



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE 28 OF 1988

IN THE MATTER OF THE ESTATE OF BARNABA AYIEGO GWANDEGA (Deceased)

R U L I N G

1. The Court has before it a Summons for Confirmation of Grant. The Application is brought by a James MMata Barnaba who describes himself as and Applicant/Petitioner. There is also another Petitioner named in the heading, a Isaac Lihasi Ayiego as an Applicant. The Application is brought under **Section 71(3) of the Succession Act Cap 160 of the Laws of Kenya.**

2. The Summons seeks the following Orders:

“1. *THAT the Grant Letters of Administration intestate made in this matter be confirmed.*

2. *THAT costs of this application be costs in the cause.*”.

3. The Application is premised on two pre-conditions. The first is the existence of Letters of Administration issued to either Isaac Lihasi Ayiego and/or James MMata Barnaba. The second is the right of Isaac Lihasi to deal with the property in question in such a way as to suggest that he is the absolute owner with the right to pass on good title.

4. The Property in question comprises the Estate of Barnaba Ayiego Gwandega. The Late Barnaba Ayiego passed away on 3rd July 1986 aged 93 years. (See Death Certificate Serial No. 152513). On 6th January 1988 one ISAKA MIMASI AYIEGO filed a Petition to be granted letters of administration for the Estate of the Late Barnaba. In his Petition sworn before the Magistrate in the Subordinate Court, he deponed that he was the only son of the Deceased. As for the heirs, again on oath he said that the heirs were the following:

- (1) Isaka Luhisa Ayiego
- (2) Mrs Febe Agaziva Ayiego
- (3) Mrs Jerida(Jelida) Imari Ayiego
- (4) Samson Elegwa Ayiego.

The Assets owned by the Deceased at the time of his death were listed as:

- (1) KAKAMEGA/LUSIOLA/366 (0.47 ha)
- (2) KAKAMEGA BUYONGA 492 (0.3 ha),
- (3) KAKAMEGA BUYONGA 754 (0.7 ha) and
- (4) KAKAMEGA BUYONGA 852 (0.24 ha).

The Petition demonstrates that it was the intention of Isaka Limasi Ayiego that Lusiola/366 should vest in him absolutely, that Buyonga/852 should best in Mrs Jarida Imari, that Buyonga/492 should vest in Febe Agaziva and Buyonga/754 in Samson Elegwa. The Guarantee of the personal sureties was signed by Isaka Lihasi.

5. On 22nd December Letter of Administration were issued to Isaka Lihasi Ayiego. Shortly thereafter there was an objection filed to the making of the Grant. The Objectors were named as:

- (1) Jamin Kashi
- (2) Silvana Vwosi
- (3) Jemusi Mmata
- (4) Hadisoni Rugalia.

The Objectors asserted that they were the “real sons of the deceased and are therefore entitled to administer the estate of the deceased ...”. It was further stated that, the Petitioner had failed to obtain the consent of the beneficiaries and also had failed to list all the assets of the Deceased.

6. On 9th March 1990 Isaka Lihasi Ayiego swore a further affidavit where he repeated that the properties left by the deceased now belong to himself (366), Febe 492 in Buyonga to Febe Agaziva, 852 in Buyonga to Jelida Imali and 754 in Buyonga to Samson Elegwa, He was still at that stage asserting that those were the only heirs of the Deceased. However, in December 1989 the Assistant Chief of Lusiola Sub-Location had prepared a statement in support of Febe which states:

1.

NYUMBA YA KWANZA

Marehemu Baranaba Ayiego na marehemu Bi Helani Mudeleng'ani na watoto wao (1) Bwana John Kihima Ayiego (2) Bwana Isaka Lihasi Ayiego (3) Bwana Samson Elegwa Ayieko (4) Bwana Henry Agade Ayiego na (5) Marehemu Saulo Ayiego. Hawa wote walipewa vipande vitatu vya shamba. Kipande cha kwanza ni cha kijiji cha Ivona - Ikumba Sub Location, Central Maragoli location nambari 492. Kipande hiki kiligawanywa katikati mara pili. Kipande kimoja kikapewa marehemu Helani Mundeleng'ani na watoto wake na kipande kimoja kwa Febe Agaziva na watoto wake. Kipande cha pili ni kile cha kijiji cha wakizugazuga. Kipande hiki kilipewa mtoto wao mukubwa/wa kwanza Bwana John Kihima Ayiego peke yake. Kipande cha tatu ni cha kijiji cha kidundu - Kidundu Sub Location Central Maragoli Location. Na kipande hiki nacho kikapewa Bw Isaka Lihasi Ayiego peke yake.

2. NYUMBA YA PILI

Marehemu Baranaba Ayiego na Bi Febe Agaziva Ayiego na watoto wao (1) Bwana Silvanos Bwosi Ayiego (2) Bwana Jamin Kahi Ayiego, (3) Bwana James Mmata Ayiego (4) Bwana Hudson Lugalia Ayiego. Hawa nao walipewa vipande viwili vya shamba. Kimoja ni nusu ya kipande cha Ivoka - Ikumba sub location Central Maragoli location Nambari 492. Na kipande cha pili ni kile cha kijiji cha Lodondo, Lusiola sub location South Maragoli location nambari 366.

3. NYUMBA YA TATU

Emali Ayiego na watoto wao (1) Bwana Anaya Ayiego(Birausi) (2) Bwana Simion Olunzi Ayiego (3) Bwana Joseph Lugalia Ayiego (4) Bwana Jairo Mukiza Ayiego, (5) Bwana Dishon Ayiego, Hawa nao walipewa vipande viwili vya shamba kama ifuatavyo; kipande cha kwanza ni kile cha Idumba, Emanda Sub Location, Central Maragoli Location. Na kipande cha pili ni kile cha kijiji cha Wang'ombi, Emanda Sub Location, Central Maragoli Location nambari 754. Kipande hiki kiligawanywa katikati Upande mmoja wakapewa nyumba ya tatu and upande mwingine ukapewa watoto wa marehemu Lugongo Ayiego.

UAMUZI

Kulingana na kitabu cha marehemu Baranaba Ayiego, Afisi hii haitabadilisha chochote juu ya ulalamishi ya kipande cha shamba nambari 366. Na kama bwana Isaka Lihasi hakuridhika, arudi nyumbani na akwaite wazee wa ukoo wa Vayonga na wakae na watatue shida yao baina yao wenyewe. Na kulingana na maandishi ya marehemu Ayiego kipande cha shamba Nambari 366 Kilipewa Bi Febe Agaziva Ayiego. Kwa hivyo mimi Assitant chief, Henry Ndanyi naamua hivi, shamba hili ni la Febe Agaziva Ayiego. Bi Febe aendelee na kuitumia vile alikua akilitumia hapo awali.

Ni mimi

Signed

19/12/1989

ASSISTANT CHIEF

LUSIOLA SUB LOCATION

7. It lists the heirs of the Deceased Barnaba. It was written in Kiswahili and can be summarised thus. The Deceased had three widows.

- (i) In relation to the first house, the Widow was Helani Mudelengani. Their children were
- (ii) In relation to the Second House, the Widow was Febe Agaziv\ Ayiego. Here Children were Siblano Bwosi Ayiego, Jamin Kahi

Ayiego, James Mmata Ayiego, Hudson Lugalia Ayiego. It was asserted that they were given a part of Plot No 492 and a portion of 366.

(iii) In relation to the Third House the Widow was Emali Ayiego and the Children were Anaya Ayiego, Simion Olunzi Ayiego, Joseph Lugali Ayiego, Jairo Mukiza Ayiego, and Dishon Ayiego.

They were said to have been given “*kipande cha kwanza ni kile cha Idumba, Emanda Sub Location, Central Maragoli Location. Na kipande cha pili ni kile cha kijiji cha Wang’ombi, Emanda Sub Location, Central Maragoli Location nambari 754. Kipande hiki kiligawanywa katikati Upande mmoja wakapewa nyumba ya tatu and upande mwingine ukapewa watoto wa marehemu Lugongo Ayiego*”.

7. It is unclear from the file whether or not the Objection was heard and/or adjudicated upon. It appears not, because the file contains a protest against confirmation of grant. That suggests that there was an application for confirmation. The Protest was filed by members of the Second House, in particular, Silvanus Bwosi Ayiego. In his Protest Silvanus informed the Court that Isaka had omitted the names of the beneficiaries/heirs and set out a what he said was a full list. He said:

“That the affidavit in support of confirmation has left out other beneficiaries/heirs whose full list is as below:-

1st House

Isaac Lihasi

Henry Akade

2nd House

Silvanus Bwosi

James Mmata

Hudson Lugalia

3rd House

Jelidah Imali

Beleaus Anaya

Simeon Ayiego

4th House

Guandega Ayiego

Ndong Ayiego

Njalenga Ayiego

5th House

Daisy Ayiego

Priscilla Afande

Rose Mideva

8. He also deponed that; “...the said deceased left the following assets some of which have not been included in the application for confirmation.

(a) *Kakamega/Lusiola/366*

(b) *Kakamega/Buyonga 492*

(c) *Kakamega/Buyonga/852*

(d) Kakamega/Buyonga/754

(e) Kakamega/Buyonga/493

(f) Kakamega/Buyonga/669

(g) Kakamega/Buyonga/649

In relation to distribution, it was deponed that; "...prior to the deceased death he had already shared out the aforesaid land parcels as follows:

1st House: Land parcel Nos. Kakamega/Buyonga/493 and 669

2nd House: Land parcel Nos. Kakamega/Buyonga/492 and Kakamega/Lusiola/366.

3rd House: Land Parcel No. Kakamega/Buyonga/852

4th House: Land parcel No. Kakamega/Buyonga/649

5th House: Land parcel No. Kakamega/Buyonga/754

1. That the sharing of the said parcels proposed by the petitioner are not in accordance with the deceased wishes.
2. That I currently occupy and work on the land parcel No. Kakamega/Lusiola/366 which was given to the 2nd house.
3. That the petitioner who is from the 1st house already have 2 parcels of land as shown in paragraph 3(above).
4. That land parcel No. Kakamega/Buyonga/754 belongs to the fifth house and should not be given to Samson Elegwa Ayiego but children of that house.
5. That I have no objection in the sharing out as proposed of the other land parcels.

He also informed the Court that the Petitioner (Isaka) "had already registered certain parcels in his own name without the benefit of a confirmed grant. The Affidavit stated, "That the petitioner's title to any of the above parcels obtained irregularly should be cancelled forthwith pending the outcome of his application."

9. On 10th January 1990 Jamin Kashi also filed an Application for an order that the Letters of Administration made to Isaak be revoked and/or annulled. The Grounds relied upon were that the Petitioner had misled the Court as to the identity of the beneficiaries, the composition of the Estate and the fact that he had obtained the consent of the beneficiaries to file the Petition.

10. The Court record shows that on 30th October 1990 Hon Mr Justice Osiemo ordered by Consent that the dispute be referred to arbitration by a panel of elders. That was done and the elders presented their decision to the Court. The award was filed on 13th February 1991. By a Chambers Summons dated 14th May 1991 the Petitioner sought an order that the Elder's Award be set aside on the grounds that the elders did not evaluate the evidence and were biased. The Objectors asked for the Award to be adopted. In his Ruling delivered on 27th May 1993, Hon Mr Justice B.K. Tanui held, "...it is clear to me that the probate and administration Rules which govern the succession causes does not permit sending dispute arising from such cases to be referred to the panel of elders unless the court makes a specific order for a reason to be records. In this case there was no reason given for reference of the dispute to the elders. In the circumstances the elders had not jurisdiction and the award is invalid. The same is therefore set aside."

11. Thereafter, on 23rd September 1999 the Petitioner Isaka Lihasi Ayiego filed a Notice of Motion Application seeking confirmation of the Grant. The Application and the Affidavit in Support both repeated the information contained in the original Petition and to which the other beneficiaries of the Deceased were objecting. The Confirmation was opposed by Silvanus Bwosi on behalf of the other beneficiaries. Silvanus filed his Chambers Summons opposing and Supporting Affidavit on 19th November 1999. Again the same grounds contained in the previous objections were repeated. In the meantime, and without the benefit of a confirmed grant Isaac Lihasi Ayiego appears to have transferred ownership of the parcels of land listed into his own name. The Beneficiaries alleged fraud, deceit and the denial of their opportunity to consent to the petition and/or renounce their right to petition, if they so wished.

12. Thereafter, on 9th May 2018 the High Court, Kakamega received a Letter from the County Land Registrar enclosing a certificate of confirmation of grant dated 3rd November 2012. The attached Certificate of Confirmation of Grant purports to distribute the Estate of Isaka Lihasi Ayiego in a way that the Whole of the parcel of land known as Kakamega/Buyonga/492 vests in one Alice Oga Bwosi. Although, the Certificate purports to deal with the Estate of Isaka Lihasi, it bears the Cause No Succession Cause No 28 of 1988 which is the file for the Estate of Barnaba Ayiego Gwandega. There is no evidence before the Court that there was any application made before this Court in relation to the Estate of Isaka Lihasi.

13. In his Affidavit in response to the Application to set aside the Elder's Award, Isaka Lihasi admitted that Jamin Kashi was one of the sons

of the Deceased Barnaba Ayiego. He deponed that Barnaba had 5 wives and 6 pieces of land which had been sub-divided to each of his wives in accordance with "abaluya customary laws". He denied that each wife was entitled to two pieces of land. He asserted that the Applicant (Silvanus) had received his share of Plot No. 492 through his mother. He asserted that he was entitled to Lusiola 366 and wanted his title deed.

14. The file shows at even as late as 2000, the Court had not issued a certificate of confirmed grant. However, on 7th June 2000 the some of the Beneficiaries entered into a consent. The terms of the consent were that the shares for each house would be transferred to the eldest son of each house. There was no provision for the fifth house which comprised only female children. The Petitioner Isaka refused to comply with the terms of the Consent and make the transfers. Isaka Lihasia died on 25th August 2015. On February 2017, James Mmata Barnaba made an application to be substituted as the sole Petitioner of the Estate in place of Isaka Lihasia. On 4th October 2018, Hon Mr Justice Njagi granted the Application ex parte notwithstanding that there was no extant grant. The earlier grant to Isaka Lihasia had been revoked. There was nothing to which a substitution could apply. Further, yet again, the other beneficiaries and dependants were denied an opportunity to object, agree and/or give up their right to be an administrator. In addition, it appears that Isaka Lihasia did, without the benefit of a confirmed grant not letters of administration, transfer some property into his own name contrary to the Law of Succession Act and in particular the section against intermeddling. That Section provides: "45. *No intermeddling with property of deceased person (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. (2) Any person who contravenes the provisions of this section shall— (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.*"

15. Dealing specifically with the Application made by James Mmata Barnaba, on 11th October 2016, he made an application to be substituted for Issac Lihasi Ayiego as sole administrator of the Estate of Barnaba Ayiego Gwandega. However, at the time he made the Application, there was no extant grant where Issac Lihasi (or Isaka Luyhasi) was an administrator. The grant had been revoked earlier. James Mmata was acting in person. The file had been closed. Justice Njagi heard the matter ex parte. Therefore, the Court did not have the benefit of hearing from the Objectors who had succeeded in getting an order for revocation.

16. The Application now before the Court seeks confirmation of a grant made to James Mmata Barnaba, however, the Application does not exhibit a copy of the letters of administration issued, nor does the file contain a signed copy of any letters of administration that could relate to the Order made by the Learned Judge on 4th October 2018. A year later, on 8th October 2019 the Judge also directed the Petitioner to file a fresh application for confirmation of grant. The current application is dated 30th October 2019 and was filed on 4th November 2019. The Application for substitution states that all the beneficiaries would be served. There is no affidavit of service whatsoever, on the Court File. On 30th November 2019, the Court differently constituted granted the Applicant leave to amend the application. No amendment was filed.

17. It is clear from the Application that it relates only to one piece of land from the Estate of Barnaba Ayiego. It is also clear that the application purports that Isaac Lihasi sold that piece of land to his cousin Harrison Malongo. At Court the persons who attended informed the Court that there was a sale but the purchase price had not been paid and was still outstanding. There is no written evidence of any agreement of sale before the Court. The persons before the Court sought to convince the Court that Isaac Lihasi had (without good title) sold THE WHOLE of a plot of land to which other beneficiaries had a claim. From the official searches on the Court file, it appears that Isaac Lihasi/Isaka Lihasi transferred land from the Estate of Barnaba, into his own name, in particular Buyonga/852 and Buyonga 754.

18. Although Isaac Lihasi transferred his father's land into his own name, it appears that none of his heirs, dependants or beneficiaries have filed a succession cause to deal with his estate. However, the Deputy Registrar of this Court was sent a letter from the Federation of Women Lawyers dated 9th February 2016 referring to a Succession Cause No 28 of 1988 in Busia High Court. The informed the Hon DR that their Client one Alice Oga Bwosi "was the legal wife and dependant of the petitioner (deceased) herein, has sought our services relating to the deceased's estate, claiming that she seeks details on the outcome of the above mentioned matter to enable her file a succession suit in respect of her deceased husband's estate. However, through an inquiry by the Vihiga County Land Registrar, it has come to the Court's attention that the same ALICE OGA BWOSI claimed to be in possession of a Certificate of Confirmed grand distributing the same property named in the current application, being Kakamega/Buyonga/492 to Alice Oga Bwosi on 24th October and/or 3rd November 2012. On those dates Isaac Lihasi was still alive. On 16th November 2020, Alice Oga Bwosi appeared before this Court and pretended to be a descendant of Silvanus Bwosi for the purposes of distributing the same land to a third part namely Harrison Malongo.

19. From the above, it is readily apparent that there has been repeated intermeddling in the Estate of the Deceased Barnaba Ayiego. In the circumstances, this Courts makes the following Order:

- (1) The Application dated 30th October 2019 and filed on 4th November 2019 is dismissed with costs.
- (2) Any and all grants and/or purported grants issued to Isaac Lihasi Ayiego also known as Isaka Lihasi Ayiego be and are hereby revoked
- (3) Any and all grants and/or purported grants issued to James Mmtaa Barnaba be and are hereby revoked.
- (4) The Public Trustee be and is hereby appointed as the sole administrator of the Estate of Barnaba Ayiego
- (5) The Public Trustee to report to this Court within 28 days on the following (a) a list of the surviving wives and children of the late Barnaba Ayiego and (b) a schedule of his estate at the time of his death.
- (6) This Order shall be served on the Office of the Public Trustee in Kakamega and all of the surviving children of the late Barnaba.

20. It is further ordered that this file be transferred to Vihiga High Court as the Estate falls within the jurisdiction of that Court. The Hon DR Vihiga High Court is directed to list the matter for a mention on the earliest date available. Mention Notices to be issued and served (on the Public Trustee and all surviving heirs of Barnaba Ayiego) by the Court.

21. On 26 October 2020, Hon Mr Justice Musyoka ordered that the Application be heard before Court 2 and that the children of Silvanus Bwosi Ayiego be made available on 16th November 2020. On the Appointed day the following persons attended:

- (i) Mr Chitwa, Counsel for the Petitioner
- (ii) James Mmata Barnaba (Brother of the Deceased)
- (iii) Duncan Lugongo Grandson of Isaac Lihasi
- (iv) Alice Oga Bwosi said to be related to Silvanus Bwosi and
- (v) Omindi Joseph also said to be related to Silvanus.

22. In addition a Harrison Malongo informed the Court that the Deceased was his cousin and sold his the shamba(Kakamega/Buyonga/492). It seems James agrees there was a sale but there is money due. The Court was told it was sold in the lifetime of the Deceased. What transpired raises two issues for concern, firstly the identity of Alice Oga Bwosi. A person with the same name previously purported to be the wife of Isaac Lihasi through a Letter dated 9th February 2016 from The Federation of Women Lawyers to the Deputy Registrar. She is also the person who presented to the Vihiga Lands Registry a Certificate of Confirmed Grant under this file relating to the Estate of Isaac Lihasi. The purport of the false document presented was that on 24th October 2012 she became the sole beneficiary of the Property in question, Kakamega/Buyonga/492.

23. Also on the Court file is an Application by Silvanus Bwosi for an order that the transfer of Kakamega/Bunyonga/492 be signed by the Registrar because Isaac Lihasi had refused to sign the transfer pursuant to the Consent entered into in relation to the Estate of Barnaba Ayiego Gwandega.

24. In the circumstances, this Court is not satisfied that there has been compliance with the Order of Hon Mr Justice Musyoka of 26th October 2020. It is also clear that Isaac Lihasi was not in a position to sell the parcel of land to Harrison because he did not have good title. He only held on trust as an administrator.

25. For those reasons it is hereby ordered that:

- (a) The Application by James Mmata to be substituted as Administrator is dismissed. He has not demonstrated that he is a fit and proper person to be administrator.
- (b) The remaining direct descendants of Barnaba Ayiego Gwandega shall chose at least 2 (and not more than 4) persons to act as Administrators to the Estate of Barnaba Gwandega, The shares of the Deceased sons of the Late Barnaba Gwandega (in so far as they have not been distributed) will be held in trust pending the filing of succession causes in relation to their Estates.
- (c) The Consent entered into by the sons of Barnaba Ayiego Gwandega shall be put into force before the spouses and/or children of those sons make any claim
- (d) Any claim by Harrison to land intended for Silvanus and/or any other child of the Late Barnaba and purportedly sold by Isaac is without foundation and amounts to intermeddling.

26. It is further ordered that this Matter be referred to Court Annexed Mediation. As many of the family members as are able shall attend before the Mediator to decide on the identity of future administrators and the transfer of the heirs respective shares. The Mediator shall report to this Court within 60 days.

27. Matter be and is hereby listed for Mention to consider the Mediator's Report and take directions on 14th May 2021.

Order accordingly,

Farah S. M. Amin

JUDGE

Delivered signed and dated at Kakamega this the 8th day of February 2021

In the presence of:

Court Assistant: Fred Owegi

