



REPUBLIC OF KENYA



**In re Estate of Marth Eladi Obelai (Deceased) (Succession Cause
75 of 2010) [2024] KEHC 737 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 75 OF 2010**

WM MUSYOKA, J

FEBRUARY 2, 2024

IN THE MATTER OF THE ESTATE OF MARTH ELADI OBELAI (DECEASED)

RULING

1. The deceased herein died on 9th October 1984, according to the certificate of death herein, serial number 172978. There is a letter from the Acting Chief of Amugura Location, dated 22nd March 2010, which indicates that he was survived by 5 children, being Vincent Eludi Asara, Crescent Ouma Eladi, Peter Obelai Eladi, Moses Arakit Eladi and Alimor Justus Eladi. Representation to the estate was sought by Asare Vincent Eladi. He listed himself as the sole survivor of the deceased. South Teso/Amukura/1692 is listed as the property that the deceased died possessed of. The cause was gazetted on 4th June 2010. Letters of administration intestate were made to the petitioner on 6th July 2010, and a grant duly issued to him, on even date. The administrator filed a summons, on 28th February 2011, for confirmation of his grant. He listed the 5 individuals, mentioned in the letter by the Chief, as the survivors of the deceased, and proposed that the sole asset be devolved equally between the 5 individuals. That summons was placed before Onyancha J, on 16th June 2011, and the grant was confirmed, in the terms proposed. A certificate of confirmation of grant was duly issued, bearing an even date. I shall refer to Asare Vincent Eladi, hereafter, as the administrator.
2. A summons for revocation of grant was filed herein on 1st July 2015, dated 29th June 2015. It was at the instance of Leah Midesha Kaburu, and it was on grounds that the grant was obtained on the basis of defective proceedings, fraud, false statements and concealment of matter from the court. It was also alleged that the administrator had failed to proceed diligently with the administration. Leah Midesha Kaburu averred that the deceased had only 2 sons, the administrator and Kabulu Obeley. She identified Kaburu Obeley as her husband. She stated that her husband had died, and she had obtained representation ad litem to his estate through Busia HCSC No. 71 of 2015. She averred that the deceased died possessed of South Teso/Amukura/1692, which ought to be shared out between his 2 sons, being the administrator herein and her late husband. She averred that after the demise of her late husband, the administrator evicted her from the estate. She stated that she had 6 children with her late husband, being Thomas Obiero, Daniel Omusu, Ginistone Umony, Joyce Osier, Betty Elogut and Merciline Ilare Emasse. She complained that her consent was not sought by the administrator, before



- he petitioned for representation, contrary to Rule 26 of the Probate and Administration Rules. She has attached a copy of a certificate of death in respect of her late husband, and the grant ad litem obtained in Busia HCSC No. 71 of 2015. She filed witness affidavits sworn by Francis Oburu Emuria, Africanus Ojuma Opero, Lawrence Emodo Ang'ido and Milton Ofomu, on 18th July 2016, to support her case.
3. The administrator responded to that application, vide his affidavit sworn on 4th January 2016. He denied being a brother of the husband of Leah Midesha Kaburu, explaining that the said late individual was in fact his uncle, being a brother of the deceased. He asserted that his late uncle had no claim to that property. He further denied that the family of his late uncle ever resided on the estate land. He stated that the late uncle was only accommodated on the estate land in 1999, after he became sickly and destitute at Webuye, where he previously resided alone. He asserted that Leah Midesha Kaburu only surfaced in 2015 claiming entitlement to a share in the estate of the deceased. He dismissed her as an opportunist.
 4. That application was heard by Kiarie J, who delivered a ruling on 8th April 2020, dismissing it, on grounds that the administrator had concealed matter from the court, by listing himself as sole survivor, contrary to the letter from the Chief, which had indicated that the deceased was survived by 5 sons. Kiarie J proceeded to re-appoint the administrator as such, jointly with Leah Midesha Kaburu. Leah Midesha Kaburu filed an application, dated 4th June 2021, for confirmation of the grant, which had been issued on 4th May 2021, proposing equal distribution of South Teso/Amukura/1692 between the 2 administrators. The application was placed before Karanjah J, on 23rd September 2021, and was confirmed in the terms proposed.
 5. I am now called upon to determine an application, dated 13th June 2023. It is for revocation of the grant, and it is brought at the instance of Jenipher Itupati Okute, who I shall refer to hereafter as the applicant. She avers that the grant was obtained secretly, without her consent, and by concealment of matter from the court. She asserts that she, and Mary Aunty Irukan, were daughters of the deceased. She complains that the 2 of them were not considered at confirmation, as they were not involved at all in the process. She states that the names of the 2 daughters were omitted from the papers filed when representation was sought.
 6. Mary Aunty Irukani swore her own affidavit on 10th July 2023, and filed it herein on 11th July 2023. She identifies herself as a daughter of the deceased, and complains that she was not informed when representation was sought herein by the original administrator. She asserts that the 2 administrators, appointed on 8th April 2020, were not the sole survivors of the deceased. She asserts that their nondisclosure made the process of obtaining the grant defective. She complains that, as a daughter of the deceased, she was not considered at distribution of the estate. She prays that the confirmation process be vacated, to pave way for fresh distribution.
 7. In response, the administrator, Vincent Asare Eladi, swore an affidavit on 18th July 2023. He identifies the applicant and Mary Aunty Irukan as her sisters, and daughters of the deceased. He discloses that the deceased had 8 children, being Jenipher Itupati Okute, the late Fobiano Alimuri Eladi, the late Andrew Itulia, Chriscent Ouma Eladi, Vincent Asare Eladi, Peter Obelai, Moses Arakit Eladi and Mary Aunty Irukan. He also identifies Feliste Amoding Eladi as a surviving spouse of the deceased. He states that the late Fabiano Alimuri Eladi and the late Andrew Itulia were survived by children. He indicates that the deceased left behind land measuring 14 acres, which should be distributed amongst the survivors. He asserts that Leah Midesha Kaburu was a stranger to the estate, and that they only saw her in court for the first time when she filed the earlier revocation application. He regrets leaving out the applicant had her sister, saying that he had been misadvised. He proposes that the applicant and her sister be made co-administratrices, after which they could perhaps sit and agree on distribution.



8. The administratrix, Leah Midesha Kaburu, replied to the application, vide her affidavit, sworn on 23rd August 2023. She avers that the orders made on 23rd September 2021, confirming the grant of 4th May 2021, were not appealed against, and that she had obtained orders to have her co-administrator sign the transmission forms. She complains that instead of the administrator signing the forms, he prompted his siblings to file a revocation application. She asserts that she is entitled to ½ share of the property, and has no problem with her co-administrator sharing the other ½ with his siblings. She asserts that the matter has already been settled, through the distribution ordered by the court. She urges that the court should not interfere with her share.
9. I directed on 28th November 2023, that the application be canvassed by way of written submissions. Both sides have complied, and I have read through the written submissions filed, and noted the arguments made.
10. I find these proceedings intriguing, and I have the sense that there is something fundamentally wrong with them. The proceedings were initiated by Vincent Asare Eladi, as sole survivor of the deceased. Curiously, he placed on record a letter from the area Chief, which indicated that the deceased had 5 sons. I wonder why Vincent Asare Eladi listed himself as the sole survivor of the deceased, in his petition, if the deceased had other sons, as indicated in the letter from the Chief. Again, it is a matter of some curiosity, that when he sought confirmation of his grant, he did not propose to have the entire property devolve upon himself, as the sole survivor, for he proposed that the same be distributed equally amongst the 5 sons listed in the letter from the Chief. Then Leah Midesha Kaburu waded into the picture, complaining that her late husband, an alleged son of the deceased, had been left out of the process. In response, Vincent Asare Eladi asserted that the alleged husband, Kaburu Obeley, was not a son, but a brother of the deceased, who was not entitled to a share in the estate. He went on to assert that Leah Midesha Kaburu was a stranger, suggesting that she was not a spouse of his uncle. The court was persuaded that Vincent Asare Eladi had not been candid with the court, when, in his petition, he alleged to be the sole survivor of the deceased, against the contents of the Chief's letter, which indicated that there were 5 survivors, only for him to have the estate distributed to the 5. There was, no doubt, some untidiness around that. In that ruling, the court did not make a determination, on whether Kaburu Obeley was a son or brother of the deceased. Thereafter, the fresh grant was confirmed, on an application, where it had been alleged that the deceased had been survived by 2 sons, Vincent Asare Eladi and Kaburu Obeley, and the court ordered equal distribution between the 2. Then Jenipher Itupati Okute and Mary Aunty Irukan emerged from the woodwork, alleging that they were blood daughters of the deceased, a claim supported by Vincent Asare Eladi. Leah Midesha Kaburu has not contested the allegation, neither has she confirmed it, but she vaguely referred to them as siblings of Vincent Asare Eladi. To make matters worse, Vincent Asare Eladi, in his replying affidavit of 18th July 2023, talks of the deceased having 8 children, excluding Kaburu Obeley, being 6 sons and 2 daughters. He has also listed a surviving spouse in that affidavit.
11. I am persuaded that there is lack of clarity on who the survivors of the deceased and the beneficiaries of the estate are. Is it the 5 sons listed in the Chief's letter, or the 2 alleged by Leah Midesha Kaburu, or are they 7 when one adds the 2 daughters to the 5 sons, or are they 9 as per the last affidavit of Vincent Asare Eladi, or are they 10 when Kaburu Obeley is counted as one of the sons? Secondly, who was Kaburu Obeley to the deceased? Was he a son of the deceased, as alleged by Leah Midesha Kaburu? Or a brother of the deceased, as alleged by Vincent Asare Eladi? Thirdly, was the deceased survived by a spouse? These issues were not addressed by Kiarie J, when he determined the revocation application, dated 29th June 2015, on 8th April 2020. The issue before Kiarie J was whether the grant was properly granted. Kiarie J was satisfied, from the material on record, without even having to consider the issues raised by Leah Midesha Kaburu, that the administrator had concealed information from the court, regarding



existence of his brothers, who had been disclosed by the Chief, in a letter which the administrator himself had filed in court. That of itself was enough, without considering the other issues. The issue raised by Leah Midesha Kaburu, as to whether her alleged husband was a son of the deceased, was best addressed at distribution, which was to follow after the revocation. Karanjah J did not address it, at the confirmation of the second grant on 23rd September 2021. There is a cloud of uncertainty, and I believe it would be untidy to proceed to allow the estate herein to be distributed in the manner ordered by Karanjah J, before the sky clears. This is the sort of scenario that usually emerges whenever these applications are canvassed by way of written submissions, rather than by viva voce evidence, where an opportunity would be given to the parties to challenge the evidence by way of cross-examination. The written submissions approach is a favourite shortcut, beloved of the Advocates for the parties, but it often leads to unsatisfactory results. I believe an injustice would be occasioned, should the status quo remain.

12. I believe that, if the deceased herein and the late Kaburu Obeley were brothers, and both were entitled to South Teso/Amukura/1692, it would be proper to have that property shared out equally between them, as was ordered by Karanjah J, so that the children of the deceased get to share one ½ share, and the other ½ share would go to the estate of the late Kaburu Obeley. However, the parties are not on all fours, or agreement, on the issue, for one side asserts that the 2 were brothers, while the other asserts that the late Kaburu Obeley was a son of the deceased. Secondly, one side asserts that, as a brother, Kaburu Obeley was not entitled to a share. The application, that Karanjah J handled, was by Leah Midesha Kaburu, and she had averred that the late Kaburu Obeley was a son of the deceased, and that the deceased had only 2 sons, Kaburu Obeley and Vincent Asare Eladi, hence the equal shares ordered. However, the material on record suggests that the deceased had more than 2 children. So, if Kaburu Obeley was a son of the deceased, why would South Teso/Amukura/1692 be distributed just between his estate and Vincent Asare Eladi, to the exclusion of the other children of the deceased, that is to say the other 4 or 5 sons and the 2 daughters? Where would be the justice of that approach? A full trial should have been conducted, to determine the status of Kaburu Obeley in the estate, and his entitlement to a share therein, and to finally determine who the actual survivors deceased and beneficiaries of the estate are.
13. The proceedings, so far conducted, were based on half-baked information. The court was not given proper information on who comprised the family of the deceased. Distribution is based on the relationship between the deceased and the persons who allegedly survived him. The configuration of distribution would differ, depending on the relationships. Where the deceased is survived by a spouse and children, section 35 of the *Law of Succession Act* would apply, and distribution would be as per section 35(1), with the property devolving to the surviving spouse, during life interest, and thereafter to the children equally. Where the deceased is survived by children only, section 38 would apply, and the property would be distributed equally between them. If it is alleged that the estate property was held in trust, by the deceased, on behalf of his siblings, then section 39 would apply, should such a trust be established, and the property would be shared out equally amongst the siblings. It would be imperative that there be proper disclosure of the survivors and beneficiaries, to enable the court adopt the correct mode of distribution, based on the relationships. The *Law of Succession Act* and the Probate and Administration Rules have very clear guidelines on who ought to be disclosed. Unfortunately, the parties hereto have not been faithful to that, hence the messy situation that currently obtains. The disclosures have been done piecemeal, in small doses, instead of them making a single full and complete disclosure. It would be grossly unjust to proceed to transmission of the estate when these issues have not been resolved.
14. I am of the persuasion that Vincent Asare Eladi and Leah Midesha Kaburu are not the proper persons to administer the estate herein, for if they were, they would not have misled the court with half-baked



information. I am also alive to the fact that they were appointed by the Judge, upon a summons for revocation of grant. However, I note that the deceased died in 1984, and representation was not granted until 2010. There should be closure, and I believe revocation of the grant would not be the best solution. The applicant, and her sister, appears to be more aggrieved about how the estate was distributed, and I agree that the distribution excluded a large constituency of survivors and beneficiaries.

15. I believe the best way forward should be to vacate the orders made on 23rd September 2021, and to cancel the certificate of confirmation of grant issued thereafter, based on those orders. I do hereby vacate the said orders, and cancel the certificate of confirmation of grant based on them. Let the administrators, within 45 days, file a fresh application for confirmation of grant, where all the 10 interested individuals are involved in the process, that is to say the 2 administrators, the 1 alleged surviving spouse, the 2 daughters, the other 3 surviving sons of the deceased, and the families of the 2 dead sons. The matter shall be mentioned after 45 days for compliance, and further directions. There is leave, of 30 days, to file an appeal at the Court of Appeal, for whoever may be aggrieved by these orders and directions. Each party shall bear their own costs. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 2ND DAY OF FEBRUARY 2024.

W.M. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Vincent Asare Eladi, co-administrator, in person.

Advocates

Mr. Ouma, instructed by B.M. Ouma & Company, Advocates for the applicant.

Mr. Shihemi, instructed by Maloba & Company, Advocates for Leah Midesha Kaburu.

