



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 399 OF 2007
IN THE ESTATE OF JOHN MUSAMBAYI KATUMANGA – (DECEASED)

RULING

1. Joseph Musambayi Katumanga died on 26th June 2005. Representation to his estate was obtained on 17th May 2007 by Lucy Kendi Khayadi, Tom Denis Musambayi Katumanga, and Katumanga C.I. Musambayi.
2. I am tasked with the confirmation of the grant made on 26th June 2005. The survivors of the deceased have not agreed on the distribution of the estate, and they have placed two applications for confirmation of the grant before me. The two applications are dated 31st March 2009 and 14th November 2012. The first application is by the surviving widow of the deceased, Lucy Kendi Khayadi; while the second application is by the surviving children of the deceased.
3. The application dated 31st March 2009 is premised on *Section 54* of the Law of Succession Act and Rule 49 of the Probate and Administration Rules. The widow explains that she brought the application without the support of her co-administrators because the latter have been uncooperative, yet she has minor children who need to be maintained. She proposes that distribution should follow the mode proposed in the family meeting held on 5th August 2007.
4. Her application is opposed by her co-administrator, Tom Dennis Musambayi Katumanga, who swore an affidavit of protest on 4th May 2009. He explains that the delay in having the grant confirmed was occasioned by the complexity of identifying the assets which make up the estate. He complains that the applicant moved to court on the wrong provisions of the law and without obtaining his approval or consent.
5. There are two other protests, filed by Felix Teddy Musambayi and Jane Khayeshe Musambayi. Both say that the estate should not be distributed, they instead propose that a trust should be created to hold the assets with the administrators acting as trustees. Alternatively, they propose that a limited liability company be registered and the assets of the estate transferred to the said company. All the survivors of the deceased would then be its shareholders, with the administrators acting as its directors. The position stated by these two is adopted in the affidavits of protest sworn by Mary Musambayi Giini, Chrisantus Musambayi Katumanga, Mike Musambayi, Noel Musambayi, Margaret Musambayi, Arthur David Musambayi and Tom Musambayi Katumanga.
6. In her response to the said protests, the widow sworn an affidavit on 21st June 2010. She urges that the distribution of the estate should take into account the fact that she is a widow, who was wholly dependent on the deceased for maintenance and upkeep, and the sole guardian and care giver of the deceased's only minor children. She further avers that as a surviving widow she is entitled to life interest over the matrimonial home, being Butsotso/Indangalasia/1066.

7. The application dated 14th November 2012 is by the protestors to the earlier application and it is expressed to be founded on **Section 71** of the Law of Succession Act. The protestors appear to shift from the position held earlier opposing the distribution. They now propose distribution of most of the assets, and a creation of a trust over a small portion of the estate.

8. The deceased person in this cause died in 2005. The administrators were appointed in 2007. According to the Law of Succession Act the administration of an estate should be completed with one year from the date of the making of the grant. **Section 71** of the Act expects that after expiry of six (6) months, the grant holder would move the court for confirmation of the grant. **Section 83(g)** of the Act envisages that within six (6) months of the confirmation of the grant, administration ought to be completed, subject, of course, to the limitations set out in the said provision. No good reason has been given in this cause to explain the delay in the filing of the application by the administrators for confirmation of the grant made to them in 2007. The applicant in the application dated 31st March 2009 cannot be faulted in moving the court in the manner she did given the unexplained delay.

9. I note that the application dated 31st March 2009 is premised on **Section 54** of the Law of Succession Act, while the second application is predicated on **Section 71** of the Law of Succession Act. No doubt, the application dated 31st March 2009 is founded on the wrong provisions of the law. That however does not invalidate it as it is quite clear from the body of the application that it seeks confirmation of the grant made to the applicant and her co-administrators. The technical defect is one that can be overlooked in the spirit of Article 159(2) (d) of the Constitution.

10. The deceased left a fairly large estate, in terms of the number of persons who survived him and the assets that he died possessed of. From the material before me, he was survived by fourteen (14) individuals; being one (1) widow and thirteen (13) children. The widow is Lucy Kendi Khayadi, the applicant in the application dated 31st March 2009. The children are Tom Katumanga, Mary Musambayi, Chrisantus Musambayi Katumanga, Jane Musambayi, Arthur Musambayi, Rita Musambayi, Felix Musambayi, Martine Musambayi, Margaret Musambayi, Noel Musambayi, Michael Musambayi, A. M. and J. K. Junior. The last two are minors and the children of the surviving widow.

11. It is not clear from the record whether the deceased was a polygamist as the whereabouts of the mother or mothers of the first eleven (11) children of the deceased has not been touched on by any of the deponents of the affidavits on record. It is not clear at what stage the surviving widow was married, whether it was during the lifetime of the previous spouse of the deceased or upon the demise of such spouse.

12. According to the documents attached to the application dated 31st March 2009 the deceased owned agricultural land, plots in urban centres, money in several banks, motor vehicles and other movable assets. As at the time of his death he owned thirty-one (31) parcels of agricultural land being – **{particulars withheld}**. The deceased operated five (5) bank accounts, three (3) with the Standard Chartered Bank and two (2) with the Kenya Commercial Bank. The said accounts held in aggregate a balance of **{particulars withheld}**. He also had three motor vehicles – **{particulars withheld}**. There were also appliances and equipment of a household nature in the possession of the widow. The only identified liability is the accrued land rent and rates totaling **{particulars withheld}**.

13. The widow, in her application dated 31st March 2009, has proposed that the estate be distributed as per the agreed mode of distribution reached at a family meeting on 5th August 2007. The minutes of the said meeting are attached to the affidavit of the widow and marked “LKA”. The scheme of distribution is in minute 7/08/07 and is as follows:-

a. Martin Musambayi – **{particulars withheld}**

- b. Jane Musambayi – {*particulars withheld*}
- c. Margaret Musambayi – {*particulars withheld*}
- d. Mary Musambayi – {*particulars withheld*}
- e. Tom Katumanga – {*particulars withheld*}
- f. Felix Musambayi – {*particulars withheld*}
- g. Rita Musambayi and Noel Musambayi – {*particulars withheld*}
- h. Michael Musambayi – {*particulars withheld*}
- i. Michael Musambayi – {*particulars withheld*}
- j. A. M. – {*particulars withheld*}
- k. J. M. Junior – {*particulars withheld*}
- l. Lucy Kendi – {*particulars withheld*}
- m. The remaining assets – {*particulars withheld*}.

14. I have noted that the minutes are not altogether clear. Some of the assets are identified by location and not by their reference numbers, which makes identification difficult for assets located in the same vicinity. References to the “plots at Milimani,” “the Nairobi house,” “the house in Tena estate” and “the chairman’s house in Lurambi” are not helpful. The said minutes therefore are of little assistance in guiding the court appropriately.

15. The minutes referred to in the affidavit of the widow are acknowledged in the affidavit of protest sworn on 2nd May 2009 and filed in court on 4th May 2009 by Tom Katumanga, one of the co-administrators. However he avers that said distribution was overtaken by events in the subsequent meeting of 15th February 2005. The minutes of the meeting of 15th February 2005 are attached to the said affidavit. I note that no agreement was reached in the meeting on the distribution of the estate of the deceased if one goes by the said minutes.

16. The co-administrator has attached a proposed mode of distribution to his affidavit, and he has marked the same “TDM 2”. His proposed scheme of distribution of the assets is as follows in terms of value:-

- a. Tom Katumanga- {*particulars withheld*}
- b. Mary Musambayi {*particulars withheld*}
- c. Chrisantus Katumanga {*particulars withheld*}
- d. Jane Musambayi {*particulars withheld*}
- e. Rita Musambayi {*particulars withheld*}
- f. Arthur Musambayi {*particulars withheld*}
- g. Felix Musambayi {*particulars withheld*}
- h. Martine Musambayi {*particulars withheld*}

- i. Margaret Musambayi **{particulars withheld}**
- j. Noel Musambayi **{particulars withheld}**
- k. Michael Musambayi **{particulars withheld}**
- l. A. M. **{particulars withheld}**
- m. J. M. **{particulars withheld}**
- n. Lucy Kendi **{particulars withheld}**

17. There is in the proposed distribution a legend on how of the money in the banks is to be distributed. The money is included in the distribution the subject of 16 above. The total amount of the liquid cash in the banks is estimated to be **{particulars withheld}**. It is proposed to be distributed as follows:-

- a. J. M. **{particulars withheld}**
- b. Lucy Musambayi **{particulars withheld}**

(for upkeep)

c. Renovation of a house at

Amalemba estate **{particulars withheld}**

- d. Town rates **{particulars withheld}**
- e. Legal fees **{particulars withheld}**
- f. Miscellaneous **{particulars withheld}**

18. Some assets are not proposed for distribution, and it is these that are to go to the trust fund. The affected properties are –

- a. **{particulars withheld}**,
- b. **{particulars withheld}**,
- c. **{particulars withheld}** and
- d. **{particulars withheld}**.

19. The liabilities of the estate are estimated at Kshs. **{particulars withheld}**, the bulk of which are to be settled using the money in the bank accounts.

20. The widow filed a further affidavit on 21st June 2010, sworn on 17th June 2009, in response to that of her co-administrator, Tom Katumanga, raising several issues. She emphasises that she is the surviving widow of the deceased who was wholly dependent on the deceased, and that as a widow, she is entitled to a life interest over the matrimonial home. She feels that the motor vehicles given to her have been overvalued, that Mary Musambayi and Michael Musambayi have benefited disproportionately from the estate, that a person called Laura Masitsa is unfairly being provided for, that she would prefer an educational fund to be set up for the education of her minor children, that the money allocated to her for upkeep is inadequate and that she should be allocated property which generates income so as to provide for her children.

21. The co-administrator, in his application for distribution dated 14th November 2012, comes up with a scheme of distribution which is totally different from that comprised in the affidavit of protest that he swore on 2nd May 2009. It would appear however that the said proposed distribution does take into account some of the concerns raised by the widow in her affidavit of 17th June 2009. The record does not have evidence as to whether the widow ever responded to the application dated 14th November 2012.

22. Both applications were placed before me on 28th October 2013. Counsel for both parties addressed me on various aspects of the two applications.

23. The deceased died intestate in 2005, long after the Law of Succession Act had come into force. Distribution of his estate is therefore subject to the provisions of the Law of Succession Act, and especially Part V thereof. The deceased had married twice. It is not clear whether he was a polygamist or not, for there is nothing on record to show when the first wife died. Whatever the case it would appear that the appropriate provisions to apply would be **Sections 35 and 40** of the Law of Succession Act.

24. However, these two provisions do not neatly meet the needs of the current case. Section 35 appears to apply only to cases where the deceased had married only once, in other words he had only one wife throughout. **Section 40** of the Act on the other hand appears to address the case of a polygamist where the deceased had several wives at some stage of his life. The Act does not appear to have provisions to govern circumstances where a monogamous deceased ends up with two households consequent upon remarriage following the death of the first wife. It would appear that in dividing the estate of such a deceased person the court should be guided by the provisions of both **Sections 35 and 40** of the Act.

25. **Section 35** of the Law of Succession Act caters for a situation where the deceased is survived by a spouse and children. The surviving spouse is entitled to the deceased's chattels and a life interest on the residue. The deceased in this case was survived by a spouse and children, although not all are her children. Under **Section 35** of Act, upon the determination a life interest the estate should be shared equally between all the children. There is also provision for appointment exercisable by the surviving spouse. The issue that would arise in the instance case is whether the surviving spouse can exercise life interest over property that ought to devolve to children other than her own.

26. Under **Section 40** of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where **Section 35** of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of **Section 38** of the Law of Succession Act, the children would divide the estate equally amongst themselves. **Section 40** was not designed for the circumstances of the instant estate, but it would appear more appealing for the purpose of distribution of the said estate than **Section 35**.

27. The spirit of Part V, especially **Sections 35, 38 and 40**, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in **Sections 35(5) and 38** is "**equally**" as opposed to "**equitably**". This is the plain language of the provisions. The provisions are in mandatory terms – the property "*shall ... be equally divided among the surviving children.*" Equal distribution is envisaged regardless of the ages, gender and financial status of the children.

28. Equal distribution does not always work justice, especially in polygamous situations, where the youngest child of the deceased may be one (1) year old, while the eldest may be over fifty (50) years of age. The infant no doubt would have far greater needs than the fifty year old, who would generally have received education and has probably been settled in life by the deceased. There cannot be justice in equal distribution in such case. The fortunes of one child may be better those that of the other – one could end up in a lowly job, say a driver or office messenger or nurse or nursery school teacher, with the

other becoming a commercial pilot or the Chief Executive Officer of a blue-chip company. There would be no fairness in equal distribution in such a case. The law as currently framed does not do justice in such circumstance. Ideally, equal distribution should be the principle, with some discretion left to the court to consider the circumstances of each case.

29. The inequity in the equal distribution principle has often caused disquiet. Omolo JA in *Rono vs Rono and another* (2005) 1 EA 363, remarked that equal division works injustice especially in the case of a young child who is still to be maintained and educated, and generally seen through life. The appeal judge took the view that **Section 40** of the Act did not provide that each child must receive the same or equal portion. That was opinion of a higher bench. **Section 40** of the Act is not independent of **Sections 35 and 38** of the Act, division is to be in equal portions. The plight of minor children is no doubt precarious in this scenario. The provisions cry out for amendment. In the meantime Article 53(2) of the Constitution can ameliorate the situation, by the court looking at the matter from the perspective that the best interests of the child are of paramount importance in every matter concerning the child.

30. There are children in this case whose ages can be defined as tender. They were six (6) and two and half (2½) years of age in 2009. That places them at eleven (11) and seven (7), or thereabout, respectively, today. These are the children of the surviving spouse. The children of the first house are all adults, but their ages are not indicated. What they do for a living is also not mentioned. The minutes of 5th August 2007 and 15th February 2009 paint the picture of persons who are highly educated and in stable employment or business. They are obviously not needy like the two minors in the second house. Any distribution of the estate of the deceased ought to take this into account.

31. As mentioned earlier the deceased was survived by a spouse. She describes herself as a housewife who was wholly dependent on her late husband. Under Part V, a surviving spouse is entitled absolutely to the deceased spouse's chattels and a life interest in the remainder. The surviving spouse, particularly the widow, is regarded as having the greatest stake in the estate. Spouses during marriage take care of each other. They depend on one another for a variety of material and emotional things. The dependency is usually higher on the part of the wife. In the traditional step-up the wife takes care of the home and the children, while the husband is out looking for resources for the family's sustenance. Often the women are housewives or persons holding lowly jobs, which afford them time to be close to their homes and family. It is in recognition of this arrangement that the law of marriage imposes a duty on husbands to provide for and maintain their wives. This duty remains even after death, but this time the burden is on the estate. It is because of it that the surviving spouse takes the household goods and enjoys a life interest in the capital assets.

32. Ideally, an estate ought not be distributed during life interest. Life interest and minority are on the same face of the coin, they result in a continuing trust which ends with the termination of life interest or minority. This would mean that the surviving spouses and minor children occupy a special place in the succession arrangement. They are vulnerable and need protection, and therefore they deserve special attention during distribution.

33. In this cause, I have noted from the various papers filed in the matter; that the adult children are talking of buying some of the estate assets from the estate. Estate property belongs to the estate. It is to be utilized for settling debts and liabilities, the surplus is then distributed to the heirs and beneficiaries. Such property is not available for sale to the heirs and beneficiaries as they please. It is equally unavailable for sale to third parties, unless it is being disposed of to settle debts and liabilities or for purposes of maintenance of family members.

34. The heirs in this cause have also been expressing an intention to set up a trust. The law provides for statutory trusts. What the heirs are proposing in this case are not statutory trusts, but private trusts. Such can only be created with the consent of all interested. I note that there is no consensus in this case. The widow does not support the proposal, and two of the heirs are below the age of consent. The idea of a trust cannot be imposed or compelled. In any event it is something that the intestacy provisions in the Law of Succession Act do not envisage.

35. There is no dispute as to who the heirs of the deceased are or on the assets. The widow is however concerned about Laura Masitsa, who the co-administrator in his affidavits of 2nd May 2009 and 14th November 2012 propose to benefit from the distribution of the estate. There is no explanation in the two affidavits as to who this person is. She is not listed in the affidavit in support of the petition for grant of letters as a survivor of the deceased, nor is she identified as such in the affidavit in support of the application for confirmation of the grant dated 14th November 2012. Her name only comes up in the distribution schedules.

36. The available literature appears to place her under Mary Musambayi. I suspect that she is a daughter of the said heir, and therefore a granddaughter of the deceased. She is described in one of the papers as a dependent of the deceased. The said Laura Mesitsa is not entitled to a share in the estate of the deceased. There are two reasons for this. She is not an heir of the deceased, for grandchildren are not entitled to inherit from their grandparents so long as their own parents, the children of the deceased, are alive and themselves taking a share in the estate. Secondly, she is not a dependant of the estate. She did not apply, as she should have, for provision under **Section 26** of the Act, and there is no court order making her a dependant of the deceased. Under **Section 29** of the Act, a grandchild can be a dependent of her grandparent, but for her to qualify as such she must demonstrate to the court in an application properly brought under **Section 26** of the Act that she was dependent on the grandparent immediately before his death.

37. Having considered the law on the matter and all the proposals on the distribution of the estate that have been placed before me, I am disposed to distribute the estate of the deceased as follows:-

1. Butsotso/Indangalasia/2954 – to Lucy Kendi Khayadi during life interest and thereafter to A. M. M. and J. M. Junior, in equal shares;
2. Butsotso/Indangalasia/1066 – to Lucy Kendi Khayadi during life interest and thereafter to A. M. M. and J. M. Junior, in equal shares;
3. Kabras/Matete/1497 – to Lucy Kendi Khayadi during life interest and thereafter to A. M. M. and J. M. Junior, in equal shares;
4. Nairobi/Block 82/1494 – to Lucy Kendi Khayadi during lifetime and thereafter to A. M. M. and J. M. Junior, in equal shares;
5. Butsotso/Indangalasia/4053 – to Tom Dennies Musambayi Katumanga, absolutely;
6. Kakamega Municipality/Block 3/262 – to Tom Dennies Musambayi Katumanga, absolutely;
7. Butsotso/Indangalasia/1880 - to Tom Dennis Musambayi Katumanga, absolutely;
8. Butsotso/Indangalasia/4077 – to Mary I. Musambayi, absolutely;
9. Isukha/Lubao/739 to Mary I. Musambaya, absolutely;
10. Kakamega Municipality/Block 4/81 - to Mary I. Musambayi, absolutely;
11. Butsotso/Shikoti/2324 – to C.I. Musambayi Katumanga, absolutely;
12. Kakamega Municipality/Block 3/261 – to C.I. Musambayi Katumanga, absolutely;
13. Butsotso/Indangalasia/3125 – to Jane Khayeshe Musambayi, absolutely;
14. Kakamega Municipality/Block 4/532 - to Jane Khayeshe Musambayi, absolutely;
15. Musaa/3699 – Rita S. Musambayi, absolutely;

16. Kakamega Municipality/Block 2/317 – to Rita S. Musambayi, absolutely;
17. Butsotso/Indangalasia/4083 – to Arthur David Alusiola Musambayi, absolutely;
18. Kakamega Municipality/Block B 3/263 – to Arthur David Alusiola Musambayi, absolutely.
19. Isukha/Shirere/943 - to Felix Teddy Musambayi, absolutely;
20. Isukha/Shirere/4718 - to Felix Teddy Musambayi, absolutely;
21. Isukha/Shirere/1656 - to Felix Teddy Musambayi, Martin Acadius Musambayi and Michael Shapaya Musambayi, in equal shares;
22. Butsotso/Indangalasia/3425- to Martin Acadius Musambayi, absolutely;
23. Isukha/Shinyalu/1196 to Martin Acadius Musambayi, absolutely;
24. Kakamega/Municipality/Block 3/257 – to Margaret S. Musambayi, absolutely;
25. Isukha/Lubao/739 – to Margaret S. Musambayi, absolutely;
26. Kakamega Municipality/Block 4/145 – to Lucy Kendi Khayadi during lifetime and thereafter to A. M. M. and J. M. Junior, in equal shares;
27. Isukha/Shirere/4275- to Margaret S. Musambayi and Noel Mercyline Musambayi, in equal shares;
28. Kakamega Municipality/Block 1/612 – to Noel Mercyline Musambayi, absolutely;
29. Butsotso/Esumeyia/1789 – to Noel Mercyline Musambayi, absolutely;
30. Nairobi/Block 72/267 – to Michael Shapaya Musambayi, absolutely;
31. Isukha/Shirere/2418 – to Michael Shapaya Musambayi, absolutely;
32. Isukha/Shirere/2419 – to Michael Shapaya Musambayi, absolutely;
33. Kakamega Municipality/Block 4/260 – to Lucy Kendi Khayasi during lifetime and thereafter to A. M. M. and J. M. Junior, in equal shares;
34. Butsotso/Esumeyia/3128 – to C.I. Musambayi Kakemega, absolutely;
35. Butsotso/Indangalasia/3130 – to Jane Khayeshe Musambayi, absolutely;
36. Butsotso/Indangalasia/3131 – to Rita S. Musambayi, absolutely;
37. Butsotso/Indangalasia/3193 – Arthur David Alusiola Musambayi, absolutely;
38. Isukha/Shirere/2716 – to Noel Mercyline Musambayi and Margaret Musambayi, in equal shares;
39. Butsotso/Indangalasia/1666 – to Felix Teddy Musambayi and Martin Musambayi, in equal shares;
40. Butsotso/Indangalasia/1880 – to Michael Shapaya Musombayi, absolutely;
41. Kakamega Municipality/Block 4/27 – to Lucy Kendi Khayadi during life interest and therefore to A. M. M. and J. M. Junior, in equal shares;

42. Butsotso/Indangalasia/1675- to Mary I. Musambayi, Tom Dennies Musambayi Katumanga and C.I. Musambayi Katumanga, in equal shares;

43. Butsotso/Indangalasia/996 – to Jane Khayeshe Musambayi, Rita S. Musambayi and Arthur David Acadius Musambayi, in equal shares;

44. Isukha/Shirere/2419 – to Felix Teddy Musambayi, Martin Acadius Musambayi and Michael Shapanya Musambayi, in equal shares;

45. Isukha/Shirere/2418 – to Margaret S. Musambayi and Noel Musambayi, in equal shares;

46. KAN 423R – to Arthur David Alusiola Musambayi and Felix David Musambayi, in equal shares;

47. KAM 553V – to Lucy Kendi Khayadi, absolutely;

48. KAB 047S – to Lucy Kendi Khayadi, absolutely;

49. Money in the bank – to the administrators – to utilize as follows:-

(1) Standard Bank, Kakamega (i) Kshs.4,000,000/= to

(a) A/C No. *{particulars withheld}* settle the debts of the estate.

(b) A/C No. *{particulars withheld}* (ii) Kshs.3,000,000/=

For the education of A. M. M. and J. K. Jr.

e. Kenya Commercial Bank, Kakamega

i. A/C No. *{particulars withheld}* (iii) Kshs.1,000,000/=

ii. A/C No. *{particulars withheld}* to the widow Lucy

iii. A/C No. *{particulars withheld}* Kendi Khayadi for her upkeep.

(iv)The balance shall be shared equally between – Tom Katumanga, C.I. Katumanga, Mary I. Musambayi, Jane K. Musambayi, Arthur D. A. Musambayi, Felix Teddy Musambayi, David Alusiola Musambayi, Margaret S. Musambayi and Michael Shapaya Musambayi.

38. Costs of the application shall be costs in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 30th DAY OF May 2014.

W. MUSYOKA

JUDGE