

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO. 187 OF 2008

IN THE MATTER OF THE ESTATE OF EZEKIEL LUYALI LIYAI (DECEASED)

IRENE JULIET OTINGA.....1ST PETITIONNER

HOROBA LIYAI.....2ND PETITIONER

VERSUS

JAMES MICHAEL LUYALI.....1ST OBJECTOR

ALEX SHIVACHI LUYALI.....2ND OBJECTOR

BEATRICE LUVUNO KALINGA (Suing on behalf

of Masista Orobai luyali).....INTERESTED PARTY

RULING

1. On 1st April 2016, a certificate of confirmation of grant in respect of the estate of the deceased was issued jointly to Irene Juliet Otinga, Alex Shivachi and James Michael Luyali. Unfortunately, James died before completion of the administration of the estate. On 19th September 2019, his name was removed from the grant and therefore afresh grant issued to the two surviving administrators. In the said certificate of confirmation of grant, the estate was shared out to eight beneficiaries among them Orobai Luyai who got 9% share of the estate. However, Orobai Luyai died before accessing her share which included Cash held by the administrators in family Bank a count No.096000036282.

2. Vide an application dated 3rd November 2021, the administrators sought for an order releasing a sum of Kshs 744,480 held in the aforesaid bank account being a share of Orobai Luyai to be distributed to the surviving beneficiaries each according to his or her share. The applicant averred in their affidavit in support of the application sworn on 3rd November 2021 that civil suit no 90 of 2017 which had withheld the proposed distribution of funds had been dismissed for want of Prosecution. That the bank has refused to release the money without a court order.

3. According to the application, the proposed distribution is in accordance with the certificate of confirmation of grant issued on 1st April 2016. Despite service, the respondents did not file any response to the application. Mr. Mutugi for the applicants urged that the rest of the beneficiaries and the respondents are in agreement with the proposal and therefore not opposed to the application. Counsel purely relied on the averments contained in the affidavit in support.

4. I have considered the application herein and an affidavit in support thereof plus oral submissions by counsel for the applicant. There is no dispute that the application is not opposed. However, the fact that an application is not opposed is no guarantee that it must automatically succeed. See **Gideon Sitelu Konchellah Vs Julius Lekakeny Ole Sunkuli & 2 others (2018)**.

5. The share sought to be distributed is that of one of the beneficiaries who is deceased. According to the law, Orobai Luyai's share can only devolve to her heirs. If the beneficiaries(heirs)are the same ones in this estate, then it should be stated as such. To that extent, the best procedure is to seek review and or amendment of the confirmed grant to remove the name of the deceased beneficiary from the certificate and then share out her share with consent of all beneficiaries.

6. I have neither seen any consent in this application nor an application seeking review of the certificate of confirmation of grant together with the beneficiaries' consent. It is the amended certificate minus the name of the deceased beneficiary that the bank can recognize as an order of the court and also for the court to issue relevant orders. As it stands now, the original grant still is intact with the name of a deceased beneficiary. For those reasons, I decline to allow the application in its current form.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF DECEMBER 2021

J.N.ONYIEGO

JUDGE