



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 112 OF 2014**

**IN THE MATTER OF THE ESTATE OF NASHON LIBOI SISA (DECEASED)**

**JUDGMENT**

1. The certificate of death serial number 235752, dated 10<sup>th</sup> November 2010, indicates that the deceased person to whose estate this cause relates, was known as Nashon Liboi Sisa, who died on 28<sup>th</sup> September 2010. There is a letter on record from the office of the Chief of Bunyala West Location, dated 19<sup>th</sup> January 2012, which is not useful at all, for it does not help the court in identifying the survivors of the deceased. .
2. A petition for letters of administration intestate was lodged herein by Margaret Nafula Muchelesia and Joseph Liboi, in their capacities as widow and son, respectively, of the deceased. In the affidavit in support they have listed themselves and Jotham Maende, Aggrey Namulanda Liboi, Caleb Liboi, Isaya Liboi, David Liboi and Mariko Liboi, who are all identified as sons. The deceased is also expressed to have died possessed of Bungoma/Kamukuyua/4416, Bunyala/Budonga/271 and shares/dividends in Mumias Sugar Company. Letters of administration intestate were made to the petitioners on 25<sup>th</sup> June 2014, and a grant was duly issued to them, dated 1<sup>st</sup> July 2014. I shall subsequently refer to the petitioners as the administrators.
3. A summons was lodged herein on 29<sup>th</sup> January 2016, under section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, for revocation of the said grant. It was filed at the instance of Divinah Nekesa Wepukhulu, claiming that the deceased had two wives, the administratrix herein, and the late Hellen Makokha Livoi. The applicant in that application is a widow of a late son of the late widow. She complains that the family of the late widow was left out of the process, and that consents of members of that family had not been obtained, and that the administrators generally did everything in secrecy. She also complains that the administrators had not listed several other assets of the estate, namely Bungoma/Kamukuyua/4413, 4414 and 4415, saying that the administratrix solely utilized Bunyala/Budonga/271. She states that it was not right for the surviving widow and her son to be the only administrators of the estate.
4. The administratrix responded to the application through an affidavit that she swore on 27<sup>th</sup> April 2016. She concedes that the deceased had a second family that she had not disclosed, comprised of eight children and a number of grandchildren of the deceased by a son who was also dead. She also disclosed that she had not disclose her own daughters, five in number. She asserts that her daughters and the daughters in the other house were all married. She states that the deceased had a property known as Bungoma/Kamukuyua/377, which she claims had been illegally subdivided after the deceased died. She mentions that Bunyala/Budonga/271 was where she resided with her family. She mentions that the deceased had sold portions of Bungoma/Kamukuyua/377 to Simon Wanyama, Elizabeth Mukana and Metrine Nasambu, before he died.
5. The application dated 29<sup>th</sup> January 2016, was resolved by consent on 18<sup>th</sup> July 2016. The grant made on 25<sup>th</sup> June 2016, and issued on 1<sup>st</sup> July 2016n was revoked. Margaret Nafula Muchelesia, Joseph Liboi and Divinah Wekesa Wepukhulu were appointed the new administrators, and a grant was to issue to them. The new administrators were directed to file a summons for confirmation of their grant.
6. There was compliance with the direction to file a summons for confirmation of grant. The application was filed on 26<sup>th</sup> April 2019, by Divinah Wekesa Wepukhulu. She identifies twenty-two individuals as the survivors of the deceased, being one widow, one daughter-in-law, six sons and twelve daughters of the deceased. She identifies nine assets as available for distribution, being Bunyala/Budonga/271 and Bungoma/Kamukuyua/4413, 4414, 4415, 4416, 4417, 4418 and 4419. It transpires that Bungoma/Kamukuyua/4416, 4417, 4418 and 4419 were already registered in the names of other individuals, and, therefore, they are not available for distribution. She proposes that Bunyala/Budonga/271 be shared out equally between the surviving widow, the daughter-in-law, the six surviving sons and the twelve surviving daughters of the deceased. It is proposed that Bungoma/Kamukuyua/4413, 4414, 4415 be devolved upon the surviving spouse, Aggrey Namulanda Livoi, Ali Wanga Ekombe and the daughter-in-law.
7. The surviving spouse has responded to the application. She avers that in 2009, the deceased had pointed out that Bunyala/Budonga/271 had been subdivided, and, distributed to Caleb Barasa, Mark Makina and Margaret Nafula who were given 4, 4 and 2 acres, respectively, out of it. She further avers that Bungoma/Kamukuyua/377 was subdivided by the deceased before he died and given to Jotham Mayende, Aggrey Namulanda, Joseph Wawire, Isaya Wakhungu and David Wanyonyi were given 4, 4, 4, 2 and 2 acres of it respectively. Out of the same land three buyers were allocated portions; Simon Wanyama got 2 acres, Elizabeth Mukana got 1 acre and the late Bernard Masika got ½ acre. She challenges the subdivision of Bungoma/Kamukuyua/1413 – 1419, saying that the exercise of subdivision was began by the deceased in 2007 and was completed after his death. She holds the view that the property be reverted to the original title, Bungoma/Kamukuyua/377. She

mentions that the deceased was survived by 12 daughters from both houses, who were also entitled to equal share of the estate. She raises issue with the daughter-in-law being an administrator, saying that she was not suitable on that account, saying that one of the sons ought to have been appointed administrator instead. She accuses her of selling part of the land to Isaiah Wakhungu.

8. Directions were given on 17<sup>th</sup> September 2019 that the application would be disposed of by way of oral evidence. .

9. The hearing happened on 22<sup>nd</sup> January 2020. Before the witnesses took to the stand, the parties recorded a consent with respect to Bungoma/Kamukuyua/4413 to 4419, which were subdivisions from Bungoma/Kamukuyua/377. The hearing proceeded with respect to Bunyala/Budonga/271. The consent was to the effect that :

- (a) Bungoma/Kamukuyua/4413 be given to Margaret Nafula Muchelesia;
- (b) Bungoma/Kamukuyua/4414 to Aggrey Namulanda Liboi;
- (c) Bungoma/Kamukuyua/4415 to Divinah Wekesa Wepukhulu;
- (d) Bungoma/Kamukuyua/4416 to Joseph Liboi;
- (e) Bungoma/Kamukuyua/4417 to Simon Wekesa;
- (f) Bungoma/Kamukuyua/4418 to Simon Wekesa Wanyama; and
- (g) Bungoma/Kamukuyua/4419 to Elizabeth Mukana Makokha.

10. The surviving widow, Margaret Nafula Muchelesia, took the witness stand first. She stated that she did not support the equal distribution of Bunyala/Budonga/271, on grounds that the deceased had distributed it before he died. She said that the same measured 10 acres, and the same had been shared out to Caleb Barasa, Makina Liboi and herself, getting 4 acres, 4 acres and 2 acres, respectively. She confirmed that the deceased had two wives. She asserted that the children of the first wife were not supposed to get shares in Bunyala/Budonga/271. She said that of her children, only Joseph Liboi got a portion in Bungoma/Kamukuyua/377. She confirmed that she got Bungoma/Kamukuyua/4413 out of Bungoma/Kamukuyua/377. She stated that the first wife was buried within Bungoma/Kamukuyua/377. She stated that the deceased died after distributing the property, but he did not obtain title deeds for the beneficiaries. She confirmed that Bunyala/Budonga/271 was still in the name of the deceased. She further confirmed that she had no document from the deceased showing that the deceased had distributed the property. She asserted that it was she and her children who were entitled to Bunyala/Budonga/271, since the children of the first wife never used the property.

11. Divinah Wekesa Wepukhulu testified next. She stated that she lived within Bungoma/Kamukuyua/377. She stated that she was a daughter-in-law, having married a son of the deceased who had since died. She described Bunyala/Budonga/271 as ancestral land, to which they were all entitled. She explained that Bungoma/Kamukuyua/4413 was about 8 acres. She was getting Bungoma/Kamukuyua/4415 which was 4 acres or 1.6 hectares. She complained that the second house was getting 10 acres out of Bunyala/Budonga/271 and 9 acres out of Bungoma/Kamukuyua/377. She rooted for equal distribution of Bunyala/Budonga/271 amongst the sons and daughters. She stated that she was aware that the deceased had shared out Bungoma/Kamukuyua/377 but not Bunyala/Budonga/271.

12. In a confirmation application, the court is called upon to address two issues – appointment of the administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act 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.”*

13. With respect to the appointment of administrators, the court is required to ascertain whether the administrators had been properly appointed. Secondly, the court is required to evaluate whether, upon being so properly appointed, if it does find that they were so properly appointed, the administrators went about administering the estate in accordance with the law. Finally, the court is required to assess whether the administrators, upon confirmation of their grant, would continue to properly administer the estate in accordance with the law.

14. In the instant case, the administrators in office were appointed by consent on 18<sup>th</sup> July 2016. The surviving spouse has raised issue, in her affidavit, with the appointment of the daughter-in-law as administratrix, but she did not pursue the issue at all at the oral hearing. I shall take it that she abandoned her case in that regard. In any case, the matter was resolved by consent, if she had any objections or reservations, she ought to have raised them before the consent of 18<sup>th</sup> July 2016 was entered into. Principally, the matter of appointment of administrators is non-issue, and I shall proceed to confirm them as such.

15. Before a court ventures to address distribution of the estate, at the hearing of a confirmation application, it ought first to consider whether the requirements of the proviso to section 71(2) of the Law of Succession Act have been complied with. That proviso makes it a requirement that the court, before it confirms a grant, be satisfied of certain things. First, that the administrators have ascertained the persons who were beneficially entitled to the estate, the assets that make up the estate and the shares to which the persons who are beneficially entitled have been allotted. Ideally, the issues as to appointment of administrators and distribution should follow only after the court has been satisfied of these two. 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 persons entitled to the estate have been ascertained and determined.”*

16. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with in this case? What has emerged from the filings is that the deceased had married two wives, and he had children, both sons and daughters, with both wives. It also emerged that the first wife was dead. Her children were identified as the late Jotham Mayende (the husband of Divinah Wekesa Wepukhulu), Aggrey Namulanda, Grace Liboyi, Alice Liboyi, Philis Liboi, Roselida Liboyi, Fenica Liboyi, Elizabeth Liboyi and Beatrice Liboyi. The second wife is the surviving spouse, whose children were identified as Joseph Wawire, Caleb Barasa, Isaiah Wakhungu, David Wanyonyi, Marko Makena, Catherine Naliaka, Christine Nekesa, Janet Nasimiyu, Anna Musanya and Julia Nayala. I am satisfied that the administrators had identified all the persons who were beneficially entitled to a share in the estate.

17. On the assets available for distribution, the deceased appears to have had two assets, being Bungoma/Kamukuyua/377 and Bunyala/Budonga/271. Bungoma/Kamukuyua/377 had been subdivided by the deceased before he died, into Bungoma/Kamukuyua/4413 to 4419. Four of the subdivisions were then transferred to the names of three purchasers and a son of the deceased, leaving three available for distribution. It was these three that remained that were distributed by consent on 22<sup>nd</sup> January 2020. The property that remains for distribution, therefore, is Bunyala/Budonga/271.

18. On distribution, I note that both sides made proposals in which they both proposed a share to all the survivors of the deceased. However, after the consent of 22<sup>nd</sup> January 2020, the positions appear to have changed. I shall have to make a decision on how the said property, Bunyala/Budonga/271, shall be distributed.

19. What is clear is that the consent of 22<sup>nd</sup> January 2020, distributed property to Margaret Nafula Muchelesia, Aggrey Namulanda, Divinah Wekesa Wepukhulu and Joseph Liboyi. The rest of the beneficiaries did not benefit from the distribution in the consent. Those not benefitting are Grace Liboyi, Alice Liboyi, Philis Liboi, Rosalida Liboyi, Fenica Liboyi, Elizabeth Liboyi, Beatrice Liboyi, Caleb Barasa, Isaiah Wakhungu, David Wanyonyi, Marko Makena, Catherine Naliaka, Christine Nekesa, Janet Nasimiyu, Anna Musanya and Julia Nayala. Fairness would require that those who have benefitted from Bungoma/Kamukuyua/377, that is to say Margaret Nafula Muchelesia, Aggrey Namulanda, Divinah Wekesa Wepukhulu and Joseph Liboyi, should not get a share of Bunyala/Budonga/271, which should go to those that did not benefit from Bungoma/Kamukuyua/377. I note that the surviving spouse is resident on the said property, Bunyala/Budonga/271, and distribution should not displace her from that property, and, therefore, she shall be given ¼ acre of the property encompassing her residence.

20. It should be noted that the rest of the beneficiaries not benefitting from Bungoma/Kamukuyua/377, are all children of the deceased. Under section 35(5) and 38 of the Law of Succession Act, where property has to be shared amongst children, the principle is that the same is shared equally. The Law of Succession Act does not discriminate between male and female children, and, therefore, the remainder of Bunyala/Budonga/271, after excision of the ¼ acre in favour of the surviving spouse, shall be shared equally between Grace Liboyi, Alice Liboyi, Philis Liboi, Rosalida Liboyi, Fenica Liboyi, Elizabeth Liboyi, Beatrice Liboyi, Caleb Barasa, Isaiah Wakhungu, David Wanyonyi,, Marko Makena, Catherine Naliaka, Christine Nekesa, Janet Nasimiyu, Anna Musanya and Julia Nayala.

21. In the end, the final orders that I shall make in this matter are as follows:

**(a) That I hereby confirm Margaret Nafula Muchelesia, Joseph Liboi and Divinah Wekesa Wepukhulu as administrators of the estate of the deceased;**

**(b) That I declare that the persons beneficially entitled to a share in the estate are Margaret Nafula Muchelesia, Divinah Wekesa Wepukhulu, Aggrey Namulanda, Grace Liboyi, Alice Liboyi, Philis Liboi, Rosalida Liboyi, Fenica Liboyi, Elizabeth Liboyi, Beatrice Liboyi, Joseph Wawire, Caleb Barasa, Isaiah Wakhungu, David Wanyonyi, Marko Makena, Catherine Naliaka, Christine Nekesa, Janet Nasimiyu, Anna Musanya and Julia Nayala;**

(c) That Bungoma/Kamukuyua/377 shall be shared out in the terms of the consent recorded herein on 22<sup>nd</sup> January 2020 as captured in paragraph 9 of this judgement;

(d) That Bunyala/Budonga/271 shall be distributed as follows:

(i)  $\frac{1}{4}$  acre to Margaret Nafula Muchlesia encompassing her residence; and

(j) the remainder, equally between Grace Liboyi, Alice Liboyi, Philis Liboi, Rosalida Liboyi, Fenica Liboyi, Elizabeth Liboyi, Beatrice Liboyi, Caleb Barasa, Isaiah Wakhungu, David Wanyonyi, Marko Makena, Catherine Naliaka, Christine Nekesa, Janet Nasimiyu, Anna Musanya and Julia Nayala;

(e) That the grant made on 18<sup>th</sup> July 2016 shall be confirmed in those terms, and a certificate of confirmation of grant shall issue accordingly;

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

(g) That any party aggrieved by the orders that I have made herein has the liberty, within twenty-eight (28) days, to move the Court of Appeal appropriately.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020**

**W. MUSYOKA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15<sup>th</sup> March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**W. MUSYOKA**

**JUDGE**