



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 360 OF 2013**

**IN THE MATTER OF THE ESTATE OF MIRIAM EVULU ZINDORI (DECEASED)**

**JUDGMENT**

1. This matter relates to the intestate estate of Miriam Evulu Zindori, who died on 11<sup>th</sup> April 1996, according to the certificate of death on record, serial number xxxx, dated 22<sup>nd</sup> October 2012. According to a letter, dated 16<sup>th</sup> October 2012, from the Chief of Chavakali Location, she was the wife of the late Simon Ivulu Nyareso and the co-wife of the late Neddy Kadunyi Ivulu. The deceased had three children, being the late Zibora Mukangula, Azibeta Kaveza and Norah Minyoso. The children of her co-wife were said to be Samson Dimbu Ivulu, the late Macsabwa Evulu and the late Edward Asena Ivulu. A copy of a certificate of official search, dated 13<sup>th</sup> September 2012, indicates that she owned half-share of North/Maragoli/Chavakali/xxx, while the other share belonged to her late husband, Simon Ivulu Nyareso.
2. Representation was sought in this cause, vide a petition lodged herein on 29<sup>th</sup> May 2013, by Nora Minyoso Masia and Azibeta Kaveza Onziambo, in their capacities as daughters of the deceased. They expressed the deceased to have been survived by the two of them, Nora Minyoso Masia and Azibeta Kaveza Onziambo, and to have died possessed of ½ share of North/Maragoli/Chavakali/xxx. Letters of administration intestate were made to them on 24<sup>th</sup> October 2013, and a grant was duly issued, dated 5<sup>th</sup> December 2013.
3. Orders were made 5<sup>th</sup> February 2014, by consent, whose effect was to revoke the grant that had been made on 24<sup>th</sup> October 2013 to Nora Minyoso Masia and Azibeta Kaveza Onziambo, to make a fresh one to Norah Minyoso Masia and Carolyne Roseline Makungu; the amendment of the petition in the cause to include the late Simon Ivulu Nyareso as co-owner of the 3 parcels of land the subject of these proceedings; consolidation of Kakamega HCSC No. 545 of 2008 with the instant cause; the new administratrices to file for confirmation of their grant within 30 days and a prohibitory order to issue with respect to North/Maragoli/Chavakali/xxx .
4. The cause in Kakamega HCSC No. 545 of 2008, which was to be consolidated with the instant one, is in respect of the estate of the late Simon Ivulu Nyareso, the husband of the deceased herein, who had died on 2<sup>nd</sup> September 1969. He was said to be the owner of a property known as North/Maragoli/Chavakali/xxx. Representation to his estate was sought by Samson Dimbu Simon, his son, who listed himself as the sole survivor. Letters of administration intestate were made to the said Samson Dimbu Simon on 15<sup>th</sup> September 2011, and a grant was duly issued to him, dated 23<sup>rd</sup> September 2011. That grant had not been confirmed, as at the date the consolidation order was made.
5. The summons for confirmation of grant, as ordered in the consent of 5<sup>th</sup> February 2014, was filed on 4<sup>th</sup> June 2015, dated 23<sup>rd</sup> May 2015, by Norah Minyoso Masia. I shall hereafter refer to her as the applicant. She identified the surviving children of the deceased as herself and Azibeta Kaveza, and the asset of the estate available for distribution to be the whole of North/Maragoli/Chavakali/xxx, which she proposed to be shared equally between the two of them.
6. To that application, her co-administratrix filed an affidavit of protest, on 8<sup>th</sup> October 2018, sworn on 5<sup>th</sup> October 2018. I shall refer to her as the protestor. She averred that the applicant had not disclosed that the late Simon Ivulu Nyareso was a co-owner of North/Maragoli/Chavakali/xxx with the deceased. She accused the applicant of not disclosing that the children of the late Simon Macsabwa Ivulu, who was a brother of the applicant, and the father of the protestor. She avers that the applicant and her sister got married in 1960, and left the late Simon Ivulu Nyareso and the family of the protestor in occupation of North/Maragoli/Chavakali/xxx. She averred that there was an oral understanding that the protestor's father was to take over the interest of the deceased in the event of her demise. She asserts that the applicant and her sister were not entitled to a share in the land, as the same was extinguished by the agreement between the deceased and the protestor's late father, and that it was her family that was entitled wholly to the deceased's share of North/Maragoli/Chavakali/xxx.
7. Directions were given on 19<sup>th</sup> July 2018, for disposal of the summons for confirmation of grant by way of *viva voce* evidence.
8. The oral hearings commenced on 26<sup>th</sup> November 2018. The case for the protestor opened first. Duncan Lunganyi Evulu Macsabwa was the first to take the witness stand. He was a brother of the protestor. He explained that the deceased was a wife of the late Simon Ivulu Nyareso, and she was co-wife of his grandmother, Agnetta Khasidaha. He stated that the applicant was a child of the deceased, while his father was her stepbrother. He stated that North/Maragoli/Chavakali/xxx belonged to the deceased and the late Simon Ivulu Nyareso. He

stated that North/Maragoli/Chavakali/xxx was occupied by his uncle Samson Dimbu, while North/Maragoli/Chavakali/xxx was occupied by the other children of the late Simon Macsabwa Ivulu. He said that Simon Evulu Nyareso was his grandfather, who was the registered proprietor of North/Maragoli/Chavakali/xxx. He indicated that he did not know whether succession to the estate of the late Simon Evulu Nyareso had been done, and he could not explain how North/Maragoli/Chavakali/xxx came to be registered in the name of Samson Dimbu. He explained that his grandmother, Agnetta, was buried on North/Maragoli/Chavakali/xxx, while the deceased was buried on North/Maragoli/Chavakali/xxx. He said that he was not aware that Agnetta was entitled to get North/Maragoli/Chavakali/xxx. He stated that the deceased had 3 children, out of which he applicant and Azubeta were alive. He said that his grandmother Agnetta had 3 children, being his father, Samson Dimbu and Asena, out of which only Samson Dimbu was alive. He stated that Samson Dimbu was not claiming North/Maragoli/Chavakali/xxx, since he already had North/Maragoli/Chavakali/xxx, while he and his siblings were entitled to North/Maragoli/Chavakali/xxx. He said that he was born on North/Maragoli/Chavakali/xxx.

9. Samson Dimbu Simon testified next. He stated that the protestors were his brother's children, while the applicant and Azubeta were his sisters, who got married a long time ago. He said that he and the father of the protestors were to wait for the deceased to die so that they could take over her share of North/Maragoli/Chavakali/xxx. He mentioned a meeting held in 1970, where that understanding was reached, between him, the deceased and the father of the protestors. He confirmed that his father had 2 wives, being his mother and the deceased. He said his mother was buried on North/Maragoli/Chavakali/xxx, while the deceased was buried on North/Maragoli/Chavakali/675. He said that they were to take care of the deceased, and upon her death they were to take over North/Maragoli/Chavakali/xxx from her. He said that North/Maragoli/Chavakali/xxx was in his name, although no succession proceedings were ever carried out over that land. He said that he did not allocate any of the other sons of the deceased or their families a share in North/Maragoli/Chavakali/xxx. He said that the father of the protestors and his wife were buried on North/Maragoli/Chavakali/464.

10. The applicant testified next. She stated that her mother, the deceased, had 3 children, herself, Azubeta, and another daughter, Zipporah, who died. She stated that the grandmother of the protestors had 6 daughters and 4 sons. 3 of the sons are dead, and the only one alive was Samson Dimbu. She stated that her late father had 2 pieces of land, North/Maragoli/Chavakali/xxx, which belonged to her mother, the deceased, and the other wife had a separate piece. She asserted that North/Maragoli/Chavakali/xxx belonged to her and Azubeta, while the other house was entitled to the land meant for their mother. She said that the protestors should have been claiming a share from the land meant for their grandmother. She denied that there was an agreement that the house of her stepmother would take over the deceased's land upon her death. She testified that she did not involve the protestors in the succession cause relating to the estate of the deceased since they were not grandchildren of the deceased. She said that their entitlement was in North/Maragoli/Chavakali/xxx, which was under the care of Samson. She said that her late father was buried on North/Maragoli/Chavakali/xxx, where the deceased was also buried. She said that after her late father married a second wife, he bought land for her and settled her on that land, and the two wives never lived together.

11. At the close of the oral hearing, the parties opted to file written summons. In the end, only the applicant filed submissions. I have read through them and noted the arguments made.

12. What is before me is a summons for confirmation of grant. The deceased died in 1996, long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into operation. Her estate, therefore, fell for distribution in accordance with the intestate provisions of the said Act. Confirmation of grants is provided for under section 71 of the Law of Succession Act, which provides as follows:

*“Confirmation of Grants*

*71. Confirmation of grants*

*(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*

*(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—*

*(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or*

*(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or*

*(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or*

*(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:*

*Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”*

14. The principal purpose of confirmation of a grant is distribution of the assets. The proviso to section 71(2) requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate, and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4), which governs applications

for confirmation of grant, as follows:

*“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons entitled to the estate have been ascertained and determined.”*

15. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? It would appear that the applicant has all through properly ascertained the survivors of the deceased. The deceased had only 3 children, all daughters. One of them died, Zipporah, leaving 2, the applicant and Azubeta. I am satisfied that the persons beneficially entitled to a share in the estate have been properly ascertained, However, the applicant ought to have disclosed whether Zipporah was survived by children, for if she was, then the said children would be entitled to a share in the estate of their deceased grandmother. In view of that, it is my conclusion that the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules have only been partially complied with.

16. These proceedings were properly initiated by the children of the deceased, then at a later stage there was introduction of other individuals in the matter, that is to say the protestors, the children of the stepbrother of the applicant, the late Macsabwa Evulu. Are the protestors survivors of the deceased, who would be entitled to a share in her estate? The protestors are not survivors of descendants of the deceased. The deceased was not their blood or biological grandmother, but a co-wife of their blood or biological grandmother. The deceased died intestate, and, under the law of intestacy, only blood kin are entitled from the estate of their kin. The only exception would be the surviving spouse of the deceased, who would be entitled to a life interest in the net intestate estate. The spouse of the deceased herein was her late husband, who died in 1969. He did not survive her, and the question of a life interest arising in his favour did not arise. The protestors are clearly not survivors of the deceased herein, and are not entitled to a share in her estate. They can only claim a share in the estate of their biological grandmother, Neddy or Agnetta Kadunyi Ivulu. Their being brought into the matter of the estate of the deceased herein was a grave mistake.

17. The other aspect of the proviso is that the shares of the survivors or beneficiaries identified must be ascertained. Shares are about the property being distributed. Before I look at the shares ascertained, it would be critical to consider whether the property forming part of the estate was properly ascertained, before shares were allotted to the survivors and heirs.

18. I have seen a copy of an official search certificate, dated 13<sup>th</sup> September 2012, which was filed herein simultaneously with the petition. It shows that the deceased herein was co-owner of North/Maragoli/Chavakali/xxx, with her late husband, the late Simon Ivulu Nyareso, and the record indicates that she was entitled to ½ share of the said property. The petition indicates that the property available for distribution in the estate of the deceased is the ½ share in North/Maragoli/Chavakali/xxx. Of course, in the confirmation application, the applicant proposes to distribute the whole of North/Maragoli/Chavakali/xxx, as if the same belonged wholly to the deceased. That is erroneous. The property that belongs to the deceased is ½ share of North/Maragoli/Chavakali/xxx, and that is what is available for distribution herein.

19. The other aspect of the proviso to section 71(2) and Rule 40(4) is with regard to distribution, the court must be satisfied as to the distribution proposed, in terms of being satisfied that the shares of all the persons beneficially entitled have been ascertained. The applicant has proposed distribution between herself and her sister, Azubeta. As indicated above, there was another daughter of the deceased, Zipporah. It was not disclosed whether or not she was survived by children. The estate herein ought not to be distributed before that is clarified.

20. Again, it was indicated above that the spouse of the deceased had predeceased her, and she was, therefore, survived only by her children. She died after the Law of Succession Act had come into force, and, therefore, distribution ought to be in accordance with section 38, of the Law of Succession Act, which provides for equal sharing amongst the children. If there are only two, the applicant and Azubeta, then the ½ share will have to be split into two equal halves between them. If the late Zipporah was survived by children, the ½ share will be split into three equal shares, the applicant will take one, Azubeta the second, and the children of the late Zipporah the third share, which they should then share equally amongst themselves.

21. I wish to reiterate that the protestors have no right to a share in the ½ share in North/Maragoli/Chavakali/xxx accruing to the estate of the deceased, for the reasons given above. The other ½ belongs to the estate of the late Simon Ivulu Nyareso, that is what they should be staking a claim in, and not in the estate of the deceased herein, where they do not belong. The ½ share of North/Maragoli/Chavakali/xxx accruing to the estate of the late Simon Ivulu Nyareso is available to members of the two sides of his family, the houses of Miriam and Agnetta, but the same is not accessible through the estate of the deceased herein. The same ought to be pursued for distribution in the estate of the late Simon Ivulu Nyareso, which was for administration in Kakamega HCSC No. 545 of 2008, the cause initiated in respect of his estate. I am aware that that cause was consolidated with the instant one, but that consolidation was a mistake which cannot stand. The two causes relate to estates of two different individuals. The law does not allow administration of estates of two or more individual dead persons in one cause or administration. A separate cause must be initiated for each deceased person. There is ample case law on this. See *In Re Estate of James Kiarie Muiruri (Deceased)* [2004] (Kooime J), *In the Matter of the Estate of Gitere Kahura (Deceased)* Nairobi HCSC No. 265 of 2009 (Musyoka J), and *P. Mbogo Karanja & 2 Others vs. Joseph Kariuki Njoka* [2017] eKLR (Muchemi J). That consolidation must be unmade, to allow the parties to pursue administration of the assets that make up the estates of the two individuals separately.

22. The protestors argued that there was an arrangement between the deceased, their late father and their uncle Samson Ivulu Simon, that they would take care of the deceased, and upon her demise take over her ½ share of North/Maragoli/Chavakali/xxx. Transactions relating to land ought to be based on some written memorandum. None was produced, and, therefore, there is no way verifying the veracity of the allegation that any such arrangement ever existed. I shall dismiss the allegation as unproven.

23. The protestors appear to argue that the applicant and her sister are not to inherit from their mother's estate on the basis that they are daughters who got married many years ago. The deceased herein died in 1996, after the Law of Succession Act had come into force. Under the Act, the definition of children does not create a distinction between them based on gender. They are not classified into sons and daughters, or men and women, or male and female. There is also no distinction between the married and the unmarried. The fact that a child is male or female is not a disentitling factor when it comes to inheritance under the Act, and the same applies to marital status. Discrimination against women is a characteristic of customary law, but this estate is not subject to customary law, since customary law is ousted or disappplied by section 2(1) of the Law of Succession Act. See *Rono vs. Rono and another* [2005] 1 KLR 538 (Omolo, O'kubasu &

Waki JJA), *In Re Estate of Harrison Gachoki (Deceased)* [2005] eKLR (Okwengu J), *In the Matter of the Estate of Mwangi Giture (Deceased)* [2004] (Koome J), *In Re Estate of Juma Shiro – Deceased* [2016] (Mwita J), *In re Estate of Gamaliel Otieno Onyiego (Deceased)* [2018] eKLR (JA Makau J) and *In re Estate of Mbiyu Koinange (Deceased)* [2020] eKLR (Machelule J). The Law of Succession Act does not allow such discrimination, and female children have the same rights as their male counterparts, and the fact of their marriage is of little consequence in succession.

24. I believe I have said enough to dispose of the application before me. The orders that I shall make are as follows:

**(a) That I hereby review the orders made on 5<sup>th</sup> February 2015, and undo the order consolidating Kakamega HCSC No. 545 of 2008 with the instant cause, for the two causes relate to estates of different individuals, the two files shall be separated and administration of the two estates shall be undertaken separately;**

**(b) That as a consequence of the order in (a), above, the file in Kakamega HCSC No. 545 of 2008 shall be transferred to the High Court of Kenya at Vihiga, for final disposal;**

**(c) That the grant that was made herein on 5<sup>th</sup> February 2015, to Norah Minyoso Masia and Carolyne Makungu is hereby revoked, and a fresh grant shall issue to Norah Minyoso Masia and Azubeta Kaveza Onziambo;**

**(d) That the new administratrices shall file a further affidavit to disclose whether their late sister, Zibora Mukangula, was survived by any offspring, and if so, to furnish the court with a list of their names, both male and female, whether married or not;**

**(e) That final orders on distribution of the ½ share accruing to the estate of the deceased, in North/Maragoli/Chavakali/xxx, shall be made after full compliance with the directions in (d), above;**

**(f) That the matter shall be mentioned hereafter for compliance and further directions;**

**(g) That, as the property is situated at Chavakali, the matter shall be transferred to the High Court of Kenya at Vihiga, and the grant to be issued under (c), above, shall issue out of the High Court registry at Vihiga; and**

**(h) That any party aggrieved by the orders made above, has leave, of 28 days, to move the Court of Appeal, appropriately, on appeal.**

25. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 1<sup>st</sup> DAY OF OCTOBER, 2021**

**W. MUSYOKA**

**JUDGE**