



**In re Estate of Reuben Kidigolo Mbaya (Deceased) (Probate & Administration  
288 of 2013) [2024] KEHC 5887 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5887 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
PROBATE & ADMINISTRATION 288 OF 2013  
RN NYAKUNDI, J  
MAY 24, 2024**

**IN THE MATTER OF**

**SAMWEL ALIVITSA MWACHI ..... 1<sup>ST</sup> APPLICANT**

**FRANCIS ANUSU KIDIGOLO ..... 2<sup>ND</sup> APPLICANT**

**RULING**

1. The petitioners approached this court vide an application dated 4<sup>th</sup> September 2018 expressed to be brought under section 71 of the Law of Succession Act and Rule 40(1) of the Probate and Administration Rules seeking two substantive orders namely;
  - a. The honourable court be pleased to amend form 5 property section to incorporate Kakamega/Lumakanda Township/37 which has been discovered belongs to the deceased.
  - b. The grant of letters of administration intestate made to Samwel Alivitsa Mwachi & Francis Anusu Kidigolo on 31<sup>st</sup> December 2014 be and is hereby confirmed.
2. The grounds of the application are set out in the application. The petitioners contend that six months have lapsed since the grant of letters of administration intestate were granted to the administrators and no objection has been lodged thereto. It is now proper that the same be confirmed to enable the administrators to finally distribute the deceased's estate.
3. The petitioners attached a consent to the confirmation of grant and mode of distribution and a copy of the title deed to Kakamega/Lumakanda/1013.

**Whether the court should amend form 5 to incorporate Kakamega/Lumakanda Township/37 as part of the estate of the deceased**

4. The petitioners seek to amend the affidavit in support of the grant of letters of administration intestate to add the property known as Kakamega/Lumakanda Township/37 as it has been discovered to form part of the estate of the deceased.



5. In the affidavit in support for Letters of Administration intestate it is deponed that the deceased is survived by the following dependants:

- a. Salome Musimbii Kevogo Daughter
- b. Samwel Alivitsa Mwachi Son
- c. Selina Adema Kataka Daughter
- d. Stephen Mudogo Kidigilo Son
- e. Francis Anusu Kidogolo Son
- f. Josephine Kanaiza Kidigilo Daughter
- g. Alfred Mbaya Kidigilo Son

6. As at the time of his death the deceased is indicated to have left behind free estate referenced as hereunder:

- a. Kakamega/Lumakanda/1013

During the pendency of the probate proceedings and after grant of letters of administration intestate issued by this court in favor of Samwel Alivitsa Mwachi and Francis Anusu Kidogolo on 31<sup>st</sup> December, 2014 it came to the attention of the administrators that Land Parcel No. Kakamega/Lumakanda Township/37 had not been discovered at the initial stages of petitioning for grant to administer the estate of the deceased. It was therefore incumbent upon the court to exercise discretion under Rule 73(1) of the Probate and Administration Rules to cause an amendment to Form P&A 5 to have the parcel of land included as part of the free property for purposes of distribution to the beneficiaries.

7. The guiding principles on amendment of pleadings are more explicit in the Civil law jurisdiction, however for purposes of this application the guidelines in the case of *Daniel Ngetich & Anor v cp Bank Limited* [2013] eKLR are relevant.

“Normally the court should be liberal in granting leave to amend a pleading. But it must never grant leave for amendment if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of the court. The power to allow amendments is intended to do justice; for, all amendments ought to be allowed which (a) do not work injustice to the other side, and (b) are necessary for the purpose of determining the real question in controversy between the parties; and all the authorities lay down precisely the same doctrine, that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. The court must aim at seeing that a multiplicity of suits is avoided, the real matters in controversy between the parties are clearly brought out, the other party is not prejudiced, the character of the suit or defence is not altered, and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work a clear injustice”



8. Similarly in the case *Emerge Development Limited v Chestnut Uganda Limited & another* [2020] eKLR the court held that:

“I find that the proposed amendments do not introduce a new cause of action or change the character of the case, but arise from the same set of facts and are necessary so as to provide clarity of issues that will enable the court to conclusively determine all the issues between the parties to the suit.”

9. The applicants have shown sufficient cause for this court to grant a remedy of amendment to form P&A 5 the property section to incorporate the aforesaid asset referenced Kakamega/Lumakanda Township/37. In so far as this estate is concerned, the applicable law is Section 38 of the *Law of Succession Act*, which states:

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

10. The *Constitution* of Kenya in Art 27(4), outlaws discrimination on grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour age, disability, religion, conscience, belief, culture, dress, language or birth etc. In assessing the evidence before this court, it is clear that land reference Kakamega/Lumakanda Township/37 the beneficiaries have consented to have it distributed to the purchaser, Wycliff Inyasa Magodi. Whereas the administrators contend that Kakamega/Lumakanda/1013 be held in abeyance until they schedule a meeting for proposals on distribution, I am in disagreement with that request on grounds that they are already in breach of the applicable law on distribution within the set timelines of six months whose countdown was to commence on the 31<sup>st</sup> day of December, 2014. There is no dispute about the surviving descent to the deceased’s intestate estate. The *Law of Succession Act* provides for intestate succession clearly designed to provide an estate plan that approximates the property distribution within the legislative scheme. An important factor in this intestate estate is that it is survived by sons and daughters of the deceased. The applicable provisions on the model of distribution is under Section 38 of the Act. For the foregoing reason the residual estate Kakamega/Lumakanda/1013 be distributed equally among the beneficiaries whose eligibility is not challenged within the scope of Section 29 of the *Law of Succession Act*. Therefore, the certificate of confirmation of grant be and is hereby issued to the administrators as an instrument to transmit the estate appropriately.

This being a family matter, I make no orders as to costs.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 24<sup>TH</sup> DAY OF MAY, 2024**

.....

**R. NYAKUNDI**

**JUDGE**

