving children of the deceased are Elijah Luchitio Mukabale, Ernest M. Mukabale, Alphonse M. Mukabale, Adriano Indeche, Joseph Ngaira, Francis Mukabale, Pius Milimu, Thomas Mukabale, Christopher Mboyi and Martin Bulinda. Three assets are proposed for distribution, being Isukha/Lukose/28, Isukha/Shitochi/1108 and Isukha/Mukhonje/1536. It is proposed that Isukha/Lukose/28 should go to Elijah Luchitio and Ernest M. Iraboka; while Isukha/Shitochi/1108 goes to Pius Milimu, Christopher Mboyi and Thomas Mukabale; and Isukha/Mukhonje/1536 to Alphonse M. Mukabale, Adriano Indeche, Martin Bulinda, Joseph M. Ngaira and Francis Mukabale. There is a consent in Form 37, dated 3rd August 2016, duly signed by 4 individuals out of the 10 listed. Those who have signed are Elijah Luchitio, Alphonse M. Mushila, Adriano Indeche and Martin Bulinda.

3. The administrator swore a further affidavit on 30th August 2016, ostensibly to amend the proposals made in the application. He discloses that Ernest Iraboka had died, and sought to have his share go to his widow, Elizabeth Achitsa Iraboka, to hold in trust for their children, Edwin Lisutsa Iraboka, Felix Ligabo Iraboka and Alex Shiangala Iraboka. He further discloses that Adriano Indeche was also dead, and proposes that his share be devolved upon his only child, Raphael Tom Indeche. Martin Bulinda Mukabale is also dead, and it is proposed that his share should be given to his children, namely Gabriel Kweyu Bulinda, Dennis Indeche Bulinda and Christopher Ligabo Bulinda. He has attached copies of certificates of death in respect of the late sons of the deceased.

4. Alphonse Mushila Mukabale swore an affidavit on 30th August 2016, in response to the application. He says that although he substantially agrees with the distribution proposed in the application, he holds a different view with respect to Isukha/Mukhonje/1536. He proposed that that property, which is 7.26 hectares or 21 acres, be shared out amongst 5 individuals, so that Alphonse Mushila Mukavale takes 5 acres, Adrian Indeche 4 acres, Martin Bulinda 4 acres, Joseph Ngaira Mukabale 4 acres and Francis Mukabale 4 acres. He states that the deceased had sold the whole property, and that it was him who salvaged it when he refunded the purchase money to the buyers. He believes that for that reason he is entitled to an extra 1 acre.

5. Francis Mukavale swore an affidavit of protest on 28th March 2017. He disagrees with the proposals on distribution made by the administrator and Alphonse Mushira Mukavale, in particular that relating to Isukha/Mukhonje/1536. He explains that the deceased was a polygamist, having married three times. The wives are identified as Margaret Muhalia, Resper Asivwa and Tifina Muchalwa, who occupied Isukha/Mukhonje/1536, Isukha/Lukose/28 and Isukha/Shitochi/1108, respectively. His problem with Isukha/Mukhonje/1536 has something to do with its history and the role of Alphonse Mushira Mukavale in it. He says that the original property was Isukha/Mukhonje/244, which was fraudulently subdivided into Isukha/Mukhonje/1536, 1537 and 1538 by Alphonse Mushira Mukavale. A suit was filed in Kakamega HCCC No. 64 of 2006, relating to that subdivision, and a judgment was delivered on 12th July 2012, where the court ordered cancellation of the registration of Alphonse Mushira Mukavale as proprietor of Isukha/Mukhonje/1536, and the reversion of the property to the name of the deceased, and for that property to be subjected to succession proceedings. The judgment also stated that Isukha/Mukhonje/1537 and 1538 be treated as the share of Alphonse Mushira Mukavale to be taken into account at distribution of the estate. He avers that Alphonse Mushira Mukavale has, therefore, already received his share of the estate, which he has since sold to Gaitano Martin Salwa Likhavila and Peter Shikanga. He calls for a surveyor's report on grounds that the property fronts the main Kakamega-Kisumu Highway, and it was prudent to determine acreages and values. He has attached a copy of the judgment in Kakamega HCCC No. 64 of 2006 to his affidavit.

6. Alphonse Mushila Mukavale swore two affidavits on 26th April 2017, in apparent response. He essentially avers that he recognizes the judgment in Kakamega HCCC No. 64 of 2006, but says even then that he is still entitled to a share in Isukha/Mukhonje/1536, given that the

portions he sold, being Isukha/Mukhonje/1537 and 1538, were small, measuring 0.34 hectare combined. He avers that his share should be less the 0.34 hectare.

7. On 12th July 2018, the parties entered into a consent in court, to have the land registrar and land surveyor visit Isukha/Mukhonje/1536 to determine acreage. The visit happened on 12th April 2019. The acreages were determined, and a sketch map was drawn showing occupancy on the ground. It was established that Adriano occupied 1.07 hectare, Alphonse 1.9 hectares, Joseph Ngaira 0.94 hectare, Agneta Nekesa Martin 1.08 hectare and Francis 1.0 hectare. 0.94 hectare was said to be unused, while Isukha/Mukhonje/1537 and 1538 were said to be part of the land occupied by Alphonse, with Isukha/Mukhonje/1537 being confirmed to be 0.14 hectare.

8. Francis Ambeyi Mukabale swore two further affidavits of protest, on 15th November 2019, wherein he reiterates his earlier affidavit on the distribution of Isukha/Mukhonje/1536, in view of the court order in Kakamega HCCC No, 64 of 2006 and the surveyor's report.

9. The application was disposed of by way of a consent order that the parties recorded on 27th January 2021, and also by way oral or *viva voce* evidence.

10. The consent related to the distribution of Isukha/Lukose/28 and Isukha/Shitochi/1108, the parties agreed on its distribution. There was no consent on Isukha/Mukhonje/1536, and the agreement was that the same proceeds to trial for determination by the court. The consent was adopted by the court. Its terms are as follows:

“The property known as Isukha/Lukose/28 measuring 4.695 acres be shared as follows:

- (a) Elijah Luchitio – 2.35 acres; and
- (b) Elizabeth Ilavoka – 2.35 acres, to hold in trust for Felix Ligabo, Alex Shiangula and Edwin Lisutsa.

Isukha/Shitochi/1108 measuring 3.7065 acres to be shared as follows:

- (a) Christopher Mboyi Mukavale – 1.24 acres;
- (b) Lina Kenyatta – 1.24 acres, to hold in trust for Elien Kenyatta; and
- (c) Polycarp Ligabo and Ignatius Mukavale – 1.24 acres, equally.

The property that remains in dispute is Isukha/Mukhonje/1536. We will take evidence on this one.”

11. The oral hearing on Isukha/Mukhonje/1536, happened thereafter, with Alfonse Mushila Mukabale and Francis Ambeyi Mukabale giving sworn statements. The first to testify was Alfonse Mushila Mukabale. He identified the persons in occupation of the said parcel of land to be Joseph Ngaira, Francis Mukabale, Adrian Indeché Ngaira, Martin Mukavale and Francis Mukavale. He stated that, he should be given 5 acres, while the remaining 4 sons should get 4 acres each. He said that he had sold part of his share to other persons who had since obtained title deeds for their portions, that is Gaitano Martin Likhavila and Peter Shikanga. He said that he should get a share less what he sold. He said that he was also agreeable to equal sharing, less what he had sold. He said that that meant that he should not get equal share with the rest once what he sold is deducted. He said that he was ready to have the boundaries adjusted if it were to be established that he occupied more than he was entitled to. On his part, Francis Ambeyi Mukavale, said that Alfonse should get less what he sold. He said that he had no issues with the boundaries being redrawn.

12. The parties were given time to file written submissions, and they did comply. I have read through their written submissions, and noted the arguments made therein.

13. In confirmation applications, there are two principal factors for the court to consider: appointment of administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

“*Confirmation of Grants*

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered;

or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

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

14. It would appear that there are no issues with respect to appointment of the administrator as such. In any event, his appointment as such was cemented by the court on 26th March 2019, when he was confirmed as such in terms of section 81 of the Law of Succession Act. Equally, no issues have arisen with respect to his administration of the estate, in the application that I am determining, and that was also addressed by the court in the ruling of 26th March 2019. Consequently, I find that there is no impediment to his confirmation as administrator.

15. The principal purpose of confirmation of grant is distribution of the assets. The proviso to section 71(2) of the Law of Succession Act requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all person entitled to the estate have been ascertained and determined.”

16. I would like to emphasize that the provisions above cast a duty on both the administrator and the court with respect to ascertainment of the persons beneficially entitled and their shares. The administrator who moves the court under section 71, is under an obligation to ascertain all the persons beneficially entitled to a share in the estate of the deceased, and to identify those shares in the application. The proviso is about cases of intestacy. The administrator ought to go back to Part V of the Law of Succession Act, and look at the provisions in that Part that apply to intestate distribution, and satisfy himself that he has ascertained the persons entitled in intestacy in accordance with those provisions. Part V runs from sections 32 to 42 of the Law of Succession Act. These provisions are very clear on who the persons beneficially entitled are, where the intestate was survived by a spouse and children, a spouse but no children, children but no spouse, and no spouse and no children. They also address situations where the intestate died a polygamist, how to deal with shares due to minors and how to treat previous gifts, settled to some of the persons beneficially entitled, either *inter vivos* or by will. The provisions are gender neutral, for the law does not entertain discrimination based along those lines.

17. The obligation on the court, faced with a summons for confirmation of grant, according to the proviso, is that the court ought not treat the application casually, by just going by what the administrator has disclosed, in terms of the persons beneficially entitled. The court ought not treat the list of survivors furnished by the administrator as the gospel truth. There is need to probe, to ask questions, to go through the entire record, to peruse the petition that initiated the cause, read the letter by the local Chief or his assistant, among other measures. Go beyond the confirmation application. This is critical because a succession cause in intestacy is about distribution of the assets amongst those entitled. In probate, the exercise is easier, for distribution is in accordance with the will of the deceased, and the persons beneficially entitled would usually be those that the testator had named in his will. In intestacy, the court relies entirely on the honesty of the administrator. The court can be misled, and so it has to be vigilant. It must, therefore, go the extra mile. It must avoid a casual approach to the application.

18. The importance of the confirmation process cannot be gainsaid. A succession or probate cause is initiated for the sole purpose of distribution of the estate. The process under section 71 is about that distribution. That should make the process of confirmation of grant the most critical in the entire succession process. It is the one process that ought to bring closure to the succession or probate cause. The parties and the court must get it right. Failure to get it right will mean that there would be no closure, and the parties will have to re-visit it for one reason or other. This would explain why, after confirmation, most causes do not close, for parties keep coming back for review, or redistribution of the estate, or for rectification of the certificate of confirmation, or for revocation. Much of it has something to do with bungling with the confirmation process. To avoid what the court ought to do is to insist on scrupulous compliance with what is required under the proviso to section 71(2) of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules, for the converse is that succession litigation then never ends.

19. The importance of the court doing duty in terms of the proviso to section 71(2) of the Law of Succession Act, was underlined in *In the Matter of the Estate of Ephrahim Brian Kawai (Deceased)* Kakamega HCSC No. 249 of 1992 (unreported) (Waweru J), where the court said:

“What is immediately obvious is that the court (Hon. Tanui J.) did not enquire into or satisfy himself as to the persons beneficially entitled and their respective shares to the estate of the Deceased as required by the proviso to subsection (2A) of section 71 of the Law of Succession Act, Cap 160 before making the order for confirmation of the grant. The proviso is in mandatory terms, and from its wording, failure of the court to so satisfy itself, in my judgment, renders the order of confirmation (and the resulting confirmed grant) illegal. Contrary to what might be thought, confirmation of grant in intestate succession is a not a mere formality. It is probably the most important aspect of intestate succession, as it is at that stage that the court determines who are beneficially entitled to the estate of the deceased and their respective shares therein. In this station and in my previous station (Kisii) I have come across hundreds of disputes which would have been avoided if the court concerned had performed its statutory duty. The present dispute is one such.”

20. I have a duty, therefore, to be satisfied, before I can proceed to confirm the grant herein, as to whether the administrator herein has ascertained the persons beneficially entitled to a share in the estate, and of their respective shares in the estate. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? On the first limb of the proviso, as to whether the administrator has properly identified all the beneficiaries of the estate, I am not persuaded that he has. The letter from the Chief, dated 27th July 2001, identified only 2 individuals as the persons beneficially entitled, that is to say Ernest Iraboka Mukavale and Elijah Luchito Mukavale. These 2 are the only individuals that were disclosed in the petition. The possibility that the deceased had more than 2 children first surfaced when a summons was filed herein on 18th February 2015, of even date, for revocation of the grant. The application was by Francis Mukabale, who disclosed that the deceased had 4 other sons, who he named as Joseph Ngaira, Christopher Mboyi Mukavale, Martin Bulinda and Adrian Indeche. To that application was attached a letter dated 16th July 2007, addressed to the District Commissioner, Kakamega, from the District Anti-Corruption Civilian Committee, which disclosed that the deceased died a polygamist, having married 3 wives, and that he had 10 sons, apart from daughters. The names of the sons were given, but not so the names of the daughters. The administrator then responded to that application, his affidavit being sworn on 9th April 2015, that indeed, apart from himself and Ernest Iraboka Mukavale, the deceased had other children, and he has named the sons only, and where some of the sons are dead he has named the grandsons of the deceased who survived the dead sons. When the summons for confirmation of grant, which is the subject of this judgement, was filed on 3rd August 2016, it only identified the 10 sons of the deceased, and proposed distribution of the estate amongst the 10 sons. The confirmation proceedings are, therefore, on how the estate is to be distributed amongst the said 10 sons.

21. The deceased herein died on 24th July 2002, that was long after the Law of Succession Act had come into force on 1st July 1981. His estate is, therefore, by dint of section 2(1)(2) of the Law of Succession Act, for distribution in accordance with the provisions of the Act. He died intestate, and, therefore, distribution should be in accordance with Part V of the Law of Succession Act. The parties have not mentioned whether any of the 3 wives of the deceased survived him, and I shall presume, therefore, that he was not survived by a spouse. Distribution has to be strictly to the children. Where the deceased is survived by children only, without a surviving spouse, that is, sections 35(5) and 38 of the Law of Succession Act apply, the property is shared equally amongst the children. Of course, in case of polygamy, the estate is first dealt with in terms of section 40(1) of the Law of Succession Act, where the assets are devolved to the houses, and thereafter each house is required, under section 40(2), to distribute the assets devolved to each house, in terms of sections 35 to 38 of the Act, whichever is applicable.

22. Let me set out verbatim what these two provisions says, for avoidance of any doubt. they state as follows:

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

(1) ...

(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, 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.”

23. The record is very clear that the administrator has disclosed only the sons of the deceased. As to whether the deceased had female children, the administrator has not disclosed that. Were there any such children? The letter from the District Anti-Corruption Civilian Oversight Committee to the District Commissioner, dated 16th July 2007, alludes to existence of daughters. If the daughters exist, then the administrator has not disclosed them. He was obliged to disclose them when he sought representation to the estate, by dint of section 51(2)(g) of the Law of Succession Act, and he was obliged to when he filed for confirmation of his grant.

24. I have mentioned above, that the proviso to section 71(2) is gender-neutral. Indeed, the entire Law of Succession Act is gender-neutral, largely, and more specifically with regard to children. It does not classify children into male and female, or sons and daughters. The reference to children in Part V, whether in section 35(5), or 38 or 40, means children of both gender. The interpretation section in the Law of Succession Act, section 3, does not define children in gender terms. In fact, the definition in there, on children, has nothing to do with children being either male or female, and addresses other issues that are not relevant to gender. The provisions in section 3, on children, are in subsections (2)(3)(4), and they state as follows:

“3. Interpretation

(1) ...

(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

(3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.

(4) Where the date of birth of any person is unknown or cannot be ascertained, that person shall be treated as being of full age for the purposes of this Act if he has apparently attained the age of eighteen years, and shall not otherwise be so treated."

25. As the deceased died after the Law of Succession Act had come into force, distribution of his estate must factor in his daughters. They are entitled to a share in the estate, according to the provisions of the Act. Daughters, therefore, should not be ignored, or be disregarded, as if they did not exist, or as if the deceased never had any such children. The Law of Succession Act has provided for them, they should be taken into account in succession proceedings, by being disclosed in the petition, and in the confirmation application, and being involved in all the processes in the succession cause. Of course, under the customary law of succession, daughters especially the married ones, have no entitlement to a share in their fathers' estates, because they are entitled through the men who married them. If customary law were of application here, unfortunately it is not, then the nondisclosure of the daughters would, perhaps, be acceptable or tolerable.

26. Other than the Law of Succession Act, I am obliged to take into consideration the rights of the daughters and granddaughters of the deceased, by the Constitution of Kenya, 2010, and international law. Article 27 of the Constitution of Kenya, 2010, decrees that men and women are to be treated equally, in all spheres of life, and succession is one such sphere. When a father dies and his estate is up for distribution, then, under Article 27 of the Constitution, all the children of the deceased, male and female, must be taken into account, and afforded equal treatment. Under Article 2(5) of the Constitution of Kenya, 2010, the general rules of international law form part of the law of Kenya, and under Article 2(6) of the Constitution, any treaty or convention ratified by Kenya forms part of the law of Kenya. Kenya has signed up to many treaties and conventions, which, by dint of that Article, have become part of the law of Kenya, even without any form domestication. I shall refer to only one of them the Convention on the Elimination of All Forms of Discrimination Against Women, otherwise known by its acronym CEDAW. It vouches for equal treatment of men and women, and enjoins States to promote non-discrimination against women. CEDAW came before the Constitution of Kenya, 2010, and the promulgation of the Constitution was, so to speak, part of the domestication of the said Convention. This court cannot, therefore, turn a blind eye to these legal instruments, and proceed as if there is nothing untoward in the manner that the administrator has done, concealed the existence of the daughters and granddaughters of the deceased, and proceeded as if they do not exist and do not matter.

27. It could be that the deceased had no daughters. In which case, the administrator is not at fault at all. However, I am not persuaded that there were no female children, be they children of the deceased or his granddaughters by those of his children who have since died. The deceased had 3 wives, I find it inconceivable that he did not have any female children from his three marriages, and female grandchildren from his sons who have since died. I am not satisfied that the administrator has ascertained all the persons beneficially entitled to share in the estate, and I am also not satisfied that he has allocated appropriate shares to all of them. Going by the injunction or enjoinder in *In the Matter of the Estate of Ephraim Brian Kavai (Deceased)* Kakamega HCSC No. 249 of 1992 (unreported) (Waweru J), it would be illegal for me to go ahead to make orders on the distribution of the estate herein before I am satisfied that the deceased herein did not have female children, and if there are such children that those female children have been allocated shares in the estate, but have declined, either through waiver of their rights or renunciation of their shares.

28. As a consequence of what I have said above, in paragraph 25, I shall only make interim orders, as follows:

- (a) That I hereby postpone confirmation of the grant herein and determination of the application dated 3rd August 2016;
- (b) That I direct the administrator to comply with the proviso to section 71(2) of the Law of Succession Act, by filing an affidavit detailing all the children of the deceased, whether male or female, whether married or unmarried, whether dead or alive;
- (c) That in the affidavit to be filed under (b), above, for any of the children of the deceased who are themselves dead, whether male or female, he shall list all the children of such dead children, whether male or female;
- (d) That he shall propose shares for any of such children or grandchildren, that were not disclosed in the confirmation application, dated 3rd August 2016, or get them to sign affidavits waiving or renouncing their entitlement to a share in the estate of the deceased;
- (e) That the matter shall be mentioned thereafter, for receipt of the affidavit referred to above, and for directions on the final determination of the application;
- (f) That at the said mention date, such daughters or granddaughters, as will have been identified under (b) and (c), above, shall attend court to state their position on the proposed distribution; and
- (g) That final orders on the distribution of the estate shall be made only after the administrator has fully complied with the directions that I have given above.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6th DAY OF AUGUST, 2021

W MUSYOKA

JUDGE