

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 105 OF 2011

IN THE MATTER OF THE ESTATE OF FRANCIS MASANGANJILA

ANDALA ALIAS MASANGANJILA ANDALA (DECEASED)

RULING

1. For the purposes of determining the summons for confirmation of grant dated 23rd September 2019, I have identified the following as the issues: whether the survivors of the deceased have been properly identified, and whether the daughters of the deceased ought to get a share of the estate.

2. I will first deal with how the estate of the deceased ought to be distributed. According to the proviso to section 71(2) of the Law of Succession Act, Cap 160, Laws of Kenya, and Rule 40(4) of the Probate and Administration Rules, the persons beneficially entitled to a share in the estate ought to be properly ascertained, together with the shares due to them. It is a question of determining whether the beneficiaries of the estate of the deceased have been properly identified.

3. In the affidavit sworn by Anereya Mukoya Masanganjira, on 23rd June, 2021, the deponent has set out the identities the survivors of the deceased. There is no contest on the listed survivors. Some of the children of the deceased are since deceased. The survivors of the deceased children, namely Felister Owano Masanganjila, Penina Queen Masanganjila and Fronika Toba Masanganjila, have, however, not been identified. Yet the shares of these children should devolve upon their own children, according to section 41 of the Law of Succession Act. The said affidavit further states that Alfred Mukavana and Wellington Mukoma, sons of the deceased were survived by their sons, namely Martin O. Mukavana and Wellington Mukoma, respectively. What is not clear is if the two deceased sons were married, and if so, where are the wives, that is critical, so that their shares are not devolved to Martin O. Mukavana and Wellington Mukoma, to the exclusion of other survivors, such as the wives of their fathers and other siblings. It is trite law that children inherit first and thereafter grandchildren inherit from children. See the case of *In Re Estate of Florence Mukami Kinyua (Deceased)* [2018] eKLR (T. Matheka J) and *In Re Estate of Veronica Njoki Wakagoto* (2013) eKLR (Musyoka J). It is my view that the beneficiaries of the estate of the deceased herein have not been properly identified.

4. I will next consider whether the daughters of the deceased ought to get a share of the estate, because the proposed distribution appears to leave them out. The deceased died after the Law of Succession Act came into operation, and as such the daughters ought to get a share of the estate unless their interest is renounced by swearing an affidavit to state so. For purposes of succession, the children of the deceased are equal irrespective of their gender and marital status. It was said in *Stephen Gitonga M'murithi vs. Faith Ngira Murithi* [2015] eKLR (Waki, Nambuye & Kiage JJA), that:

“... Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children irrespective of gender and whether married and comfortable in their marriage or unmarried. Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each household of a polygamous deceased. Applying the above principles ... it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of the section 38 of the Law of Succession Act by discriminating against the married daughters of the deceased ...”

5. How should the estate of the deceased be distributed? The deceased died intestate and polygamous, and, therefore, his estate ought to be distributed in accordance with the provisions of section 40 of the Law of Succession Act, which provides as follows:

“Where intestate was polygamous

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

6. What is envisaged is that the assets are first distributed according to the houses, depending on the number of children in each house, treating any surviving spouse as an additional unit in the house.

7. Thereafter, the assets allocated to each house are distributed within the house in accordance with sections 35 to 38 of the Law of Succession Act, depending on the composition or complexion of each house.

8. Before distribution is undertaken, the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules has to be

complied with, the persons beneficially entitled and their shares must be ascertained. That has not been done here. The beneficiaries of the estate of the deceased ought to be properly ascertained. Thereafter, the Estate ought to be distributed in accordance with section 40 of the Law of Succession Act. I shall postpone confirmation of the grant, in terms of section 71(2)(d) of the Act, to allow the administrators address the issues raised in this ruling, by way of an affidavit, including the issue of daughters not being provided for. The affidavit to be filed within forty-five days. The matter to be mentioned thereafter for further directions. I so order.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER, 2021

W. MUSYOKA

JUDGE