



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**SUCCESSION CAUSE NO. 59 OF 2018**

**IN THE MATTER OF THE ESTATE OF EDWIN LUVITA KAVAI (DECEASED)**

**JUDGMENT**

1. This judgment relates to the application to confirm grant filed in this cause on 27th August 2019, and the application filed on 17th February 2020 seeking to include a further asset namely land parcel **LR No. Mavoko Town Block 2/16941** among assets in the estate of the deceased, and that the same devolves absolutely upon **Rachael Nthenya Luvita**, the deceased's widow absolutely. The grant had been issued to the said widow and her co-Petitioner.

2. When the former application was first placed before this court on 27.11.19, the court had expressed misgivings on the mode of distribution proposed by the administrators, and particularly because no provision had been made for the three minor children of the deceased, the widow proposing to take absolutely all the 109 assets of the estate. The assets primarily comprise of land parcels.

3. Mr. Muthomi, counsel for the Petitioners had upon consulting the Petitioners placed before the court proposals to allocate certain identified land parcels, 15 in number, as the shares due to the three minor children of the deceased. Whereupon the court directed the Petitioners to furnish by way of a further affidavit, a schedule showing the extent of the free property of the deceased to enable the court gauge whether the latest proposals were fair and in the best interests of the minor children of the deceased.

4. The 1st Petitioner (widow) has now filed a further affidavit but did not attach a schedule as directed. In the further affidavit, she has claimed that there is a debt of Kshs. 3000, 000/- outstanding in respect of the deceased's purchase of the land parcel **LR No. Mavoko Town Block 3/2057**, the apparent mother title, which upon sub-division resulted in the assets, identified as nos. 5 of 109 in the application to confirm grant. The widow further asserts that she would need to dispose of ten of these plots in order to pay off the debt of Shs. 3000, 000/-. Further, that items 5 to 20 in the application are the subject of litigation brought by some claimants in **ELC Case No 22 of 2017** at the Environment and Land Court at Machakos and that the claimants have commenced development on the said assets; that asset no. 2 – a plot identified as **Plot No. "H"** in Thika municipality was gifted to a church known as **King Jesus Faith Ministries Thika** by the deceased, although no conveyance by the deceased is attached; and that the plot identified as **Plot no. "J"** in Thika Municipality being asset no. 1 in the application was sold to Anchor Limited by the deceased (a sale agreement is attached).

5. In the widow's view therefore, the minors ought to receive no more than 5 plots each, and moreover, that the land parcels are at risk of being taken over by squatters and invaders leading to unending litigation. She reiterates that the minor children are young and in need of upkeep and maintenance. Hence, it would be best that the widow inherits all the plots and there after disposes of some of the assets and invest the proceeds thereof for the minors' benefit, upkeep and maintenance.

6. The court has considered the further affidavit and annexures alongside the record herein. First, the alleged debt of shs. 3000, 000/- was not listed among the liabilities in the Petition for Grant. No demand letter is attached to the further affidavit. Besides, at the time of his death, the deceased had already obtained titles in his name in respect of the subdivisions of the purchased mother title and had sold off one of the subdivisions as stated by the widow. It is not believable that these actions by the deceased were possible if he had not fully paid the purchase price. Therefore, there is no justification for the sale of ten plots purportedly to pay off the alleged debt.

7. Secondly, with regard to plots (subdivisions) identified as assets nos. 5 to 20, it appears that a dispute had been filed by several claimants thereto before the Environment and Land Court at Machakos. The suit, namely **ELC No. 22 of 2017** related to the mother title **LR Mavoko Town Block 3/2057**. However, according to the ruling of **Angote J** of 4th October 2019, the suit had been dismissed for want of prosecution on 9th April 2019. By his ruling **Angote J** rejected the application to review the dismissal order and to reinstate the suit. Hence for all intents and purposes, the suit is resolved and cannot be the basis for excluding in the distribution, the properties which were the subject of the dispute. I have already noted with regard to asset no. 1 – **Plot "H"** Thika municipality, that no evidence has been proffered of the purported gifting by the deceased of the plot to the **King Jesus Faith Ministries**.

8. It appears to the Court from her depositions in the further affidavit that the widow has not abandoned her initial proposal to have all the assets, and they are numerous, devolve upon her absolutely. While the court appreciates that the widow is responsible for the care and upkeep of the three minor children of the deceased, it is the duty of this court under Article 52(3) of the Constitution, the Children Act and

the Law of Succession Act to ensure that the best interests of the minors are upheld in the distribution of their father's estate.

9. The deceased died intestate while possessed of a relatively large estate primarily comprised of land parcels. He was survived by the widow Rachael Nthenya Luvita and three minor children, namely, Jemima Rose Vihenda; KenRose Nduku ; and Alphaeus Luvita. For purposes of the instant case, Section 35 of the Law of Succession Act provides that where an intestate left one surviving spouse and child or children, the surviving spouse is entitled to a life interest in the whole residue of the net intestate estate, which interest determines upon the death or remarriage of a widow, and whereupon the net estate devolves upon the surviving children of the deceased. Section 41 of the Law of Succession Act requires that property devolving upon a child be held in a continuing trust by at least two administrators by virtue of Section 71 (2A) of the Law of Succession Act. Under the provisions of section 71 of the Law of succession Act, in cases of intestacy, the grant shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled.

10. It appeared to the court that the widow in this case considers herself exclusively entitled to all the assets of the deceased absolutely. Such notion is inconsistent with the letter and spirit of the Law of Succession Act. The court is duty bound to secure the inheritance of the minor children of the deceased even while appreciating that the widow has the responsibility to provide for them and would require means in order to fulfil her parental obligations to the three children. The facts of this case therefore appear not to support a rigid application of section 35 of the Law of Succession Act, even as the Court attempts to uphold the best interests of the minor children of the deceased and to achieve equity among all the beneficiaries herein.

11. In the circumstances, the court will grant the application to confirm the grant herein and the further application filed on 17<sup>th</sup> February 2020 subject to the following terms: -

a) The land parcel **LR No. Mavoko Town Block 2/16941** will be included among the assets of the estate herein, and will devolve absolutely, **together** with the assets listed in the affidavit in support of summons for confirmation of grant as items 1 (one) to 36 (thirty six) and item no. 109 (one hundred and nine) in the widow, **Rachael Nthenya Luvita**.

b) The balance of the estate assets identified in the affidavit in support of the summons for confirmation as items 37 (thirty seven) to 108 (one hundred and eight) comprised of 72 (seventy two) plots are to be shared **equally** by the three minor children of the deceased listed below, in descending order of their age so that the first child will get the first 24 (twenty four) plots starting from asset no. 37 (thirty seven) onwards, as follows:

i) **Jemima Rose Vihenda- Assets nos. 37 to 60;**

ii) **KenRose Nduku -Assets nos.61 to 84;**

iii) **Alphaeus Luvita—Assets nos. 85 to 108**

c) The shares of the minors in (b) above are to be held in trust by the two administrators herein until the minors are of age.

d) There is liberty to apply.

Delivered in virtual Court on this 25th Day of June 2020.

**C. MEOLI**

**JUDGE**

In the presence of: Mr. Muthomi for the Petitioners.

C/A: Kevin