



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 55 OF 2012**

**IN THE MATTER OF THE ESTATE OF LUCHIBIA WANGATIA ALIAS LUCHIVIA WANGATIA (DECEASED)**

**RULING**

1. I am called upon to determine an application filed herein on 11<sup>th</sup> September 2018, and it is purported to be supported by an affidavit by Peter Layisa Luchibia. That affidavit is not commissioned. As it is there is nothing for me to determine. The purported application is not supported by an affidavit. There is no factual basis to support the prayers it seeks to the extent that it is not supported by what can be called an affidavit. The said application is hereby struck out. It should be expunged from the court record.

2. Even as the administrator seeks to file a fresh application for confirmation of his grant, there are several things that I have noted about his conduct so far with respect to administration of the estate.

3. The matter was first placed before me on 18<sup>th</sup> June 2018, for the hearing of a summons for revocation of grant. The administrator then in office requested the court to grant him time to discuss with the family on representation to the estate. Time was allowed. The parties came back to court on 18<sup>th</sup> June 2018. They had agreed that the grant held by Reuben Mukalo be revoked, and that Peter Laisa Luchibia be appointed to take his place. That was granted and Peter Layisa Luchibia was appointed the new administrator. A grant of letters of administration intestate was issued to him on 31<sup>st</sup> July 2018.

4. The new administrator filed then the summons that I have struck out in paragraph 2 here above. The said application was placed before me on 9<sup>th</sup> October for confirmation of the grant. Three individuals attended court, being, and the administrator, Peter Layisa, Reuben Mukalo and Peris Lucheli. These three were the only individuals that were listed in the application as having survived the deceased. At the hearing the administrator confirmed that there were other children of the deceased who had not been disclosed in the confirmation application and in the petition. He mentioned Elly Matole Luchivya, David Luchivya, Mochi Luchivya, Flora Luchivya, Oyuma Luchivya, Linet Luchivya, Jane Luchivya and Susie Luchivya. He explained that the deceased had distributed his property and given title deeds to some of those who had been left out of the application. I stood over the matter to 29<sup>th</sup> November 2018, and required the administrator to avail Elly Matole Luchivya, David Luchivya, Mochi Luchivya, Flora Luchivya, Oyuma Luchivya, Linet Luchivya, Jane Luchivya and Susie Luchivya on that day.

5. On 29<sup>th</sup> November 2018, the court did not sit. The parties were given 29<sup>th</sup> January 2019 as the next hearing date. On that day, only Peter Layisa, Reuben Mukalo and Peris Lucheli attended court. They informed me that they had brought only one of their siblings to court, Salome Waiyeko Luchivya, Salome Waiyeko Luchivya said that she had not been served with any papers, and that she needed to sit with the family to agree on distribution. She stated that the family had not yet sat to discuss distribution of the estate. I took the matter out of the cause list for that day, and fixed it for hearing on 29<sup>th</sup> January 2019 as I was not satisfied that the other survivors of the deceased had been notified of the hearing.

6. The next court appearance was on 29<sup>th</sup> April 2019. On that day, again, only Peter Layisa, Reuben Mukalo and Peris Lucheli attended court. They claimed that they had served all the other beneficiaries. The affidavit of service on record, however, told a different story, for it indicated that only Peris Mukalo had been served. I formed the opinion that the administrator either did not understand what the legal process required of him or was intent on not having his siblings attend court. I decided to involve the Chief of the area where they hailed from to assist in causing attendance in court of all the children of the deceased. I fixed the matter for hearing on 25<sup>th</sup> June 2019, and directed the Deputy Registrar to cause a summons to issue for the attendance by the Chief, of Chemuche Location, Kakamega North.

7. The Chief, Ernest Lijendi Masava, attended court on 25<sup>th</sup> September 2019. It would appear that the summons that the Deputy Registrar issued did not conform to the orders of 29<sup>th</sup> April 2019, which had required the Chief to mobilize all the children of the deceased to attend court for distribution of the estate of their late father. The Chief did not come to court on 25<sup>th</sup> September 2019 with the children as envisaged by the said order, he came alone, with Peter Layisa, Reuben Mukalo and Peris Lucheli. He informed the court that the deceased had one wife, who was also deceased. The couple had twelve (12) children, whose names he gave as Linnet David Luchivya, Elima Atore, Peter Layisa, Reuben Mukalo, the late David Lucheli the husband of Peris Lucheli, Dorcas Mmochi, Flora Eliraku, Miriam Ayuma, the late Susan Gulenywa Luchivya, Linnet Oyoo Luchivya, Jane Nanjila Luchivya and Salome Luchivya. He stated that three of the children were dead, being David Luchivya, David Lucheli and Susan Gulenywa. He stated that all the daughters were married, and that none of them were living within the home of the deceased.

8. Quite obviously, a large part of the family of the deceased was concealed from the court by the administrator. Out of the twelve children of the deceased only three were disclosed. I have noted that for the various times that the administrator attended court he refrained from disclosing to the court the extent of the deceased family, only mentioning three or four names. The information from the Chief no doubt confirmed my suspicions all through that the administrator did not wish to disclose to the court all the children of the deceased and he did not wish all of them to come to court.

9. This fear on my part is somewhat confirmed by a document that I have seen on the court record. It was filed herein on 21<sup>st</sup> June 2019. I do not understand why it was filed in the first place for no order was ever made for its filing, and no directions had been given for the holding of a meeting to come up with the resolutions that are reflected in the document. It is also not clear who filed it in court, but I shall presume that it was the work of the administrator.

10. The document bears the number of the instant succession cause. It appears to be minutes of a meeting that was held on 2<sup>nd</sup> October 2019, although the said minutes were signed by the Chairperson and Secretary of the meeting on 19<sup>th</sup> June 2019. From the minutes, it is clear that the purpose of the meeting was to distribute the estate of the deceased.

11. Minute 2 of the said minutes distributed the household assets of the deceased in the following terms:

“The chairman ordered the children of the deceased to bring what the late mother left in the house and display them for relatives to pick them traditionally. They did so and things were picked at random. For example:

I. Mary David picked the table

II. Robai Muchuma picked the box for clothes, etc.”

12. Minute 3 of the minutes distributes the daughters of the deceased. It is not clear what is meant by this, for daughters of the deceased are not property that can be distributed. The said minute says:

“The clan distributed the late daughters as follows:

i. Dorcas M’ mochi and Susy were given to Reuben Mukalo the brother.

ii. Flora and Jane were given to Elly Matore Luchivya.

iii. Mirriam Wayuma and Salome were given to the children of their late brother David Sembeya to care for them in case of anything. The children were: - Wangatia, Evans and Chisika.

iv. Linet Luchivya was given to peter Luchivya.

v. Jescah Mmochi was left generally to the sons of Luchivya in case of any problem.”

13. Minute 4 of the said minutes distributed the land. It states as follows:

“The deceased Parents Luchivya and Rebah Makonjo had two farms. The original on which they were staying or living and the one they bought. The time, mzee Jafethat Luchivya died, had already given his first two sons the land he had bought. That is David Sembeya and Elly Matore.

After the deaths of Mama, Rebah Matonjo, the clan and the family agreed to share the original land (Farm) between the three left children. These are:-

i. Peter Laisa Luchivya

ii. Reuben Mukalo’

iii. And the daughter of the late brother Lucheli – Peris Lucheli

The clan and the family of the deceased all agreed and resolved that, they will lease part of the land in order to buy two cattle’s so that they give one to the daughters of the late and the other to the children of the late brother David Sembeya and Elly Matore. No complain was raised ...”

14. The meeting the subject of the minutes apparently happened after the order that I made on 29<sup>th</sup> April 2019, requiring the Chief to cause all the children of the deceased to attend court on 25<sup>th</sup> June 2019, and ahead of the court appearance on 25<sup>th</sup> June 2019. Indeed the minutes were signed on 19<sup>th</sup> June 2019, just days to the court appearance on 25<sup>th</sup> June 2019. At that meeting the administrator was in attendance with all his siblings. Yet when he came to court on 25<sup>th</sup> June 2019, he did not bring them along with him.

15. My view of this development is that the said meeting was designed to defeat the orders of 29<sup>th</sup> April 2019 and to undermine the authority

of the court. On one hand, the court was ordering the administrator to bring his siblings to court so that the court could take their views on the proposals that he had made on distribution of the estate of their father, while on the other, he convenes a meeting, under the auspices of the clan, to do exactly what the court was supposed to be doing, distribute the estate of the deceased. From those minutes it is quite clear that the administrator is attempting to subordinate the interests of the daughters, and to ensure that they do not get to attend court to state their opinions on the matter in an open forum in which he has no control.

16. The deceased died on 13<sup>th</sup> February 2004. That was long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force on 1<sup>st</sup> July 1981. The effect of that is that the estate of the deceased should be distributed in accordance with the Law of Succession Act since it is that law that applies by virtue of section 2(1), which states:

*“2. Application of Act*

*(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.”*

17. That would mean that it would be the provisions of the statute rather than any other thing that should be the basis for distribution of the estate herein. Prior to 1<sup>st</sup> July 1981, estates of deceased Africans were subject to customary law. That changed when the Law of Succession Act came into force, and customary law only applied in a few limited areas. One such area would be where the deceased died before 1<sup>st</sup> July 1981 but his estate fell for distribution after the date. By virtue of section 2(2) of the Law of Succession Act, the law and customs that applied before 1<sup>st</sup> July 1981 would apply, but administration of the estate would be subject to Part VII of the Law of Succession Act. Section 2(2) states as follows:

*“(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”*

18. The other exception is in section 32 of the Law of Succession Act, with respect to Part V of the Act, which deals with intestacy, where a person dies without leaving a will, such as in the instant case, and it exempts Part V from application in certain areas of the country, and upon that exemption, customary law is made applicable. The exemption was allowed only once, in 1981, and it affected only the marginal areas in the former provinces of North Eastern, Eastern, Coast and Rift Valley. That exemption did not affect any of the districts in the former Western Province, and therefore, it was of no relevance to Kakamega County. That means that customary law of succession has not been allowed to apply to Kakamega County by dint of sections 32 and 33 of the Law of Succession Act. The two provisions state as follows:

*“32. Excluded property*

*The provisions of this Part shall not apply to—*

*(a) agricultural land and crops thereon; or*

*(b) livestock, in various Districts set out in the Schedule: West Pokot Wajir Samburu Lamu Turkana Garissa Isiolo Kajiado Marsabit Tana River Mandera Narok [L.N. 94/1981.]*

*33. Law applicable to excluded property*

*The law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law or custom applicable to the deceased’s community or tribe, as the case may be.”*

19. As the provisions of the Law of Succession Act apply fully to property of persons who died within Kakamega County after 1<sup>st</sup> July 1981, like the deceased herein, Luhya customs relating to succession are of no application or relevance whatsoever when it comes to the sharing out of the property of a deceased Luhya man or woman. That means that any person who files a petition under the Law of Succession Act, seeking distribution of the estate of a dead Luhya person must fully comply with the requirements of Part VII of the Law of Succession Act, and the distribution of the estate of that person must be strictly in accordance with Part V of the Law of Succession Act.

20. Distribution of the estate of a dead person, which is subject to and in accordance with the Law of Succession Act, like the present case, is carried by the court. The succession cause is filed so that ultimately the court makes orders on the distribution of the estate. By filing this cause that is what the parties herein must have contemplated, that the court would distribute their estate. That responsibility the court does not delegate to anyone, and it does not share it with anyone or any other institution. Not even the clan of the deceased person. The purported distribution of the estate herein, by the clan of the deceased, in that meeting whose minutes have been filed herein, was a usurpation of the role, function and mandate of the court. For the court had not directed that entity to assist it in distributing the estate. Neither does the clan have any power under any law to do what it did.

21. Indeed, that exercise should fall afoul of section 45 of the Law of Succession Act, which makes it an offence for any person who has no legal authority to deal with the estate of a dead person to handle or deal with it. The clan had no such authority and no power to do so. Yet, it purported to distribute the estate of the deceased allegedly under customary law. What it did amounted to intermeddling with the estate of a dead person, and it is an offence under section 45 of the Law of Succession Act, which can expose the clan leaders who presided over that event and the clan members who participated in the unlawful exercise to criminal prosecution. For avoidance of doubt, section 45 of the Law of Succession Act, provides as follows:

*“45. No intermeddling with property of deceased person*

*(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*

*(2) Any person who contravenes the provisions of this section shall—*

*(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*

*(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”*

22. The legal framework in the Law of Succession Act for applications for grants of representation is section 51 of the Law of Succession Act. Subsection (2)(g), states as follows:

*“Application for Grant*

*51. (1) ...*

*(2) Every application shall include information as to—*

*(a) ...*

*(b) ...*

*(c) ...*

*(d) ...*

*(e) ...*

*(f) ...*

*(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;*

*(h) ...”*

23. What section 51(2) (g) requires is that the person applying to be appointed administrator must to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The deceased herein died intestate, as he had not made a will. The petitioner, Reuben Mukalo, presented a letter from the Assistant Chief of Tumbeni Sub-Location, dated 9<sup>th</sup> May 2011. In that letter, addressed to the Deputy Registrar of this court, the Assistant Chief told the court that the deceased had been survived by three heirs, who he named as Ruben Mukalo, Peter Laisa and Peris Lucheli. He also listed Absalom Manyasa, Silikwa Kharinda and Thomas S. Maikuva as liabilities. A copy of the affidavit that he swore to support his petition is not in the court file, and therefore, I cannot tell who he purported in that affidavit to have been the survivors of the deceased. I would presume though that he listed the same persons listed in the Chief’s letter. If then that was the case then he must have created an impression to the court that these three individuals were the sole survivors of the deceased, and that the deceased had no other children. From what the Chief told the court on 25<sup>th</sup> September 2019, the deceased had twelve children, out of which three had died, and each of the dead children had had children. In the minutes of the clan meeting that purported to distribute the estate of the deceased in June 2019, there is a list of eight individuals who attended that meeting and were classified as children of the deceased, with another two listed as grandchildren. The petition disclosed only three persons out of the more than twelve individuals who had survived the deceased. Therefore, there was no compliance with section 51(2) (g) of the Law of Succession Act, which requires that all the children of the deceased be disclosed, and grandchildren of the deceased whose own parents had died. Section 51(2) (g) refers to children, not sons. Indeed, the Law of Succession Act is gender neutral. It is expected that all the children of the deceased and all the relevant grandchildren ought to have been disclosed.

24. What is before me for determination is an application for confirmation of grant. Two such applications are on record. The first is by the initial administrator, Reuben Mukalo. It is undated and was filed in court on an unknown date for it bears no court stamp. In the affidavit in support of that application, the persons listed under the column of survivors of the deceased are three, the same three individuals who were in the Chief’s letter. There is also a list of the three individuals named in the Chief’s letter as liabilities. The statement made in that affidavit that the deceased was survived by the three individuals was false for in total the deceased was survived by about eight living children and several grandchildren of his children who had since died. All these individuals were survivors who ought to have been disclosed in that application. The grant to Reuben Mukalo was subsequently revoked, which meant that the application for confirmation of grant became spent automatically upon the revocation of the grant that was sought to be confirmed through that application. The new administrator filed his own application dated 11<sup>th</sup> September 2018, which was just a carbon copy of that filed by the administrator that he had replaced. I have ruled that that application is incompetent to the extent that it is not supported by a proper affidavit.

25. There is no application for me to consider but I raise these issues because I have noted that there is a determined effort by the administrator to exclude a good number of survivors of the deceased from benefit. He is also determined that those individuals do not come to court at all where their views are likely to be captured by the court. However, it is important for the administrator to understand that this is a court process. A court of law enforces the law as it is. He is bound to comply if he fails to there there is always the option of his being removed as administrator, to pave way for another administrator who is neutral and capable of fully complying with the law. The government does have offices and entities that can play that role. His tricks will surely take him nowhere.

26. It is important for the administrator to understand that the law does not allow discrimination of children of the deceased. All are treated equally regardless of gender or marital status. Distribution is expected to be equal to all of them. That is what section 38 envisages, which states as follows, in cases where the deceased is survived by children but no spouse, as in the present case:

*“38. Where intestate has left a surviving child or children but no spouse*

*Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”*

27. I shall, therefore, direct the administrator to file another confirmation application. In it he shall list all the children of the deceased, both male and female, as disclosed by the Chief in open court. He shall also list all the children of the deceased who have died, and name their children, both male and female. If he claims that some of the children were given land by the deceased, he shall list such persons, and indicate the lands given to them, citing the relevant land references. If he claims that there are persons who bought estate land, he shall set them out, indicating who sold them the land, when the transactions happened, and attach documents to support the alleged sales.

28. To move the matter forward, the said application shall be filed within thirty days. There shall be a mention after some time for compliance and further directions.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF NOVEMBER, 2019**

**W. MUSYOKA**

**JUDGE**