



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 215 OF 2003**

**IN THE MATTER OF THE ESTATE OF OMUNANGA OTATWA MUSA (DECEASED)**

**JUDGMENT**

1. The deceased herein, Omunanga Otatwa Musa, who appears to have also been known as Munanga Lutatwa, died on 29<sup>th</sup> November 1991. A letter from the Chief of East Butso Location, dated 1<sup>st</sup> May 2003, indicates that he was survived by a widow, Grace Ekhebani Munanga, three sons – Samson Otatwa Munanga, Zadock Okore and Gabriel Andala Munanga, and a daughter, Meliza Owenza.
2. Representation to his estate was sought by Samson Otatwa Munanga, in his capacity as son of the deceased, in a petition lodged herein on 7<sup>th</sup> May 2003. He listed the persons mentioned the Chief's letter, mentioned in paragraph 1 here above, as the survivors of the deceased, and that the deceased had died possessed of a property known as Butso/Indangalasia/349.
3. The initiation of the cause was publicized in a notice carried in the *Kenya Gazette* of 27<sup>th</sup> June 2003. The notice provoked the filing of an objection on 6<sup>th</sup> October 2003, of even date, by Peneta Akatseba Munanga. In the affidavit sworn in support of the objection, she avers that she was the first wife of the deceased yet her name was not listed amongst the survivors of the deceased. She identifies the petitioner as her stepson, and complains that the cause was initiated without her knowledge.
4. The petitioner replied through an affidavit sworn on 11<sup>th</sup> November 2003. He avers in the affidavit that the objector had stayed for a short time with the deceased but then she left the matrimonial home in 1986. He asserts that she did not have a child with the deceased. He asserts further that she was not a wife of the deceased as at the date of his death, saying that she was living with her parents at the time. He avers that she is not entitled to a share in the estate.
5. There is a document filed herein on 5<sup>th</sup> March 2012 by Tom Mboya S. Thalia and Saul Tsalia, headed affidavit of protest to the 'grand,' and sworn on 23<sup>rd</sup> February 2012. They aver that they were sons of Thalia Lutatwa, a brother of the deceased herein. They state that their father and the deceased had a half-brother known as Majengo, a child of their mother by another man. After their father died their father and the deceased had a land dispute before the African Court in suit number 48 of 1957, where it was ordered that the land be divided equally between the two sons, and that Majengo was not entitled to a share in the said land. They aver that part of the land, the subject of these succession proceedings, belonged to their father, and mention a suit that was pending between them and the estate in Kakamega HCCC No. 112 of 2009. They have attached several documents to their affidavit to support their case.
6. There is another document on record filed herein on 5<sup>th</sup> March by Luka Majengo, also known as Luka Omusinya Omuhimwa, sworn on 23<sup>rd</sup> February 2012, which purports to be an affidavit of protest to distribution, but which appears to be an objection to the grant being made to the petitioner. He avers that he, Tsalia Mutatwa and Munanga Lutatwa were all sons of their mother Etemesi. The father of Tsalia Mutatwa and Munanga Lutatwa was one Lutatwa, the previous husband of Etemesi, while his father was one Muhimwa, the subsequent husband of Etemesi. After Lutatwa died his sons, Tsalia Mutatwa and Munanga Lutatwa, had a dispute over land, which ended up in court in case number 48 of 1957. The court ordered that the land be divided equally between the two, excluding him, as he was supposed to go back to his father, Muhimwa. He averred that his name ought not be used in the proceedings to deny anyone their share of the land in dispute.
7. There is yet another document lodged herein on 22<sup>nd</sup> August 2013. It is a purported affidavit of protest to the 'grand' by Jane Chapia Okore. She avers to be a widow of Zadock Okore, who had been allegedly murdered by members of the family of the petitioner. Her husband was apparently one of the children of the deceased, and he died on 30<sup>th</sup> July 2010, and was survived by her and her five children. She would list to be listed in the schedule of survivors in the place of her husband.
8. It is clear to my mind that there is no proper objection on record to the making of the grant. The law on objections is found in sections 68, 69 and 70 of the Law of Succession Act, Cap 160, Laws of Kenya. After notice of objection is lodged at the registry, the objector ought to be notified by the court that they should thereafter file an answer to the petition and a cross-application. That was not done in this case. The matter, any way proceeded as if there had been compliance with sections 68, 69 and 70. I suppose that that is now water under the bridge.
9. Directions were given on 25<sup>th</sup> November 2003 that the 'objection' proceeds by way of *viva voce* evidence.

10. Peneta Agneta Akatseba took the stand on 25<sup>th</sup> February 2008. She testified that the deceased was her husband having married her under Butso traditions, which included payment of dowry amongst other things. She identified the first wife as Flora Keya, who she said was also deceased. The said Flora was said to have had seven children, one of whom had since died. She named the surviving children as Ayieta, Atayi, Eshiteti, Etemesi, Oatwa and Andai. She named the child who died as Okore. She named the petitioner as a son of Flora Keya. She named the deceased's second wife as the late Irene Amatsima, who had a daughter called Melisa Owenza, who was still alive. She named herself as the third wife of the deceased. She named Grace Akhebale as the fourth wife of the deceased, who had five children with the deceased, four daughters and a son, all of whom were alive. She complained that the petitioner had excluded her name from the list of the survivors of the deceased, which she said had only five names. She denied that she had left the deceased, saying that she lived in the deceased's homestead in a house he had put up for her until he died, when she was chased away by the petitioner, and her house was demolished.

11. After that the objector passed on. The hearing resumed on 5<sup>th</sup> July 2012 when it was directed that the matter starts afresh. Jennifer Tsalia took the witness stand. She identified the deceased as her brother-in-law, being a brother to her husband Tsalia. She stated that the property be shared out between the petitioner and Grace Khanelia, his stepmother. She also claimed a share of the land saying that her father-in-law, Tsalia was entitled to a portion of it, the portion that had been given to Majengo before he was chased away from the land by the deceased.

12. Tom Mboya Tsalia testified next. He was a nephew of the deceased, who was a brother of his father. He testified that Butso/Indangalasia/349 was ancestral land to which his father was entitled to a share. He talked about the 1957 case between his father and the deceased. He explained that after the land case two parcels of land were created, Butso/Indangalasia/349 which was registered in the name of the deceased and Butso/Indangalasia/350 registered in the name of his father. He said that an appeal from Land Case No. 48, that if case number 157 of 1957 resulted in Majengo being incorporated and the acreage of Butso/Indangalasia/349 increased to accommodate him. Majengo eventually left to go to his father's home in Bunyore. The witness told the court that his family was entitled to the land which ought to have gone to Majengo from Butso/Indangalasia/349. He stated that the registrations of Butso/Indangalasia/349 and 350 were done in 1969, and that his father died and they did succession to his estate. He testified that as at the date of his father's death there was no dispute between him and the deceased. He also stated that the Majengo family had also not sued the family of the deceased over the land. He mentioned that his brother, Saul Tsalia, had filed a suit against the deceased.

13. The case for the petitioner opened on 17<sup>th</sup> September 2018. The petitioner, Samsom Oatwa Munanga, was the first on the witness stand. He averred that the estate's asset, Butso/Indangalasia/349 measured 31.5 acres. He said that the objectors were entitled to Butso/Indangalasia/350, whose acreage he did not know. He stated that his grandfather, Oatwa, had four sons – Akala, Pius Wahu, Musa Munanga and Tsalia. He said that land demarcation happened in 1957. He said he heard that there was a land case between his father and the objector's father, which resulted in the registrations of Butso/Indangalasia/349 and 350 in the names of the deceased and the objectors' father, respectively, and title deeds were issued. He said that he was aware that there was an appeal but he stated that he did not know of its details. He stated that he had a dispute with his father over Butso/Indangalasia/349, when the deceased sought to lease it out to Indian businessmen.

14. Grace Khebali Omunanga followed. She testified that she was a widow of the deceased, and a stepmother of the petitioner. She stated that the deceased was survived by ten children. She said that she was not opposed to what the petitioner was seeking. She also testified at length on the claim by the objectors.

15. The proceedings before me are objection proceedings premised on sections 68, 69 and 70 of the Law of Succession Act. As said earlier, I am hold the view that these provisions were not fully complied with to the letter in terms of the objectors not filing an answer to the petition and a cross-application as envisaged in section 69. The court, however, chose to proceed with the matter as if there had been full compliance, and there would be no reason to reopen that issue. At this stage the only issue for consideration is whether or not the petitioner should be granted representation in the terms of his petition lodged herein on 7<sup>th</sup> May 2003.

16. I have considered the documents filed in opposition to the petition. One is by Peneta Akatseba Munanga. The other is by the sons of Tsalia. The third is by the widow of one of the sons of the deceased. Peneta Akatseba Munanga has since died and therefore her objection lapsed, seeing that she did not have children with the deceased who could take over. The widow of the late son of the deceased, who is himself listed as a survivor, did not testify at the oral hearing, so I shall take it that she abandoned her objection. That then leaves me with the objection by the sons of Tsalia.

17. The cause herein relates to the estate of Omunanga Oatwa Musa, and not that of Tsalia. The immediate family members of the deceased are his widow and children. In terms of section 66 of the Law of Succession Act, these are the persons who have priority to administration in intestacy, for the deceased died intestate, over everybody else. The children of the deceased's brother have a lesser right to administration. Their entitlement to administration of their uncle's estate cannot override that of the immediate family of the deceased, that is to say the widow and children of the deceased. For avoidance of doubt, section 66 states -

*'When a deceased has died intestate, the court shall, save otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as general guide the following order of preference –*

*(a) surviving spouse or spouses, with or without association of other beneficiaries;*

*(b) other beneficiaries entitled in intestacy, with priority according to their respective beneficial interest as provided by Part V;*

*(c) the Public Trustee; and*

*(d) creditors ...'*

18. The court is granted wide discretion over the matter, but it should, generally, follow the guide specified in section 66. It may overlook a person with prior right and appoint a person with a lesser right where it is satisfied that the person with prior right is either incompetent or unsuitable for whatever reason.

19. From the papers on record the family of Tsalia does not appear to be objecting to the appointment of the petitioner as administrator. Instead,, they are objecting to the property being distributed solely amongst members of the family of the deceased while excluding them, yet they claim to have some stake over the same. They would like to have their interest recognized and taken into account in distribution. The issue, in my very humble view, is premature. It should not be for consideration at this stage of appointing administrators. It ought to arise at distribution, and therefore the objectors ought to have waited for a grant to be made, and an application for confirmation of the grant to be filed in terms of section 71 of the Law of Succession Act, whereupon they could then raise their objection, by way of filing an affidavit of protest as envisaged by Rule 40(6) of the Probate and Administration Rules.

20. In any event, it would appear to me that the family of the deceased and that of his brother, Tsalia, litigated over the land in cases that were heard and determined in 1957. It would appear that there were no appeals against the determinations of 1957, and the matter should have come to an end then. It would profit no one to seek to have the same issue revived after the deceased's demise and re-litigated in his succession cause. This issue is, to my mind, water under the bridge. In any case, there is a pending land case before the Environment and Land Court, ELC No. 112 of 2009. The objectors ought to ventilate their case if they have one; before that court to its logical conclusion. In any case, the High Court has no jurisdiction, by virtue of Articles 162(2) and 165(5) of the Constitution, to delve into issues around title to and right to occupy and use land.

21. The conclusion to draw is that the said objectors have not presented before me a case upon which I can hold that the petitioner herein is not qualified and competent for appointment as an administrator of the estate of the deceased herein. I note that members of the immediate family of the deceased, following the demise of Peneta Akatseba Munanga, do not appear to have any objection to the appointment of the petitioner as administrator.

22. I have keenly gone through the pleadings herein, all the other filings and recorded oral testimonies. In his petition, the petitioner only listed his stepmother and four children as the sole survivors of the deceased. When Peneta Akatseba Munanga testified, it came out that the deceased had married about four wives, and that he had had children with three of those wives. One of the wives was said to be alive, and so were some of the children of the other wives. The petitioner himself called Grace Khebal Omunanga, his stepmother, as a witness in his cause. She stated too that the deceased had been survived by ten (10) children, whose names she did not mention. The petition lists only five individuals, being one widow and four children, meaning that six children had not been disclosed.

23. In view of the above, it is plain that the petitioner concealed from the court the existence of more than half of the survivors of the deceased. I doubt that he can be fully trusted to faithfully and honestly administer the estate of the deceased of his father alone if he can conceal the existence of some of his siblings. Since no one has come forward to strongly oppose his appointment from among the immediate family, I am minded to appoint him, but in association with the surviving widow, who, in any case, has a superior right or entitlement to administration of the estate of the deceased over him.

24. I shall dispose of the objection proceedings in the following terms -

**(a) That I hereby dismiss the objection proceedings herein;**

**(b) That I hereby appoint Grace Khebal Omunanga and Samson Otatwa Munanga administrators of the estate of the deceased herein;**

**(c) That a grant of letters of administration intestate shall issue to them accordingly;**

**(d) That the administrators shall move forthwith to have their grant confirmed so as to distribute the estate, in which case they shall involve all the children of the deceased, be they male or female, married or unmarried;**

**(e) That any person not satisfied with the proposals on distributions made in the applications filed under (d) above shall be at liberty to file an affidavit of protest.**

**(f) That the matter shall be mentioned after thirty (30) days to confirm filing of the confirmation application;**

**(g) That the mention date shall be given in open court at the delivery of this ruling;**

**(h) That each party shall bear their own costs; and**

**(i) That any party aggrieved by the orders that I have made herein above shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14<sup>th</sup> DAY OF June, 2019**

**W. MUSYOKA**

**JUDGE**