



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 207 OF 1983**

**IN THE MATTER OF THE ESTATE OF FANUEL ASEKA MATUMO OTEMBA (DECEASED)**

**JUDGMENT**

1. This cause relates to the estate of the late Fanuel Aseka Mafuno Otemba, who, according to the certificate of death, serial number 101179, dated 8<sup>th</sup> July 1982, died on 22<sup>nd</sup> July 1977. There are copies on the record, of certificates of freehold title in respect of Kisa/Emasatsi/273 and 305, in the name of Aseka Otemba, both dated 15<sup>th</sup> December 1966.
2. Representation was sought in this cause vide a petition that was filed herein on 12<sup>th</sup> December 1983, by Christopher Enos Likuyi, in his capacity as the eldest son of the deceased. He listed Kisa/Emasatsi/273 and 305 as the assets that the deceased died possessed of, and himself and William Otwero Aseka, John Omulama and Isaack Amanami, as the persons who survived the deceased.
3. An objection was raised by Jane Mukasiali Aseka, on 23<sup>rd</sup> December 1983, in her capacity as surviving widow of the deceased, on grounds that she and her son had been excluded from the process. She subsequently filed, on 30<sup>th</sup> January 1984, an answer to the petition, a petition by way of cross-application for a grant and an affidavit in support of the petition. In the petition she identified the survivors of the deceased as herself, Christopher Likuyi, William Otwero Aseka, John Omulama, Clyde Aseka and Isaack Ananami. She also listed Kisa/Emasatsi/273 and 305 as the assets of the estate.
4. There is a letter on record, dated 10<sup>th</sup> October 1985, from the Chief of East Kisa Location, where it is explained that the deceased had married 2 wives, being Musilima Aseka and Jane Mukasiali Aseka. Musilima Aseka had 4 sons, being Enos Aseka, William Aseka, John Omulama and Isaac Amani; while Jane Mukasiali Aseka had one son, Clyde Aseka. Kisa/Emasatsi/273 is said to be 2.8 acres, and Jane Mukasiali Aseka lived there; while Kisa/Emasatsi/305 is said to be 5 acres and the family of the first wife, Musilima Aseka lived here.
5. The objection raised by Jane Mukasiali Aseka was resolved on 15<sup>th</sup> October 1985, by consent, before Aganyanya J. It was directed that the grant was to be made in the name of Christopher Enos Likuyi alone, but Kisa/Emasatsi/273 was to be administered by Christopher Enos Likuyi and Jane Mukasiali Aseka. The grant was confirmed in the names of the two in the proportions of 50:50.
6. Nothing much appears to have happened since then, until 19<sup>th</sup> June 2019, when a summons for revocation of grant, of even date, was lodged herein by John Omulama Aseka. He accuses the administrator, Christopher Enos Likuyi, of failing to conclude his duties as administrator. He avers that the administrator had left out some of the survivors of the deceased and other beneficiaries of the estate, such as Messalina Ayiti Kayo, Resna Osimbo Indika, John Omulama Aseka, Isaac Amanani Aseka and Emulanda Primary School. He asks for substitution, and for a fresh grant.
7. There is a reply to the application by the administrator, Christopher Enos Likuyi. He avers that the land was divided equally amongst the 5 sons of the deceased, but they had been unable to subdivide and distribute it for lack of funds. It is explained that Messalina Ayita Kayo was married, and Resna Osimbo was catered for through her husband William Aseka, and that Emulanda Primary School had gotten its share. It is also said that John Omulama had sold the land meant for Isaac Amanani.
8. I heard the parties orally on 27<sup>th</sup> April 2021. The applicant John Omulama Aseka explained that the court in 1985 shared out on asset, Kisa/Emasatsi/273, equally between the administrator and Jane Mukasiali Aseka, and left Kisa/Emasatsi/305 pending. He asserted that the administrator was entitled to Kisa/Emasatsi/273, but not Kisa/Emasatsi/305. He stated that transmission was not done. The administrator said that the estate was to be shared equally between him and Jane, and that Jane wanted to take Kisa/Emasatsi/273 and he Kisa/Emasatsi/305. That was never done. He said that the deceased had 5 sons, and confirmed that those other sons were not given shares. He said the sons who did not get shares reside on both parcels of land.
9. The deceased died a polygamist. It is only democratic in such situations that members of both sides of the family be represented in administration. He died possessed of two parcels of land. When the estate was distributed in 1985, only one asset was distributed. No reason was given for not distributing the second one. Secondly, the distribution was only between two members of the family, the surviving widow

and the eldest son. The other children were left out. To date transmission has not happened. According to section 83(g) of the Law of Succession Act, Cap 160, Laws of Kenya, administration ought to be completed within 6 months of the confirmation of the grant. The fact that transmission has not happened, and administration has not been completed 36 years after the grant was confirmed, amounts to a monumental failure on the part of the administrator. Since the confirmation process involved only 2 out of 6 members of the family, and distributed only 1 out of 2 assets, I believe that the process was not inclusive, neither was it conclusive. It would only be just if the said process was repeated.

10. In order to do justice between the parties hereto, I shall make the following orders:

- (a) That I hereby revoke the grant that was made to Christopher Enos Likuyi on 15<sup>th</sup> October 1985;**
- (b) That I appoint, in his stead, John Omulama Aseka and Clyde Aseka, administrators of the estate of the deceased herein, and a fresh grant of letters of administration intestate shall be issued to them;**
- (c) That the orders made on 15<sup>th</sup> October 1985, confirming the grant made to Christopher Enos Likuyi, are hereby vacated;**
- (d) That the new administrators shall apply for confirmation of the grant made in (b) above, within the next 45 days, in a process that shall propose distribution of Kisa/Emasatsi/273 and 305 to all the survivors of the deceased, and which shall be involve all the survivors;**
- (e) That whoever shall not agree with the proposals, to be made, in the application to be filed under (d) above, shall be at liberty to file an affidavit of protest;**
- (f) That each party shall bear their own costs; and**
- (g) That any party aggrieved, by the orders made above, has leave, of 28 days, to file an appeal at the Court of Appeal.**

11. 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**