



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 38 OF 1987**

**IN THE MATTER OF THE ESTATE OF ANASTANZIO MUTIKOLI LIHUNZU (DECEASED)**

**RULING**

1. The deceased herein died on 19<sup>th</sup> October 1985. Letters of administration intestate were made to his son, William Mang'oli Lihutsu, on 20<sup>th</sup> July 1988, and a grant was duly issued on even date. The said grant was confirmed on 14<sup>th</sup> December 1988, and a certificate in that respect issued.

2. On 11<sup>th</sup> September 1989, a summons in chambers, dated 30<sup>th</sup> June 1989, was lodged, seeking revocation of the grant. That application was never disposed of, and the last orders on it were made on 23<sup>rd</sup> January 1991, when it was referred to arbitration, by a panel of elders under the chairmanship of the District Officer, Ikolomani, with directions that an award be filed within three months. There is nothing on record to suggest that such arbitration proceedings were ever undertaken, and that an award was ever filed in court.

3. The next step in the matter was taken on 3<sup>rd</sup> July 2020, when a chamber summons dated 2<sup>nd</sup> July 2020, was lodged at the registry. It principally sought revocation of the grant of 20<sup>th</sup> July 1988, and a host of other orders, which include the seeking the setting aside of the confirmation orders of 14<sup>th</sup> December 1988 and cancellation of the certificate of confirmation of grant, the setting aside of the consent order of 23<sup>rd</sup> April 1991, a fresh grant to issue, the transfer of Kakamega/Shivakala/265 to be cancelled and the property be reverted to the name of the deceased, and injunctive relief pending hearing and disposal of the application.

4. The application was brought at the instance of Claus Ihachi Lumala, on his behalf and that of Joseph Martin Ngaira and Abraham Lihutsu Mashalia, grandchildren of the deceased. He avers that the initial administrator, William Nang'oli Lihutsu, and the applicant in the application dated 30<sup>th</sup> June 1989, were half-siblings, who had since died. The persons named in the instant application as respondents, are Cecilia Khamali and Joseph Misango. It is averred that the 1<sup>st</sup> respondent, Cecilia Khamali, was a widow of the late administrator, while the 2<sup>nd</sup> respondent was said to be a stranger to the estate, who had allegedly purchased a portion of the estate from the 1<sup>st</sup> respondent, and was in the process of establishing a home at the property. According to the applicants, the property, Kakamega/Shivakala/265, was transferred by transmission, from to the name of the late administrator, William Nang'oli Lihutsu, and a title deed had been issued in his name. A copy of the grant and certificate of confirmation of grant had been registered against the title. He avers that the applicant, in the application dated 30<sup>th</sup> June 1989, was his father, and that his application was never disposed of, and was still pending. He also mentions that the matter was referred to arbitration by an order made on 23<sup>rd</sup> April 1991, but no arbitration report was ever filed thereafter. When he sought audience with the 1<sup>st</sup> respondent, she told him that the property was registered in the name of her late husband and she could deal with it as she pleased. The applicants avers that the deceased herein had six children, being the late Matayo Lumala Likhutsu, the late Martin Ngaira, the late Charles Mashalia, the late Ann Mutakale, the late Sofia Makanga and Veronica Mutiovo. The late administrator is accused of not disclosing the existence of his siblings, and, consequently, they were disinherited.

5. To the affidavit sworn in support of the application are attached several documents, being: a letter of authority executed by Joseph Martin Ngaira and Abraham Mashalia, dated 2<sup>nd</sup> July 2020; a certificate of death in respect of the late Matayo Lumala Likhutsu, dated 10<sup>th</sup> June 1997, showing that he died on 14<sup>th</sup> July 1994; a certificate of official search, in respect of Kakamega/Shivakala/265, showing a registration in favour of the late William Mang'oli Lihutsu, and a caution by the late Matayo Lumula Likhutsu, claiming beneficiary interest; and a consent, dated 2<sup>nd</sup> July 2020, executed by Gabriel Sulumbu Lihutsu, Joseph Muteyii and Protus Ambayi.

6. There is evidence that the application was served on the two respondents, that is to say Cecilia Khamali and Joseph Misango, through his wife, Everlyne Nanzala Keya. I have carefully perused through the file of papers before me, and I have not seen a response to the application by the respondents.

7. The application was placed before me on 14<sup>th</sup> July 2020, under certificate of urgency. I gave directions as to service and granted temporary relief in terms of prayers 5 and 7 of the summons.

8. Directions were given on 29<sup>th</sup> September 2020, for disposal of the application by way of oral evidence. A date was allocated for the hearing, 3<sup>rd</sup> December 2020. On the date appointed for hearing, the advocate for the respondents, Mr Munyendo, asked for time to file his

replies, and the matter was stood over to 23<sup>rd</sup> March 2021. Come 23<sup>rd</sup> March 2021, the respondents had not yet filed their responses. They sought more time. It transpired, however, that the administrator was dead, and the court revoked his grant, of 20<sup>th</sup> July 1988, on grounds that it had become useless and inoperative on account of his death. The parties were directed to consult and agree on appointment of new administrators. They came back to report that they were unable to agree on administrators. Mr. Munyendo proposed appointment of the 1<sup>st</sup> respondent, Cecilia Khanali, and the 1<sup>st</sup> applicant, Claus Ihachi Lumala; but Mr Shivega protested, saying the 1<sup>st</sup> respondent was the person selling estate property. I reserved the matter for ruling on appointment of administrators.

9. The record is clear, that administration of the estate was initially committed to the late husband of the 1<sup>st</sup> respondent. It is alleged that he had six siblings, but he did not disclose them in his papers. He obtained representation without disclosing them, and had the grant confirmed, and used the confirmation to have the entire property devolved and transmitted to his name. After his death, it is alleged that the 1<sup>st</sup> respondent was selling estate property. According to the affidavit of service on record sworn on 13<sup>th</sup> July 2020, and filed in court on 14<sup>th</sup> July 2020, the 1<sup>st</sup> respondent was served with the application on 10<sup>th</sup> July 2020. Mr Munyendo came on record for her on 3<sup>rd</sup> December 2020, vide his notice of appointment of even date. He attended court on 3<sup>rd</sup> December 2020 and pleaded for time to respond to the application. He was given 30 days. By 23<sup>rd</sup> March 2021, he had not filed any. The application dated 2<sup>nd</sup> July 2020 is, therefore, unopposed. The allegations made in it are uncontroverted. I shall take them to be true, that the late administrator concealed his siblings from the court and he disinherited them, and that the 1<sup>st</sup> respondent was selling off portions of the estate to the 2<sup>nd</sup> respondent, who was also served with the application, but did not file a response. The 1<sup>st</sup> respondent can, therefore, be taken to be complicit in the fraud practised by his late husband administrator. She does not, therefore, merit appointment as administratrix.

10. So, who should I appoint as administrator? The 1<sup>st</sup> applicant was proposed. There was no opposition from the respondents. All the children of the deceased are dead, save for one. That one, Veronica Mutiovo, has prior right to administration over everybody else, by virtue of section 66 of the Law of Succession Act, Cap 160, Laws of Kenya. She should have priority to appointment. She can work together with the descendants of her late siblings, represented by the applicants herein.

11. The cause herein ought not to have been closed, and the file conveyed to the archives, as there was a pending application for revocation of grant, based on grounds that the late administrator had practised fraud, misrepresentation and concealment of matter from the court, by not disclosing that the deceased had six other children, and disinheriting them. There were also orders made on 23<sup>rd</sup> January 1991, that had not been complied with, the reference to arbitration of the matters raised in the application dated 30<sup>th</sup> June 1989. These issues were still pending, meaning that the matter had not been concluded.

12. Since it is not contested that the late administrator misled the court into believing that he was the sole child of the deceased, and that he went ahead to have the entire estate devolved wholly upon himself, it follows, for justice to be attained, that the distribution orders that conveyed the entire estate to him should not be allowed. The property ought to be reverted back to the name of the deceased, so that the administrators, to be appointed through this ruling, can propose fresh distribution, in a process that ought to be more inclusive, in compliance with the proviso to section 71(2) of the Law of Succession Act and rule 40(4) of the Probate and Administration Rules.

13. In the end, the final orders that I hereby make are as follows:

**(a) That I hereby appoint Veronica Mutiovo, Claus Ihachi Lumala, Joseph Martin Ngaira and Abraham lihustu Mashalia administrators of the estate of the deceased, and a grant of letters of administration intestate shall issue to them accordingly;**

**(b) That the orders made on 14<sup>th</sup> December 1988, confirming the grant made on 20<sup>th</sup> July 1988, are hereby set aside, and the certificate of confirmation of grant, issued on even date, based on those orders, is hereby cancelled;**

**(c) That all transactions carried out on the strength of the orders made and the certificate issued in terms of (b) above, inclusive of the transmission of Kakamega/Shivakala/265 to the name of the late William Mang'oli Lihutsu on 2<sup>nd</sup> March 2002, are hereby nullified, and the Land Registrar responsible for Kakamega County is hereby ordered and directed to cancel the registration of the said William Mang'oli Lihutsu as proprietor of Kakamega/Shivakala/265, the title deed issued to him shall be cancelled, and the said property shall be reverted to the name of the original proprietor, who is the deceased herein, Anastanzio Mutikoli Lihunzu alias Nastanzia Mutikoli;**

**(d) That the administrators appointed under (a) above, shall apply for confirmation of their grant, in a process that shall be inclusive and in full compliance with section 71 of the Law of Succession Act and Rule 40 of the Probate and Administration Rules;**

**(e) That any person beneficially interested in the estate who shall be unhappy with the proposals to be made in the application to be filed under (d) above, shall be at liberty to file affidavits of protest under rule 40(6) of the Probate and Administration Rules;**

**(f) That the application contemplated in (d) above shall be filed herein and served on all the descendants of the deceased within the next forty-five days;**

**(g) That the matter shall thereafter be mentioned for compliance; and**

**(h) That any party aggrieved by these orders has leave of twenty-eight days to move the Court of Appeal appropriately.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 7<sup>TH</sup> DAY OF MAY 2021**

**W MUSYOKA**

**JUDGE**