



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**SUCCESSION CAUSE NO. 341 OF 2009**  
**IN THE MATTER OF THE ESTATE OF PETER THUKA SILU (DECEASED)**

**DAVID MUTULU SILU.....PETITIONER**

**VERSUS**

**WILSON MUTHIKE THUKA.....1<sup>ST</sup> OBJECTOR**

**MICHAEL MULULU THUKA.....2<sup>ND</sup> OBJECTOR**

**SHEM K. THUKA.....3<sup>RD</sup> OBJECTOR**

**MODEST KAUMBULU THUKA.....4<sup>TH</sup> OBJECTOR**

**RACHAEL NDWELE MAUNDU.....5<sup>TH</sup> OBJECTOR**

**NGONDU KIVUNZA.....6<sup>TH</sup> OBJECTOR**

**JOHN KYANIA THUKA.....7<sup>TH</sup> OBJECTOR**

**R U L I N G**

1. A grant of Letters of Administration Intestate in respect of the Estate of **Peter Thuka Silu** (deceased) who died domiciled at **Kalama, Kenya** were issued to **David Mutuku Silu** (Applicant) on the **22<sup>nd</sup>** day of **January, 2010**. On the **17<sup>th</sup>** day of **February, 2010**, he filed summons for confirmation of grant.

2. He deponed an affidavit in support of the application where he deposed that the deceased was survived by the following beneficiaries:

i. **Wilson Muthike Thuka (Son).**

ii. **Michael Mululu Thuka (Son).**

iii. **Shem K. Manthi Thuka (Son).**

iv, **David Mutuku Silu (Son).**

v. **John Kyana Thuka (Son).**

vi. **Modest Kaumbulu Thuka (Son).**

vii. **Rachel Ndwale Maundu (Daughter).**

viii. **Ng'ondu Kivunzya (Son).**

All adults.

3. He proposed that **Plot No. 6 Kola Market** an asset left by the deceased be divided among the eight (8) sons and what the deceased will be entitled to after distribution during his lifetime in portion **No. Kalama/Katanga/1097** be distributed among his eight sons.

4. On the **21<sup>st</sup> November, 2011** **Wilson Mutuku Thuka** filed an Affidavit of Protest expressing his disagreement with the proposed mode of distribution of the Estate. He proposed that the entire Estate of the deceased be distributed among the eight (8) sons equally without first giving the Petitioner a portion alone.

5. The Applicant filed a further affidavit stating that property land parcel number **Kalama/Katanga/1097** measures **13.6 hectares**. On the **28<sup>th</sup> November, 1981**, the deceased summoned the clan and two elders who were his neighbours but have since died. He subdivided the land into nine (9) portions and gave to his eight sons who took possession of their respective shares but retained one portion for himself and his wife. The deceased planted sisal plants which marked boundaries and the information was reduced into writing. According to his wish per the write-up, the trees on each portion belonged to the owner while coffee trees on the land were considered valueless.

6. Subsequently, **John Kyania Thuka** filed a case before the Land Disputes Tribunal challenging the submission. The matter went before the Appeals Committee which ruled that the Land Parcel No. **Kalama/Katanga/1097** be subdivided according to the wish of the deceased. The award was adopted as the judgment of court. The land was to be surveyed. The Objectors filed an application seeking Judicial Review to quash the decision. A Notice of Preliminary Objection was filed that is pending hearing. He sought an order confirming the decision of the deceased which resulted into all of them taking their individual portions that they reside on to date.

7. On the **21<sup>st</sup> March, 2012** **Daniel Morris Mutiso** filed an affidavit stating that he participated in the distribution of the Estate of the deceased.

9. **John Kyania Thuka** filed an affidavit on the **18<sup>th</sup> March, 2012** praying that all assets owned by the deceased be distributed to his sons equally. That the Judicial Review proceedings attacks the jurisdiction of the Land Disputes Appeal Committee which handled a case of land belonging to a deceased person.

9. The application was canvassed by way of *viva voce* evidence. The Petitioner/Applicant, **David Mutuku Silu**, relying on his affidavit and that of his witness **Daniel Morris Mutiso** asked the court to divide **Plot No. 6 Kola Market** amongst all his brothers and his wives, as one of them, **Beatrice Kamanthe** is alive. Then **Plot No. Kalama/Katanga/1077** be subdivided in accordance with the deceased's wish.

10. On cross examination he stated that the deceased had two wives – **Kalekye** and **Beatrice Kamanthe** although he did not include them in the petition. He acknowledged that the deceased had a parcel of land at Makueni that was not included in the list of assets. He admitted that the parcel of land **Katanga/Kalama/1097** was not subdivided but each one of them was shown a portion where they reside.

11. The Applicant called a witness, **Daniel Morris Mutiso** who reiterated what he stated in his affidavit.

12. The Protester called **John Kyania Thuka** who relied on affidavits deponed by the Protesters and stated that the Applicant did not notify them when he filed the petition for Letters of Administration. He denied the allegation that the deceased subdivided land. He denied having signed the agreement adduced in evidence. He went on to state that their Step-mother **Beatrice Kamanthe** has children – **Munyiva, Mwanja, Wausi, Mulei** and **Malonza** whose names were omitted in the petition. He proposed that the 2<sup>nd</sup> family be included in the distribution so that all of them can have equal shares. On cross examination he stated that although he said that the property should be divided amongst the deceased's sons, all his children should share the property. He said that the 2<sup>nd</sup> family was given land at Makueni where they reside and none of the children from the first house has land there.

13. Both counsels for the Applicant and Objectors filed submissions that I have duly considered.

14. **Section 71(1) and (2)** of the **Law of Succession Act** provides thus:

*“(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from, the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*

*(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may -*

*(a) If it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or*

*(b) If it is not so satisfied, issue to some other person or persons, in accordance with the provisions of section 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or*

*(c) Order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or*

*(d) Postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:*

*Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”*

15. Following evidence adduced, it was not disclosed that the deceased was married to two (2) wives. Only the first house is indicated as having survived the deceased. There is a second wife not disclosed who was known as **Beatrice Kamanthe** who has children. Their names were given as **Munyiva, Mwanja, Wausi, Mulei** and **Malonza**. It was alleged without proof that they live in Makueni. They were not notified of pendency of the Succession Cause. Parties herein have proposed that the property be subdivided amongst the sons of the deceased. A daughter from the 1<sup>st</sup> house has not been notified. Neither the Applicant nor the Protesters have stated that she renounced her right to inherit her father's land.

16. It has been alleged that the deceased distributed part of his properties during his lifetime. The document that was purportedly written then (**Annexure “DMM”**) was authored by two (2) different people as clearly indicated. The interpretation of the same as submitted by Counsel for the Protesters would imply that it was written after the event. Persons who were alleged to have been present to witness the event did not sign it. This is not a document which the court can rely on to reach a just decision. The same must be disregarded. The deceased having died intestate the law applicable will be that of an intestate deceased who did not distribute his property during his lifetime.

17. Taking all these into consideration, I am not satisfied that all assets belonging to the deceased have been disclosed; all people entitled to benefit from the Estate of the deceased have not been included. These persons must be notified of the existence of the Succession Cause and unless they renounce their right to inherit from the deceased, their share must be identified.

18. Consequently, pursuant to the provisions of **Rule 41(2)** of the **Probate and Administration Rules**, the grant shall be referred back to the Applicant for further consideration.

19. It is so ordered.

**Dated at Kitui this 22<sup>nd</sup> day of October, 2015.**

**L. N. MUTENDE**

**JUDGE**

**Dated, Signed and Delivered at Machakos this 9<sup>th</sup> day of November, 2015.**

**P. NYAMWEYA**

**JUDGE**