

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.31 OF 2008

IN THE MATTER OF THE ESTATE OF AURA LIHUNGU alias JOHN AURA
LIHUNGU

AND

LAWRENCE BABU AURA
DOUGLAS AURA MUTESHI
APPLICANTS

AND

JOHN AURA
PIUS SHIHEMI AURA
RESPONDENTS.

JUDGMENT

1. The matter refers to the estate of late Aura Lihungu alias John Aura Lihungu, who died intestate on 17th March 1974 at Mutoma, Kakamega. He was survived by his widow, Dina Isigi Aura and sons Allan Hussein Aura, Charles Aura, John Aura, Pius Shihemi Aura, and Ernest Aura.
2. His widow, Dina Isigi Aura, applied for letters of administration intestate, which were issued on 21st January 2009.

3. On 22nd March 2019, Lawrence Baabu Aura and Douglas Aura Muteshi applied for annulment of the grant issued to the widow and the same be issued to them on grounds that the widow had died, and that some of the deceased assets and beneficiaries had been left out of the succession proceedings.
4. On 1st March 2022, Justice W.M Musyoka issued a fresh grant of letters of Administration to John Aura and Douglas Aura Muteshi and on 6th November 2023, filed summons for confirmation of the grant. They listed the deceased 26 children, both alive and dead, his 4 wives who were now deceased as well as a purchaser, Isaiah Akala, who was also deceased.
5. They listed the deceased assets as L.R No. Kakamega/Shisejeri/131 L.R Kakamega/Shisejeri/784, a commercial plot at Litambitsa market, Commercial plot at Shisejeri market, L.R No Kakamega/ Idakho/ Shikulu /188.
6. The parties applied for confirmation of the grant on 6th November 2023 attaching for consent of confirmation from the parties. On the 26th March 2024 Douglas Aura Muteshi filed his proposed mode of distribution supporting the mode of distribution by John aura save for Isaac Aura and Cynthia tsisika shitoko who had died without children or wife to get equal share of the parcel of land Idakho/ Shikulu/188. They prayed that parcel of land Kakamega/Shisejeli/131 be equally shared among all the beneficiaries.

7. He further prayed that the land parcel Kakamega/Shisejeli/784 measuring 0.5 ha be shared between Douglas Aura Muteshi and Morris Aura.
8. He stated that the deceased had sold 1 acre of parcel of No. Idakho /shikulu/188 to one Isaiah Akala and plot No. 3 at Lidambitsa market was re-possessed and not available for distribution.
9. He proposed that plot No.4 at Shisejeli Market be sold and the proceeds be distributed of this estate.
10. Douglas Aura Muteshi filed his statement in evidence in responded to his brother's summons for confirmation of the grant acknowledges that he and his brother were the administrators especially Isaac Aura and Cynthia Tsisika Shitoli who had died without leaving any children or spouse. He proposed that the property comprised in the parcel of land No. Kakamega /Shisejeli/784 measuring 0.5 ha be equally shared between John Aura, Douglas Aura Muteshi and Morris Aura.
11. He proposes that Idakho/ Shikulu/188 measuring 4.6 ha be shared among all the deceased children listed in paragraph 2 and that Idakho/shikulu/188 equally to all the heirs of the late father a portion measuring one acre out of the parcel be given to Isiah Akala who was a liability.
12. He states that the plot no 3 at Lidambitsa market is not available for distribution as it was repossessed by Kakamega County Council and that Plot No.4 Shisejeli Market be disposed by way of sale and the proceeds be distributed to the other heirs.

13. In reply the John Aura claimed that the protest was misplaced and uninformed he states that deceased passed on it 1974 and that Cynthia Tsisikia listed as the deceased daughter was born in 1978 to one Esteli Isigi and Linus Shisanya and hence not a child to the deceased.
14. He admitted that Cynthia Tsisika and Isaac Aura died without leaving any children or dependent. He claimed at the deceased had already settled all his widows at their respective homes peacefully and that the beneficiaries had consented to the mode of distribution
15. He was in agreement that LR Idakho/Shikulu/188 was already in occupation by the liabilities being Isaiah Akala and united Pentecostal church and not part of the distribution list.
16. He denied the allegation that Plot no 3 Lidambitsa market was repossessed and claimed that it was sold by the protestor and Lawrence Babu to a third party same to LR. No. Kakakmega/Shisejeri/784 which was sold to one Fredrick Isumba Abukachi which was brought to the court's attention on 24/02/2022. He gave the proposed mode of distribution as follows;

Plot No 4 Shisejeri Market- Lucitina Khaseye (deceased - survived by

- 1) Mary Munyasa Aura- daughter- deceased
- 2) Agnes Muchinga- daughter - adult
- 3) Ernest Lubutse Aura-son deceased
- 4) Henrietta Aliviza- daughter- adult

LR NO. IDAKHO /SHIKULU/188 4.6 Hectares) Dinah Isigi

Aura- (deceased) survived by;

- 1) John Aura- son-adult
- 2) Pius Aura- son- adult
- 3) Charles Sembi- son- (deceased)
- 4) Allan Aura Oseni – son – (deceased)
- 5) Leornida Osami- daughter- Adult
- 6) Jacklyne Musieka- Daughter- Adult
- 7) Jane Aura- Daughter- Adult
- 8) Rosalia Aura- daughter- adult
- 9) Tabitha Aura- daughter- Adult
- 10) United Pentecostal Church- Liability- 0.12141
Hectares
- 11) Isaiah Akala- Liability -1.0 Hectares

LR. NO KAKAMEGA /SHISEJERI/784 - (0.5 Hectares) Bernetta

Makai (deceased) survived by;

- 1) Morris aura- son- adult
- 2) Agnes Mutimba- daughter- adult

LR NO. KAKAMEGA / SHISEJERI/131- (1.3) Hectares- Esteli Isigi

(deceased) survived by

- 1) Charles Milimu- son
- 2) David Litsalia- son- adult
- 3) Christine Khaseyi- Daughter- adult

- 4) Isaac Aura- son- (deceased)
- 5) Rosaline Ingunene- Daughter- Adult
- 6) Dimitilla Mbochi aura- Daughter- adult
- 7) Elphas Lunale Aura- son- adult
- 8) Cynthia Tsisika Shitoko- daughter- adult
- 9) Violet Khatumi- Daughter- adult

Plot No.3 Lidambitsa Market

- 1) Douglas Aura Muteshi- son- Adult
- 2) Lawrence Babu- son- Adult

Analysis and determination

17. I have considered the parties' affidavit on the court records as well as the rival proposed mode of distribution by the parties. The applicable in law in this instance shall be the Law of succession Act Cap 160.
18. It is not in dispute that the deceased died intestate. He was survived by his widow Dina Isigi Aura who unfortunately like the other 3 widows have since passed on.
19. As the deceased was a polygamous man with four houses although the widows are now deceased there are surviving children, the mode of distribution will be in accordance with section 35, 38 and 41 of the Law of succession act.
20. The first issue that this court should address and was raised by one of the administrator being John Aura is whether Cynthia Tsisika Shikoto was a child of the deceased and whether she should

be termed as a beneficiary to the estate. Although he claimed that she was born after the deceased died, he has not availed any evidence to prove his assertion about her paternity. In succession cases, issues relating to dependency and proof of relationship are matters determined by evidence.

21. Section 108-112 of the Law of succession act is very clear. He who asserts must prove. In the absence of such proof, this court is unable to prove that she is not a beneficiary or a defendant.

22. The other issue for determination is on the issue of liabilities. All the parties were in agreement that portion of L.R No. Kakamega/Idakho/Shikulu/188 measuring approximately one acre was sold to Isaiah Akala by the deceased. The court recognizes such purchaser as a liability to the estate, and that portion shall be excised and transferred to both United Pentecostal Church measuring 0.12141 Hectares and Isaiah Akala accordingly.

23. The applicant claims that the protestor and Lawrence Babu had sold some of the deceased estate. The allegations are serious and amount to intermeddling which is unlawful under section 45 of the Law of Succession Act. The protestor has not provided any evidence that the properties had been sold off. In the absence of formal proceedings to nullify such transactions, the court will refrain from making definitive findings but cautions the parties accordingly from selling or attempting to sell of the deceased assets.

24. With regard to Plot No. 3 at Lidambitsa Market which is contested. There are conflicting claims as to whether it was

repossessed or sold. Given the uncertainty, the same shall not be distributed until its status is regularized.

25. On distribution, the court is guided by the principle of equality among the children of the deceased, subject to adjustments for liabilities.

26. Accordingly, the court orders as follows:

a) The grant of letters of administration intestate issued on 1st March 2022 and confirmed herein.

b) L.R No. Kakamega/Idakho/Shikulu/188 (4.6 Ha):

- I. One (1) acre shall be excised and transferred to Isaiah Akala as a purchaser and United Pentecostal Church measuring 0.12141 Hectares
- II. The remainder of L.R NO. Kakamega/Idakho/Shikulu/188 and L.R No. Kakamega/Shisejeri/131 (1.3 Ha) and L.R No. Kakamega/Shisejeri/784 (0.5 Ha):shall be distributed equally among the children of the deceased and if a child has died the share to go to the deceased's child children
- III. Plot No. 4 at Shisejeri Market shall be sold and proceeds distributed equally among the children of the deceased, and if one of the children has died the share to go to the children of the deceased child/children..
- IV. iv. Plot No. 3 Litambitsa Market; if found to exist to be sold and the proceeds distributed equally among the children of the deceased, and if one of the children has died the share to go to the children of the deceased child/children.

- V. The distribution of the land shall be done in a way that no one is displaced from where he has put up his or her home or any other permanent development.
 - VI. Mention on 30.6.20206 to confirm transmission or for further orders.
 - VII. Each party shall bear their own costs.
27. Right of Appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF APRIL, 2026.

S.N MBUNGI

JUDGE

In the presence of:-

CA: Angog'a/Velma

Mukavale J for the Petitioner, present.

Shifwoka for the protestor absent.