



**REPUBLIC OF KENYA.**

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

**SUCCESSION CAUSE NO. 1330 OF 2012.**

**IN THE MATTER OF THE ESTATE OF LUCY SHISIALI ALIAS LUSIA BUKHAMBALE,  
DARIA KHACHESENGA ALIAS DARIA BUKHUMBALE AND ANAH IRAGO SHIRAMBA  
ALIAS ANNA BUKHUMBALE (DECEASEDS)**

**AND**

**GAUTENZIA IKHUNGU BUKHUMBALE : PETITIONER/APPLICANT.**

**R U L I N G.**

1. The application herein dated 2<sup>nd</sup> July, 2015 seeks orders for rectification of the certificate of confirmation of grant issued on 8<sup>th</sup> July, 2014, to Gautenzia Ikhungu Bukhumbale. The applicant seeks the inclusion of all the names of the deceased persons who were registered owners of the parcel of land, the subject matter of this cause.
2. The application is premised on the affidavit of Gautenzia Ikhungu Bukhumbale who deposes at paragraph 3 that her 3 sisters namely Lucy Shisiali alias Lusua Dari Khachesanga Shitsukane alias Daria Bukhumbale and Anah Irigo Shiramba alias Anna Bukhumbale have died. She attached copies of their death certificates, marked G.I.B – 2a, 2b and 2c.
3. Mr. Khayumbi, learned counsel for the petitioner/applicant submitted that when the applicant petitioned for letters of administration, all the names of her late sisters were included in the Gazette Notice. He submitted that the applicant has been unable to file forms No. 19 and 7 because she and her deceased sisters were having half of an undivided share in LR. No. Isukha/Lukose/411 and the advice from the Lands Office was to have the names of the deceased persons reflected in the grant of letters of administration and the certificate of confirmation of grant
4. The applicant therefore prays that the grant of letters of administration intestate and certificate of confirmation of grant be amended/rectified to include all the deceased persons with whom she was jointly registered with as owners of the parcel of land.

**Determination of the application**

5. The issues that I identify for determination are as follows:-

1. *Is Gautenzia Ikhungu Bukhumbale the same as Kabutenzia Bukhumbale?*
2. *Is the applicant entitled to the estate of the 3 deceased persons vide a rectification of grant of letters of administration and certificate of confirmation of grant issued?*

6. On the first issue, I have perused the pleadings filed in this succession cause and I have not come across an affidavit whereby the applicant Gautenzia Ikhungu Bukhumbale has sworn to indicate that she is one and the same person as Kabutenzia Bukhumbale. The copy of the search certificate availed by the applicant shows that the name given in the search certificate is Kabutenzia Bukhumbale. The applicant's copy of identity card issued on 10<sup>th</sup> April, 1997, which is available on record gives the name of Gautenzia Ikhungu Bukhumbale. The variance in the two names is a matter which is within the knowledge of the applicant and at the outset she should have set the record straight by reconciling this issue.
7. Secondly, the copy of the search certificate issued on 27<sup>th</sup> June, 2012 shows that parcel No. Isukha/Lukose/411 was registered in the names of Lusua Bukhumbale, Daria Bukhumbale, Anna Bukhumbale and Kabutenzia Bukhumbale in a ¼ undivided share. This copy of the search certificate was filed in court on 14<sup>th</sup> December, 2012.
8. The copy of the search certificate issued on 3<sup>rd</sup> August, 2012 and filed in court on 29<sup>th</sup> July, 2015, shows that LR No. Isukha/Lukose/411 is owned by Lusua Bukhumbale, Daria Bukhumbale, Anna Bukhumbale, Kabutenzia Bukhumbale in ½ undivided share. There is no record availed to show how the ¼ undivided share that existed on 27<sup>th</sup> June, 2012 changed into ½ undivided share by 3<sup>rd</sup> August, 2012. There seems to be an error in the description of the ownership and it is apparent to this court that something does not add up.
9. Going by the two search certificates filed in court, it is clear that ownership of LR. No. Isukha/Lukose/411 was by four (4) proprietors in undivided shares. Legally, this means that what existed amongst the four (4) proprietors was a tenancy in common, whereby the four (4) held the property in equal undivided shares. Each tenant had a distinct share in the property which had not been divided among the co-tenants. The doctrine of survivorship, therefore does not apply. In such a scenario, the share of the 3 deceased co-tenants, devolves not to the other co-tenant, Kabutenzia Bukhumbale, but to the estates of the deceased persons.
10. Section 91 (5) of the Land Registration Act provides that:-

***“If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.”***

11. In the circumstances of this case, the undivided shares that belonged to the deceased Lucy Shisialia alias Lusua Bukhumbale, Daria Khachesenga Shitsukane alias Daria Bukhumbale and Anah Irago Shiramba alias Anna Bukhumbale can only vest in their surviving spouses or children or other rightful beneficiaries in accordance with the provisions of section 35 of the Law of Succession Act, Cap 160 Laws of Kenya.
12. In the case of **Matheka & Another vs. Matheka (2005) 2KR 455**, the Court of Appeal laid down the following guiding principles:-

***“1. A grant may be revoked either by application by an interested party or on the court own motion.***

***2. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.***

***3. The grant may also be revoked if it can be shown to the court that the person to***

*whom the grant has been issued has failed to produce to the court such inventory or account of administration as may be required.*

*4. When a deceased has died intestate, the court shall save as 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 a general guide the following order of preference.*

*(a) Surviving spouse or spouses, without association of other beneficiaries.*

*(b) Other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided by part V of the law of succession Act.*

*(c) The public Trustee; and*

*(d) Creditors”*

13. In the exercise of the powers conferred on this court by dint of section 76 (a) of the Law of Succession Act, on this court’s own motion, I hereby revoke the grant of letters of administration issued on 19<sup>th</sup> June, 2013 and the certificate of confirmation of grant issued to Gautenzia Ikhungu Bukhumbale on 8<sup>th</sup> July, 2014, for the reason that the proceedings to obtain the grant were defective in substance.

14. The application is hereby dismissed.

15. Costs in the cause.

**DELIVERED, DATED and SIGNED** in open court at **KAKAMEGA** on this **10<sup>TH</sup>** day of **MARCH**., 2016.

**NJOKI MWANGI.**

**JUDGE.**

**In the presence of:-**

..... **for the Petitioner/applicant**

..... **Court Assistant**