



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of James Lukunza Makabila (Deceased) (Succession Cause
967 of 2012) [2025] KEHC 7135 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7135 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 967 OF 2012**

PJO OTIENO, J

MAY 29, 2025

IN THE MATTER OF THE ESTATE OF JAMES LUKUNZA MAKABILA (DECEASED)

BETWEEN

FLORENCE AKALA OBJECTOR

AND

CHARLES LISIYE MAKABILA PETITIONER

RULING

1. Before this court is the objector's summons for revocation of a grant application dated 11th December, 2017. It is brought pursuant to section 76(a)(b) and (c) of the *Law of Succession Act* and rules 44 and 73 of the Probate & Administration Rules seeking the following orders: -
 - i. That the grant of letters of administration intestate issued on the 18th day of April, 2013 and the certificate of confirmation of grant dated 31st day of October 2013 be revoked and/or annulled.
 - ii. That the titles resulting from the subdivision on parcel of land No. Idakho/Shitoli/586 be revoked and/or nullified and the original title be reverted back to the deceased Rasoah Muyuka Lisiye and James Lukunza Makabila who were jointly proprietors.
 - iii. That Kakamega Succession Cause No. 1210 of 2012 be consolidated in this cause and the grant issued therein issued on the 8th day of May, 2013 to one Charles Isiye Makabila be revoked and/or annulled.
 - iv. That Joab Andalo Ingosi and Rita Andalo be enjoined in this cause as interested parties and/or liabilities of the estate of the deceased and their annexed supporting affidavits be deemed as properly filed and served on the respondent herein.
 - v. That the costs of this application be in cause.



2. It is important to note this early that, even though both parties cite cause No. No 967 of 2012 to concern the estate of James Lukunza Makabila, (aka James Lugunza mukabira), the filed records in the two files are unanimous that the cause actually concerns the estate Rasoah Muyuka Lisiye and that the petition for the estate of James is actually in cause No 1210 of 2012. The court will thus proceed with full appreciation of such a misnomer in mind.
3. The application is supported by the affidavit of Florence Akala sworn on 11th December, 2017 in which she avers that she is a daughter of the deceased and that the deceased who in life married two wives. She states that she is the only surviving child of the first house and that the second house had two children namely Pius Lukuza Makabila (deceased) and Susan Malesi. She asserts that the respondent misled the court in believing that he was the sole survivor of the deceased yet he was not a child of the deceased. She adds that the petitioner further failed to disclose to the court that the deceased jointly owned parcel of land known as Idakho/Shitoli/586 with one Rasoah Muyuka Lisiye. She further asserts that out of the deceased's share in Idakho/Shitoli/586, the deceased had sold 0.3HA to Alfonse Andalo Lukunza and a piece measuring 60 by 60m to Maurice Ingosi Lime. She asserts that she recently did a search on Idakho/Shitoli/586 only to discover that it had been subdivided into Idakho/Shitoli/1811,1812,1813,1814 and 1815 and registered in the names of total strangers to the estate of the deceased which move she claims disinherited the rightful beneficiaries of the estate of the deceased.
4. The application is opposed by the affidavit of Charles Lisiye Makabila sworn on 19th February, 2018 in which he avers that he is a son of the deceased and Rasoah Muyuka Lisiye and that following their demise he distributed the assets of the deceased's estate to the beneficiaries that came forward as per the certificate of confirmation of grant dated 28th October, 2013. He further contends that the allegation that Maurice Ingosi Lime bought a piece of land from the deceased does not hold water because the agreement relied on shows that he bought land from the daughter of Lugunza Magavila, and that the agreement dated 3/10/1989 is unsigned and does not state the names of the parties.
5. He adds that it was the objector who sold part of the estate of the deceased even before the subject proceedings commenced and that such sale is unlawful and cannot be enforced. It is of not that the petitioner does not dispute the fact that the objector is a daughter to the deceased James Lukunza Makabila, fails to controvert the fact that the property was owned in common and lastly that he was never a child to the deceased.
6. The court discerned the dispute between the parties to revolve around the issue; whether Idakho/Shitoli/586 was jointly held or held in common. The court thus directed and the parties agreed to canvass the application by way of submissions rather than viva voce evidence. Both sides have filed written submissions and addressed the court on their rival positions.

Applicant's Submissions

7. It is her submission that as a daughter of the deceased, she fell in priority under section 66 of the [law of Succession Act](#) to administer the estate of the deceased and not the petitioner who was not such a child to the deceased. She further argues that Idakho/Shitoli/586 was held in common by the deceased and Rasoah Muyuka Lisiye. She claims that the grant ought to be revoked since it failed to recognize her as a daughter of the deceased and further failed to recognize Blevian Malesi and Joseph Lukunza who are children of Pius Lukunza Makabila.

Petitioner's Submissions

8. The petitioner submits that according to the adjudication record filed by the objector and marked as annexure FA 1(b) in her supporting affidavit sworn on 11/12/2017, paragraph 8 of the said document,



provides that Idakho/Shitoli/586 is held in common by James Lugunza Makabira and Rasoah Muyuka Lisiye each holding ½ share.

Issues for determination

9. From the subject application, the response thereto and the submissions by the parties, the issue that arise for determination by this court are
 - a. Whether Florence Akala, the objector is a daughter and beneficiary of the deceased's estate?
 - b. Whether James Lukunza Makabila and Rasoah Muyuka Lisiye held the property known as Idakho/Shitoli/586 jointly or in common?
 - c. Flowing from the determination of that issue; whether the petitioner was entitled to proceed with the cause without naming the objector as a beneficiary?
 - d. Flowing from the determination of the foregoing question, whether the remedy of revocation is deserved in the matter?
 - e. What is the appropriate order to be made over the two files filed in respect of two different persons but concerning the same asset?

Analysis

10. Because the petitioner led the court, in the two petitions that the property, Idakho/ Shitoli/586, belonged to the two deceased persons wholly and separately, it is only appropriate that the two petition be considered together for purposes of giving both a tidy and efficacious way forward. The orders that ought to result from this decision must thus be geared towards directing the two files towards timely and just closure.
11. Owing to the fact that assertion by the objector that she is a daughter to the deceases who was not disclosed in the petition has not been challenged, the court finds that the question presents no dispute. The court finds and holds that the objector is a daughter to James Lukunza Makabila, who ranks in priority over the petitioner.
12. The distinction between joint tenancy/proprietorship and tenancy/proprietorship lies on the fact that in joint tenancy the survivor of the joint proprietors take it all while common proprietorship, the interest survives the deceased. In other words, in joint proprietorship, the interests of the joint owners are so fused as to be severable upon death while in common proprietorship, the interests are severable and distinct to the levels of certainty. The court in *Isabel Chelangat vs. Samuel Tiro Rotich & 5 others* (2012) eKLR observed as follows;

“These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land. To expound on this point I have borrowed heavily from two texts, Megary & Wade, *The Law of Real Property* [2] and Cheshire & Burn's, *Modern Law of Real Property*, [3]. According to Burn, “...a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares...”[4]. Further, that “there is a thorough and intimate union between joint tenants. Together, they form one person.”[5]

A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities”. The right of



survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence.”

13. In this matter, the adjudication record produced by the objector at paragraph 8 indicates that Idakho/Shitoli/586 is held in common by James Lukunza Makabira and Rasoah Muyuka Lisiye each holding ½ share.
14. That is to mean that each of them held distinctive shares in Idakho/Shitoli/586 though held together and their respective beneficiaries would be entitled to their distinctive shares. Accordingly, it matters not that one of the registered proprietor died before the other. In life and death, the interests of the two were distinct and severable. It was thus improper for the petitioner, in both petitions, to treat the entire asset as belonging to either of the deceased persons at his whim and election. He was duty bound to declare the distinctive shares of each deceased as a separate estate to be administered and transmitted separately. He did not and chose to proceed in a very convoluted manner of suggesting that the asset belonged to both deceased persons wholly and separately. In doing so, he failed in his duty to make full and candid disclosure but instead opted to make untrue statement material to the case. For the non-disclosure and declaration of untruths, the grant thereby obtained becomes liable to revocation as a matter of course. The grant issued to the petitioner in this cause is thus revoked on the basis that it was issued over a property that did not entirely belong to the deceased on grounds of untrue allegation as to ownership which untrue allegation made the entire process to be defective in substance.
15. This finding is not oblivious of the claims by John Andalo Ingosi and Rita Andalo. The two may get advice on how to proceed and lodge their claims appropriately once the petitions are ripe for consideration by the court.
16. Having found that the objector is a daughter and beneficiary of James Lukunza Makabila, the deceased in Cause No 1210 of 2012, having found that the two deceased persons were proprietors in commons and that the petitioner proceeded inappropriately in the two petitions and thus revoked the grant, it is now directed, as the most appropriate order to be made, that the administration of the two deceased proprietors’ estates be pursued separately it being disclosed, in each petition, that each only owned one half (1/2) of the property. For that reason, let the respective petition be appropriately amended to disclose only the free estate of each deceased, with only true beneficiaries being disclosed.
17. The court further considers it appropriate that the grant having been improperly obtained, the transmissions based on it even if effected by the administrator cannot, in justice be left to stand. Such transmissions are therefore recalled and the titles consequently issued cancelled. Let the land registrar, upon cancellation of titles Nos. Idakho shitoli/1811,1812,1813,1814 and 1814, revert and reinstate the registration of the asset as Idakho shitoli/586 in the names of James Lugunza Makabira and Rasoah Muyuka Lisiye, as proprietors in common, holding equal shares.
18. Additionally, it is ordered that the grant issued to the petitioner in Cause No. 1210 of 2012 is equally revoked to enable the objector, as the disclosed daughter of the deceased, to move appropriately and seek to administer the estate.
19. Because the petitioner acted by way of overreach in his failure to disclose the fact that the objector was a daughter who survived James Lugunza Makabira, he shall pay the costs of the application which is hereby assessed, for the purposes of timely disposal of the matter, at Kshs 30,000/-.

DATED AND SIGNED THIS 29TH DAY OF MAY, 2025.

PATRICK J O OTIENO



JUDGE

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 29TH DAY OF MAY, 2025.

S. MBUGI

JUDGE

In the presence of:

No appearance for the parties

C/A: Agong'a

