



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 548 OF 2014**

**IN THE MATTER OF THE ESTATE OF JOSEPH ALWANYI ANYOLO (DECEASED)**

**RULING**

1. According to the certificate of death on record, serial number 586102, dated 7<sup>th</sup> December 2000, the deceased herein, Joseph Alwanyi Anyolo, died on 23<sup>rd</sup> September 1988. According to the letter by a letter from the Assistant Chief of Malimili Sub-Location, dated 29<sup>th</sup> May 2014, the deceased was said to have had been survived by a son and a buyer, being Vincent Alwanyi Litonde and Mechtilda Khabale Lisutsa, respectively. He was said to have had died possessed of Isukha/Mug/399.

2. Representation to the estate of the deceased was sought by Vincent Alwanyi Litonde, in his capacity as son of the deceased, in a petition that was lodged herein on 17<sup>th</sup> March 2015. The deceased was expressed to have had been survived by three individuals, the petitioner, Vincent Alwanyi Litonde, as son, and Brigit Khakuya Alwanyi and Mary Mbuya Alwanyi, as daughters of the deceased. He was expressed to have had died possessed of an asset known as Isukha/Mugomari/399. Mechtilda Khabale Lisutsa is listed as a liability.

3. The petitioner, Vincent Alwanyi Litonde, died on 5<sup>th</sup> May 2017, according to a certificate of death, serial number [xxxx], dated 8<sup>th</sup> November 2017, before a grant of representation was made to her. On 14<sup>th</sup> December 2017, Francis Lunalo Amulaa filed an application dated 11<sup>th</sup> December 2017, seeking to substitute Vincent Alwanyi Litonde, as petitioner. He described himself as a son of the deceased and a brother of the dead petitioner, Vincent Alwanyi Litonde. When the Deputy Registrar required Francis Lunalo Amulaa to produce a letter from the Chief, he presented a letter from the Chief of Ilesi Location, dated 5<sup>th</sup> November 2018, which stated that the deceased had been survived by Vincent Alwanyi Litonde, Brigit Khakuya Alwanyi, Mary Mbuya Alwanyi and Mechtilda Khabale Lisutsa.

4. When the court insisted that the consents of the children of the deceased be availed before the court could consider the application, it would appear that the application dated 5<sup>th</sup> May 2017 was abandoned, and another application was filed on 11<sup>th</sup> January 2019, by Brigit Khakuyia Alwanyi, dated 20<sup>th</sup> December 2018, to substitute Vincent Alwanyi Litonde as petitioner. She described herself as a granddaughter of the deceased. The application dated 20<sup>th</sup> December 2018 was allowed on 7<sup>th</sup> October 2019. Letters of administration intestate well accordingly made to Brigit Khakuyia Alwanyi, on 17<sup>th</sup> October 2019, and a grant was issued to her on 8<sup>th</sup> November 2019. I shall refer to her hereafter as the administratrix.

5. What I am called upon to determine is a summons for confirmation of grant, dated 15<sup>th</sup> August 2020, filed herein on 2<sup>nd</sup> September 2020. It is brought at the instance of the administratrix. She listed the survivors of the deceased to be herself as granddaughter of the deceased, Mary Mbuya Alwanyi, as daughter of the deceased, and Mechtilda Khabale Lisutsa, as liability. The property proposed for distribution is Isukha/Mugomari/399. The said summons provides for a schedule for distribution of the property as follows: -

a) 0.37 hectare, to Brigit Khakuyia Alwanyi;

b) Nil, to Mary Mbuya Alwanyi; and

c) 0.10 hectare, to Mechtilda Khabale Lisutsa.

6. A consent, in Form 37, was filed, under Rule 40(8) of the Probate and Administration Rules, duly signed by Brigit Khakuyia Alwanyi and Mechtilda Khabale Lisutsa. The column against the name of Mary Mbuya Alwanyi is not signed.

7. The application for confirmation of grant first came up for hearing on 21<sup>st</sup> October 2010 before Njagi J. The record indicates that the petitioner and Mechtilda Khabale Lisutsa were in attendance. The court was informed that the other beneficiary was a daughter of the deceased who was not interested in the estate. When Njagi J interviewed the two who were in court, the administratrix informed the court that Mary Mbuya was married in Migori, while Mechtilda Khabale Lisutsa told the court that she had no objection to the proposals made in the confirmation application. The court then directed that Mary Mbuya be presented in court on 30<sup>th</sup> November 2020.

8. Come 30<sup>th</sup> November 2020, the matter was placed before me. Mary Mbuya was not in court. I was informed that she had been served. I was also informed that the buyer had acquired the property from the deceased.

9. In confirmation applications, there are two principal factors for the court to consider, appointment of administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

*“Confirmation of Grants*

*71. Confirmation of grants*

*(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*

*(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—*

*(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or*

*(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or*

*(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or*

*(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:*

*Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”*

14. The principal purpose of confirmation of grant is distribution of the assets. The proviso to subsection (2) of section 71 requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

*“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all person entitled to the estate have been ascertained and determined.”*

15. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? I do not think that the persons beneficially entitled to the estate have been properly ascertained. The letter filed simultaneously with petition was from the Assistant Chief of Malimili Sub-Location, and it was dated 29<sup>th</sup> May 2014. It listed Mechtilda Khabale Lisutsa and Vincent Alwanyi Litonde as the survivors of the deceased. When the petition was lodged in court, two other survivors were introduced, described as daughters of the deceased, being Brigit Khakuya Alwanyi and Mary Mbuya. When the first petitioner, Vincent Alwanyi Litonde, died, Francis Lunalo Amulaa emerged and attempted to substitute him as petitioner. He described himself as a son of the deceased, and a brother of Vincent Alwanyi Litonde. When the court required him to avail the two alleged daughters of the deceased before he could be allowed to substitute Vincent Alwanyi Litonde as petitioner, the said Francis Lunalo Amulaa simply vanished, and another application for substitution was filed by Brigit Khakuyia Alwanyi. The application by Francis Lunalo Amulaa was not withdrawn. In her application, Brigit Khakuyia Alwanyi, described herself as a granddaughter of the deceased, and a daughter of the dead petitioner, Vincent Alwanyi Litonde. That was curious, for Brigit Khakuyia Alwanyi had all long been described as a daughter of the deceased. Firstly, in the petition that was filed herein on 17<sup>th</sup> March 2015, where Vincent Alwanyi Litonde, her alleged father, described her, in his affidavit in support of the petition, as a daughter of the deceased. Secondly, the letter obtained from the Chief of Ilesi Location, dated 5<sup>th</sup> November 2018, described her as such, a daughter of the deceased. So when she sought to substitute Vincent Alwanyi Litonde as administrator, she became a granddaughter of the deceased, and a daughter of Vincent Alwanyi Litonde. She appears in this new capacity of granddaughter in the summons for confirmation of grant.

16. I have asked myself several questions with regard to several things. Firstly, I ask myself whether Brigit Khakuyia Alwanyi is a daughter or a granddaughter of the deceased. She cannot be both. Secondly, I ask myself, whether Francis Lunalo Amulaa is a son of the deceased. He came on board, with an application seeking to be appointed administrator of the estate of the deceased, claiming to be a son of the deceased and a brother of Vincent Alwanyi Litonde. How is he related to the deceased? He simply abandoned his application, which he has not withdrawn, meaning that it is still pending. His name has not been brought forth at confirmation, as a son of the deceased. So who is he to the estate?

17. Then there is the issue of Mary Mbuya. She was listed in the petition and the letters from the Chiefs as a daughter of the deceased. When the petition was lodged in court, a consent to the making of the grant was lodged simultaneously, bearing a signature said to be that of Mary Mbuya. When the two applications, for substitution of Vincent Alwanyi Litonde, as petitioner, were mounted, none of them had the consent of Mary Mbuya. When the summons for confirmation of grant was filed in court she was not allocated a share in the estate. She did not sign

the Form 37 that was placed on record. When the application for confirmation of grant was placed before Njagi J, the court was told that she was not interested in the estate. Njagi J did not buy that, given that there was no document before the court, signed by her, indicating that position, and the judge directed that she be presented in court on 30<sup>th</sup> November 2020. On 30<sup>th</sup> November 2020, the matter was placed before me, as Njagi J had gone on transfer. I was told that Mary Mbuya had been served. There is an affidavit of service on record sworn on 24<sup>th</sup> November 2020, and filed in court on 30<sup>th</sup> November 2020. It alleges that Mary Mbuya had been served with a hearing notice for 30<sup>th</sup> November 2020, on 22<sup>nd</sup> November 2020, at her home at Ilesi Location, Malinya Sub-Location, near the Malimili Divine Church. When the matter was in court on 21<sup>st</sup> October 2010, Njagi J was informed that Mary Mbuya was married in Migori, which suggested that her home was situated somewhere within Migori County. The question to ask then is whether her home is at Migori or Malimili of Ilesi Location. Something does not quite add up about Mary Mbuya. Someone is not telling the court the true. I doubt whether Mary Mbuya is even aware of these proceedings.

18. After Vincent Alwanyi Litonde died, his estate was not allocated a share in the estate of the deceased herein at distribution. Brigit Khakuyia Alwanyi claims to his daughter. It is not disclosed whether the said Vincent Alwanyi Litonde had other children, apart from her, and whether he had wife, and whether she had survived him. It is also not disclosed whether Brigit Khakuyia Alwanyi had obtained representation to the estate of her alleged late father, Vincent Alwanyi Litonde, in the event that the said Vincent Alwanyi Litonde had other children.

19. From what I have seen so far, the administratrix has not properly identified the survivors of the deceased. It is not clear how many wives the deceased had, and how many children he had with them, both male and female, whether married or not. I am not persuaded that the administratrix has satisfied the proviso to section 71(2) of the Law of Succession, so far as ascertainment of the persons beneficially entitled to the estate are concerned.

20. I have indicated that Mary Mbuya has not been allocated any share in the estate of the deceased. Yet, she is a daughter of the deceased. The court was told that Mary Mbuya was not interested in a share in the estate. Yet, she has not signed any document renouncing or waiving or forfeiting her share. Her exclusion appears to be founded on the fact that she was married. Yet, there is no provision in the Law of Succession Act which disqualified her from taking a share in the estate of the deceased, on the ground of marriage. The deceased died in the year 1988, while the Law of Succession Act came into force in 1981. Distribution of his estate, therefore, should be in accordance with the Law of Succession Act. If what has been disclosed is the truth, that the deceased was survived by children but no spouse, then distribution should be governed by section 38, which envisages equal distribution amongst the children. Reference to children in the Law of Succession Act does not mean sons only, it includes daughters, whether or not married. No reason, grounded in law, has been given for not allocating Mary Mbuya a share in her father's estate. The fact that she is married does not disqualify her from inheriting from her father. The fact that she has not come forward to claim a share does not disqualify her either or suggest that she is not interested. Entitlement to a share in the estate of a dead person is not based on whether a person participates in the proceedings or not. It depends on one factor, and one factor only, the relationship between the survivor and the deceased. The only thing that can disentitle a child to a share in their father's estate is the child's own renunciation or waiver or forfeiture of their right to a share.

21. Mechtilda Khabale Lisutsa is projected as a liability, on the basis that she had acquired a right to a share in the estate on account of having bought land from the deceased. It is not enough to just say or aver so. Some material should be placed on record. A sale agreement duly signed by the so called liability and the deceased, or a transfer form duly signed by the deceased in favour of the so called liability. An administrator should not appear to allocate shares in the estate of the deceased without some proof of entitlement to that share. An administrator is required to render an account of their administration of the estate and to provide an inventory of the assets. He or she is also required to ascertain the debts and liabilities of the estate. The affidavit in support of the confirmation application has not disclosed how it ascertained Mechtilda Khabale Lisutsa was a liability of the estate. How was it established that she had bought land from the deceased? Was the transaction documented.

22. The proviso to section 71(2) of the Law of Succession Act requires administrators to satisfy the court that the shares of the persons beneficially entitled had been ascertained. Mary Mbuya, by virtue of being a daughter of the deceased, is a person beneficially entitled to a share in the estate. Her share ought to have been ascertained. She is entitled to equal share with the other children of the deceased, unless she had waived or renounced or forfeited that share. She did not, or at least no evidence was presented to show such renunciation, and, therefore, the proviso has not been complied with. Mechtilda Khabale Lisutsa is alleged to be a liability of the estate, a buyer of land from the deceased, yet no documents have been presented to support her entitlement to the 0.10 hectare allocated to her in the summons for confirmation of grant. That would mean that her claim to a share has not been properly ascertained. The proviso to section 71(2) has, therefore, not been complied with with respect to that.

23. The overall picture, therefore, is that the summons for confirmation of grant that is before me is premature, as the persons beneficially entitled to a share in the estate have not been properly ascertained, and their shares in the estate have also not been properly ascertained. I cannot determine the said application in the circumstances. Section 71(2)(d) of the Law of Succession Act allows me to postpone such application, so that all the issues are addressed first, before final orders are made. That is what I shall do here. Let the administratrix address all the issues that I have raised, in a further affidavit, that she should file within forty-five days from the date of this ruling. The matter shall be mentioned thereafter, on a date that the parties shall obtain at the registry. It is so ordered.

**DELIVERED, DATED AND SIGNED IN CHAMBERS ELECTRONICALLY AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF APRIL, 2021**

**W MUSYOKA**

**JUDGE**