



**REPUBLIC OF KENYA**

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

**SUCCESSION NO. 187 of 2008**

**IN THE MATTER OF THE ESTATE OF EZEKIEL LUYALI LIYAI**

**IRENE JULIET OTINGA .....1<sup>ST</sup> PETITIONER**

**HOROBA LUYALI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**JAMES MICHAEL LUYALI.....1<sup>ST</sup> OBJECTOR**

**ALEX SHIVATSI LUYALI.....2<sup>ND</sup> OBJECTOR**

**BEATRICE LUVUNO KALINGA**

**(on behalf of MASITZA OROBA LUYALI)..... INTERESTED PARTY**

**RULING**

1. Before me for consideration is an application dated 8.11.19 by the Interested Party, Beatrice Luvuno Kalinga on behalf of her daughter Masitza Otroba Luyali, the Applicant. The main prayer sought herein is a declaration that **Irene Juliet Otinga and Alex Shivatsi Luyali**, the Administrators of Ezekiel Luyali Liyai, have no power or authority to unilaterally withhold any funds or moneys the Applicant is entitled to, in terms of the certificate of confirmation of grant in respect of the estate the deceased.

2. The Application is premised on the grounds set out therein and in the Applicant's affidavit sworn on 8.11.19. The Applicant avers that she is a beneficiary of the estate of the deceased. In a judgment of this Court of 22.1.16, the Court made a determination on the distribution of the estate of the deceased and set the Applicant's share at 16% thereof. A certificate of confirmation of grant was issued on 1.4.16.

3. The Applicant further averred that during the proceedings leading to the judgment, she was a minor and represented by her mother, the Interested Party. At the time, she was known as Oroba Masitza Luyali but is now known as Swabrina Masitza Luyali. She further stated that following the judgment, the Administrators and James Micahel Luyali entered into a lease with Oilybia (K) Limited in respect of one of the properties of the estate, Plot No. 7665 Section I Mainland North. The proceeds of rent were since 2016, paid to the beneficiaries in accordance to their respective shares. However, while awaiting payment of her share of the rent proceeds for the period 1.10.19 to 10.9.21, the Applicant received a letter dated 2.10.19 from the Administrators informing her and other beneficiaries, that there was a dispute regarding her parentage and entitlement to the estate and withheld her share. The rent received for the said period, amounted to Kshs. 8,712,000/= thus her share is Kshs. 1,393,092/=. This has caused her great mental anguish as she was preparing for her examinations and further intended to clear outstanding college dues amounting to Kshs. 450,000/=. The Applicant contended that there is no justification to withhold her share as this is a matter that was determined by the Court in its judgment.

4. In her replying affidavit sworn on 28.11.19, Irene Juliet Otinga, the 1<sup>st</sup> Administrator takes issue with the commissioning of the supporting affidavit in Mombasa yet the Applicant stated that she resides in Kampala, Uganda. To the 1<sup>st</sup> Administrator, the affidavit is fatally flawed and should be struck out as it ought to have been notarised in Uganda. The 1<sup>st</sup> Administrator, then contends that the Applicant is a stranger to the suit herein since the certificate of confirmation of grant referred to Oroba Masitza Luyali. Upon receipt of the rent proceeds, the Administrators by a letter dated 2.10.19 invited the Applicant and 3 other beneficiaries to a meeting to clarify the issue of their identity that had arisen since the issuance of the certificate of confirmation of grant. Rather than giving an explanation, the Interested Party sent a copy of the Applicant's national identity card which bore a different name. Given that they had never met the Applicant who is now an adult, the Administrators were apprehensive that they could be dealing with a different person other than the one referred to in the judgment. The Administrators demanded that the Applicant appears in their advocates' offices for confirmation but the Interested Party declined to comply. As a result, they asked their advocates to deposit the money in the Administrators' account in Bank of Africa. The 1<sup>st</sup> Administrator contends that since it is not known the circumstances under which the Applicant changed her names, the Court should order a DNA test to be done to properly identify her as a biological daughter of the deceased. The 1<sup>st</sup> Adminsitator further stated that out of the amount received, she paid

Kshs. 340,000/= legal fees and Kshs. 100,000/= as valuer's fees which was deducted equally from all beneficiaries.

5. Alex Shivachi Luyali, the 2<sup>nd</sup> Administrator in his replying affidavit sworn on 28.11.19 averred that the whereabouts and college of study of the Applicant are not known to him. He also stated that the name in the certificate of confirmation of grant referred to Masitza Oroba Luyali and not Swabrina Masitza Luyali as indicated in the Applicant's identity card. He further stated that failure by the Interested Party to present the Applicant to the family despite numerous pleas cast aspersions on the Applicant's heredity and parentage. The 2<sup>nd</sup> Administrator assured the Court that the money withheld is safe. The Administrators are ready to disburse the same to the Applicant once it is proven through a DNA test that she is a child of the deceased.

6. In her further affidavit of 5.12.19, the Applicant stated that the affidavit is not defective as she swore the affidavit in Mombasa, having travelled from Kampala. She exhibited bus tickets. The Applicant further stated that her mother pointed her out in Court during the hearing of the main succession cause and no further issues were raised. She further stated that she had sworn an affidavit stating that the names Swabrina Masitza Luyali and Oroba Masitza Luyali refer to one and the same person, and that person is herself. The right to a name is constitutional and cannot be fettered and person can change their name at will upon attaining the age of majority. There is no legal basis to refer to her as a stranger to the estate just because of her change of name. The Applicant accused the Administrators of harassing her by demanding a DNA test which cannot legally be raised or re-opened at this stage. She however stated that she was willing to subject herself to a DNA test at the Administrators expense as long as all beneficiaries undergo the same. According to the Applicant, the Administrator's conduct is contemptuous of the Court's orders.

7. Submissions were filed by the Applicant and the 1<sup>st</sup> Administrator which I have duly considered. The main issue herein is the identity of the Applicant.

8. Before I consider the main issue, it is necessary to dispense with the issue of the validity of the supporting affidavit sworn on 8.11.19. The 1<sup>st</sup> Administrator challenged the validity of the affidavit alleging that it was sworn in Uganda and not Mombasa as indicated therein. It is however noted that no submissions were made to support this contention. This is perhaps because the Applicant did exhibit in her further affidavit, a bus ticket showing that she had in fact travelled to Mombasa from Kampala on 6.11.19. I am therefore satisfied by the Applicant's explanation that she was indeed in Mombasa when she swore the affidavit. The affidavit is therefore not defective.

9. I now turn to the issue of the identity of the Applicant. The record shows that after a protracted hearing, the Court made a determination as to the beneficiaries of the estate and the share of each beneficiary as follows:

Horoba Liyai	mother	9%
Irene Juliet Otinga	widow	12%
Alex Shivachi	son	10%
James Michael Luyali	son	10%
Lydia Luyali	daughter	9%
Purity Luyali	daughter	9%
Lewis Luyali	son	10%
Godswill Luyali	son	15%
Oroba Masitza Luyali	daughter	16%

10. The Court found that Oroba Masitza Luyali was indeed a daughter of the deceased and was entitled to 16% share of his estate. At the time of the judgment, Oroba was a minor. Prior to the last payment of the rent proceeds in question, Oroba's share in the same was paid to her mother, the Interested Party, as Oroba was still a minor. The dispute arose when the Administrators asked for the Applicant's identity documents as she had attained the age of majority. The Applicant's identity card bears the name Swabrina Masitza Luyali and not Oroba Masitza Luyali.

11. The Applicant's national identity card indeed bears the name Swabrina Masitza Luyali. In her affidavit sworn on 7.11.19, the Applicant stated that when she was born, she was given the name Oroba. Masitza Luyali. However upon attaining the age of majority, she adopted the name Swabrina Masitza Luyali. She asserts that the 2 names refer to one and the same person and that is her. To the Administrators however, the names Swabrina Masitza Luyali and Oroba Masitza Luyali refer to 2 different people and Swabrina Masitza Luyali is not the daughter of the deceased referred to the judgment.

12. The right to a name is guaranteed by the Constitution of Kenya, 2010. Article 53(1)(a) of the Constitution provides:

***(1) Every child has the right—***

***(a) to a name and nationality from birth;***

13. Pursuant to her right to a name from birth, the Applicant was given the name Oroba Masitza as indicated in her birth certificate. If the right to a name exists, then it follows that the right to change that name also exists. It has not been argued that the Applicant changed her name unlawfully. In this regard, I concur with Odunga, J. who in the case of RKM v Attorney General & Kenya National Examinations Council [2019] eKLR, stated:

***“In my view the right to have a name necessarily implies the right to change that name. Therefore, where a person lawfully changes his name, it is only right that the person ought to enjoy the benefits that accrue to him as a result of that change. To deny a person the benefits that accrue to him as a result of the change of his name, in my view, amounts to the denial of the right under Article 53 of the Constitution. This court is constitutionally obliged to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”***

14. The Court notes that the date of birth in the Applicant’s identity card is indicated as 8.4.98, which is the same date of birth of Oroba indicated in her birth certificate which was issued on 16.12.16. Moreover, it is only the first name that is different. The other 2 names are the same. From the material placed before me, I am persuaded that the names Swabrina Masitza Luyali and Oroba Masitza Luyali refer to one and the same person and that is the Applicant. Accordingly, I find that the reason advanced by the Administrators for withholding the Applicant’s share of the proceeds of rent received, is not legitimate.

15. Further, I have looked at the letter from the Administrators dated 2.10.19 addressed to the Applicant and other beneficiaries. They stated in part:

***“One of the issue (sic) raised is the decision which the High Court rendered giving many beneficiaries portions of the estate. We need to revisit this issue.***

***The second issue raised is whether you are entitled to the share given to you by the court. We have been requested to apply to court for a DNA examination on all of you. You know very well that you are not the biological children of the deceased.”***

16. The said letter was written over 3 years after the judgment that determined the beneficiaries of the estate of the deceased and their entitlement thereto, was rendered. The only known ways in law of “revisiting” a decision rendered by a Court of competent jurisdiction are review, setting aside or appeal. If the Administrators had any reservations on the finding of the Court as to the Applicant’s entitlement to a share of the estate of the deceased as his daughter, they ought to have pursued any one of the remedies available to them in law. It is not open to them to withhold the entitlement of the Applicant or indeed of any of the beneficiaries, in the pretext that they doubt their heritage, without recourse to the Court. If indeed an issue of the identity or parentage of the beneficiaries did arise post confirmation of the grant, the Administrators ought to have moved the Court appropriately rather than purport to arrogate to themselves power to review the orders of this Court. As such, withholding any share that has been determined by the Court is an affront to the rule of law and is also contemptuous to the orders of this Court.

17. This Court cannot be called upon to re-open the issue of the beneficiaries of the deceased and their entitlement to his estate. As such, the prayer that a DNA test be done on the Applicant to ascertain her paternity, even without going into whether such a prayer can competently be made in a replying affidavit, has no merit. In this regard, I am duly guided by the Court of Appeal in the case of Pop-In (Kenya) Ltd & 3 others v Habib Bank AG Zurich [1990] eKLR, where the Court of Appeal stated:

***As long as 1925 it was recognised that,***

***....Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted ... : Hoystead and Others v Taxation Commissioner, (1925) All ER Rep 56 at p 62 Letters A.B.C.”***

18. In the result, the Application is merited and is allowed as prayed. A declaration be and is hereby made that **Irene Juliet Otinga and Alex Shivatsi Luyali**, the Administrators of the estate of Ezekiel Luyali Liyai, have no power or authority to unilaterally withhold any funds or moneys the Applicant, Swabrina Masitza Luyali is entitled to, in terms of the certificate of confirmation of grant in respect of the estate of the deceased.

19. Given the circumstances of this case and the prejudice occasioned to the Applicant by the Administrators, I award costs to the Applicant to be borne by the Administrators.

**DATED, SIGNED and DELIVERED in MOMBASA this 5<sup>th</sup> day of May 2020**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... for the Applicant/Interested Party

..... for the 1<sup>st</sup> Administrator

..... for the 2<sup>nd</sup> Administrator

..... Court Assistant