



REPUBLIC OF KENYA



In re Estate of Francis Ekumba Masikana (Deceased) (Succession Cause 16 of 2009) [2023] KEHC 18051 (KLR) (2 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18051 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 16 OF 2009**

WM MUSYOKA, J

JUNE 2, 2023

N THE MATTER OF THE ESTATE OF FRANCIS EKUMBA MASIKANA (DECEASED)

RULING

1. On December 10, 2021, I delivered a ruling herein, where I expressed dissatisfaction, in terms of the proviso to section 71(2) of the *Law of Succession Act*, cap 160, Laws of Kenya, and Rule 40(4) of the *Probate and Administration Rules*, on grounds that the persons beneficially entitled to a share in the estate had not been properly ascertained, and allocated the shares due to them.
2. I noted, in that ruling, that one of the persons who had obtained representation to this estate was a brother of the deceased. He had proposed that the estate be distributed to the brothers of the deceased and to 1 son of the deceased, yet the law is clear that where a dead person is survived by children, the children take priority with respect to administration and distribution, and other relatives play a second fiddle. I noted, as my predecessor, Mwita J had in 2016, that this succession was being driven by siblings of the deceased rather than his immediate family, which raised a red flag. Mwita J gave directions on the way forward, which were not followed. When the confirmation application was placed before me, I was still unable to distribute the estate as there was still non-compliance with the proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the *Probate and Administration Rules*, and I gave further directions.
3. The ruling, of December 10, 2021, specifically required an explanation on how Lawrence Nerima Masikana and Julius Chimwani Musikana were related to the deceased. It also required that the family of the deceased, comprised of Josephat Musa Ekumba, Patrick Odongo Ekumba, Gaudencia Ekumba, Monica Ekumba and Carolyne be provided for. I directed the administrator to file an affidavit to deal with those issues.
4. The administrator filed an affidavit, sworn on December 14, 2022. He discloses that the deceased and himself, and Julius Nerima Masikana, were brothers, and were entitled to South Wanga/Lureko/346, which their late father had shared out between the 3 of them. He identifies the persons entitled to the share of their late brother as his widow, Mary Ekumba; sons, Josephat Odongo Ekumba and Patrick Ekumba; and daughters, Gaudencia Ekumba, Monica Ekumba and Carolyne Ekumba. He proposes



- that the widow of the deceased be appointed as a co-administrator. He has attached a copy of the official search certificate for South Wanga/Lureko/346, dated December 5, 2022, showing it to have been registered in the name of the deceased on September 1, 1967. He has not proposed distribution of South Wanga/Lureko/346 to Mary Ekumba, Josephat Odongo Ekumba, Patrick Ekumba, Gaudencia Ekumba, Monica Ekumba and Carolyne Ekumba, contrary to what I had directed in my ruling of December 10, 2021.
5. This cause is not about the estate of the father of the deceased, the administrator and their brother Julius Chimwani Masikana, but in the estate of the late Francis Ekumba Masikana. The property, South Wanga/Lureko/346, is not registered in the name of the father of the deceased, the administrator and their brother Julius Chimwani Masikana, but in the name of the late Francis Ekumba Masikana. The official search certificate for South Wanga/Lureko/346 does not indicate that the deceased herein held South Wanga/Lureko/346 in trust for the administrator and Julius Chimwani Masikana, and that makes it critical that the family of the deceased, that is to say his widow, Mary Ekumba; sons, Josephat Odongo Ekumba and Patrick Ekumba; and daughters, Gaudencia Ekumba, Monica Ekumba and Carolyne Ekumba, be actively involved in the process.
 6. It could be that the deceased held South Wanga/Lureko/346 in resulting trust for the 1st administrator and Julius Chimwani Masikana. In which case, if his widow, Mary Ekumba; sons, Josephat Odongo Ekumba and Patrick Ekumba; and daughters, Gaudencia Ekumba, Monica Ekumba and Carolyne Ekumba, agree to, that the grant would be confirmed, and the estate distributed, providing for the family of the deceased and his 2 brothers. If the the family of the deceased objects to that, given that the title does not indicate any trust, then a hearing will have to be conducted, to determine whether such a trust exists to warrant the administrator and Julius Chimwani Masikana getting a share in South Wanga/Lureko/346. Rule 41(3) of the Probate and Administration Rules requires that, in the event such a dispute arises, the property be appropriated and set aside to allow either party to move the relevant court appropriately, for determination of the matter as to whether such trust exists. See *In re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim, J) and *In re Estate of Mwangi Gikonyo (Deceased)* [2017] eKLR (Waweru, J).
 7. I note that the grant was made on May 4, 2009, to Lawrence Nerima Masikana and Patrick Odongo Ekumba. Whereas Lawrence Nerima Masikana has been very active in the matter in court, Patrick Odongo Ekumba has not. I do not know whether he has been aware of what has been going on. His mother, Mary Ekumba, has priority in administration over him, and I shall incorporate her to this administration, as suggested by Lawrence Nerima Masikana.
 8. I have seen correspondence on record which indicates that while this matter has been in court, where the court has been giving directions, the parties have also been very active before the Deputy Commissioner for Mumias West Sub-County, where the Deputy County Commissioner's office has been summoning the same parties to appear before him for fixing boundaries for the purpose of subdivision of the property, South Wanga/Lureko/346. The letters before me are dated April 14, 2021 and the other April 27, 2021. That would mean that the parties are conducting parallel succession proceedings, one here in court, and the other before the Deputy County Commissioner for Mumias West. Clearly, the reason why the court is not able to make headway in this matter is because the parties are busy before the Deputy County Commissioner. These parallel proceedings can only cause confusion in the minds of the parties, who may find themselves having to decide on which proceedings to give primacy, between the court process and the process before the Deputy County Commissioner. The danger with these parallel proceedings, which are exclusive of each other, would be conflicting outcomes, creating an impression that the 2 arms of government are not working in tandem, but at cross-purposes.



9. The effort by the Deputy County Commissioner, to reconcile parties and to mediate disputes, is appreciated by the court. However, where a matter is in court, protocol, to avoid confusion, would require that the Deputy County Commissioner ought not get involved, unless or until the court refers the dispute to him or her, to facilitate reconciliation or mediation. To proceed otherwise is to create a conflict between what the courts are doing and the efforts by the Deputy County Commissioner. It could lead to conflicting outcomes. It creates confusion, and, in the end the parties could end up in a worse situation than if 1 of the 2 State organs was handling the matter. In the eyes of some ordinary persons the court and the office of the County Commissioner represent the same thing, they are government organs, and either of them can sort out whatever issues the citizen places before them, which is removed from the reality that the 2 have different mandates.
10. My understanding of the law, in this case the *Law of Succession Act*, is that once a person dies, succession to the estate is undertaken, by his survivors or by the persons beneficially entitled, through a court process. Being a court process, the court is fully in charge, and should control all the steps in the matter, up to the point when it gives orders on how the property is to be distributed. If there is any need, before then, for intervention by the National Government actors on the ground, like Chiefs or County Commissioners, then the court gives orders referring the matter to either the Chief or the County Commissioner. Any intervention by the Chiefs or County Commissioners in these matters, without reference from the court, for these matters that are in court, amount to interference, which causes confusion and does not help the parties in the end.
11. In this case, there has been intervention by the Deputy County Commissioner, without reference from or to court, in the matter. It has created confusion, and has made it very difficult for the court to progress the matter, as the parties are also being summoned to the office of the Deputy County Commissioner. As the Deputy County Commissioner is closer to the parties, in terms of access, and to avoid confusing the parties more, I shall let the process before the Deputy County Commissioner to go on to its logical conclusion, with liberty to the parties to move the court, if necessary. Once an outcome is arrived at, let the same be placed before the court for adoption. The only caution I should sound is that the Land Registrar ought not proceed to subdivide South Wanga/Lureko/346 without the court herein making an order confirming the grant herein, for the ultimate order for distribution of land belonging to a dead person lies with the court. See section 61 of the *Land Registration Act*, No. 3 of 2012 (Cap 300), Laws of Kenya. Distribution and subdivision of land on the ground can only be done after the court has confirmed the grant. Even as the Deputy County Commissioner goes about his duties, in this regard, it should be borne mind that the court has not given orders for distribution and subdivision of South Wanga/Lureko/346, and none should be undertaken, by anyone, including any State office or organ, before the confirmation process is finalized by the court. It may be well to know that any purported distribution and subdivision of South Wanga/Lureko/346, on the ground, by anyone, undertaken before the court confirms the grant, will be a nullity.
12. The final orders are:
 - a. That I hereby appoint Mary Ekumba an administratrix of the estate herein, alongside the current administrators;
 - b. That the grant of letters of administration intestate, issued on June 11, 2009, shall be amended to include the name of Mary Ekumba;
 - c. That determination of the summons for confirmation of grant, dated June 15, 2016, remains postponed, to await finalization of the processes that the Deputy County Commissioner for Mumias West Sub-County is conducting;



- d. That the matter shall be mentioned after 3 months, to allow for completion of the exercise by the Deputy County Commissioner for Mumias West Sub-County; and
- e. That the Deputy Registrar shall cause certified copies of this ruling to be made available to the Kakamega County Commissioner, the Deputy County Commissioner for Mumias West Sub-County and the Kakamega Land Registrar.

13. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 2ND DAY OF JUNE 2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Lawrence Nerima Masikana, the administrator.

