

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
SUCCESSION CAUSE NO.150 OF 2013

**IN THE MATTER OF THE ESTATE OF THE LATE TITO M'MBIFWA
MUSOGA- DECEASED**

**PHANICE .K. IMBWENYA.....1ST
APPLICANT**

**HELLEN VUTAGWA BARASA.....2ND
APPLICANT**

**FLORA KAHADI M'MBIFWA.....3RD
APPLICANT**

**JANE KAMWENYA M'MBIFWA.....4TH
APPLICANT**

AND

**ARTHUR LUGUSA M'MBIFWA.....1ST
RESPONDENT**

**WYCLIFF MUSOGA M'MBIFWA.....2ND
RESPONDENT**

**ZABLON OMIDO M'MBIFWA.....3RD
RESPONDENT**

**PHELISTAS MUKUNGU M'MBIFWA.....4TH
RESPONDENT**

JUDGMENT

1. This cause relates to the estate of the late Tito M'Mbifwa Musoga (deceased) who died on 7/8/2006 domiciled at Matisi Location, Trans-Nzoia County. The deceased died intestate leaving the following listed dependants;-

- (i) *Rachel Midecha Nyangel (now deceased)*
- (ii) *Phanice Kangahi Imbwenya*

- (iii) *Arthur Lugusa M'Mbifwa*
- (iv) *Hellen Vutangwa Barasa*
- (v) *Wycliffe M'Mbifwa Musga*
- (vi) *Zablon Omido M'Mbifwa*
- (vii) *Flora Kahadi M'Mbifwa*
- (viii) *Kenneth Amugune M'Mbifwa*
- (ix) *Phelistas Makungu M'Mbifwa and*
- (x) *Jane Lamwenya M'Mbifwa*

2. The deceased's estate comprised the following listed assets;-

- (a) L.R No.3024/5-Kitale**
- (b) Motor vehicle Reg No.KLA 871**
- (c) Motor vehicle Reg No.KXF 335**
- (d) Motor vehicle Reg No.KYS 487**

**3. Arthur Lugusa M'Mbifwa,
Wycliffe Musoga M'Mbifwa,
Zablon Omido M'Mbifwa
& Phelistas Makungu M'Mbifwa**

were appointed joint administrators vide a grant issued on 23/9/2013.

4. The appointed administrators were unable to move the court for confirmation of grant due to simmering tension and disagreement among the dependants on how the estate of the deceased should be distributed.
5. This led to the daughters of the deceased filing an application for revocation of grant dated 30/1/2019 which however was not prosecuted after the parties agreed to court's suggestion to resolve their differences through mediation.

9. When the matter came up for viva voce evidence, Hellen Vutagwa Barasa (**PW1**) testified on behalf her sisters and pitched camp at equal distribution of the estate stating that as the children of the deceased, they all deserved to get an equal share.
10. Arthur Lugusa M'Mbifwa (**DW1**) on his part agreed that the contestation about distribution pitted the sons on one hand against the daughters on the other. He claimed that the deceased had shown each son where to occupy adding that the deceased did not indicate that the daughters were to get any share. He further stated that the mediation report was fair and urged this court to adopt it.
11. He further stated that the motor vehicles were grounded but proposed that the brothers should share them out. He further proposed that Faith Ingumba and Ian Musoga should be given the share of Kenneth Amugune (deceased) to hold in trust.
12. Wycliffe Musoga M'Mbifwa (**DW2**) on his part agreed with Arthur (**DW1**) but added that the parcel of land has no title. In his view the same should be left out undistributed. He however conceded that he and other sons have been in occupation of the parcel and have been utilizing it as per the wishes of the deceased. He stated that they agreed as brothers to give small shares to their sisters because they did not want to lock them out. He faulted the sisters for going against their culture by demanding more and advised them to get proper advise from the elders.
- 13.** The protestors submit that the mediation agreement should be adopted as the best mode of distribution and hold the view that having signed the mediation agreement their sisters were

bound by the terms. They rely on the case of **Ward -vs- Standard Ltd & Anor 2024 KEHC 2116 (KLR)**.

14. They submit that because mediation process was a form of an alternative mode of resolutions of disputes promoted by the Constitution, the estate of the deceased should be distributed as per the mediation agreement.
15. They further contend that the estate of the deceased to wit the parcel of land and motor vehicles are not **“free property”** as per section 3 of Law of Succession Act. They submit that the tractor KXF 335 does have a log book while motor vehicle Reg No.KYS 487 is under joint ownership. It is their contention that the parcel of land is not registered in the name of deceased. It is therefore their contention that there is no property belonging to the deceased that has been placed before this court for distribution.
16. This court has considered the applicants’ case as well as protestors’ position. It is quite clear that the protestors who are the sons of the deceased prefer status quo on the estate of the deceased so that they continue utilizing it to the exclusion of the sisters.
17. In this matter there is no dispute as to who are the dependants of the deceased. The protestors themselves petitioned for letters of administration and listed all the dependants and assets comprising the estate in the affidavit sworn on 26/6/2013. They had no doubt of what the estate comprised. They listed all the assets as I have outlined above. For them to come up with a contention that the deceased did not

own anything or that no asset was registered in his name in my view is an afterthought and made in bad faith.

18. The provisions of section 38 of Law of Succession Act which is applicable in this instance provides as follows;-

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children”

The proposal of the applicants is hinged on law and is supported by the law.

19. The protestors claim that the sisters should accept a small share on account of their gender but that proposal does not sit well with cited provision and Article 27 of the Constitution. Article 27 of the Constitution provides as follows;-

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

**(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Constitution of Kenya, 2010
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(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than

two-thirds of the members of elective or appointive bodies shall be of the same gender.

20. The proposal by protestors is discriminative and therefore untenable in law.
21. I do find the protestors' view that the mediation report be adopted in distributing the estate to be interesting because it is quite apparent that they are conflicted. On one hand they propose that the estate be distributed as per mediation report while on the other hand they claim that the assets comprising the estate is not **'free property'** as contemplated under section 3 of Law of Succession Act. At the same time they would want to continue occupying and enjoying the same asset in the estate to the exclusion of their sisters. That in my view is in bad faith. In any event **"free property"** under section 3 means any property that the deceased was legally competent to freely dispose during his life time. The fact that some assets comprising the estate are not yet registered in the name of the deceased is a technicality. The assets are in the hands of the protestors and in fact they claim that the deceased had shown them where to occupy.
22. This court further notes that the proposed mediation agreement was not signed by all the beneficiaries and that is why it was rejected by this court. For a mediation agreement to be binding all the beneficiaries should agree and append their signatures.

In the end, this court for the aforestated reasons finds that the estate of the deceased person shall be divided equally among all his

children. The grant issued on 23/9/2013 is hereby confirmed as per paragraph 6 of the affidavit of Hellen Vutagwa Barasa sworn on 24/6/2019 save that the proposal under paragraph (k) is declined because the actual liabilities have not been ascertained. Any liability including the surveyor's fees shall be paid equally by all the beneficiaries. Any party who fails to comply with the payments is liable to pay the same as a civil debt.

I will also make no order as to costs as this is a family matter.

**DELIVERED, DATED and SIGNED at KITALE this9th day of
.....OCTOBER....., 2025.**

HON JUSTICE R.K. LIMO
KITALE HIGH COURT

Judgment delivered in open court

In the presence of

Wanyonyi for Kraido for the Petitioners

4th Respondent present in person

Duke/Chemosop- Court assistants