



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Lumakanda Katuyi (Deceased) (Succession Cause
25 of 2002) [2023] KEHC 18388 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 25 OF 2002**

WM MUSYOKA, J

JUNE 2, 2023

IN THE MATTER OF THE ESTATE OF LUMAKANDA KATUYI (DECEASED)

RULING

1. I am called upon to determine an application for confirmation of grant. There are several such applications pending, although the one that I fixed for hearing is dated November 27, 2006. The applications, dated May 13, 2022 and May 16, 2022, are also for confirmation of grant, but brought by different persons and make different proposals.
2. I did preliminary hearings on February 14, 2022, July 18, 2022 and January 30, 2023. It emerged that the administrators had not properly ascertained the persons who are beneficially entitled to a share in the estate, as required of them by 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*, as it transpired that the deceased had 6 daughters, who had not been disclosed in the petition and the applications. When I directed that the 6 be produced in court, only 1 was availed, Hellen Wafula.
3. The deceased herein died in 1983, after the *Law of Succession Act* had come into force. That means that distribution of the estate is governed by the *Law of Succession Act*. He died intestate, meaning that the estate is for distribution under Part V of the *Law of Succession Act*. Under Part V, sons and daughters of the deceased are treated equally, and are entitled to equal share in the estate. Sections 35(5) and 38 state that position in mandatory terms. So, both all the sons and all the daughters of the deceased must be disclosed.
4. Part V is for reading together with article 27 of the *Constitution*, which commands that men and women be treated equally, and it also outlaws discrimination based on gender. See *Ludiah Chemutai Bett v Joseph Kiproop Tanui* [2017] eKLR (M Ngugi, J). Article 2(4) of *the Constitution* makes any law, which is inconsistent with the *Constitution*, null and void, including customary law. It is notorious that African customary law discriminates against women when it comes to succession. Article 2(4) of the *Constitution* renders African customary law null and void, where it is inconsistent with the *Constitution*. If Luhya customary law is the basis for the administrators herein not disclosing the 6 daughters of the deceased, then they should understand that they are relying on a law which the



- Constitution has rendered null and void. See *In re Estate of M'Itunga M'Imbutu (Deceased)* [2018] eKLR (Gikonyo, J), *In re Estate of Stanley Mugambi M'Muketha (Deceased)* [2019] eKLR (Gikonyo, J) and *Wanjiru & 4 others v Kimani & 3 others* (Civil Appeal 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA).
5. Article 2(4) of the Constitution also renders invalid any act, by anyone, including the court, if it violates or contravenes the Constitution. The failure or omission to disclose the 6 daughters of the deceased, in this cause, is an act which violates or contravenes Article 27, for it discriminates against the 6 daughters of the deceased. That act of discrimination renders the applications, that have been placed before me, invalid. It also renders any order that I may make, on distribution of the estate, based on the invalid applications, invalid. Proceeding to determine the applications before me, for as long as they do not disclose the 6 daughters, would be to act in vain, for the orders would be nullities. See *In re Estate of M'Itunga M'Imbutu (Deceased)* [2018] eKLR (Gikonyo, J), *In re Estate of Stanley Mugambi M'Muketha (Deceased)* [2019] eKLR (Gikonyo, J) and *Wanjiru & 4 others v Kimani & 3 others* (Civil Appeal 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA).
 6. I gave the administrators a chance to bring the 6 daughters to court, so that the court could take their views, but they did not comply. The administrators should understand that proceeding with succession causes where the daughters do not participate does not mean that the daughters will be deemed to have abandoned their entitlement, for the court should proceed to provide for them even if they do not participate. See *Christine Wangari Gichigi v Elizabeth Wanjira Evans & 11 others* [2014] eKLR (Emukule, J) and *In re Estate of Joyce Kanjiru Njiru (Deceased)* [2017] eKLR (Gitari, J).
 7. I will give the administrators a second chance, before dismissing their applications, for being non-compliant with articles 2(4) and 27 of the Constitution. They shall file a further affidavit, where they shall disclose all the sons and all the daughters of the deceased, and allocating to them their due share of the estate. The affidavit shall be filed within 30 days, and, in the event of default, the applications, dated November 27, 2006, May 13, 2022 and May 16, 2022, shall stand dismissed. 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

Alfred Chekeni Lumakanda and Owili Lumakanda, the administrators, in person.

