



In re Estate of Lisutsa Evaristo Newton (Deceased) (Succession Cause 643 of 2008) [2024] KEHC 1682 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1682 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 643 OF 2008
PJO OTIENO, J
FEBRUARY 16, 2024**

IN THE MATTER OF THE ESTATE OF LISUTSA EVARISTO NEWTON (DECEASED)

BETWEEN

**PETER MUKHANJI 1ST APPLICANT
TIMOTHY MUKHANJI 2ND APPLICANT
FORTUNATA ITEMELA 3RD APPLICANT**

AND

**EDWIN MUKHANJI 1ST RESPONDENT
EDWARD MUKHANJI 2ND RESPONDENT**

JUDGMENT

1. This cause concerns the distribution of deceased's Lisutsa Evaristo Newton estate. He died on 10th day of August 2002 and was survived by six children namely; Edwin Mukhanji, Edward Mukhanji, Mercyline Mukhanji, Peter Mukhanji, Timothy Mukhanji and Fortunata Mukhanji, without a spouse.
2. The estate subject to distribution constitutes Money at public trustee and ten land parcels known as;
 - i. Kakamega/Shitochi/1235 (0.5 HA),
 - ii. Isukha/Shitochi/1007 (0.11 HA),
 - iii. Kakamega/Sergoit/1045 (0.83 HA),
 - iv. Kakamega/Shitochi/1005 (0.28 HA),
 - v. Kakamega/Shitochi/1006 - ??????
 - vi. Isukha/Shitoto/459 (0.70 HA),



- vii. Isukha/Murhanda/1059 (0.24 HA),
 - viii. Kakamega/Shitochi/1347 (0.44 HA)
 - ix. Two unregistered parcels of land at Isukha/Shitochi registration area measuring (0.19 HA) and (0.051 HA), which have not been assigned numbers.
3. The respondents, Edwin Mukhanji and Edward Mukhanji applied for grant of letters of administration to the estate of the deceased, a grant which was issued to them on 5/06/2009 and was subsequently confirmed on 7/10/2009 where the property was transmitted to the administrators for themselves and in trust for the other beneficiaries.
 4. Thereafter, the three applicants filed summons for revocation of the grant supported by respective affidavits and seeking the revocation of the grant while accusing the administrators/respondents for being incompetent in dealing with their deceased father's estates and that they have turned the properties only to serving their personal interests. They contend that the properties were to be held in trust for all beneficiaries by the respondents and now that they are all grown up and can legally inherit from their father's estate and having the properties registered under their names, there is no need for any property to be held in trust for them. They indicate that it is unfair for the two beneficiaries to benefit from the whole estate adding that they have refused to treat them as their equals in the estate of their father.
 5. The respondents on the other side, and in response to the summons, contend that they have all along, in addition to their administrative mandate, taken charge of general upkeep of the estate and welfare of the minor beneficiaries, fact supported by their filled affidavit of accounts supported by receipts showing all the expenses they incurred in catering for their minor siblings as well as management and maintenance of their late father's estate only by using money that was paid by the public trustee without tampering with the real properties of their deceased's father.
 6. They add that in a family meeting convened on 22/08/2020 in presence of all family members as well as the local area administrators, all the beneficiaries agreed on the proposed mode of distribution of the said estate. The mode of distribution involves the deceased's estate being subdivided as follows;
 - Kakamega/Shitochi/1235 - 0.5HA. Mercyline Mukhanji Kakamega/Shitochi/1347 - 0.44 HA. ... Timothy Mukhanji (where his house is)
 - Kakamega/Shitochi/1006 ALL
 - Kakamega/Shitochi/1005 0.28 HA. Timothy Mukhanji
 - Isukha/Shitochi/1007 - 0.11HA. - Edward Lisutsa Mukhanji (where his home is)
 - Isukha/Shitochi/459 - 0.70HA. - Peter Muhajji (0.5) and Fortunata Itemele (0.2)
 - Isukha/Shitochi/... - 0.19 HA. - Mukhanji Joseph Edwin (where his home is)
 - Isukha/Shitochi/... - 0.051 HA. Peter Mukhanji
 - Isukha/Murhanda/1059 - 0.24 HA. Fortunata Itemele Kakamega/Sergoit/1045 - 0.83 HA. - Edward Lisutsa Mukhanji (0.43) and Mukhanji Joseph Edwin (0.40)
 7. An analysis of that allegedly agreed distribution show that each beneficiary would get: -
 - i. Mercyline Mukhanji 0.5 HA



- ii. Fortunata Itemele 0.44 HA
 - iii. Edward Lisutsa Mukhanji 0.54 HA
 - iv. Mukhanji Joseph Edwin 0.59 HA
 - v. Peter Mukhanji 0.56 HA
 - vi. Timothy Mukhanji 0.72 HA
8. Subsequently, other affidavits were filed and sworn by Mukhanji Joseph Edwin. The first was to give accounts of the cash paid from the Public trustee and to demonstrate that the administration expenses had far exceeded the said sum. The second was to propose mode of distribution, slightly different from the proposal in the summons and to disclose that Shitochi/1006 does not form part of the estate and is not thus capable of being subjected to distribution. That proposal however evidently appears to seek and achieve a mathematical equality on sharing by which each beneficiary gets 0.56 or 0.55 Ha. In doing so most of the parcels of land are earmarked for subdivision.

Analysis and Determination

9. When counsel appeared before the court on the 15.2.2023, after consulting with the parties, they narrowed down the dispute by agreeing that five of the beneficiaries get the following properties: -
- 1. Isukha/Shitochi/1007 - Edward Mukhanji
 - 2. Kakamega/Shitochi/1005 - Timothy Mukhanji
 - 3. Isukha/Shitochi/1004 - Mukhanji Joseph Edwin
 - 4. Isukha/Shitochi/1028 - Peter Mukhanji
 - 5. Isukha/Muranda/1059 - Fortunata Itemele
 - 6. Kakamega/Shitochi/1006 - Does not belong to the estate as yet
10. On that day, the court engaged the beneficiaries present in court and they made further concessions as follows;
- i. Mercyline asserted being the only one who had not benefited from the consent and proposed that she gets Shitochi/1235 in whole and not just a portion.
 - ii. Timothy on his part conceded that if he gets Shitochi/1005, he would seek no more.
 - iii. Even Peter Mukhanji supported the proposal by Mercyline in addition to conceding to the excision of 0.2Ha off Shitochi/1028 in favour of Fortunata so that Edward and Edwin get the rest of the land including the Sergoit/1045. He added that since all the boys had chosen where to build, Mercyline deserves to be given the opportunity to also make a choice.
 - iv. Edward Mukhanji on his part urged that on top of Shitochi/1007, he would be fully satisfied if he gets 0.45Ha out of Sergoit/1045 and expressed no interest in Shitochi/1235.
 - v. On his part Edwin Mukhanji preferred that on top of Shitochi/1004 measuring 0.11 Ha, he gets 0.38 out of Shitochi/1235 so that Mercyline gets the balance of 0.12 and a portion in Sergoit.
11. For counsel, Mr. Iddi proposed equal sharing while Ms. Mburu feared that such a formula would necessitate subdivision of most parcels and therefore scatter the beneficiaries far and wide.



12. The court having given to the rival submissions and proposals by both the applicants and the respondents the due and necessary consideration, finds that there is no dispute that the deceased died intestate leaving behind a total of six children and a spouse. However, the spouse died years later leading the respondents to seek for grant of administration to manage their deceased father's estate on behalf of other siblings who were still minors.
13. It is apparent to the court that the principle of equal sharing stipulated by section 38 and subject to sections 40 and 41 of the Act must be followed. On that appreciation the issues of contention and which must be resolved in the determination by the court in this cause can only be: -
 - i) Whether the grant to the respondents/administrators deserves revocation?
 - ii) Which property should go to which dependant?

a. Whether the grant calls for revocation?

14. This issue strictly speaking, upon analysis of the affidavits as well as address to court by parties and their counsel seems to have been abandoned as both side desire that the estate be shared out and not left in the names of the administrators. The court thus considers its duty to be the determination of application as one seeking ascertainment of the respective shares of the beneficiaries.
15. It is however worth noting that under section 76 of the *Law of Succession Act*, the court would only revoke a grant where it is proved, to the satisfaction of the court, that; the grant was defective in substance in that it was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently and lastly where the grant has become inoperative.
16. While the applicants collectively contend that the respondents have been incompetent in dealing with their deceased's estate and that they have turned the properties only to serving their personal interests by, nay, squandering the money paid to the estate from the public trustee, there was no proof that the demands of the law to justify revocation had been met. Against that charge and in its rebuttal, the administrators have filed an affidavit and documents of accounts detailing that they have in fact spent more than they have received on behalf of the estate. Even the charge by the 1st applicant that he not involved in the petition for the said grant ought not be the only reason to revoke the grant if the administrators can be pushed to conclude the administration in a just and timely manner. The court thus finds it not in the interests of justice to revoke the grant as doing so would only delay the conclusion of the administration.

Which property should go to which dependant?

17. From the Affidavits filed and concessions recorded in Court, parcels No. Shitochi/1007, 1005, 1004, 1028, 1059 and 1006 were allocated by consent of all the ...
18. While it appears true that all beneficiaries, except Peter Mukhanji, met and agreed on how to share the estate on 22/08/2020 that may not be a consensual position even if only one person was to differ. The parties have however ceded considerable ground by the consent recorded before court on the 15.2.2023 by which five properties were shared out and one excluded from the estate for being not part of the net estate. That leaves only four parcels of land to be shared out while noting that one of the beneficiaries got nothing out of the settlement. The four assets that are to be shared out are, Shitochi/1235, 1347, Shitoto/495 and Sergoit/1045.



19. Taking into account that mathematical equality in distribution would yield an average of 0.56 Ha to each of the beneficiaries, the court considers that what the five have received by consensus be balanced against the now available property to achieve that equality in sharing. The available property now are of the following sizes; -Shitochi/1235 - 0.5 Ha. Shitochi/1347 - 0.44 Ha. Shitoto/495 - 0.7 Ha. and Sergoit/1045 - 0.83 Ha.
20. The person who hasn't got any property, Mercyline must get first before the rest. She expresses the desire to get Shitochi/1235 in whole a choice supported by at least four of the siblings. The court considers that desire reasonable and the one that support public policy that fragmentation of agricultural land beyond viable economic use needs to be discouraged. For that reason, let Mercyline get Shitochi/1235 in whole.
21. Up to this level only Mercyline has got a share that nears the desirable equal share to all the beneficiaries. What remains aggregates 1.97ha. While being minded to achieve equal sharing while at the same time mindful of the need to avoid uneconomical fragmentation, the court directs that the three parcels of land be shares as follows;-
 - a. Sergoit/1045 - 0.83 Ha.
Edward Lisutsa Mukhanji - 0.45 Ha.
Mukhanji Joseph Edwin - 0.38 Ha.
 - b. Shitoto/495 - 0.7 Ha
Peter Mukhanji - 0.51 Ha.
Timothy Mukhanji - 0.19 Ha.
 - (c) Shitochi/1347 - 0.44 Ha.
Fortunata Itemele - 0.34 Ha.
Mercline Mukhanji - 0.10 Ha.
22. In conclusion, the estate of the deceased as currently held by the two administrators for themselves and in trust for their other four siblings is distributed as follows:-
 - a. Isukha/Shitochi/1235 - 0.5 Ha.
Mercyline Mukhanji - Whole
 - b. Kakamega/Sergoit/1045 - 0.83 Ha.
Edward Lisutsa Mukhanji - 0.45 Ha.
Mukhanji Joseph Edwin - 0.38 Ha.
 - c. Isukha/Shitoto/495 - 0.7 Ha
Peter Mukhanji - 0.51 Ha.
Timothy Mukhanji - 0.19 Ha.
 - (c) Isukha/Shitochi/1347 - 0.44 Ha.
Fortunata Itemele - 0.34 Ha.
Mercline Mukhanji - 0.10 Ha.



23. Let a Certificate of Confirmation of grant issue in accordance with the consent filed and this Judgment to enable administrators conclude administration within ninety (90) days. Mention 4.6.2024.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 16TH DAY OF FEBRUARY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:-

Ms. Mburu for the Applicants

No appearance for Nandwa for the Respondents

Court Assistant: Polycap

