



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 563 OF 2013**

**IN THE MATTER OF THE ESTATE OF EDWARD KISIENYA MUSUNGU alias EDWARD KISIENYE MUSUNGU  
(DECEASED)**

**JUDGMENT**

1. The deceased herein died on 11<sup>th</sup> May 2007. The letter from the Chief of Butso Location, dated 10<sup>th</sup> April 2013, indicates that he was survived by only one survivor, a son known as Josef Anekha Eyeswa. Representation to his estate was sought by the said son, in a petition filed herein on 24<sup>th</sup> July 2013. The petitioner indicated himself to be the sole survivor, and letters of administration intestate were made to him on 11<sup>th</sup> September 2013, and a grant was duly issued, dated 12<sup>th</sup> September 2013. I shall refer to Josef Anekha Eyeswa as the administrator.
2. The application for determination is a summons for confirmation of grant, dated 14<sup>th</sup> March 2019. It is brought at the instance of the administrator. He claims to be the sole survivor of the deceased, and he seeks that the entire property, Butso/Shibeye/56, devolves upon him.
3. There is a protest affidavit to the application, sworn on 30<sup>th</sup> May 2019, by Silas Munyasa Bengo. He objects to the proposed distribution. He says that Butso/Shibeye/56 had been awarded to him in Kakamega CMCCC No. 148 of 2008. He avers that he had bought the property from the deceased, states that the administrator, as son of the deceased, was aware of the portion sold to him. He avers that the order in Kakamega CMCCC No. 148 of 2008, had directed that, after succession, a survey be carried out and each beneficiary given their specific shares. He proposes that the property be shared out so that he takes 1.23 acres, while the administrator takes 1.35 acres. I shall hereafter refer to him as the protestor.
4. The application was disposed of orally, on 7<sup>th</sup> November 2019. The protestor, Bengo Munyasa, national identity card number xxxx, was the first on the witness stand. He testified that he had bought a portion of the land from the deceased in 1988. He and the deceased went through the relevant process and a title deed was issued to him for Butso/Shibeye/1497. He states that the deceased did not have a wife nor children, disclosing that the administrator was not his son, but a nephew, being a son of a brother of the deceased, known as Joseph Anekha Eyeswa. The protestor took possession, and planted cane. He took the matter to the Land Disputes Tribunal and was awarded 1.25 acres, while the administrator was awarded 1.35 acres. He stated that the award of the tribunal was made a decree of the court, and the title deeds were cancelled. He accused the administrator of selling the portion, he had bought, to a third party, while the succession cause was still going on.
5. During cross-examination, he confirmed that when the land was being sold to him, it was not in the name of the deceased, but that of Musungu Akhura, who died in 1972. He stated that he and the deceased did not have leave of court to transact over the property since it belonged to a dead person. He said that he knew that an agreement of sale over the property of a dead person was invalid. He noted that at the tribunal the panel of elders had noted that the property in question belonged to a dead person, Musungu Akhura, but then added that the issue of the same being registered in the name of a dead person did not arise. They directed that the property be subjected to succession. He averred that it was the administrator who had taken the matter to the tribunal. He conceded that when the matter was before the tribunal succession had not been done to the estate of the owner, and what was done was to correct the names instead of doing succession. He insisted that he bought the land from the deceased, and that the deceased had given him the land. He said that he did not know how the deceased was related to Musungu Akhura.
6. The second witness was David Achesa Munyasa, national identity card number 6283186. He was one of the signatories to the sale agreement between the deceased and the protestor. He said that he did not know the land reference number of the land that was being sold. He said that he knew Musungu Akhura, and that they bought the land from the owner.
7. The administrator did not testify. His advocate stated that the administrator relied entirely on the affidavit sworn on 26<sup>th</sup> February 2014. In that affidavit, the administrator had averred that the protestor had fraudulently caused the property to be subdivided without the participation of the registered owner, and that the titles illegally obtained were subsequently canceled by the court. He averred that the deceased person, the subject of the proceedings, did not have title to the said property, since the land belonged to his grandfather and the father of the deceased, known as Musungu Akhura, who died in 1972. He stated that no succession was conducted for the property to pass from the estate of Musungu Akhura to the hands of the deceased herein. He asserted that the protestor was a stranger to the family, as he was not a member of the family, and he was, therefore, not obliged to include him in the proceedings. He also averred that the protestor was not

in possession of the property.

8. 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, 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.”*

9. The principal purpose of confirmation of a grant is distribution of the assets. The proviso, to subsection (2) of section 71, states that the court must 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 share due to them. The proviso is emphatic that the grant should not be confirmed before the court is so satisfied. Therefore, there is no need for me 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.”*

10. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? I do not think so. What has emerged is that the administrator herein is not a son of the deceased. The relationship between them is that of a nephew and an uncle. It was not disclosed whether the deceased had other siblings other than the father of the administrator, and whether he had other nephews and nieces, apart from the administrator. Such nephews and nieces would be entitled equally with the administrator to the intestate estate of their late uncle, not only to shares in that estate, but also to administration. The administrator has been incredibly silent on the existence of those others. He should have disclosed them, or given a background to show that they did not exist, and that the deceased had only one sibling, his father, and that he, the administrator was the sole child of his father.

11. Secondly, there is the issue of what assets constitute the estate of the deceased herein. It would appear that the deceased herein did not have any property registered in his name. The property that the protestor claims to have had bought from him was never registered in his name, but in the name of his father and the grandfather of the administrator, the man said to have been known as Musungu Akhura. It would appear that succession to the estate of Musungu Akhura was not done, instead what happened was that, somehow, through unprocedural means, the register for the subject property was altered so as to remove the name of Musungu Akhura, and to substitute it with that of the deceased. If that is what happened, then the same amounted to intermeddling with the estate of Musungu Akhura, and the parties hereto are better of first of all completing the process of succession to the estate of Musungu Akhura before they can purport to move the court to distribute the estate of the deceased, for it is only after the inheritance of the deceased has moved properly from the estate of Musungu Akhura that the court then deal with what was due to the deceased from that estate. This is a court of law, everything must be done properly, in accordance with the law.

12. In view of everything that I have said, the matter is not mature for confirmation. Let the administrator do the right thing first before he can seek to have the estate of his uncle distributed. The parties appear to be in a hurry to cut corners, like it appears was done with the estate of Musungu Akhura. The application dated 14<sup>th</sup> March 2014 is hereby dismissed. There is no order as to costs. Any party aggrieved has a right to move the Court of Appeal, appropriately.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22<sup>ND</sup> DAY OF MAY, 2020**

**W. MUSYOKA**

JUDGE