



**In re Estate of Khalayi Ndendela (Deceased) (Civil Appeal E004 of 2022)
[2024] KEHC 11460 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11460 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E004 OF 2022
DK KEMEL, J
SEPTEMBER 30, 2024**

BETWEEN

JOHNSTONE BARASA KHALAYI APPELLANT

AND

DIMINAH NALIAKA WOSULA RESPONDENT

(Being an appeal arising from a Judgement delivered by Hon. G. Adhiambo (Principal Magistrate) in Kimilili Principal Magistrate's Court Succession Cause No. 51 of 2021 (formerly Bungoma High Court P&A No. 288 of 2014 delivered on 14th October 2022)

JUDGMENT

1. This is an appeal against the judgement of the Principal Magistrate's Court at Kimilili, delivered on 14th October 2022, relating to the estate of Khalayi Ndendela (deceased), whereby the Court held that the Appellant/1st Administrator was intermeddling with the property of the deceased thus terming his actions illegal and proceeded to distribute the estate of the deceased (land parcel No. Elgon/Kaptama/318 as proposed by the 2nd administrator who is not before this Court as follows:



No.	Name	Acreage
1.	Pamela Namaemba Kalamu	1.0 Acres
2.	Joina Mukhwana Sioyi	1.0 Acres
3.	Florence Wafula Wachilonga	1.0 Acres
4.	Dinninah Naliaka Wosula	3.0 Acres
5.	Anna Nasimiyu Mukhwana	0.5 Acres
6.	Johnstone Barasa Khalayi	2.0 Acres
7.	Esther Nafula Wafula	0.5 Acres
8.	Joan Wekesa Wanjala	2.0 Acres
9.	Paul Nakhanya Wafula	2.0 Acres

2. A brief background of the case is that the deceased died intestate on 17th February 1977. He was survived by two wives. The first house comprised of six children, including the Respondent/2nd Administrator herein. The second house was made up of six children including the Appellant/1st Administrator herein. The Petitioners (John Masungu and Paul Simiyu Khalayi) moved the Court seeking confirmation grant vide summons dated 27th October 2021 which was supported by the affidavit of the Respondent/2nd Administrator herein. However, Johnstone Barasa Khalayi (1st Administrator/Appellant) protested the confirmation of the grant.

3. The dispute was heard by way of viva voce evidence. It was the evidence of PW1, Diminah Naliaka Wosula, that she moved the lower Court seeking confirmation of grant of the estate of her late father as the 2nd Administrator vide an application dated 27th October 2021. On her request, the Court adopted her affidavit in support of the application sworn on 27th August 2021 and her recorded statement dated 14th February 2022 as her evidence-in-chief. According to her, she wanted the Court to distribute the property as her father's demise occurred in the year 1977 and whose estate was yet to be distributed. On cross-examination, she testified that since her father's death she has not used the land Elgon/Kaptama/318 and that at the point of her father's death she had not been given any portion. She told the Court that due to the clashes that occurred from 1990 to 1995, the Appellant herein and her other brothers vacated the parcel and she later learnt that they sold portions of the land they were occupying and went to purchase land elsewhere. She told the Court that she last visited the land in 1983 when they went to bury their mother. She told the Court that none of her sisters reside on the said land as they are married and that apart from Elgon/Kaptama/318, her deceased father had other parcels of land namely 368 Kamukuywa Kimilili where her step mother was buried. According to her, her brother Samuel Wanjala and Edward Juma reside in parcel 368 Kamukuywa Kimilili and that her late father purchased another parcel 385 for Samuel Wanjala and that Peter Khalayi resides on the Elgon/Kaptama/318 parcel. On re-examination, she told the Court that the land of the deceased was not distributed to her brothers by the deceased prior to his demise and that it was only Peter Khalayi who was given land by the deceased. She told the Court that as a child of the deceased herein she is claiming her father's land and that her brothers lacked the authority to sell the deceased's land.



4. PW2 was Prisca Namaemba Piti, who testified that she is one of the heirs to the estate of the deceased as she was his daughter. At her request, the Court proceeded to adopt her statement recorded on 14th February 2022, as her evidence in chief. According to her, she was born in 1926 and is duly entitled to the estate of the deceased. She confirmed that she gave her consent to the appointment of PW1 as the 2nd Administrator to the estate of the deceased and urged the Court to distribute her father's estate equally and allocate her one acre from the land parcel Elgon/Kaptama/318 that is measuring 5 HA.
5. PW3 was Joyna Mukhwana Khalayi, who testified that she was a daughter of the deceased herein. At her request, the Court proceeded to adopt her statement recorded on 14th February 2022, as her evidence in chief. According to her, she is aware of the succession proceedings as filed by PW1 in relation to the distribution of her father's estate. She told the Court that she was born in 1934 and is duly entitled to the estate of the deceased. She confirmed that she gave her consent to the appointment of PW1 as the 2nd Administrator to the estate of the deceased and urged the Court to distribute her father's estate equally. On cross-examination, she told the Court that at the time of her father's death she was residing in the parcel where her step mother lived and so did her brothers, the Appellant and John Masungu but they were each given lands that were bought and eventually vacated her father's land. She confirmed that the deceased never distributed his land to her when he was alive.
6. At the close of the 2nd Administrator's case, DW1 Johnstone Barasa Khalayi, proceeded to render his evidence protesting the confirmation of the grant and the adoption of the proposed 2nd Administrator's mode of distribution. According to him, he is the 1st Administrator to the estate of the deceased herein and that PW1 is his sister and at his request the Court adopted his affidavit of protest sworn on 17th December 2021 as his evidence-in-chief. On cross-examination, he told the Court that they sold land of the deceased who died in 1977 to one Maurice Kiboi and that his sisters were involved in the sale. He told the Court that as per the sale agreement marked as annexure JPK1, PW1 and his other siblings are not in the agreement. According to him, it is not just for his sisters to be given land. He told the Court that the land is still in his father's name but that they were in the process of transferring ownership. He told the Court that they had every right to sell their late father's land. On re-examination, he told the Court that when they were selling their late father's land each of them had their respective portions as distributed to them by the deceased and that land parcel Elgon/Kaptama/318 was allocated to him, John Masungu and Benjamin Khalayi and Peter Khalayi. He further testified that, none of his sisters were given any portions.
7. DW2 was Peter Khalayi, who at his request the Court adopted his recorded statement dated 12th March 2022, as his evidence-in-chief. According to him, the deceased herein was his father and that PW1 is his sister. He insisted that PW1 was never given any land as she is married thus cannot inherit land from his father again. He told the Court that as per the Bukusu customs, when a lady gets married, they should not get land from their father. According to him, the land parcel Elgon/Kaptama/318 was duly distributed to the deceased's sons by the deceased and that he was given three acres. On cross-examination, he told the Court that it was his late father who distributed land to him and his brothers with John getting five acres, Benjamin getting four acres and Johnstone getting three and half acres. Boundaries were erected and all of them sold their portions to Maurice Barasa Kiboi who bought the same in 1993 and is in occupation of the portions.
8. DW3 was Samuel Wanjala Khalayi, who at his request the Court adopted his recorded statement dated 18th March 2022, as his evidence-in-chief. On cross-examination, he told the Court that he is the son of the deceased and that PW1 is his sister. He told the Court that his sisters were not given land and that the land in question is still registered under the name of the deceased.



9. DW4 was Paul Benjamin Khalayi who at his request the Court adopted his recorded statement dated 12th March 2022, as his evidence-in-chief. He told the Court that the land parcel Elgon/Kaptama/318 belongs to his grandfather as Benjamin is his father. On cross-examination, he told the Court that the land is still registered in the name of the deceased and that the daughters of his grandfather were never given any land as they got married and only sons were given land by his grandfather. He told the Court that the land was sold to Maurice Kiboi.
10. After hearing the parties, they were directed to file and serve their respective submissions. Hon. G. Adhiambo, in her judgment delivered on 4th October 2022, determined that the daughters of the deceased had every right to benefit from the distribution of the estate of the deceased and found that the mode of distribution as proposed by the Respondent/2nd Administrator to be appropriate.
11. It is this decision of the learned magistrate that provoked the instant appeal. The Appellant proffered six grounds of appeal. In a nutshell, the Appellant faulted the learned magistrate for adopting the Respondent/2nd Administrator's proposed mode of distribution yet the deceased had already allocated land parcel No. Elgon/Kaptama/318 to his sons during his lifetime and for distributing to the daughters of the deceased 1.0 acres and 0.5 acres without demonstrating the formula used to arrive at the said figures.
12. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged their respective submissions.
13. This being a first appeal, our duty was well stated in *Abok James Odera T/A A.J. Odera & Associates v. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where this Court held:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
14. Likewise, in *Selle and Another v. Associated Motor Boat Co. Ltd* [1968] E.A. 123, the Court observed as follows:

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mhamed Sholan*, (1955) E.A.C.A. 270).”
15. Guided by the foregoing principles, the record of appeal as well as submissions by parties to the appeal, i am called upon to re-evaluate the evidence tendered before the lower Court and determine whether the learned trial magistrate erred in adopting the 2nd Administrator's proposed mode of distribution that catered for the daughters of the deceased and whether the deceased distributed his estate to his sons only prior to his death as alleged.



16. Before i get into the substance of the matter before me, it is critical that i deal with the issue of the sale of the portions of the asset of the estate of the deceased from the sons of the deceased. Section 79 of the [Law of Succession Act](#) should be read together with Sections 82 and 83 of the Act, which set out the powers and duties of administrators. Once the assets of the deceased were vested in the administrators, the administrators would then be entitled to exercise the powers conferred upon administrators by Section 82, and they were subject to the duties that were imposed by Section 83. The powers included powers to enter into contracts with respect to assets of the estate, to sue and be sued with regard to estate assets, among others. Entering into contracts over estate assets would include converting estate assets by way of sale. However, Section 82(b)(ii) of the Act outlawed the sale of immovable assets of an estate before the Grant had been confirmed. That would mean that any such sale would be unlawful and unenforceable unless it happened with the leave of the Court.
17. This simply means that Mr. Maurice Barasa Kiboi who purchased portions off the deceased's estate post the deceased persons death, 17th February 1977, cannot be viewed as a creditor of the estate. He would only have a claim against the estate if he had transacted over the land with the deceased owner himself. The transaction in question appeared to have been entered into after the deceased died as per the availed sale agreement which indicated the date they entered into the transaction as on 10th August 1993. The document placed before the Court was the sale agreement signed by Mr. Maurice Barasa Kiboi and the deceased's sons, with Benjamin Wafula selling his 4 acres for Kshs. 90,000/=, John Masungu selling his 5 acres for Kshs. 150,000/= and the Appellant selling his 3.5 acres for Kshs. 105,000/=. Later, Benjamin Wafula sold an additional 1 acre to Mr. Kiboi for Kshs. 30,000/=.
18. The alleged sale of land did not happen during the deceased's lifetime and did not involve the deceased, but after his death, involving his surviving sons before the parties to this instant appeal had obtained representation to enable them administer the estate. That would mean, by dint of Section 79 of the [Law of Succession Act](#), the assets of the estate had not yet vested in the Administrators. The Appellant and his brothers, therefore, did not have power by dint of Section 82 of the [Law of Succession Act](#), to sell the property. The Appellant could not enter into any binding contract with anybody over any of the assets that made up the estate of the deceased.
19. By dint of Section 45 of the [Law of Succession Act](#), any transaction between the Appellant and Mr. Maurice Kiboi amounted to intermeddling with the estate of the deceased, and those involved, therefore, would be deemed to have engaged in criminal activity and should have been prosecuted. The sales contravened Sections 45 and 82 of the [Law of Succession Act](#) and there was no possibility that Mr. Kiboi could have acquired any valid title from the sales, for the persons who purported to sell the property to him had no title to it. He had nothing to sell and Mr. Kiboi bought nothing from him. I duly concur with the holding of the lower Court that the Appellant and his brothers are intermeddlers and that their sale of their late father's land was illegal and unlawful.
20. The deceased herein died in 1977, before the [Law of Succession Act](#) came into force on 1st July 1981. According to Section 2(1) of the [Law of Succession Act](#), the substantive provisions of the said legislation applied only from the date the statute became operational, which therefore meant that the substantive provisions did not apply to estates of persons dying before 1st July 1981, like the deceased herein. Section 2(2) of the [Law of Succession Act](#), provides that the law to govern distribution of estates of persons dying before the commencement of the Act was to remain the law or customs that applied as at the date of death. See In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura (deceased) Nairobi High Court Succession Cause number 935 of 2003.



21. The deceased herein was evidently a man of Luhya-Bukusu Sub-tribe ethnic extraction and hence the distribution of his estate would be governed by Bukusu customary law as tempered or moderated by *the Constitution* and Section 3(2) of the *Judicature Act* which provides that:

“The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

22. The deceased herein died a Luhya, presumably of the Bukusu sub-tribe, and, therefore, an effort should have been made to demonstrate what the Luhya or Bukusu customs, as at 17th February 1977 indicated on the matter of distribution of estates of a dead polygamist intestate. The Appellant did not place any material on the record on the purport of Luhya or Bukusu customs in that regard nor did he avail any witnesses apart from his brothers who were present in the alleged distribution exercise by the deceased herein. In the absence of such evidence, I can only advert to Eugene Cotran, *Restatement of African Law: 2 Kenya II Law of Succession*, Sweet & Maxwell, London, 1969, dated as it is, to guide me on the purport of Luhya or Bukusu customs with respect to distribution of the estate of a Bukusu polygamist intestate. This is what Cotran wrote at pages 45 and 46:

- “ 1. Estate of a married man with one wife, sons and daughters
 - (a) Land. The land is shared among the sons so that each son receives a slightly larger share than his immediate junior. The widow is entitled to use or cultivate a portion of the youngest son. Daughters receive no share.
 - (b) Livestock. ...
2. Estate of a married man with two or more wives, sons and daughters
 - (a) Land.
 - (i) Each house keeps that land which was allocated to it during the husband’s lifetime.
 - (ii) Land, which has not been allocated to any house, is divided among the houses with reference to the number of sons in each house.

Local variation. Among the Idakho, Isukha, Tiriki and Maragoli, the land is divided among the sons irrespective of the number of sons in each house.

The rules of distribution within each house are the same as in 1(a) above.
 - (b) Livestock ...”

23. The Respondent vide affidavit in support of her summons for confirmation of grant sworn on 27th October 2021, her proposed mode of distribution captured all the deceased’s beneficiaries and catered to the daughters who were married. On the other hand, the Appellant vide his affidavit of protest to the



confirmation of the grant sworn on 17th December 2021 the Appellant proposed mode of distribution excluded the daughters of the deceased as according to him, under Bukusu Customary Law when a lady gets married they should not inherit from their father's land.

24. This is patently discriminatory and, in a period, post the promulgation of the 2010 Constitution cannot be upheld. For Article 10(2)b) of *the Constitution* includes among national values and principles the values and principles of human dignity, equity, social justice, inclusivity, equality, human rights, protection of the marginalized and non-discrimination.
25. Under Article 27 of *the constitution*, discriminatory practices are outlawed as all persons are declared equal before the law. Both men and women are entitled to equal treatment and equal benefit of the law and that their right to equal opportunities in political, economic cultural and social spheres is guaranteed. Indeed, any customary practice or law that is inconsistent with these provisions is void to the extent of the inconsistency by dint of Article 2(4) of *the Constitution*.
26. In the case of *The Estate of Seth Namiba Ashuma (Deceased)* [2020] eKLR. Musyoka J. juxtaposed the application of Luhya customary law vis-à-vis the *Law of Succession Act, the Constitution* of Kenya 2010 and international instruments in a case where a step brother to the deceased person who died in 1965, had sought to revoke the grant issued to the daughter of the deceased on the basis that, his clan had appointed him guardian of the estate pursuant to customary law.
27. The Court, having set out the provisions of Article 27 of *the Constitution*, asserted that:

“This is not just a matter of municipal law. International law also applies to the matter, and has imposed universal standards when it comes to how women are to be treated, generally. Article 2 of *the Constitution* states that international law is part of Kenyan law and any treaty or convention ratified by the Kenyan State forms part of the Kenyan law, including treaties and conventions ... whether domesticated or not ... Among the conventions that the Kenyan state has ratified is the convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in 1984. By appending its signature to that convention Kenya condemned discrimination against women in all forms, and committed itself to eliminate the vice”

28. The learned Judge then set out some of the Articles of the convention (CEDAW) before concluding that:

“33. The standards that are set by the Law Succession Act, *the Constitution* of Kenya 2010 and the Convention on the Elimination of All Forms of Discrimination against Women requires that women be treated equally with men in all spheres of life, including succession. They frown upon women being treated as lesser beings. With respect to succession, it would be discriminatory and unfair for the daughter of the deceased, who is the surviving immediate blood relative of the deceased, to be overlooked, so that the deceased's estate devolved upon the deceased's stepbrother instead of the deceased's own daughter. To sanction such a development or devolution would be to go contrary to the law as stated in the *Law of Succession Act, the Constitution* of Kenya 2010 and the Convention on the Elimination of All Forms of Discrimination against Women.”

29. I associate myself entirely with the above sentiments, and for the purposes of this case, I have no difficulty in finding that all the children who survived the deceased in this case ought to be treated



equally in considering distribution. I do concur with the holding of the trial Court on this and uphold the same.

30. Indeed, the two rival sides to this dispute appeared to premise their claims on the basis of daughters of the deceased inheriting from his estate. The Appellant however claimed that the sons of the deceased are entitled to all the estate of the deceased as his only sons and that prior to his demise the deceased ensured that he distributed land parcel No. Elgon/Kaptama/318 to his sons accordingly. Section 107 of the *Evidence Act* provides that:

- “ 1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- 2) When a person is bound to prove the existence of any fact it is said that the burden or proof has on that person.”

31. Section 108 of the *Evidence Act* states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. In this instance, the burden of proof lay with the Appellant to prove his claims. The Appellant availed no evidence in form of minutes of testimony of their clan elder who was present during the distribution exercise by the deceased.

32. In my view, the Appellant has failed to establish his claims on a balance of probabilities. It seems to me that the allegations were just mere denials and that the evidence of the Respondent was more credible and worthy of belief. The finding by the learned trial magistrate was therefore sound and must be upheld. I find that the Appellant and his siblings are entitled to an equal share of the suit property. The purchasers who bought parcels from the beneficiaries will have to pursue the concerned beneficiaries upon confirmation of the grant.

33. The suit property measures 5.0 HA. From the material placed before the Court, Certificate of Official Search, and the evidence of the Appellant, the said land parcel No. Elgon/Kaptama/318 is still registered under the name of the deceased herein. The proposed mode of distribution as fronted by the Respondent is truly appropriate, fair and the best as the same is inclusive.

34. In the circumstances, I concur with the holding of the trial Court and uphold the same. It is my finding that the appeal herein is without merit and is dismissed. This being a family matter, I shall make no order as to costs.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF SEPTEMBER 2024.

D. Kemei

Judge

In the presence of :

Oriko for Murunga for Appellant

Wanjala for Wanyonyi for Respondent

Kizito Court Assistant

