



In re Estate of Andrew Mwabaka Muyale alias Muyare Mwabaka (Deceased) (Succession Cause 694 of 2011) [2024] KEHC 832 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 694 OF 2011
SC CHIRCHIR, J
JANUARY 31, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE ANDREW
MWABAKA MUYALE ALIAS MUYARE MWABAKA (DECEASED)**

BETWEEN

DERESINA KHAVUGWI RESPONDENT

AND

ADRIANO LIBASIA MUYALE PROTESTOR

JUDGMENT

1. This cause relates to the Estate of Andrew Muyale Mwabaka (Deceased) who died on 10th July 1979 .
2. Upon the deceased's demise, his son, Athanas Ford Muyale applied for a Grant of letters of administration ,which was issued on 28th January 2013 vide succession cause No 84 of 2011.
3. That upon the demise of the administrator Athanas Ford Muyale, succession Cause No 84 of 2011 remained dormant for a while.
4. On the other hand the widow to the deceased one Deresina Khavugwi Muyale petitioned the court for a separate Grant of letters of administration intestate in the present succession cause. The Grant was issued on 15th March, 2013.
5. On 23rd July 2013, the applicant/objector Adriano Libasia Muyale applied for summons for revocation of a grant on grounds that the petitioner failed to disclose that the deceased had other survivors whom he lists as Adriano Libais Muyale, Renida Isaho Muyale, Mebo Khajenja Muyale and Calestas Muyale Ford. He further sates that another property, being land parcel No. Isukha/ Murhanda/158 was left out of the Assets of the Estate.



6. The appointed Administrator, Deresina, passed on in the cause of these proceedings, and on 22.7.2019 , by consent of the parties a fresh Grant was issued in joint names of Juliana Vilinga Muyale ,the daughter of Deresina ,and Adriano Libasia Muyale, the objector.
7. The 1st Administrator, Juliana Vilinga Muyale filed for summons for confirmation of the grant on 17th April 2020.
8. On 25th November 2020, the Applicant , filed an affidavit of protest on the mode of distribution that was proposed by the 1st administrator.
9. The hearing of the protest proceeded by way of oral Evidence.
10. The first witness was Adriano Lubasia Muyale the protestor. He adopted his affidavit of protest dated 25.11.2020 as his evidence – in- chief. In the said Affidavit he stated that he was the son of the deceased.; that his father left two parcels of land , namely Land parcel No. Kakamega/ Murhanda/158 (parcel No. 158) and Isukha / Murhanda/381 (parcel No. 381); that it was agreed in a family meeting that him and his brother Athanas Ford Muyale, who has since died , were to share parcel No. 158 . That his brother later died without leaving any children and hence the whole parcel went to him.
11. He further stated that the deceased’s widow sold her parcel, being parcel No. No. 381 and shared the proceeds of sale with her children.. He further stated that he purchased parcel No. Kakamega / Mukulusu/370 (parcel No. 370) which is now registered in his name ,and hence the said property is not part of the Estate.
12. On cross- examination he admitted that his brother Athanas Ford Muyale , left a child, one Carlistus Muyale Ford.; that the first Administrator, Angelina Lihali, Lenida Isiaho,Olivia Khatenje are all his sisters. He further stated that he bought parcel No. 370 in 1975 but that the transaction was not reduced to writing . Later on in his testimony, he stated that he could not recall clearly when he purchased the land. He admitted that as per minutes of the family meeting he and his late brother Athanas were to share the land in mulusu ; that the land in mulusu is the parcel No. 370. He denied that the said parcel was given to him by the deceased. He further denied the suggestion that his sisters were not allocated any land. He finally stated that they are all in occupation of parcel No. 370 .
13. The 2nd witness was Calistus Muyale. He adopted his statement dated 25.5.2021. In the statement he stated that he was the son of Athanas Ford Muyale , and a grandson of the deceased; that that his father and PW1 shared parcel No. 158.That the 1st petitioner , her deceased mother and siblings were given parcel No. 381 to share amongst themselves, and that they have already sold the said land.
14. In cross- examination, he told the court that PW1 was his uncle while the 1st petitioner was his paternal Aunt. He admitted that he signed the consent for distribution filed by the 1st petitioner but insists that he did not understand what he was signing. He wants to get a portion of parcel No. 158 ,which he says, he currently occupies. He is not aware of the land parcel in mukulusu and that PW1 lives in parcel No. 158 and not in kabras.
15. The protestor closed his case.
16. The first witness for the defence/ 1st petitioner was one Andrea Shimenga Madasio. He adopted his statement dated 15th march 2021. In the statement he stated that the deceased was his uncle.; and that PW1 was his cousin. That the deceased bought parcel No. 370 prior to Adjudication of lands and when the Adjudication process took place the deceased had the said parcel registered in the name of PW1.
17. That after the deceased died a family meeting was held in which PW1 agreed that parcel No. 370 was given to him by the deceased . That he was present in the said meeting. It was further agreed in the said



- meeting that the parcel No.370 was to be shared equally be shared equally between PW1 and his late brother Athanas Ford. He further stated that PW1 later sold this land and went and settle in kabras . He denied that PW1 bought parcel No. 370.
18. On cross- examination he told the court that parcel No. 370 was bought by the family in the 1960s; that the deceased bought it from one Thomas Nang'oli
 19. The 2nd witness was one Simon Witindi Ayisi. He stated that the deceased “ was his brother in the family” . He adopted his statement dated 15. 3. 21 as his evidence -in- chief. In the statement he stated that the deceased was his “ uncle in the clan” and PW1 was his cousin; that the deceased bought parcel No. 370 from one Thomas Nangoli Liyenzero , who was also his uncle. ; that he used to help the deceased plough this land and the deceased’s wife , Teresa Khavuvukwuli would bring them meals as they worked.; that PW1 was still in school then; that the deceased registered the parcel in the name of PW1. He denied that PW1 ever bought the land. He finally stated that he was in the family meeting, in which PW1 agreed to share parcel No. 370 with his deceased brother Athanas.
 20. On cross- examination , he testified that parcel No. 370 was bought in 1964
 21. In the course of the trial, the objector/applicant Adriano Libasia Muyale died , and was substituted by his son , one Wilfred Linsen in this proceedings.
 22. The last witness was the 1st petitioner. She adopted her Affidavits sworn on 23.11.2020 and 17.4. 2020 .
 23. In the Affidavit of 17th April 2020 in support of the Application for confirmation of Grant, she listed the deceased’s properties as parcels Nos. 158 and 381 and identified the heirs as
 - a. Adriano Libasia Muyale-son
 - b. Athanas Ford Muyale- son
 - c. Juliana Vilinga Muyale- daughter
 - d. Anjeline Lihavi Muyale- Daughter
 - e. Leonida Isiaho
 - f. Oliver Khatenje
 - g. Deresina Khavugwi Muyale- widow
 24. She further stated that her brother Atanas died and left a son , one Calistus Muyale Ford; that the deceased gave parcel No. 370 to the 2nd Administrator in 1976 and that the land measures 0.7 hectares. And that PW1 should not therefore benefit from parcel No. 158.
 25. She proposed distribution of parcel No. 158 measuring 1.2 hectares as follows:
 - b). Calistus Muyale Ford-1.0 acre
 - c). Juliana Vilinga Muyale- ¼ Acre
 - d). Anjeline Lihavi Muyale- ¼ Acre
 - e). Leonida Isiaho Muyale- ¼ Acre
 - f). Oliver Khatenje Limisi- ¼ acre
 26. She further proposes that parcel No. Isukha/Muranda/381 should go to one Benedict Mambili Abung'ana as a whole as the parcel had been sold to him by the deceased’s widow.



27. In her further Affidavit sworn on 23.11.2020, she attached a certificate of official search showing that parcel No. 370 was registered in the name of the protestor; that it was the intention of the deceased that once the protestor benefited from parcel No. 370, he should not get any share of the remaining properties.
28. On cross- examination, she testified that parcel No. 370 was her late father's and that indeed she was born there . she further denied that parcel No. 381 came to his father in his capacity as the Administrator of the Estate.

Protestor's submissions

29. The protestor submits that there is an agreement in place to the effect that parcel No. 158 was to be shared between himself and his late brother while parcel No. 381 was to be shared between the Deceased's widow and her daughters.
30. He further submits that consequently parcel no. 158 should be shared between the children of the protestor and the children of his late brother Athanas Ford Muyale.
31. The objector then goes ahead and list the children of the protestor and proposes a mode of distribution of the half share of parcel No. 158 between the children of the objector and the children of his late brother.
32. He reiterates that parcel No. 370 did not form part of the Estate. He referred to an Agreement dated 13.2.1969 which he alleges, is evidence of the the purchase of land from one Thomasi Nangoli Liyenze
33. He urges the court to adopt the mode of distribution as proposed by the objector.

The 1st petitioner's submissions

34. It is the 1st petitioner's submission that by his own admission, the protestor through the minutes of the family meeting filed in court, and during cross- examination , land parcel No. 370 was to be shared between him and his late brother Atanas; that the admission is an indication that parcel No. 370 indeed once part of the deceased's property.
35. It is further submitted that whereas the protestor claimed that he bought parcel No. 370, he had no evidence of purchase and could not provide the full names of the purchaser; that the protestor gave conflicting dates of purchase; and finally that, in any event , the protestor did finally admit during cross-examination that indeed the land once belonged to his father.
36. Consequently, the petitioner finally submits, the protestor is no longer entitle to any further share from the remaining property as he had been adequately provided for.

Determination.

37. I have considered the pleadings , the testimonies and submissions of the parties. The following issues arise for determination:
 - a). Whether the protestor had benefitted from parcel No. 370
 - b). what properties are available for distribution.
 - c). Whether the grant issued by the court should be confirmed and what is the applicable mode of distribution



Whether the Protestor had benefitted from parcel No. 370

38. The controversy surrounding this parcel is whether the same initially belonged to the deceased. The protestor's Evidence is that the above parcel is his land, that he purchased it and is registered in his name. The Applicant contends that the land belonged to the deceased, that during adjudication process the deceased had it registered in the name of the protestor.

39. A letter dated 21.12.2004 done by the Assistant – chief, of Shiswa/ shisembe addressed “To whom it may concern” refers to minutes of a meeting that was held on 10.12.2004. This was after the deceased had died.

The letter states that a meeting was held between family members in the presence of some elders. A section of the letter reads as follows:

“It was agreed that:

“Adriano and Athanas will also share a shamba which is in mukulusu sub- location but registered in the name of Adriano Libasi Muyale”.

40. It came out during the cross- examination of the protestor that the land in mukulusu is parcel No. 370. In his Affidavit of protest dated 25.11.2020 the protestor acknowledges that indeed such a meeting was held. Indeed he goes ahead and annexed the letter to demonstrate that he was to share parcel No. 158 with his brother. To the extent that the protestor admits to the existence of such a meeting and the deliberations thereon, then it is an admission that the land was given to him by his father.

41. Further to the extent that the deceased had gone ahead and registered it in the protestor's name then it follows that the protestor had benefitted during the lifetime of the deceased. Land parcel No. 370 therefore was a gift *inter vivos* from the deceased to the protestor. Gift *inter vivos* is governed by section 42 of the *law of succession Act*. It refers to gifts given out by the deceased during his life time. When the court is distributing the net Estate of a deceased person, it behoves it to consider any gifting the deceased may have made to any of his heirs so as to ensure equity and equality of distribution of the net Estate.

What properties are available for distribution and how should the distribution be?

42. There is no dispute that at the time of the deceased's demise, parcel Nos. 158 was registered in the name of the deceased and therefore is available for distribution.

43. In respect to parcel No. 381 the petitioner has told the court that the deceased's widow sold parcel No. 381 to one Benedict Mambili Abung'ana. A search done on 8.8.2011 shows that the property belonged to the deceased. It measures 0.04 hectares. A certified copy of the Register shows that the property was registered to the widow then as the Administrator in this succession cause. The Grant issued herein is yet to be confirmed and any purported sale therefore was in contravention of section 45 of the *Law of succession*. The section provides as follows:

“(1) Except so far as expressly authorized by this *Act*, or by any other written law, or by a grant of representation under this *Act*, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased.

(2) Any person who contravenes the provisions of this section shall-



- a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."

44. Thus the widow of the deceased had no right to sell any Estate's Assets without the express authority of the court or without the succession process being completed. Indeed there was no document shown to the court showing any transaction between the deceased's widow and the alleged purchaser. In any event, if there was any transaction that took place between the Deceased's widow and the alleged purchaser, the purchaser's recourse is against the said Deresina personally, or her Estate and not against the deceased's Estate herein

45. It is therefore the finding of this court that land parcels Nos. 158 and 381 are Estate properties and are therefore available for distribution between the beneficiaries.

What is the Applicable mode of distribution

46. According to the 1st petitioner the deceased left the following heirs:

- a). Adrian Libasia Muyale- (Deceased but left children.)
- b). Atanas Ford Muyale – (Deceased but left behind a son , one Calistus Muyale Ford.
- c). Juliana vilinga Muyale
- d). Anjelina Lihavi Muyale
- e). Leonida Isiaho
- f). Oliver Khatenje
- g). Deresina Khavugwi Muyale –(widow and now deceased)

47. It is common ground that the widow to the deceased has since passed on and the children of the deceased are the only survivors. The mode of distribution should therefore be as per section 38 of the *Law of succession Act*. The Section 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.”

48. I have already determined that the family of Ardian Libasia Muyale has benefited from Estate through the gifting of parcel No. 370 as aforesaid. The search certificate dated 14.8.2000 indicate that this parcel measures 0.7 hectares. In the light of the size of the remaining parcels, particulars of which are indicated hereafter, am of the considered view that the Estate of Adrian Libasia Muyale has been adequately provided for and will not therefore benefit from the rest of the properties.

49. Parcel No 381 is 0.4 hectares, while parcel No. 158 is 1.2 hectares. The land available for distribution therefore is approximately 2.8 hectares, and the same is to be distributed between the remaining 5 beneficiaries or their respective Estates.



50. I will therefore proceed to confirm the grant and distribute the two parcels of land to the remaining 5 beneficiaries as follows:

a). Kakamega/ muranda/ 158 to be shared Equally between :

Julia Vilinga Muyale

Anjelina Lihavi Muyale

Leonida Isiaho Muyale

Oliver Khatenje Muyale

b). Isukha/ muranda / 381 wholly to Calistus Muyale Ford.

51. In the cause of these proceedings the 2nd petitioner/ protestor Adrial Libasia Muyale died , and a death certificate in respect thereof was submitted by his son Wilfred Linsen Libasia. I take note of the fact that whereas the said Wilfred sought to represent the objector in these proceedings there was no prayer for revocation of the Grant issued on 5th December 2019 to Julia Vilinga Muyale and Adriano libasia Muyale. In any event where there is no continuing trust the surviving Administrator can continue with the Administration of the Estate. (see section 81 of the Law of succession Act of the Act)

52. Consequently, for ease of Administration and transmission of the properties, and on the basis of the powers bestowed to this court by Rule 73 of the Probate and Administration Rules, I will order for the amendment of the grant by removing the name of Adriano Libasia Muyale.

53. In conclusion I hereby proceed to make the following orders: a

a). That the Grant of letters of Administration issued on 5th December 2019 is hereby amended by removing the name of Adrian lubasia Muyale, and an amended Grant of letters of Administration intestate to issue forthwith.

b). The Amended Grant is hereby confirmed.

c). The distribution of the properties of the Estate will be as per paragraph 50 of this judgment.

d). This being a family matter, each party will meet their own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF JANUARY 2024.

S.CHIRCHIR

JUDGE.

In the presence of :-

Rono- Court Assistant.

No appearance by the parties.

