



REPUBLIC OF KENYA



In re Estate of Lolo Inzoberi Indika (Deceased) (Succession Cause 354 of 2014) [2023] KEHC 21485 (KLR) (1 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21485 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 354 OF 2014**

WM MUSYOKA, J

AUGUST 1, 2023

IN THE MATTER OF THE ESTATE OF LOLO INZOBERI INDIKA (DECEASED)

RULING

1. The deceased herein died on November 6, 1979. A letter from the Chief of Butso East Location, dated April 23, 2014, indicates that he was survived by 4 individuals, being 3 sons and a daughter-in-law, namely Patterson Mulati Inzobeli, Julius Kombo Lolo, Khatikhwi Lolo and Ruth Muchenya. A liability is also listed, Jonathan Anunda Mushefi. He is shown as having died possessed of Butso/Indangalasia/463. Representation was sought by Patterson Mulati Inzobeli and Julius Kombo Lolo, in their capacities as sons of the deceased. They listed the 3 sons and 1 daughter-in-law as the survivors of the deceased. Butso/Indangalasia/463 was listed as the property that the deceased died possessed of. Jonathan Anunda Mushefi was listed as a liability. Letters of administration intestate were made to Patterson Mulati Inzobeli and Julius Kombo Lolo on July 24, 2014, and a grant was duly issued, dated September 1, 2014. I shall refer to Patterson Mulati Inzobeli and Julius Kombo Lolo corporately hereafter as the administrators.
2. I am tasked with determining a summons for confirmation of grant, filed on December 9, 2014, by Patterson Mulati Inzobeli, dated September 15, 2014. He identifies the survivors of the deceased as Patterson Mulati Inzobeli, Julius Kombo Lolo, Khatikhwi Lolo and Ruth Muchenya. He identifies 1 asset as available for distribution: Butso/Indangalasia/463. He proposes that the said property be shared out between Patterson Mulati Inzobeli, Khatikhwi Lolo, Ruth Muchenya and the alleged liability, Jonathan Anunda Mushefi, so that Patterson Mulati Inzobeli gets 7.0 acres, Khatikhwi Lolo 2.0 acres, Ruth Muchenya 4.0 acres and Jonathan Anunda Mushefi 2 acres. I shall thereafter refer to Patterson Mulati Inzobeli as the applicant.
3. Julius Kombo Lolo has filed an affidavit of protest, sworn on December 17, 2019. He avers that although he has been listed as a survivor of the deceased, he had not been allocated any share in Butso/Indangalasia/463, yet he was in occupation of about 3 acres of the land, and his home had been on that land since time immemorial. He accuses the applicant of disinheriting him.



4. The applicant filed another affidavit on November 3, 2020, sworn on October 30, 2020. He avers that the deceased had married 5 wives. He has named 4 of them, saying that he did not know the name of the fifth wife, as she was never brought home, but she was the mother of Japheth Lolo. The 4 who are named are Peletina Omar, Tabitha Atsing'a, Ritah Mumanyi and Asanda Avuko. The children of Peletina Omar are said to be the protestor, the late Roseland Mukoyia and the late Fenda Nerima. Tabitha Atsing'a had only 1 child, the late Inzobeli Lolo. The children of Rita Mumanyi are Imbayi Lolo, Sussy Ameyo and Joyce Alasha. Asanda Avuko had the applicant, Khatikhwi Lolo and the late Peter Muchenya. He avers that the deceased had distributed his property to his children before he died, and that the older sons registered their shares during land adjudication, and became first registered proprietors in 1969. He lists those who had been settled inter vivos. The applicant, also known as, Omurambi Lolo, got Butsotso/Indangalasia/459, 8 acres; Ingutia Lolo, Butsotso/Indangalasia/460, 3.42 hectares, Inzobeli Lolo, Butsotso/Indangalasia/461, 7.28 hectares; and Imbayi Lolo, Butsotso/Indangalasia/462, 1.62 hectares. He explains that Butsotso/Indangalasia/463 remained in the name of the deceased. He asserts that the deceased bequeathed members of the 5th house Butsotso/Indangalasia/463 equally, but he had agreed with his brothers to share the same so that each gets 4 acres, and the balance of 3 acres be devolved to him because he was the one funding the process. He asserts that the protestor is not entitled to a share in Butsotso/Indangalasia/463, as he would benefit twice, which would be unfair. He has attached copies of search certificates for Butsotso/Indangalasia/459, 460, 461 and 462, registered in the names Omurambi Lolo, Ingutia Lolo, Inzoberi Lolo and Imbayi Lolo, respectively, measuring 8 acres, 8.006 acres, 17.989 acres and 4.003 acres, respectively.
5. Directions were given on September 28, 2020, for disposal of the matter by viva voce evidence.
6. The protestor was the first to testify, on September 16, 2021. He stated that the deceased was his father. He said that the deceased had 5 wives, and the applicant was a half-brother from 1 of the 5 wives. He said he was from the 1st house, and the applicant from the 5th house. He said that he was entitled to 3 acres out of Butsotso/Indangalasia/463, where he had a boma. He said the deceased had shared out his estate before he died. He said that he had filed pictorial evidence of the houses in the boma, 1 of which he constructed in 1978. He said that it was the deceased who showed him where to construct his house on Butsotso/Indangalasia/463, and the deceased himself laid the foundation for the house. He stated that his mother and 2 of his children were buried at his boma, in 1971, 1972 and 1978. He stated that 1 of his brothers and a child of his sister were also buried there. He said that his boma comprised of 5 houses. He explained that Butsotso/Indangalasia/463 was in 4 pieces, occupied by himself, the applicant, Khatikhwi Lolo and Ruth Muchenya. He stated that Khatikhwi Lolo had sold his share. He proposed that Butsotso/Indangalasia/463 should be divided into 4 equal portions and shared out to all 4 of them. He said that the deceased had given him the whole of Butsotso/Indangalasia/459. He said that his brothers had also been given their own pieces of land. He said that his brothers Jafred, Kefa, Hezekiah Imbayi and Muchenya were showed the boundaries fixed on Butsotso/Indangalasia/463 by the deceased in 1977. He said that that distribution was done in 1977. He said that distribution had been done according to wives, in 1967 and 1968. He said that Butsotso/Indangalasia/459 was a gift to him, from the deceased, made in 1968, and was 8 acres, registered in his name. Jafred had also been given Butsotso/Indangalasia/459. He said that Inzobeli, Jafred, Imbayi, himself and the applicant had all been given land in 1968 or thereabouts, but he could not tell whether the land was registered in their names. He said Butsotso/Indangalasia/463 was 17 acres, out of which the deceased had given him 3 acres. He said Butsotso/Indangalasia/460 was given to Ingutia Lolo, Butsotso/Indangalasia/461 to Inzobero Lolo and Butsotso/Indangalasia/462 to Imbayi Lolo. He said that the deceased involved all the children who were available in the said distribution, but the applicant and Khatikhwi were not present, and they had already been given their portions. He said that the 5th house had put up a house



- on Butsotso/Indangalasia/463, but there were boundaries. He said that he had given out Butsotso/Indangalasia/459 to his sons, who have put up houses on it.
7. Ezekiel Imbayi Lolo testified next. He said that he was a son of the deceased from the 2nd house. He confirmed that the deceased had married 5 times. He said that he was not listed in the petition as a son of the deceased. He said that the applicant was from the 3rd house, while the protestor was from the 1st house. When shown the pictorial evidence filed by the protestor, he said that those were houses in the compound of the protestor. He said that the protestor had buried his mother, his 2 children and his wife on Butsotso/Indangalasia/463, and that entitled him to 3 acres out of the land. He said that the deceased had given to him land in 1973, and that he was not claiming anything out of Butsotso/Indangalasia/463. He stated that the deceased had distributed his land.
 8. Joyce Okwaro testified next. She was a daughter of the deceased. She identified the applicant and the protestor as her half-brothers. She said that the protestor was on Butsotso/Indangalasia/463 since childhood, and had buried his relatives there. She asserted that the deceased had given the protestor land within Butsotso/Indangalasia/463, and he could not move out. She stated that the applicant was not in occupation of Butsotso/Indangalasia/463. She said that she was of the same mother with Ezekiel Imbayi Lolo, who had had land given to him by the deceased, although she could not recall the land reference number for the land. She said that the applicant and his brother had also been given land, and they had title deeds to the lands given to them. She stated that Butsotso/Indangalasia/463 was not given to the applicant and his brother, but was given to the protestor. She asserted that the protestor had no other land, apart from Butsotso/Indangalasia/463. She said Butsotso/Indangalasia/463 was meant for Isaac and the protestor.
 9. Jafret Ingutia followed. He was also a son of the deceased. He identified the applicant and the protestor as his half-brothers. He said that the deceased had distributed his lands before he died, and that he, the witness, occupied land that had been given to him by the deceased. He said that the applicant and the protestor were given lands just like all the other sons. He said that the protestor was on the land given to him by the deceased. He described the applicant as his neighbour.
 10. Benson Kefa Inzoberi followed. He was a grandson of the deceased, being a son of the late John Inzoberi Lolo. He described the applicant and the protestor as his uncles, both of whom occupied Butsotso/Indangalasia/463. He said that both have bomas on the land. He said that the land was shared in 1973, and everyone got their portion. He said that when the mother of the protestor died, she was buried on the land. He said that he was born in 1957, and was present in 1973, when the deceased shared out the lands. He said no title deeds were issued, and that Butsotso/Indangalasia/463 was for the applicant. He said that the protestor occupied the land given to him by the deceased, being Butsotso/Indangalasia/459. He said that the protestor was entitled to Butsotso/Indangalasia/463 because his mother was buried there. He said the mothers of both the applicant and the protestor were buried on Butsotso/Indangalasia/463. He said that the land for the applicant was Butsotso/Indangalasia/459, while Butsotso/Indangalasia/463 was for the protestor and the applicant because both of them were in occupation. He said that the applicant was entitled to 12.5 acres and the protestor to 2.5 acres out of Butsotso/Indangalasia/463. He said that the portion given to his own father was 18 acres. He said that the protestor did not have any other land.
 11. The case for the applicant opened on June 16, 2022, with the applicant himself being the first witness. He stated that the deceased was his father, while the protestor was his brother. He stated that the protestor had not been given 3 acres out of Butsotso/Indangalasia/463 by the deceased. He said the land was meant for 7 sons, 4 of whom got title deeds, and the remaining 3 were to get the land that remained. The applicant was given Butsotso/Indangalasia/459, Jafred got Butsotso/Indangalasia/460 and Inzobeli got Butsotso/Indangalasia/461. Butsotso/Indangalasia/463 remained for the applicant,



Khatikhwi Lolo and the late Peter Muchenya. He said that he was not aware of the Luhya custom to effect that the protestor should get a portion of Butso/Indangalasia/463 because his mother was buried there. He asserted that it was the deceased who buried her there, and not the protestor. He said that the deceased had told the protestor to move his houses out of Butso/Indangalasia/463, to his own land, but he had refused to move, and the deceased left him alone. He testified that his mother, the applicant, was the 5th wife of the deceased, and that when she was married, the entire family was on Butso/Indangalasia/463, and that was how when the mother of the protestor died she was buried on Butso/Indangalasia/463. He stated that 4 families were on Butso/Indangalasia/463, asserting that the protestor was on the land illegally, after he refused to move out. He said that he was not aware that Abel had sold his portion, saying that he had only leased it out. He said that the late Jonathan Musotsi had also been on the land. He said that he did not know whether the road cutting through Butso/Indangalasia/463, and recently made, marked the boundary to the land meant for the protestor. He said that his mother, the applicant, had her home on Butso/Indangalasia/463, and that was where the deceased was buried, but she was buried on the portion meant for Peter Muchenya. He said that he did not see the need for one to have to protect their mother's grave. She said that the children in the 5th house were orphaned in 1961, and when the other houses were being allocated land, the children in that house were not allocated any. He said that as first-born son and leader, he was entitled to 7 acres. He stated that it appeared as if Jonathan Anunda Muchefi was in a sale arrangement with Khatikhwi, who sold to him 2 acres. He said that he obtained an order in these proceedings to have the protestor barred from interring the remains of his wife on Butso/Indangalasia/463, but he ignored the orders and buried her on the land.

12. Peter Omuhaka Amwoka followed. He was a former Assistant Chief for Indangalasia Sub-Location. He was related to the family of the deceased. He said that the protestor ought not be on Butso/Indangalasia/463, as he had already been given his own land. He said that the entire family lived on Butso/Indangalasia/463, but the majority moved out after they were allocated land by the deceased. He stated that after the mother of the applicant died, it was the mother of the protestor who raised her children. He said that the road on the land had always been there, and the families settled on the land while that road was still there. He said that the road separated the 2 families. He said that the road was repaired recently.
13. Jeremiah Mukabana Lubale testified next. He said that the deceased was a grandfather in the family. He said that he came from a different area, and did not know the numbers of the lands being disputed.
14. I believe that this matter is fairly straightforward, going by the material before me, by way of both the filings and the oral testimonies. The deceased had 5 wives. He had a son with each of his first 4 wives, and 3 sons with his 5th wife. He settled his 4 sons from the first 4 houses, but not the sons in the fifth house. Only 1 asset is in the name of the deceased, Butso/Indangalasia/463, and was registered on the same day with the rest, that is to say Butso/Indangalasia/459, 460, 461 and 462, on 9th January 1969. The fifth house says that Butso/Indangalasia/463 was meant for them, as the sons in the other houses had benefited from inter vivos distributions of Butso/Indangalasia/459, 460, 461 and 462 to them. All the sons from the other houses are happy with their registrations, and have no claim on Butso/Indangalasia/463, save for the protestor, who is from the first house, who claims that he had been settled on Butso/Indangalasia/463 by the deceased. The overwhelming evidence is that the deceased had distributed his assets during his lifetime, leaving Butso/Indangalasia/463 under his name, which should be available to the house that was not settled, and that is the fifth house to which the applicant belongs, together with his brothers, Khatikhwi and Peter Muchenya. I shall distribute the same exclusively amongst members of the fifth house.



15. The protestor claims that the deceased had given him the land. I have not seen any concrete evidence to that effect. He claims that under custom he should not abandon the grave of his mother. He did not adduce any evidence that such a custom exists. In any case, land rights are not tied to where graves are located on the land. That was criteria that was used during land demarcation and adjudication to determine who had occupied and used which land, for the purpose of determining who was to be registered as proprietor during the first registration. That approach does not apply subsequently. The argument that the protestor is entitled to a share in Butso/Indangalasia/463, because the remains of his mother were interred there is, therefore, hollow. If the protestor feels that his mother's grave and those of his other close relatives ought to be near his home, then he has the liberty to disinter the remains, and relocate them to his own land, Butso/Indangalasia/459. Of course, he has the liberty to negotiate with the applicant and his siblings so that he can cede part of his Butso/Indangalasia/459 in exchange for the 3 acres where he claims the remains of his relatives are in Butso/Indangalasia/463, should he be so minded, and should they be inclined to accommodate him in that respect. He also claims to have had occupied Butso/Indangalasia/463 since time immemorial. These are succession proceedings, and not proceedings for a declaration that the protestor had acquired rights to Butso/Indangalasia/463 by adverse possession. The principle of adverse possession is of no application here. I agree with the applicant, if the protestor is allowed to take a 3 acre share in Butso/Indangalasia/463, in addition to the 8 acres he has in Butso/Indangalasia/459, he would benefit twice from the assets of the deceased, for he will end up with a much larger share of the estate compared with the applicant and his brothers.
16. The applicant says that the deceased intended that Butso/Indangalasia/463 be shared between him and his siblings in the 5th house equally. Then, to justify his getting 7 acres, while his siblings get smaller portions, he avers that they had agreed that they take 4 acres each at first, and then the balance of 3 acres should devolve to him, as the funder of the succession proceedings. No agreement of that kind has been pointed out to me. I have seen no consent in Form 37. I have no evidence that the siblings have consented to that proposal. I reject it. The other argument is that he is the first born and, therefore, the leader in the 5th house. In law, being a firstborn child confers no benefits of the sort that the applicant is talking about. All are considered equal in the eyes of the law. The applicant is merely using his firstborn status to bully and lord it over his younger siblings. He has no justifiable cause. I reject that argument. He says that he funded the succession proceedings. He has not provided any proof of that. In any event, the funds to administer an estate must be sourced from the estate itself, and not from the beneficiaries. I shall divide the estate equally.
17. I was told that there was a buyer from one of the sons in the 5th house. I have seen no document evidencing the alleged sale. I was not told when the liability, Jonathan Anunda Mushefi, bought the 2 acres, and from who. Perhaps it should be pointed out that purporting to sell or buy estate assets before distribution, unless sanctioned by the law, amounts to intermeddling with the estate of a dead person, and it is in fact criminal to do so. Transactions that amount to criminality are not a sure way of asserting a right, for no right can accrue out of a criminal act. I shall leave it to the alleged buyer, to pursue whoever sold the 2 acres to him, once transmission is done.
18. The deceased herein died on 6th November 1979, before the *Law of Succession Act*, Cap 160, Laws of Kenya, came into operation on 1st July 1981. By dint of section 2(2) of the Act, distribution of the intestate estate herein ought to be based on the law and custom in force in 1979. For estates of Africans, and I presume that the deceased herein was one, customary law applied. Distribution was meant to be to the sons only. That is why I have not ventured to ask why the daughters of the deceased herein were not involved in the process nor provided for. The provisions of *the Constitution*, 2010, in Articles 2(4) and 27, would easily override section 2(2) of the *Law of Succession Act*, but I shall leave it to the daughters



of the deceased to decide whether or not to take advantage of the new constitution. The estate is being distributed after the promulgation of *the Constitution*, 2010, and its provisions can quite properly be invoked. I am also cognizant of the fact that quite many years have elapsed since the deceased died, and there is a case for bringing closure to the matter. That, however, cannot take away the rights of the daughters of the deceased to move the court appropriately, should they be minded to.

19. The final orders are:

- a. That the protest by Julius Kombo Lolo, dated December 17, 2019, is hereby dismissed, and the confirmation application, dated September 15, 2014, is hereby allowed;
- b. That the grant made on July 24, 2014, and issued on 1st September 2014, is hereby confirmed;
- c. That Butso/Indangalasia/463 shall devolve upon Patterson Mulati Inzobeli, Khatikhwi Lolo and the late Peter Muchenya Lolo, equally;
- d. That a certificate of confirmation of grant shall issue, accordingly;
- e. That the share due to the late Peter Muchenya Lolo shall thereafter devolve upon his estate, to be distributed in succession proceedings initiated under his name by his successors or survivors;
- f. That the administrators have 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;
- g. 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;
- h. That each party shall bear their own costs; and
- i. That any party aggrieved, by the orders made herein, has leave of 30 days, to move the Court of Appeal, appropriately.

20. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 1ST DAY OF AUGUST 2023

W.M MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Ms. Masakhwe, instructed by Gabriel Fwaya, Advocate for the applicant.

Mr. Elung'ata, instructed by Elung'ata & Company, Advocates for the protestor.

