



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 16 OF 1999**

**IN THE MATTER OF THE ESTATE OF HEZRON MWANJE SHISANYA (DECEASED)**

**RULING**

1. The applications for determination are dated 26<sup>th</sup> November 2019 and 27<sup>th</sup> October 2020.
2. The application of 26<sup>th</sup> November 2019, seeks review and setting aside of orders made on 21<sup>st</sup> November 2019 to allow distribution of the estate of the deceased in accordance with the wishes of the deceased as expressed in a will that he had authored before he died, and that the court hears the evidence of interested parties. The application is supported by the affidavit of Dorcus Khagayi Agala. She said that the deceased had expressed his wishes on the estate before he died, on how he wanted the estate distributed. She avers that when the interested parties – herself, Alice Ayuka Vichenje, Sera Ayuma Kolia, Dorah Khanyaje Muhadia and Solome Mung'ohe Lyuva – attended court on 21<sup>st</sup> November 2019, they were intimidated and did not understand what they were being asked. They aver that the distribution of 21<sup>st</sup> November 2019 was not in tandem with the wishes of the deceased. They aver that the deceased had given the sons specific parcels of the land.
3. The application, dated 27<sup>th</sup> October, 2020, similarly seeks review of the orders of 21<sup>st</sup> November 2019, and to hear the evidence of the applicant and that of the five interested parties. The applicant is Laban Musonye Hezron Mwanje. He avers that the interested parties were his biological sisters. They attended court, but they did not understand the proceedings. He avers that his advocate was not in court, and he had not been served with the summons. He claims that due to old age they were not able to understand the proceedings.
4. There is a reply to the application dated 26<sup>th</sup> November 2019, by Isaac Mahiri Mwanje. He avers that the interested parties were accorded opportunity to be heard at revocation and confirmation of grant. He avers that the issue of the wishes of the deceased was an afterthought for no will was attached, and the deceased had died intestate. He further avers that Laban Musonye was one of the administrators. He filed an affidavit sworn on 21<sup>st</sup> December 2020, to respond to the application dated 26<sup>th</sup> November 2019, which express similar sentiments as the affidavit of 25<sup>th</sup> August 2020.
5. Laban Musonye filed a supplementary affidavit sworn on 22<sup>nd</sup> April 2021. He avers that the advocate who held brief for their advocate conceded to things that she did not understand. He argues that the beneficiaries should be given opportunity to file an affidavit of protest.
6. The journey to the ruling of 21<sup>st</sup> November 2019 started on 20<sup>th</sup> July 2016, when Mwita J delivered a ruling on a summons for revocation of grant, which had been brought at the behest of Isaac Maheri Mwanje against Laban Musonye Hezron Mwanje, where a grant that had been made to Laban Mwanje was revoked, and registration of an estate asset in his name annulled and reverted to the name of the deceased. A fresh grant was made to Laban Mwanje and Isaac Mahiri Mwanje. The two were directed to file for confirmation of their grant.
7. A summons for confirmation of grant was filed on 2<sup>nd</sup> May 2017, dated 28<sup>th</sup> April 2017, by Isaac Mwanje. It listed the survivors of the deceased as his three sons, being Nathan Shisanya, Isaac Maheri and Laban Musonye. Only one asset was listed for distribution, Kakamega/Iguhu/1601, and it was proposed that the same be shared equally between the three sons. A consent in Form 37 was attached, signed only by Isaac Maheri.
8. A response to the application, by way of a replying affidavit sworn on 19<sup>th</sup> April 2019, was filed by Laban Musonye on 20<sup>th</sup> April 2018. He averred that Kakamega/Iguhu/1601 had been bought by himself from one Marko Ambaka, in the 1960s, and in 1968 it was registered as Idakho/Iguhu/1601 in the name of the deceased. He avers that Isaac Maheri and Nathan Kisanya had been given other pieces of land, being Idakho/Iguhu/188 and 189. He avers that he was the one using the entire parcel of land, while his brothers utilized Idakho/Iguhu/188 and 189. No documents were attached to the affidavit to support the assertions made in it.
9. Isaac Maheri swore an affidavit on 30<sup>th</sup> April 2018, stating that Laban Musonye had not, in his reply, made a proposal on the distribution of the estate, in opposition to the proposals made in the confirmation application.
10. Laban Musonye swore a further affidavit on 31<sup>st</sup> October 2018, wherein he averred that the deceased died testate, and had made his wishes known, and he has attached a copy of the alleged will. The alleged will was dated 3<sup>rd</sup> January 1987.

11. The matter was placed before me on 17<sup>th</sup> July 2018, when I was told that the deceased had died testate and that there was a will, whereupon I directed the filing of an affidavit of protest to the application dated 28<sup>th</sup> April 2017. The matter was fixed for confirmation on 17<sup>th</sup> September 2019. On 17<sup>th</sup> September 2019, the parties had their advocates in court, I noted that besides the three sons, the deceased had five daughters, who had not been factored in the proceedings. I put off the matter to 21<sup>st</sup> November 2019, for further directions in view of that.

12. On 21<sup>st</sup> November 2019, the parties were represented by their advocates. Mr Mukabwa, for Isaac Mahiri presented the five daughters and asked me to interview them. I interviewed all five of them separately. They made oral statements, where all said that they had no interest in the estate, as they were married and had land elsewhere. After that Mr. Mukabwa invited me to make the confirmation orders, even though the matter was up for mention. Ms. Sijenje, who was holding brief for Mr Chitwa for Laban Musonye, indicated that she had no issue with that, whereupon I confirmed the grant of 20<sup>th</sup> August 2016, as per the application dated 28<sup>th</sup> April 2017..

13. Am invited to review and set aside the orders of 21<sup>st</sup> November 2019. Review is premised on two principal grounds, error on the face of the record and discovery of new evidence which was not available previously.

14. On error on the face of the record, none has been pointed out to me. The daughters had come to court to indicate whether or not they were claiming a share in the estate. When I interviewed them, they all said that they had no interest. I have looked at the two applications before me, and there is no indication as to whether the daughters have moved away from that position, I am not being told that they now understand that they are entitled to a share, and they would like to be considered. They are not saying that. They are merely saying that they did not understand the proceedings, yet they are not coming out to say what exactly it is that they did not understand, and what they would like done with regard to their position. In these applications the interest being advanced is not of the daughters, who allegedly did not understand the proceedings, but of Laban Musonye, who might have expected that the daughters would say something to the court that would have advanced his case. As it is, I have no material before me which reflects an error on the face of the record, with respect to what the daughters said.

15. I am told that the advocate who held brief for Mr. Chitwa conceded to what she did not know, or acted way outside what she had been instructed. Neither the principal Advocate, Mr. Chitwa, nor the advocate holding his brief, Ms. Sijenje, have filed affidavits to renounce what transpired on 21<sup>st</sup> November 2019, to effect that Ms. Sijenje had no authority then to concede the application like she did. So, with regard to that I cannot say that there was an error on the face of the record, which can be basis for me to review or set aside the orders of 21<sup>st</sup> November 2019.

16. Laban Musonye argues that the deceased died testate. He had made a will, a copy of which he has placed on record. The cause herein was initiated by Laban Musonye on 13<sup>th</sup> January 1999. He came to court alone. He listed himself as the sole survivor of the deceased. He did not disclose nor involve his two brothers, nor his five sisters. His petition was for a grant of letters of administration intestate, and the grant that was made to him solely, on 9<sup>th</sup> March 2012, was in those terms. The issue of the deceased having made a will on 3<sup>rd</sup> January 1987 did not arise, and he appears to raise it now that the court has established that he had siblings that he had left out of the process.

17. I note that Laban Musonye has not explained where the will of 3<sup>rd</sup> January 1987 was on 13<sup>th</sup> January 1999 when he sought representation in intestacy. He has not explained why he did not produce it in 1999, and use it to apply for probate then, instead of a grant of letters of administration intestate. He has not explained who has had custody of the said will of 3<sup>rd</sup> January 1987 all this while, and if the will was only discovered recently, he has not explained the circumstances leading up to its discovery. It is not enough to just say that the deceased died testate, when all along he had been advancing the case that the said deceased person had died intestate.

18. I have looked at the piece of paper dated 3<sup>rd</sup> January 1987, which is said to be the will in question. It does not appear to bear the signature of the maker, that is to say the deceased herein, and it does not appear to have been executed by any witnesses. For a written will to be valid, it must meet the requirements of section 11 of the Law of Succession Act, Cap 160, Laws of Kenya. It must bear the signature or mark of the maker, and it must be made in the presence of two or more witnesses, who must have seen the deceased sign the will or affix his mark, or to whom the deceased acknowledged the mark or signature, and who must themselves sign on the will. The document before me has no signature or mark purported to be that of the deceased, nor signatures or marks said to be those of the witnesses attesting to the making of the will. There would be no basis upon which it can be concluded to be a valid written will by dint of section 11 of the Law of Succession Act.

19. Perhaps Laban Musonye would like it to pass as the oral will of the deceased. It would be if it meets the requirements of section 9 of the Law of Succession Act, so long as the same is made in the presence of more than two witnesses who could attest to the making of the oral utterances by the deceased. The courts, in *Re Rufus Ng'ethe Munyua (Deceased) Public Trustee vs. Wambui* (1977) KLR 177 (*Harris J*) and *Wambui & another vs. Gikonyo & another* (1988) KLR 445, (*Gachuki, Apoaloo JJA, & Masime Ag JA*) have stated that a written document could pass as the oral will of the deceased, if it was made by a person who was present when the deceased was making his utterances and he reduced the said utterances into writing on instructions of the deceased. The additional requirement under section 9 is that the deceased should die within three months of the making of the utterances. The utterances in question were made on 3<sup>rd</sup> January 1987, the deceased died on 4<sup>th</sup> October 1989. That, no doubt, was outside the three months period envisaged in section 9 of the Law of Succession Act, and the will of 3<sup>rd</sup> January 1987, if it was not a valid written will, could not possibly pass as the oral will of the deceased. Clearly, there was no valid will worth talking about.

20. The applicants plead that they should be allowed to file affidavits of protest to the confirmation application dated 28<sup>th</sup> April 2017. When the matter was placed before me in 2018, Mr. Chitwa appeared before me several times. He was aware of the confirmation application, and I presume, that he knew that the response to a confirmation application takes the form of a protest affidavit, under Rule 40(6) of the Probate and Administration Rules. Instead of filing a protest affidavit, Laban Musonye swore a replying affidavit and filed it herein on 20<sup>th</sup> April 2018. When the matter was placed before me on 17<sup>th</sup> July 2018, I directed the filing of a protest affidavit, but none was ever filed. Laban Musonye had opportunity to file a protest affidavit, he did not avail himself of the opportunity, he cannot now be heard to say that he should be given a chance to file one, given that he had, in any case, filed a replying affidavit to the application, which, really amounts to the same

thing.

21. Laban Musonye has asserted in his papers that Kakamega/Iguhu/1601 was his property. He says he bought it from Ambaka, but during land adjudication it was registered in the name of the deceased. It would appear that is his justification for having sought representation to the estate without involving any of his siblings. He has provided no documentary evidence that he was the one who bought this property from Ambaka. No copy of a sale agreement was exhibited, or an affidavit from any person who might have witnessed the sale. The certificate of official search on record indicates that the property was registered on 9<sup>th</sup> October 1976 in favour of the deceased. That makes it an asset in his estate, until the contrary is established, which Laban Musonye made no effort to establish in his response to the confirmation application of 28<sup>th</sup> April 2017.

22. He claims that the deceased had settled or gifted his brothers with Idakho/Iguhu/188 and 189. He has not placed a copies of search certificates to demonstrate that these two parcels of land had anything to do with the deceased or with his two brothers. He has not produced green cards with respect to the two assets, which would have provided some historical background. These two parcels of land are talked about in the alleged will of 3<sup>rd</sup> January 1987. The application dated 24<sup>th</sup> October 2020 and the alleged will do mention Kakamega/Iguhu/1602, arguing that this is the property to which Isaac Mwanje is entitled to. In his supporting affidavit of 21<sup>st</sup> October 2020, Laban Mwanje avers that Kakamega/Iguhu/1602 is registered in his name, while Kakamega/Iguhu/1601 is registered in the name of the deceased. So, if Kakamega/Iguhu/1602 is registered in the name of Laban Musonye, it cannot possibly be an asset in the estate of the deceased, available to Isaac Mwanje. The only asset that ought to be available to Isaac Mwanje is that which is registered in the name of the deceased, which is Kakamega/Iguhu/1601. Much as Laban Mwanje makes these averments, he has not placed on record a copy of official search certificate or green card for Kakamega/Iguhu/1602 to support his assertions. In any case, if Kakamega/Iguhu/1602 was estate property that ought to have devolved to Isaac Mwanje, when he, Laban Mwanje sought letters of administration intestate, he did not list it as an asset in the estate of the deceased. He only listed Kakamega/Iguhu/1601.

23. From the record before me, the only property that has been demonstrated to belong to the deceased, and, therefore, available for distribution is Kakamega/Iguhu/1601. Laban Mwanje has not demonstrated that he bought it or that it was his and the deceased only held it for him. Since it is the only asset available in the estate of the deceased, and seeing that the daughters renounced their entitlement to it, the same is available for distribution to the three sons of the deceased equally by virtue of section 38 of the Law of Succession Act.

24. Overall, I see no error on record, or new material which was not available when the orders of 21<sup>st</sup> November 2019 were made, or any other reason upon which the said orders can be reviewed or set aside. It is my finding, therefore, that the two applications are without merit, and I hereby dismiss them. Each party shall bear their own costs. There is leave of twenty-eight days, to file appeal at the Court of Appeal, for any of the parties who will be dissatisfied with my finding and holding. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS .....10<sup>TH</sup> ..... DAY OF  
.....DECEMBER....., 2021**

**W MUSYOKA**

**JUDGE**