



REPUBLIC OF KENYA



**In re Estate of Kwasila Luharo (Deceased) (Succession Cause  
695 of 2010) [2023] KEHC 20337 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20337 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 695 OF 2010**

**WM MUSYOKA, J**

**JULY 21, 2023**

**IN THE MATTER OF THE ESTATE OF KWASILA LUHARO (DECEASED)**

**JUDGMENT**

1. The deceased herein died on December 1, 1986. Representation to his estate was sought by Adelaide Wileka Muterwa, in her purported capacity as granddaughter of the deceased, vide a petition filed herein on October 13, 2010. She expressed the deceased to have had been survived by 4 individuals, being 2 granddaughters, 1 grandson and 1 daughter-in-law, who she named as herself, Frida Lihavi Mutemwa, Fred Lugare Chunga and Mary Mutsami Ayuma, respectively. He was said to have died possessed of Isukha/Shiswa/908. Letters of administration intestate was subsequently made to her on May 24, 2011, and a grant was duly issued, bearing an even date. She applied for confirmation of her grant, by an application, dated June 16, 2011, where she disclosed herself as the sole survivor of the deceased, and the estate, Isukha/Shiswa/908, was devolved wholly upon her, by orders made on July 27, 2011, and a certificate of confirmation of grant was duly issued, bearing an even date.
2. Fredrick Ligare Otunga filed a summons for revocation of the grant made to Adelaide Wileka Muterwa. The application was dated April 2, 2012, and was filed herein on May 10, 2012, and was based on grounds that the grant was obtained fraudulently, and on the basis of false statements. He disclosed that he was a grandson of the deceased, who had 2 sons, both dead, being John Muterwa and Maurice Otunga Kwasira. Fredrick Ligare Otunga averred that he was a son of Maurice Otunga Kwasira, and that John Muterwa died without a child. He asserted that he was the sole survivor of the deceased, and dismissed Adelaide Wileka Muterwa as an imposter. Elisha Shitambasi Akweya filed an affidavit, sworn on December 4, 2012. He said that the deceased was his cousin. He said that his nephew, John Muterwa, had only 1 child, called Harambee, who died. After John Muterwa died, his widow left, and remarried, and begat 3 daughters with her new husband, one of whom was Adelaide Wileka. He asserted that Adelaide Wileka was not related to the deceased, saying that she should inherit from her father, the man her mother remarried after John Muterwa died. Oral evidence was taken on the revocation application, and Njagi J delivered a ruling on it, on May 24, 2017. The court found that Adelaide Wileka Muterwa was not a granddaughter of the deceased, and that the rightful heir was



- Fredrick Ligare Otunga. The grant made to Adelaide Wileka Muterwa was revoked, and a fresh grant was made to Fredrick Ligare Otunga, and was issued to him on July 17, 2017.
3. Adelaide Wileka Muterwa brought an application, dated June 28, 2017, seeking review of the orders of May 24, 2017, on grounds of error on the face of the record and discovery of new material. That application was dismissed, in a ruling that was delivered on February 6, 2020, on grounds that it had not been demonstrated that she had new and important evidence, or that there was an error on the face of the record.
  4. I am now tasked with determining a summons for confirmation of grant, dated June 29, 2018, which was filed herein on July 18, 2018, at the instance of Fredrick Ligare Otunga, who I shall refer hereafter as the applicant. He lists himself as the sole survivor of the deceased. He has listed Isukha/Shiswa/908 as the sole asset of the estate.
  5. Adelaide Wileka Muterwa filed an affidavit of protest, sworn on September 28, 2020. I shall refer to her as the protestor. She averred to be a granddaughter of the deceased, being a son of John Muterwa. She said that the land was demarcated on the ground, and that Isukha/Shiswa/908 should be shared equally between the family of the petitioner and her family, so that each gets 1.30 hectares each. She averred that her father had 4 children, who she named as Frida Lihavi Muterwa, Dora Mulondola Muterwa, Alexander Kwabila Muterwa and Adelaide Wileka Muterwa. She stated that Dora and Alexander had died, with Alexander leaving behind a widow and children. She averred that the issue of Isukha/Shiswa/908 was handled by the local Chief, who had distributed the land between them, and marked boundaries on the ground. She attached documents, purportedly from the Chief of Murhanda Location, dated March 4, 2010 and August 9, 2010.
  6. To that protest, the applicant filed a reply, vide an affidavit sworn on December 8, 2020. He asserted that the purported subdivision by the Chief was baseless, and the Chief had no authority to distribute the land.
  7. Another affidavit was sworn by Wilfreda Lihavi, on February 16, 2021, and filed herein on even date. Its averments are word for word a replica of the affidavit by the protestor of September 28, 2020.
  8. The confirmation proceedings were disposed of by way of *viva voce* evidence.
  9. Wilfreda Lihavi was the first to take the stand, on May 25, 2022. She said that she was a granddaughter of the deceased, being a daughter of his late son, John Muterwa. She described the protestor as her sister. She conceded that she had given evidence earlier, during the hearing of the revocation application, and she had read the ruling that Njagi J delivered in 2017. She stated that she did not agree with the ruling, and said that they had appealed. Larten Musikohe Ndula testified next. He was the Chief who had intervened in the matter, and shared out the land between the 2 sides of the family. During cross-examination, he said that he did not know the mother of the protestor and Wilfreda. He said Harambee was a child of John Muterwa, who killed the deceased, was jailed, and upon his release he died. He said that he did not know whether the protestor was born after her mother separated from the deceased. He said that he never saw the certificates of birth for the protestor and Wilfreda. He said he was unaware that the court had ruled that the protestor and Wilfreda were not children of the deceased, saying that he did not know what had been happening in court. He denied backdating the documents that were presented in court, purportedly signed by him.
  10. The applicant testified on July 18, 2022. He said he was the sole survivor of the deceased. He asserted that he had no siblings, as all of them died young. He described John Muterwa as his uncle, who was survived by Harambee, who had also died. He asserted that the protestor and her sister were not survivors of the deceased, as they were not children of John Muterwa. He stated that their mother



- abandoned the late John Muterwa when he was sick, and got married to another man, and she did not even attend the burial of John Muterwa. He asserted that the protestor and her sister were not his cousins.
11. The parties did not submit.
  12. Confirmation of grants is provided for in section 71 of the *Law of Succession Act*, Cap 160, Laws of Kenya. Confirmation is about approving the administrators to carry on administration of the estate to completion, and where found wanting, to revoke their grants, and appoint other administrators for that purpose. The second objective is distribution of the estate.
  13. On confirmation of administrators, the applicant is the sole administrator. He was appointed on March 24, 2017, to take the place of the protestor, whose grant was revoked. There is no evidence that the applicant failed to administer the estate in accordance with the law.
  14. On distribution, 2 things have to be addressed. One, the persons beneficially entitled to shares in the estate, and two, the assets to be distributed. After the persons beneficially entitled and the property available for distribution have been identified or ascertained, the court then considers how the property identified is to be shared out between the persons ascertained as beneficially entitled to a share in the estate.
  15. The issue of who survived the deceased is now water under the bridge. It was resolved by Njagi J, in the ruling of May 24, 2017. The court found that it had no evidence before it, establishing that the protestor and her sister were related to the deceased. The applicant was identified as the lawful heir of the deceased. The protestor filed an application, seeking to have the orders of May 24, 2017 reviewed, but that application was dismissed on February 6, 2020. I have not seen evidence of an appeal having been filed at the Court of Appeal, against the orders of February 6, 2020. The issue as to whether the protestor and her sister were survivors of the deceased, is *res judicata*. I cannot revisit it in these confirmation proceedings.
  16. The protestor introduced the Chief into the matter, purporting that he had intervened in the matter and shared out the land between her and the applicant. Whether the Chief intervened in the matter is neither here nor there. The Chief has no jurisdiction to distribute the estate of a dead person. The mandate to do so is vested in the court, under the *Law of Succession Act*. The intervention of the Chief is limited to what is provided in section 46 of the *Law of Succession Act*, which does not cover distribution of the estate. Distribution is ordered by the court, under section 71 of the *Law of Succession Act*. Intervening in an estate, and purporting to distribute it, without leave of court, is outlawed by section 45 of the *Law of Succession Act*, and it is a criminal act. The Chief engaged in criminality, if he purported to have distributed the land, and fixed boundaries. He had no authority to handle the property of a dead person in that manner. Whatever he did amounted to nothing, and was null and void, and invalid *ab initio*. In any event, whatever the Chief purported to do was placed before the court in the review application, dated June 28, 2017, which the court dismissed, on February 6, 2020. The issue of the validity or otherwise of what the Chief did is also *res judicata*.
  17. On the assets, the deceased is said to have died possessed of only 1 property, Isukha/Shiswa/908. I have seen a certificate of official search, dated December 13, 2011. It indicates that the property was registered in the name of the deceased on August 7, 1973, and remains so registered. It is free property, except for a caution that was registered on May 2, 2010, by the applicant, and which, I believe, he would have no difficulty removing.
  18. The applicant is the sole survivor. He is a grandson of the deceased. Section 41 of the *Law of Succession Act* enables grandchildren to take the share that ought to have gone to their dead parents.



Consequently, the applicant is entitled wholly to the share that would have devolved to his late father, by dint of section 38 of the *Law of Succession Act*.

19. The final orders are as follows:

- a. That the protest by Adelaide Wileka Muterwa, dated September 28, 2020, is hereby dismissed, and the summons for confirmation of grant by Fredrick Ligare Otunga dated July 29, 2018, is hereby allowed;
- b. That the grant made to Fredrick Ligare Otunga, on May 24, 2017, is hereby confirmed;
- c. That Isukha/Shiswa/908 shall devolve wholly and absolutely upon Fredrick Ligare Otunga, and a certificate of confirmation of grant shall issue, accordingly;
- d. That the applicant has 6 months from the date herein, by dint of section 83(g)(i) of the *Law of Succession Act*, to transmit the estate in terms of the orders above, and to complete administration of the estate herein;
- e. That the matter shall be mentioned, after 6 months, to confirm transmission of the estate, and completion of the administration, so that the court file herein can thereafter be closed;
- f. That each party shall bear their own costs; and
- g. That any party aggrieved, by the orders made herein, has leave of 30 days, to move the Court of Appeal, accordingly.

20. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS.....  
21<sup>ST</sup>.....DAY OF.....JULY.....2023**

**WM MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Appearances**

**Mr. Mango, instructed by DSG Mango & Company, Advocates for the applicant.**

**Mr. Manyoni, instructed by Momanyi Manyoni & Company, Advocates for the protestor.**

