



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Saulo Wakalikha Masoni (Deceased) (Succession Cause
40 of 2001) [2024] KEHC 15030 (KLR) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15030 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 40 OF 2001**

DK KEMEL, J

NOVEMBER 29, 2024

IN THE MATTER OF THE ESTATE OF SAULO WAKALIKHA MASONI (DECEASED)

BETWEEN

PATRICK MASONI WAKALIKHA 1ST PETITIONER

JACOB MUKOYANI 2ND PETITIONER

AND

MARTHA NASONGO PROTESTOR

JUDGMENT

1. The 2nd Petitioner herein filed summons for confirmation of grant dated 5th April, 2024 pursuant to Section 71 (1) & (2) of the *Probate and Administration Rules*, and sought for the following orders:
 - a. That the Grant of Letters of Administration issued to the Petitioner on 15th February 2024 be confirmed.
 - b. That the costs be in the cause.
2. The Summons were premised on the grounds inter alia; that six months have lapsed since the Grant was issued; that there is no objection to the confirmation of the Grant; that there is no pending application under Section 26 of the Succession Act CAP 160 Laws of Kenya.
3. In addition, the Summons were based on the supporting affidavit of Jacob Mukoyani, the 2nd Petitioner herein, sworn on 5th April 2024, wherein he averred that the Grant of Letters of Administration to the estate of the deceased were to him and the 1st Petitioner herein. According to him, the deceased herein was married to two wives who are late and survived as follows:
 1. 1st House-Anne Naliaka (1st wife)-deceased
 - a. Joseph Mukoyani Wakalikha (son)-deceased



- b. Johnstone Musamali Wakalikha (son)-deceased
 - c. Ruth Inyanji Kakai (daughter)-deceased
 - d. Selina Liambila (daughter)
 - e. Rebecca Wakasa Wakalikha (daughter)
 - f. Margret Khanjila Kimoi (daughter)
2. 2nd House (2nd wife)-deceased
- a. Patrick Masoni (son)
 - b. Violet Khakasa (daughter)-deceased
The deceased's estate comprises of:
 - a. Land Parcel No. Ndivisi/Ndivisi/574 measuring 9.7 acres
 - b. Land Parcel No. Ndivisi/Ndivisi/596 measuring 5.9 acres
 - c. Land Parcel No. Ndivisi/Ndivisi/604 measuring 7.35 acres
 - d. Land Parcel No. Ndivisi/Ndivisi/606 measuring 20.1 acres
 - e. Land Parcel No. Ndivisi/Ndivisi/647 measuring 5.0 acres
4. He averred that prior to the death of the deceased, he had distributed his property to his heirs as follows:
- a. Land Parcel No. Ndivisi/Ndivisi/606 measuring 20.1 acres
Joseph Mukoyani Wakalikha (son)-deceased-19.1 acres
Violet Khakasa (daughter)-deceased-1 acre
 - b. Land Parcel No. Ndivisi/Ndivisi/596 measuring 5.9 acres
 - c. Johnstone Musamali Wakalikha (son)-deceased-3.4 acres
Rebecca Wakasa Wakalikha (daughter)-2 acres
Margret Khanjila Kimoi (daughter)-0.5 acres
 - d. Land Parcel No. Ndivisi/Ndivisi/574 measuring 9.7 acres
Johnstone Musamali Wakalikha (son)-deceased- 9.7 acres
 - e. Land Parcel No. Ndivisi/Ndivisi/604 measuring 7.35 acres
Patrick Masoni (son)-7.35 acres
 - f. Land Parcel No. Ndivisi/Ndivisi/647 measuring 5.0 acres
Selina Liambila (daughter)-5.0 acres
5. He averred that all the beneficiaries of the 1st House consented to this mode of distribution and the confirmation of the Grant in accordance to the wishes of the deceased. He annexed a consent and schedule of distribution marked as J4 A and J4 B respectively.
6. He averred that Selina Liambila is a liability to the estate of the deceased having bought the whole of Land Parcel No. Ndivisi/Ndivisi/647 measuring 5.0 acres from the deceased. Also, that the numerous



innocent purchasers who bought from some of the beneficiaries will claim their shares from those they purchased from. He prayed that the Grant issued on 31st January 2024 be confirmed.

7. Patrick Masoni Wakalikha, by an affidavit sworn on 15th April 2024, responded via a Protest on the basis that he is the 1st Petitioner herein and that he opposed that 2nd Petitioner's mode of distribution. According to him, the deceased had the following assets:

- a. Land Parcel No. Ndivisi/Ndivisi/574 measuring 9.70 acres
- b. Land Parcel No. Ndivisi/Ndivisi/596 measuring 5.9 acres
- c. Land Parcel No. Ndivisi/Ndivisi/606 measuring 20.10 acres
- d. Land Parcel No. Ndivisi/Ndivisi/647 measuring 5.0 acres

He averred that the deceased herein had two wives and 8 children namely:

1. 1st House-Anne Naliak (1st wife)-deceased
 - a. Joseph Mukoyani Wakalikha (son)-deceased
 - b. Johnstone Musamali Wakalikha (son)-deceased
 - c. Ruth Inyanji Kakai (daughter)-deceased
 - d. Selina Liambila (daughter)
 - e. Rebecca Wakasa Wakalikha (daughter)
 - f. Margret Khanjila Kimoi (daughter)
2. 2nd House (2nd wife)-deceased
 - a. Patrick Masoni (son)
 - b. Violet Khakasa (daughter)-deceased

8. He proposed that the estate of the deceased be distributed as follows:

- a. Land Parcel No. Ndivisi/Ndivisi/606 measuring 20.1 acres
1st House-10.05 Acres
Jacob Mukoyani
Selina Liambila
Rebecca Wekesa Wakalikha
Margaret Khanjila Kimoi
2nd House-10.05 Acres
Patrick Masoni Wakalikha
Violet Khakasa
- b. Land Parcel No. Ndivisi/Ndivisi/596 measuring 5.9 acres
1st House-2.95 Acres
Jacob Mukoyani



Selina Liambila
Rebecca Wekesa Wakalikha
Margaret Khanjila Kiimoi
2nd House-2.95 Acres
Patrick Masoni Wakalikha
Violet Khakasa

c. Land Parcel No. Ndivisi/Ndivisi/574 measuring 9.70 acres

1st House -4.85 acres
Jacob Mukoyani
Selina Liambila
Rebecca Wekesa Wakalikha
Margaret Khanjila Kiimoi
2nd House-4.85 acres
Patrick Masoni Wakalikha
Violet Khakasa

d. Land Parcel No. Ndivisi/Ndivisi/647 measuring 5.0 acres

1st House -2.25 acres
Jacob Mukoyani
Selina Liambila
Rebecca Wekesa Wakalikha
Margaret Khanjila Kiimoi
2nd House-2.25 acres
Patrick Masoni Wakalikha
Violet Khakasa

9. The Court gave directions that the matter be heard by way of viva voce evidence.

Protestor's case

10. PROT-PW1 Patrick Masoni Wakalikha testified that he is the 1st Petitioner/Administrator herein and a son to the deceased as his father was the late Joseph Mukoyani Wakalikha. At his request, this Court adopted the contents of his affidavit of Protest sworn 15th April 2024 as his evidence in chief. Also, his proposed mode of distribution was adopted. He told the Court that he is currently residing in Land Parcel No. Ndivisi/Ndivisi/606 measuring 20.1 acres.

On cross-examination, he told the Court that the deceased had two wives. The 1st House had six children while the 2nd House had two children. According to him, there are only four parcels of land and that Land Parcel No. Ndivisi/Ndivisi/604 does not exist on the map or ground and that he has not availed details with regard to the same parcel. He confirmed that he has seen a green card with regard



to Land Parcel No. Ndivisi/Ndivisi/604 and that the details indicate the deceased as the proprietor. He told the Court that the deceased died in 1994 and that he was then residing on Land Parcel No. Ndivisi/Ndivisi/610 while his co-Petitioner resided on Land Parcel No. Ndivisi/Ndivisi/606, and that the deceased used to reside on Land Parcel No. Ndivisi/Ndivisi/574 where he was buried.

11. It was his testimony that Joseph Mukoyani and Johnstone Musamali Wakalikha were both buried on Land Parcel No. Ndivisi/Ndivisi/606 and that his sister Selina Liambila resided on Land Parcel No. Ndivisi/Ndivisi/647, and that Land Parcel No. Ndivisi/Ndivisi/596 was occupied by his other three brothers.
12. He told the Court that the “lufu” ceremony was duly conducted but no land was distributed and that the remains of his mother were buried on Land Parcel No. Ndivisi/Ndivisi/606.

On re-examination, he told the Court that his father had two wives; the 1st wife bore two sons and four daughters; his mother, the 2nd wife, bore one son and one daughter. He concurred that he was given seven acres on Land Parcel No. Ndivisi/Ndivisi/606 and that the mode of distribution by the 2nd Petitioner is not fair as he is entitled to a share in Land Parcel No. Ndivisi/Ndivisi/606. He reiterated that the 2nd Petitioner only wants to disinherit him as he was not given any portions in Land Parcel No. Ndivisi/Ndivisi/596 or Land Parcel No. Ndivisi/Ndivisi/574. He told the Court that he wants the deceased’s assets to be divided equally and that all of his sisters are married.

The 2nd Petitioner’s case

13. PET-PW1 Jacob Wanjala Mukoyani testified that he is the 2nd Petitioner herein and the grandson of the deceased and that his father is the late Joseph Mukoyani Wakalikha. At his request, this Court adopted the contents of his statement dated 4th July 2024 and a list of his documents (1-8) dated 4th July 2024 as his evidence in chief. He told the Court that the deceased prior to his demise distributed his land to his heirs and that the 1st Petitioner herein sold and vacated from his Land Parcel No. Ndivisi/Ndivisi/604 in 1996 and that the 1st Petitioner forcefully occupied Land Parcel No. Ndivisi/Ndivisi/606.
14. According to him, the current occupation of the estate of the deceased is as follows:
 - a. Land Parcel No. Ndivisi/Ndivisi/574- Rebecca Wakasa and purchasers.
 - b. Land Parcel No. Ndivisi/Ndivisi/596-Johnstone Musamali’s house, Patrick Masoni’s son and purchasers.
 - c. Land Parcel No. Ndivisi/Ndivisi/604-occupied by purchasers exclusively.
 - d. Land Parcel No. Ndivisi/Ndivisi/606-Jacob Mukoyani and purchasers.
 - e. Land Parcel No. Ndivisi/Ndivisi/647-Selina Liambila and Purchasers.

He urged this Court to adopt the distribution as done by the deceased person herein and that allocations of 0-5 acres be made to Ruth Inyanji on Land Parcel No. Ndivisi/Ndivisi/574 and 0.5 acres to Margaret Khanjila on Land Parcel No. Ndivisi/Ndivisi/606. He opposed the 1st Petitioners proposed mode of distribution.

On cross-examination, he told the Court that the deceased was his grandfather and that the share given to his father is in Land Parcel No. Ndivisi/Ndivisi/606 and that the same is 19.1 acres. He told the Court that the Petitioner has no share on Land Parcel No. Ndivisi/Ndivisi/596, Land Parcel No. Ndivisi/Ndivisi/604 and Land Parcel No. Ndivisi/Ndivisi/647. He concurred that his proposed mode of distribution is not equal, fair or just. He testified that his grandfather distributed his estate prior to



his demise and that the 1st Petitioner has not signed the “lufu” report. He confirmed that none of the beneficiaries signed the “lufu” ceremony minutes.

On re-examination, he told the Court that the 1st Petitioner was allocated land in Land Parcel No. Ndivisi/Ndivisi/604 measuring 7 acres and that the deceased had divided his land amongst his sons. He confirmed that the “lufu” report was only signed by the secretary and that the children of the deceased were present.

15. PET-PW2 Moses Wanjala Furaha testified that the deceased was his neighbor and friend and that he has known him, his sons and daughters all his lifetime. At his request, this Court adopted the contents of his statement dated 4th July 2024 as his evidence in chief. According to him, the deceased gave the whole of his Land Parcel No. Ndivisi/Ndivisi/647 to Selina Liambila in 1975 where she has lived and resided to date. At the demise of the deceased in 1994, he attended the “lufu” meeting where an inventory of the deceased assets and liabilities was done; it was confirmed that the deceased had distributed his land to his children as follows:
- a. Land Parcel No. Ndivisi/Ndivisi/574-Johnstone Musamali
 - b. Land Parcel No. Ndivisi/Ndivisi/596-Johnstone Musamali
 - c. Land Parcel No. Ndivisi/Ndivisi/604-Patrick Masoni
 - d. Land Parcel No. Ndivisi/Ndivisi/606-Joseph Mukoyani
 - e. Land Parcel No. Ndivisi/Ndivisi/647-Selina Liambila Mukite

He told the Court that thereafter several purchasers occupied the rest of the estate and that it would be prudent for this Court to distribute the estate of the deceased as per his wishes to avoid unsettling the beneficiaries who have settled on their respective portions.

On cross-examination, he told the Court that he is not aware of who is in occupation of Land Parcel No. Ndivisi/Ndivisi/606 and confirmed that the 1st Petitioner entered Land Parcel No. Ndivisi/Ndivisi/606 and then left. He told the Court that he has not seen the deceased’s will or minutes over his property and that he did not have the written instructions of the deceased.

16. At the close of the 2nd Petitioner’s case, this Court directed the parties to file and exchange their respective written submissions. Both parties duly complied.
17. After going through the pleadings, evidence on record and the parties’ submissions, i find the issue for determination is which proposed mode of distribution is appropriate? 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.”

18. The deceased died in 1994 prior to the promulgation of the Constitution that provides for non-discrimination vide Article 27 *Constitution* of Kenya. The *Law of Succession Act* is therefore, the applicable law in distribution of the estate of a polygamous family by Section 40 of the *Act* and taking into account the Constitution standard of non-discrimination.
19. Section 40 (1) of the *Law of Succession Act* stipulates that :
- “Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”
20. Applying the law to the facts of the instant case, there are rival issues and submissions raised by parties with regard to the proposed mode of distribution in the summons for confirmation filed in Court.
21. The list of beneficiaries is/are;
- 1. 1st House
 - a. Joseph Mukoyani Wakalikha (son)-deceased
 - b. Johnstone Musamali Wakalikha (son)-deceased



- c. Ruth Inyanji Kakai (daughter)-deceased
 - d. Selina Liambila (daughter)
 - e. Rebecca Wakasa Wakalikha (daughter)
 - f. Margret Khanjila Kimoi (daughter)
2. 2nd House
- g. Patrick Masoni (son)
 - h. Violet Khakasa (daughter)-deceased
22. The properties comprising of the deceased's estate are;
- a. Land Parcel No. Ndivisi/Ndivisi/574 measuring 9.70 acres
 - b. Land Parcel No. Ndivisi/Ndivisi/596 measuring 5.9 acres
 - c. Land Parcel No. Ndivisi/Ndivisi/604 measuring 7.35 acres
 - d. Land Parcel No. Ndivisi/Ndivisi/606 measuring 20.10 acres
 - e. Land Parcel No. Ndivisi/Ndivisi/647 measuring 5.0 acres
23. According to the 2nd Petitioner's proposed mode of distribution, the same was a reflection of the actions of the deceased as he had distributed his assets to his sons prior to his demise. He did not avail any evidence in form of minutes indicating that his proposed mode of distribution does reflect the wishes of the deceased. PET-PW1 testified that he did not see the deceased's will or minutes with regard to distribution of his property. He referred to the "lufu" ceremony minutes which were not presented in Court by the author and that no one from the clan was brought forth as a witness to substantiate the contents in the minutes. The same is not fair and equal as it excludes some of the beneficiaries of the deceased. On the other hand, the proposed mode of distribution as proposed by the 1st Petitioner herein excluded Ruth Inyanji Kakai.
24. Sons and daughters of the deceased are equally entitled to inherit, regardless of whether married or not. They should have been brought on board and allocated shares in the estate. It is not for the sons to decide whether daughters should get a share in the estate or not. The rights of daughters are is stated in the *Law of Succession Act*, the Constitution and the Convention on the Elimination of All Forms of Discrimination against Women. They should have been allocated their share at distribution, unless they, of their own freewill, choose to renounce or waive or forgo the right. Secondly, some of the sons and daughters of the deceased are dead. The administrators have not made a proper disclosure of which of these children are dead, and who survived them. The persons who survived them have not been brought forth and involved in this process. The fact of death of a child of the deceased does not extinguish their right to inherit. Section 41 of the *Law of Succession Act* provides that their share passes to their children. So, where a child of the deceased died, their children step up to take what should have accrued to their parents. So, such dead children of the deceased ought to be disclosed, and so should their survivors. The failure to disclose them, means that the administrators have failed to properly ascertain persons beneficially entitled to a share in the estate, and have also failed to allocate to such persons the share due to them in law, and especially Part V of the *Law of Succession Act*.
25. To reiterate, where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also



adding any wife surviving him as an additional unit to the number of children. In *Re Estate of Welsa Bange Oganda Ayoo alias Welsa Bange Oganda (Deceased)* (Succession Cause E081 of 2022) [2024] KEHC 2464 (KLR) (7 March 2024) (Ruling) the court held:

“Further, and for clarity, the law, as I understand it, in regard to polygamous marriages is that the properties of the deceased are divided to each house in accordance with the formula given on section 40 of the Act. Thereafter, the widow has a life interest in the net estate of the deceased due to her household.”

26. Both the Protestor and 2nd Petitioner herein did not file a consent on distribution executed by all the children of the deceased who support their respective proposals. In the absence of such consent, or other material by all the children of the deceased, it is appropriate that the estate be distributed equally between the two houses of the deceased pursuant to Section 40 of the *Law of Succession Act*. This will take care of all the children of the deceased both deceased and alive and that the houses once they get their share they then distribute to the members of their household. I find this to be fair and just in view of the fact that the petitioners herein failed to convince the court on their rival modes of distribution. However, parcel number Ndivisi/Ndivisi/647 is agreed that the same should go to the deceased’s daughter Selina Liambila who had bought it from the deceased way back in 1975 and thus the same should be transferred to her. Consequently, the properties namely Ndivisi/Ndivisi/574, 596, 604, 606 respectively shall be shared equally between the two houses.
27. In the result, the proposed modes of distribution by both petitioners herein lack merit and are rejected. Consequently, the summons for confirmation of grant dated 5/4/2024 succeeds to the extent that the grant made on 15/2/2024 is hereby confirmed and that the estate of the deceased comprising of five parcels of land namely Ndivisi/Ndivisi/574, 596, 604, 606 respectively shall be distributed equally between the two households as pointed out vide paragraph 26 above Parcel number Ndivisi/Ndivisi/647 shall be transferred to Selina Liambila. Any purchasers who bought from the beneficiaries will pursue the respective sellers from their shares as is appropriate. A certificate of confirmation of grant is to issue forthwith. As the parties are members of one family, each party shall bear their own costs.

DATED AND DELIVERED AT SIAYA THIS 29TH DAY OF NOVEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

Watangahfor 1st Petitioner/Protestor

Lunani.....for 2nd Petitioner

N/A for Ms Change.....for Protestor

Kizito/Ogendo.....Court Assistant

