



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 767 OF 2007

IN THE MATTER OF THE ESTATE OF MBALU NZUNZA (DECEASED)

1. **DAVID MBALU**
2. **ALICE MBALU**
3. **JOHN NZUNZA MBALU PETITIONERS/APPLICANTS**

VERSUS

1. **PETER MBALU**
2. **NZISA MBALU**
3. **KYALO MBALU**
4. **NDAMBO MBALU**
5. **MUTUNGI MBALU**
6. **NDUKU MBALU BENEFICIARIES/RESPONDENTS**

RULING

Following a filing of the Summons for confirmation of grant by the 2nd Petitioner, **Alice Mbalu**, the 1st Petitioner, **David Ndambo** and the 3rd Petitioner **John Nzunza** filed an affidavit sworn on 23/4/2012 on their preferred mode of distribution pursuant to the court's directions given on 28/2/2012.

The 2nd Petitioner also filed an affidavit sworn on 26/4/2012 giving her proposal on distribution.

The 1st and 3rd Petitioner filed an affidavit sworn on 2/5/2012 pursuant to leave granted by the court on 27/4/2012. The 2nd Petitioner filed a further affidavit sworn on 22/5/2012. The 1st and 3rd Petitioners filed a further affidavit sworn on 25/7/2012 pursuant to leave granted by the court on 20/7/2012. The beneficiaries thereafter embarked on out of court negotiations but the same did not bear any fruit.

On 11/2/2013, there was a consent that the court do proceed to rule on the question of distribution based on the affidavit evidence on record. Prior to the ruling date, counsel for 1st and 3rd Petitioner wrote to court stating that the aforesaid consent was recorded in error as no directions had been taken as provided for under rule **40 (6) & 41** of the **Probate and Administration Rules**.

To my mind, once the parties agreed to proceed by way of affidavit evidence and the court ordered accordingly, there were no other directions required. The directions were that the distribution was to proceed by way of affidavit evidence.

However, it has now turned over that the 1st and 3rd Petitioner prefer to proceed by way of *viva voce* evidence. There being no consent on distribution and taking into account that there is no consensus on proceeding by way of affidavit evidence, the matter ought to proceed for directions as provided for under

rule **40 (8)** of the **Probate and Administration Rules**.

Consequently, directions are hereby given for the matter to proceed by way of *viva voce* evidence.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 18th day of July 2013.

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B. THURANIRA JADEN

JUDGE