



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO 67 OF 1985**

**IN THE MATTER OF THE ESTATE OF MILIKAU SAWANGA (DECEASED)**

**RULING**

1. The application that I am tasked with determining is dated 10<sup>th</sup> January 2019. It is brought at the instance of Peter Kauli Sawanga. He seeks the setting aside or variation of the orders that had been made herein on 15<sup>th</sup> October 1997, which had awarded Richard Anyika Milikau, who he has named as respondent, two acres out of Butsotso/Ingotse/620, and that the orders made on 31<sup>st</sup> May 1994 be reverted to.
2. In the affidavit in support of the application, the applicant points at several factors that the court should take into account. Firstly, he says that the orders of 31<sup>st</sup> May 1994 excluded the respondent from benefit and if he was aggrieved of the said orders he ought to have appealed. Secondly, the court fell into error in sharing out 23 acres of Butsotso/Ingotse/620 instead of the exact acreage of 22 acres. Thirdly, the application to amend distribution could only be made by an administrator. He, therefore, avers that there was an error apparent on the face of the record.
3. In his reply the respondent avers that the amendment of 1997 gave him one extra acre that was surrendered to him by Wycliffe Muyonga and Alloys Sawanga. Following that the certificate of confirmation of grant was amended in 2001. He complains that the applicant never appealed the order and instead resorted to frustrating the exercise of distribution.
4. The application was argued orally on 7<sup>th</sup> May 2019. The applicant submitted that Butsotso/Ingotse/620 was to be shared out between him and his siblings, to the exclusion of the respondent. He asserted that the respondent was entitled to Butsotso/Ingotse/746 instead. He further submitted that the property ought to be shared out as per the orders of 1993. He stated that the respondent ought to get his land from Wycliffe Muyonga and Alloys Sawanga. On his part, the respondent, through Mr. K'Ombwayo, stated that he only got one acre out of the subject property and not two.
5. I have perused the record before me. The genesis of the dispute herein appears to be the orders that were made by Tanui J on 31<sup>st</sup> May 1994. In the judgement delivered on the said date the court said:

*“... The other dispute is whether Richard Anyika is entitled to a share of the said parcels of land. The petitioner and the objectors had pointed out that this objector along with his four brothers were given the parcel of land no. Butsotso/Ingotse/746 by the deceased before he died. I note that the parcel no. Butsotso/Ingotse/634 was given to Belt Milikau and his brother Charles Kisiyia. Both those sons of the deceased are satisfied and have not come to court to claim to be considered in the succession proceedings. In the same way the other brothers of Richard Anyika who include DC Milikau, Salim Kavila have not stated that the land given to Julius Sawanga by the deceased did not cater for them. I hold that Richard Anyika Milikau is not entitled to the share of the parcel of land nos. Butsotso/Ingotse/ 1341 and 1342. If he is dissatisfied, he should sue his own brother Julius Sawanga.*

*In the result, I find that the beneficiaries of the estate entitled to share the parcels of land nos. Butsotso/Ingotse/ 1341 and 1342 are:*

- (1) Peter Sawanga the petitioner 3 acres*
- (2) Philip Sawanga 2 acres*
- (3) Richard Omumia 2 acres*
- (4) Moses Otsyula 2 acres*
- (5) Zakayo Kimendu 2 acres*

(6) Resto Kendo 2 acres

(7) Nicholas Ndume 2 acres

(8) Datani Milikau 2 acres

(9) Niki Milikau 2 ½ acres

(10) Aloiz Sawanga 2 ½ acres

*The certificate of confirmation issued herein on 29<sup>th</sup> June 1993 is cancelled and another one in conformity with the above decision to issue. There is no order as to costs.*

6. My understanding of the orders made on 31<sup>st</sup> May 1994 is that Richard Anyika Milikau was not entitled to benefit from the lands the subject of the proceedings. In a curious turn of events, the said orders were reviewed on 15<sup>th</sup> October 1997 in proceedings that the applicant attended, as a respondent, to provide for the said Richard Anyika Milikau out of the estate. The record of the events of 15<sup>th</sup> October 1997 is as follows:

*“Coram Tanui J*

*Lugulu for applicant*

*Respondent present*

*Lugulu:*

*This is an application to rectify the amount awarded to the 3 beneficiaries i.e.*

*(i) Niki Milikau to get 2 acres instead of 2 ½*

*(ii) Aloizi Sawanga to get 2 instead of 2 ½ acres and*

*(iii) Richard Anyika to get 2 acres instead of 1 acre.*

*We also pray that a transfer of parcel no. Butsotso/Ingotse/ 1342 to Repa MMbone Kalware be revoked.*

*Orders:*

*(1) That judgment herein be amended so that –*

*(a) Niki Milikau’s portion is 2 acres instead of 2 ½ acres*

*(b) Portion for Aloiz Sawanga is 2 acres instead of 2 ½ acres*

*(c) Richard Anyika to get 2 acres instead of 1 acre*

*(2) ...*

*(3) ...”*

7. The events of 15<sup>th</sup> October 1987 were curious in the sense that the applicant herein, who was then, as is now, the administrator of the estate, was in attendance but the record is silent as to whether the court sought his views on the proposed review of the judgment. The record is silent on whether the administrator expressed any views on the same. Secondly, it is reflected in those proceedings that Richard Anyika Milikau had been awarded one acre in the judgment of 31<sup>st</sup> May 1994, when in fact that was not the case, as it had been adjudged in that judgment that he was not entitled to anything from the assets of the estate of the deceased that were in contents, and the court had accordingly not awarded him anything from the said assets. There was no considered determination of the review application, neither does it appear that the orders were by consent of the parties.

8. It would appear that the orders of 15<sup>th</sup> October 1997 did not please the applicant herein, and some of the other parties, but they did not appeal against them. There were applications that were subsequently brought on the matter, and especially about Richard Anyika Milikau taking a share in the estate in view of the orders of 31<sup>st</sup> May 1994. Waweru J delivered a ruling on 4<sup>th</sup> April 2001, which, I believe, pretty sums up what had been happening in the cause, and I believe it also laid to rest the issue of Richard Anyika Milikau benefitting from the estate.

9. I will quote what Waweru J said *in extenso*. He wrote:

“On 20<sup>th</sup> December 1991 another application for confirmation of grant issued to the petitioner on 11<sup>th</sup> December 1985 was made. Detailed proposals were made in the affidavit sworn in support thereof for distribution of the estate. That application was allowed on 29<sup>th</sup> June 1993 and the grant confirmed (for the second time round), presumably in the terms of distribution proposed by the petitioner. But thereafter, and by orders of the court, the parties filed affidavits setting out the names of the beneficiaries and the proposed shares of each in the estate, which now comprised of two parcels of land registered in the names of the petitioner as the legal representative of the deceased, that is LR BUTSOTSO/INGOTSE/1341 and 1342, which were subdivisions of the original parcel of land No. 620. On 10<sup>th</sup> April 1994 the court took evidence on distribution. In a judgement delivered on 31<sup>st</sup> May 1994 the court (Hon. Tanui Judge), held that the persons beneficially entitled to the estate of the deceased, and their respective shares, were as follows: -

(i) Peter Sawanga the petitioner 3 acres

(ii) Philip Sawanga 2 acres

(iii) Richard Omumia 2 acres

(iv) Moses Otsyula 2 acres

(v) Zakayo Kimendu 2 acres

(vi) Resto Kendo 2 acres

(vii) Nicholas Ndume 2 acres

(viii) Datani Milikau 2 acres

(ix) Niki Milikau 2 ½ acres

(x) Aloiz Sawanga 2 ½ acres

The court also specifically held that RICHARD ANYIKA MILIKAU (that, it will be recalled, was the person who had filed the application for revocation of grant in 1987), was not entitled to any share in any of the two parcels of land and that he should look to his brother, JULIUS SAWANGA, for land. That judgment settled the issue of the persons beneficially entitled to the estate of the deceased, and their respective shares. The petitioner should then have proceeded to distribute the estate of the deceased in accordance with that judgement.

To enable this to be done the court cancelled the earlier certificate of confirmation of grant and issued a fresh one dated 29<sup>th</sup> June 1993 in conformity with the judgment. Richard Anyika Milikau, Nicholas Ndume Milikau, Datani Kimatsi Milikau, Zacchaeus Kwendo Milikau, Philip Sawanga Milikau, Joseph Muyonga Milikau and Morris Otsula Milikau, apparently were not satisfied with the judgment delivered on 31<sup>st</sup> May 1994 and they lodged a notice of appeal on 2<sup>nd</sup> June 1994. It appears that they never pursued the intended appeal, although the court granted temporary stay of execution of the decree on 6<sup>th</sup> June 1994 pending the hearing inter partes and determination of the application for stay of execution pending appeal. I see nothing on the record to indicate that this application for stay was ever heard inter partes.

On 14<sup>th</sup> June 1995 Richard Anyika Milikau and his group applied by Chamber Summons dated 16<sup>th</sup> May 1995 for, inter alia, an order to amend the judgment of 31<sup>st</sup> May 1994 to read:

(a) Niki Milikau to get 2 acres instead of 2 ½ acres

(b) Alois Sawanga to get 2 acres instead of 2 ½ acres

(c) Richard Anyika Sawanga to get 2 acres instead of 1 acre.

It will be recalled that the court had held in the said judgment that Richard Anyika Milikau was not entitled to any share in the two parcels of land constituting the estate of the deceased. His application dated 16<sup>th</sup> May 1995 therefore was a clever way of having himself included in the list of persons found by the court on 31<sup>st</sup> May 1994 to be beneficially entitled to the estate of the deceased.

The application was heard on 15<sup>th</sup> October 1997. Although the respondent (the petitioner) was recorded as being present, he does not appear to have been given an opportunity to say anything. Only the applicants' counsel is recorded as having addressed the court. The application was allowed as prayed and the judgment of 31<sup>st</sup> May 1994 ordered to be amended as proposed. A subsequent application (by chamber summons dated 12<sup>th</sup> November 1997) to set aside those orders of 15<sup>th</sup> October 1997 was dismissed on 27<sup>th</sup> January 1998, apparently for want of prosecution.

On 27<sup>th</sup> March 2000 (Hon Tanui Judge) ordered that the petitioner do “formalize” the petition within 60 days from that date. I do not know if that was meant to be that the petitioner must complete distribution of the estate within that time.

*In the above review of the history of the matter, I have not mentioned a number of other applications of one kind or another that have been made in the course of the proceedings.*

*I have also not mentioned many other orders, of one type or another, that have been made, usually ex parte. The effect of all this has been to unnecessarily complicate and draw out the dispute. I shudder to think what great, and probably unnecessary expences the parties have had to bear ...*

*I must state that I see no reason at all why the petitioner should not have now distributed the estate of the deceased as ordered in the judgement delivered on 31<sup>st</sup> May 1994 (and amended by the order of 15<sup>th</sup> October 1997). He cannot argue, as he did when I heard the present application, that Richard Anyika Milikau is trying unlawfully to include himself in the list of the beneficiaries. He has already been duly included by the court pursuant to the aforesaid order of 15<sup>th</sup> October 1997. As pointed out elsewhere in this ruling, an application to set aside that order was dismissed on 27<sup>th</sup> October 1998. The petitioner is therefore obliged to distribute the estate in accordance with the judgement dated 31<sup>st</sup> May 1994 as amended by the order of 15<sup>th</sup> October 1997.”*

10. I have cited Waweru J extensively, from that ruling, not just to get a summary of or a background to the events that led up to the decisions of 31<sup>st</sup> May 1994 and 15<sup>th</sup> October 1997, but also to demonstrate that the issues that the applicant in the present application raises were dealt with comprehensively and with finality by the court in previous applications. He is treading on a beaten path. The issues are water under the bridge. He is seeking review of orders that were made over twenty years ago. The delay in filing the review application is, no doubt, unreasonable. No explanations have been offered for the delay. If he felt strongly about the orders of 15<sup>th</sup> October 1997 he should have appealed against them. I cannot possibly sit in judgement over orders made by any of my predecessors.

11. I need not say more. The application before me has no merit. It should suffer the fate of being dismissed, and I do hereby dismiss the same.

12. I note that in 2001 Waweru J had directed the applicant herein to distribute the estate herein in terms of the orders of 31<sup>st</sup> May 1994 and 15<sup>th</sup> October 1997. To date, 2019, he has not complied with those orders. Administration of the estate of a dead person should not last forever. It is envisaged, in section 83(g) of the Law of Succession Act, Cap 160, Laws of Kenya, that distribution of an estate should be completed within six months after confirmation of the grant. I shall give the administrator sixty (60) days to complete administration. Default shall mean that his grant shall stand liable to revocation without any further reference to him. I shall have the matter mentioned after the said period, on a date to be given at the delivery of this ruling, to confirm compliance and for further directions.

13. Any party aggrieved by the orders made above is at liberty, within twenty-eight (28) days, to move the Court of Appeal appropriately.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF JULY 2019**

**W. MUSYOKA**

**JUDGE**