



REPUBLIC OF KENYA



**In re Estate of Dinah Malaba (Deceased (Probate & Administration  
1B of 2016) [2023] KEHC 26743 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26743 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
PROBATE & ADMINISTRATION 1B OF 2016  
DK KEMEL, J  
DECEMBER 18, 2023**

**BETWEEN**

**WAFULA MALABA ..... PETITIONER**

**AND**

**RICHARD WANJALA MALABA ..... 1<sup>ST</sup> OBJECTOR**

**PATRICK MALABA KUYA ..... 2<sup>ND</sup> OBJECTOR**

**ANTHONY WAFULA WABUKE ON BEHALF OF EVANS KISEMBE MALABA  
(DECEASED) ..... 3<sup>RD</sup> OBJECTOR**

**JUDGMENT**

1. On 8<sup>th</sup> February 2021, the 2<sup>nd</sup> Objector swore an affidavit in protest wherein he averred that he had the express consent of the 1<sup>st</sup> and 3<sup>rd</sup> Objectors to swear the affidavit and that the proceedings before this Court were in regard to the estate of the deceased herein who was the 1<sup>st</sup> wife of his late father Malaba Kuya.
2. According to him, their late father had two wives namely: Dinah Malaba (deceased) and Loice Malaba (deceased). The deceased Dinah Malaba was appointed the administrator of the estate of their late father in Bungoma HCC P&A No. 3 of 2005. The deceased had the following children:
  - i. Ruth Naliaka-deceased
  - ii. Jones Nekesa-alive
  - iii. Margret Nasambu-alive
  - iv. Grace Nasimiyu-deceased
  - v. Nafula Malaba-deceased



- vi. Alice Namwaya-alive
  - vii. Eddah Namachanja-alive
  - viii. Doricas Nangekhe-alive
  - ix. John Luvisia Malaba-alive
  - x. Wafula Malaba-alive
3. The 2<sup>nd</sup> wife, Loice Malaba, had the following children:
- i. Gladys Nafula-alive
  - ii. Grace Nalonja-alive
  - iii. Lorna Nasimiyu-alive
  - iv. Esther Khasiro-alive
  - v. Eunice Malaba-alive
  - vi. Evans Kitembe-deceased
  - vii. Richard Wanjala Malaba-alive.
4. He averred that their late father also had another child by the name Patrick Malaba Kuya who is still alive.
5. According to him, prior to the death of his father he had the following properties:
- i. Land Parcel No. Bokoli/Kituni/344 measuring 0.23 Ha to 0.575 Ha.
  - ii. Land Parcel No. Ndivisi/Mihuu/13 measuring 8.9 Ha.
  - iii. Land Parcel No. Ndivisi/Mihuu/121 measuring 75 acres.
  - iv. Land Parcel No. Ndivisi/Mihuu/1179 measuring 2.025 acres.
  - v. Land Parcel No. Ndivisi/Mihuu/120 measuring 25.2 acres.
6. He averred that prior to his demise, his late father had a piece of land which was initially registered in the name of Settlement Trust Known as L.R. Bungoma/Kiminini/83 measuring 50 acres. The same land was gifted by his late father to his brother John Luvisia Malaba and that all the assets of their late father were transmitted from their deceased father to the deceased herein by way of transmission and thus they were not properties of the deceased herein.
7. He averred that they did not object to the appointment of the Petitioner herein as an Administrator of the estate of the deceased but was categorical that the Petitioner omitted their names from the list of beneficiaries.
8. He proposed that the estate of their late father now under the name of the deceased ought to be distributed as follows:
- L.R. No. Bokoli/Kituni/344 (0.575 Acres)
- i. Patrick Malaba Kuya-0.191 acres
  - ii. Richard Wanjala Malaba-0.191 acres



iii. Anthony Wafula Wabuke on behalf of Evans Kisembe Malaba (deceased)-0.191 acres  
L.R No. Ndivisi/Mihuu/13-9 Acres

i. Wafula Malaba-9 acres

L.R No. Bungoma/Kiminini/83-50 Acres

i. John Luvisia Malaba-50 acres

L.R No. Ndivisi/Mihuu/121-75 Acres

i. Richard Wanjala Malaba-25.8 Acres

ii. Patrick Malaba Kuya-28 Acres

iii. Vincent Malaba (grandson)-2 Acres

iv. Eddah Namachanja Malaba-1 Acre

v. Jones Nekesa Malaba-1 Acre

vi. Mary Nasambu Malaba-1 Acre

vii. Alice Namwaya Malaba-1 Acre

viii. Doricas Nangekhe Malaba-3 Acres

ix. Esther Khasiro Malaba-1 Acre

x. Lornah Nasimiyu Malaba-3 Acres

xi. Grace Nalonja Malaba-1 Acre

xii. Eunice Nafula Malaba-1 Acre

xiii. Glady Nafula Malaba-1 ¼ Acre

xiv. Wafula Malaba-3 Acres

L.R No. Ndivisi/Mihuu/120-25.2 Acres

i. Anthony Wafula Wabuke on behalf of Evans Kisembe Malaba  
(Deceased)-25.2 Acres.

9. He averred that all beneficiaries agreed and consented before this Court on the shares to get from the estate of the deceased as per the proceedings before this Court. He stated that the only people who had been left out were himself and his co-objectors.
10. He averred that out of the 28 acres that was bequeathed to him he has so far sold 25 acres to 10 different people who are now in occupation on their respective portions in L.R No. Ndivisi/Mihuu/121.
11. Further, the 1<sup>st</sup> Objector herein, Richard Wanjala Malaba, also told him that he has so far sold land out of his portion to 6 different people who are now in occupation of their shares in L.R No. Ndivisi/Mihuu/121 and that the same applies to the 3<sup>rd</sup> Objector with regard to his portion in L.R No. Ndivisi/Mihuu/120.
12. On 3<sup>rd</sup> February 2021, the Petitioner herein swore a supplementary affidavit where he averred that on 23<sup>rd</sup> January 2020 he applied for the confirmation of the Grant issued on 6<sup>th</sup> September 2018 and



that at Paragraph 4 of his affidavit in support of the application he inadvertently left out names of 3 beneficiaries-Richard Khwatenge Malaba, Patrick Wanyonyi Malaba and Evans Kisembe Malaba.

13. He averred that the names ought to be added as follows:
  - i. Patrick Wanyonyi Malaba- Ndivisi/Mihuu/120-6.47 Ha  
Ndivisi/Mihuu/1179-0.4 Ha
  - ii. Richard Wanjala Malaba- Ndivisi/Mihuu/120-6.47 Ha  
Ndivisi/Mihuu/1179-0.4 Ha
  - iii. Evans Kisembe Malaba- Ndivisi/Mihuu/120-6.47 Ha  
Ndivisi/Mihuu/1179-0.4 Ha
14. He averred that all the beneficiaries to get 5ft × 100ft from Ndivisi/Mihuu/120 as the distribution is in line with the confirmed grant that was given to the deceased.
15. In response to the Objectors affidavit in Protest, he swore a replying affidavit on 23<sup>rd</sup> June 2021 wherein he averred that the contents of the affidavit sworn by the 2<sup>nd</sup> Objector are false and that he is his half-brother. According to him, L.R No. Bungoma/Kiminini/83 measuring 50 acres or thereabouts does not exist as annexure PMK-3 shows that the title was closed on 3<sup>rd</sup> January 2003 on subdivision into 1176 and 1178. He averred that the land was purchased directly by and belonged to his brother John Luvisia Malaba and that the same was registered way back in 8<sup>th</sup> October 2002 when their late father was still alive and thus the same cannot be included in this succession cause.
16. He further stated that the mode of distribution as fronted by the Objectors cannot be allowed as no explanation has been given as to why the 1<sup>st</sup> and 2<sup>nd</sup> Objectors get 25.8 and 28 acres respectively while the others get a pittance. He further stated that no explanation has been given as to why Vincent Malaba is included in the list yet he is a grandson from a different family altogether. He also questioned the exclusion of LR. No. Ndivisi/Mihuu/1179 which is an asset of the estate.

## Evidence

### Objector's case

17. OB-PWI was Patrick Malaba Kuya who testified that he is the 2<sup>nd</sup> Objector herein. That the deceased herein was his step mother and wife to Malaba Kuya. That the Petitioner is his step brother whose mother was Dinah Malaba. He adopted his statement recorded on 4<sup>th</sup> January 2022 as his evidence in chief. He also relied on his Affidavit of Protest dated 8<sup>th</sup> February 2021. According to him, he testified that he failed to capture in his affidavit that parcel LR. No. Ndivisi/ Mihuu /1179 was to be given to Richard Wanjala Malaba who is the 1<sup>st</sup> Objector herein. He proceeded to rely on his documents filed vide the list of documents dated 4<sup>th</sup> January 2022 which he produced as OB Exhibit 1 -13.
18. It was his testimony that Parcel LR. No. Bungoma/Kiminini/83 belonged to his late father but it was registered in name of his step brother, John Luvisia Malaba. According to him, his late father had given him the land that it was his all along and the allegation that it belong to him is incorrect. He recalled sometime in January 2004, his father called all the family members over distribution of his parcels of land and that was when he pointed out that he had already allocated John Luvisia LR. No. Parcel Bungoma/Kiminini/83, the same land that John had already claimed ownership to as per the title numbers from the search certificate. He told the Court that John Luvisia is his elder brother and that he recalled the Petitioner in his evidence agreed with the proposed contribution.



19. On cross-examination, he told the Court that his late father was registered as owner of parcel LR. No. Bungoma /Kiminini/83 which was given to their brother then under the settlement fund and that he does not have proof to that effect. He testified that he was allocated 28 acres by his father in parcel LR. No. Ndivisi/Mihuu/121 and that everyone was given their portions by the time his father died as the subdivision occurred in the year 2004. He stated that he did not know that one of his father's wives had lodged a succession matter over the estate of their late father.
20. On re-examination, he stated that the Objectors were not involved in the succession proceedings over the estate of his late father.
21. OB-PW2 was Richard Wanjala Malaba who testified that he is the 1<sup>st</sup> Objector herein. That the deceased herein was his step mother and wife to Malaba Kuya. He adopted his statement recorded on 4<sup>th</sup> January 2022 as his evidence in chief.
22. It was his testimony that prior to his death his late father had land which was initially registered in the name of Settlement Trust known as Parcel LR. No. Bungoma/Kiminini/83 measuring 50 acres. According to him, the parcel was gifted by his late father to their brother, John Luvisia Malaba and that all the parcels were transmitted from his late father to the deceased through transmission.
23. According to him, prior to the listing of this matter under succession they had agreed with the Petitioner that the estate of their late father should be distributed as captured by the 2<sup>nd</sup> Objector in his affidavit in protest. He prayed that the Court will adopt that mode.
24. On cross-examination, he stated that it was true parcel LR. No. Bungoma /Kiminini/83 belonged to his father but he does not have proof of documents and that the same was gifted to his brother, John Luvisia as a gift in January 2004 when there was a family meeting called by his father. He added that the deceased was present in the meeting. According to him, the Objectors were not involved in the succession proceedings over the estate of their late father and only found out about the same recently. He confirmed that the Objectors are not in good terms with the Petitioner and his blood siblings.
25. On re-examination, he stated that the family members present in the meeting that occurred in January 2004 included Sablon Teka, Ham Wanyonyi while the rest were clan members. He reiterated that he was not involved in the succession proceedings over the death of his father and that he only came to know of plot LR. No. Bungoma/Kiminini/83 in January 2004.
26. OB-PW3 was Anthony Wabuke Kisémbé who testified that he is the 3<sup>rd</sup> Objector herein and that his father was Evans Kisémbé Malaba(deceased). He adopted his statement dated 4<sup>th</sup> January 2022 as his evidence in chief. According to him, his late father was the son of the late Malaba Kuya and that the deceased herein was his step-grandmother. He aligned himself with the statements of his uncles, the 1<sup>st</sup> and 2<sup>nd</sup> Objector.
27. On cross-examination, he stated that he disputed the contents of his statement as he was before this court over the estate of his grandfather. He added that he was only well versed with the things about his late father and nothing else.
28. On re-examination, he reiterated that he agreed with the statements of the rest of the Objectors.
29. OB -PW4 was John Namunaba Wanyonyi who testified that he is a farmer and adopted his statement dated 4<sup>th</sup> January 2022 as his evidence in chief. He testified that he is the clan chairman of the Balonja clan Matulo Branch and that she knew the deceased. According to him, the deceased had begun succession proceedings of her late husband's estate but she died prior to its completion. The deceased was successful in transferring the properties of the late Malaba Kuya to her name. He agreed with the



- mode of distribution as fronted by the 1<sup>st</sup> and 2<sup>nd</sup> Objectors and asked this Court to adopt the same. He insisted that that it was true parcel LR. No. Bungoma /Kiminini/83 belonged to the late Kuya and that the same was gifted to John Luvisia as a gift in January 2004.
30. He testified that some of the parcels that the Objectors were occupying had already been sold off and innocent purchasers have already developed their portions. He beseeched this Court to adopt the Objectors mode of distribution to avoid any inconvenient situations.
31. On cross-examination, he stated that he can confirm that the deceased, Dinah Malaba lodged succession cause over the estate of her late husband and that the late Kuya Malaba had already subdivided the land to the children. He also told the Court that three sons were left out and that the Objectors learnt of the succession proceedings much later. He confirmed that he received a Complainant in 2019 and that it was true that the family lands were distributed in 2004 and that they participated in the sub-division of the lands to the family members.
32. On re-examination, he stated that he could not tell if the Objectors were aware of the succession proceedings lodged by the deceased.
33. OB -PW5 was Protus Khuteka Temba, who testified that he is a farmer and adopted his statement dated 4<sup>th</sup> January 2022 as his evidence in chief. He stated that he is the clan chairman of the Balonja clan Matulo Branch and that she knew the deceased. According to him, the deceased had begun succession proceedings of her late husband's estate but she died prior to its completion. That the deceased was successful in transferring the properties of the late Malaba Kuya to her name. He agreed with the mode of distribution as fronted by the 1<sup>st</sup> and 2<sup>nd</sup> Objectors and asked this Court to adopt the same. He insisted that that it was true parcel LR. No. Bungoma /Kiminini/83 belonged to the late Kuya and that the same was gifted to John Luvisia as a gift in January 2004.
34. He testified that some of the parcels that the Objectors were occupying had already been sold off and innocent purchasers have already developed their portions. He beseeched this Court to adopt the Objectors mode of distribution to avoid any inconvenient situations.
35. On cross-examination, he stated that he is one of the clan members and that he can confirm that Dinah Malaba(deceased) filed succession proceedings over the death of Malaba Kuya. He stated that he did not participate in those proceedings in P&A 3 of 2005. He added that he was aware of parcel LR. No. Bungoma/Kiminini/83 which belonged to the late Malaba Kuya and which he gave to his son John and that the late Malaba Kuya used to pay for land parcel LR. No. Bungoma/Kiminini/83
36. On re-examination, he stated that he could not tell if the Objectors were aware of the succession proceedings lodged by deceased and that he understood the contents of his statement before signing it.

#### **Petitioner's case**

37. PET-PW1 was Wafula Malaba, who testified that he is the Petitioner in this cause and adopted his replying affidavit dated 23<sup>rd</sup> June 2021 and witness statement dated 27<sup>th</sup> April 2022 as his evidence in chief. He stated that he did file the Petition before this Court and that he later filed the requisite summons for confirmation of grant and that every member of the family duly signed the consent to distribution.
38. On cross-examination, he stated that he concurred with the averments in his affidavit in support of the summons and that the distribution did not factor in the Objectors as they refused to consent to the same. He agreed that the Objectors are entitled to their late father's estate and that their shares are still intact. He testified that the Grant was partly confirmed and that he disagreed with the argument that Vincent was allocated land by his late father. According to him, he only knew of Vincent Kundu



- Wabomba but not Vincent Malaba. He stated that his late father never distributed any land to his children in January 2004 as alleged and that his sisters are satisfied with his proposed distribution schedule. He further testified that land parcel Bungoma/Kiminini/83 did not belong to his late father but rather it is the property of his brother, John Luvisia Malaba.
39. On re-examination, he stated that land parcel Ndivisi/Mihuu/121 was already distributed by the deceased herein in 2005 and that he could not tell if the Objectors herein sold their portions.
40. PET-PW2 was Simiyu Mwanja, who testified that he is the brother of the late Malaba Kuya and he proceeded to adopt his witness statement dated 27<sup>th</sup> April 2022 as his evidence in chief. He stated that Malaba Kuya died in 2004 while his wife Dinah Malaba (deceased herein) died in 2005. He testified that he is the vice chairman of the Balonja clan of Omukiyani.
41. On cross-examination, he stated that Malaba Kuya invited him together with other clan members in 2004 for purposes of distribution of his properties and that the same meeting took place in July 2004. He testified that all the children of Malaba Kuya totaling 19 in number were present and that Malaba Kuya later gave his son John Luvisia Malaba the details of the distribution of properties. According to him, it is true that the said Malaba Kuya who gave each of his sons five acres each. He confirmed that I am aware that the deceased herein lodged a succession cause for her late husband's estate and that she included all the children of her late husband and that the sons of Malaba Kuya agreed to the distribution of the lands. Malaba Keya had two parcels of land. He further testified that all the female children of deceased were satisfied with the distribution.
42. PET-PW3 was Dorcas Nangekhe Kimunguyi, who testified that she is the daughter of the late Malaba Kuya and Dinah Malaba and she proceeded to adopt her witness statement dated 27<sup>th</sup> April 2022 as her evidence in chief. She stated that during the distribution of her late father's assets she appeared in Court and agreed with the proposed mode and that she was granted three acres in land parcel Ndivisi/Mihuu/121.
43. On cross-examination, she stated that that during the distribution of her late father's assets she appeared in Court and agreed with the proposed mode and that she was granted three acres in land parcel Ndivisi/ Mihuu/121. She further testified that she was satisfied with the distribution mode.
44. PET-PW4 was Jefuneh Kisaka Sudi, who testified that he is a farmer and former clan elder. He proceeded to adopt his witness statement dated 27<sup>th</sup> April 2022 as his evidence in chief.
45. On cross-examination, he stated that he had no proof that he was a clan or village elder and that he does not know all the names of the daughters of the late Malaba Kuya. According to him, the late Malaba Kuya did not call for a family clan meeting to share his land. According to him, he was invited for the meeting at the late Malaba Kuya's compound in Lugulu and that none of the late Malaba Kuya's female children were present. He further testified that only the male children of the late Malaba Kuya were present including the clan members and that he went to witness what the late Malaba Kuya wanted to say. He stated that he did not see any minutes being taken at the meeting but may be minutes had been before his arrival. He testified that the meeting took place in 2003 on a date and month he could not recall. He added that he was not aware if the late Malaba Kuya distributed his assets in 2004 and that he was before the Court to state what he bore witness to in 2003 and not 2004. He confirmed that the deceased was the first wife to the late Malaba Kuya and that she held the parcels of land in trust for the beneficiaries.
46. On re-examination, he stated that he was a village elder for 22 years and that the late Malaba Kuya had 14 daughters and five sons. According to him, the late Malaba Kuya owned Ndivisi/Mukuyuni/120,



Ndivisi/Mihuu/121 and Ndivisi/Mihuu/15. He testified that he retired voluntarily and that he attended the meeting where five sons were present, and that he is not aware of any other meeting.

47. At that juncture the Petitioner closed his case and this Court proceeded to direct the parties to file and exchange their respective submissions. It is only the Objectors who filed their submissions urging this Court to adopt their proposed mode of distribution.

### **Analysis and determination.**

48. The application for determination is a summons for confirmation of grant as well as the objectors protest. Grants are confirmed under Section 71 of the *Law of Succession Act*, which states as follows:

#### “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.”



49. In confirmation applications, there are two principal factors for the Court to consider namely; appointment of administrators and distribution of the estate. The principal purpose of confirmation is the distribution of the assets left behind by a deceased.
50. From the foregoing evidence of the parties, it is not in dispute that the deceased commenced the process of confirmation of grant of letters of administration. She was already appointed as an administrator of the estate of her late husband and that she proceeded to transfer all the properties of the late Malaba Kuya to her name. She was in the process of distribution when she passed on. All beneficiaries of the estate of the deceased herein *vide* Form 38R:26(2) consented to the appointment of the Petitioner herein for purposes of completion of the distribution of the estate of the late Malaba Kuya. The Objectors availed Form 9 and subsequently filed an affidavit in protest, alleging their exclusion from the Petitioner's schedule of distribution. On 4<sup>th</sup> February 2021, the Petitioner filed a supplementary affidavit in support of his Summons for Confirmation of Grant dated 23<sup>rd</sup> January 2020, admitting to have excluded the three Objectors and requesting their names to be included in the earlier list of beneficiaries. He further averred that his proposed mode of distribution is in line with the grant that was given to the deceased. It is also not in dispute that the late Malaba Kuya had the following assets: Ndivisi /Mihuu/13; Ndivisi /Mihuu/120; Ndivisi /Mihuu/1179 and Ndivisi /Mihuu/121. I think it is important to point out at this juncture that for as long as parties are not in agreement, it is left to the Court to apply the laid down law and principles to arrive at what the Court would consider to be fair and just in the circumstances of the case.
51. I have considered the averments of the parties, and the mode of distribution of the deceased's estate that each proposes. I have also considered the submission on record. In my view, the only issue for determination is which is the appropriate mode of distribution of the deceased's estate?
52. This inheritance is by descent. The claims of descent and all existing models and rules are set forth in the [Law of Succession Act](#) covering both real and personal property.
53. The deceased, as evidenced by a certificate of death filed herein, died on 1<sup>st</sup> October 2018 intestate. It follows that under section 2(1) of the [Law of Succession Act](#) the law applicable is the [Law of Succession Act](#). The deceased died intestate after the Act came into force on 1<sup>st</sup> July, 1981.
54. The law relating to the distribution of the estate of an intestate was stated by the Court of Appeal sitting in Meru in [Justus Thiora Kiugu & 4 others V. Joyce Nkatha Kiugu & another](#), [2015] eKLR. Reinforcing the duty of the Court to promote alternative forms of dispute resolution under Article 159 (c) of the [Constitution](#) of Kenya, the Court held that if the parties agree on a mode of distribution of the estate of an intestate, then the Court must adopt that consent and make it an order of the Court. If the parties are unable to agree, then the Court has no discretion but to distribute the property as per the provisions of the [Law of Succession Act](#), Cap 160 Laws of Kenya.
55. The [Law of Succession Act](#) does not allow any person to distribute asset of a deceased person other than through the process of succession. The deceased in this matter died post the commencement of the [Law of Succession Act](#) (Cap 160 Laws of Kenya). That is the applicable law in the distribution herein.
56. Beneficiaries can and do often agree on the mode of distribution of a deceased's estate. Where, however, there is disagreement on the mode of distribution, the Court must step in and invoke the law.
57. It has been alleged by the Objectors witnesses and some of the Petitioner's witnesses that the deceased in 2004 distributed his properties to his children. Each witness had a different recall of how and whether all the beneficiaries were present and that none of them availed any evidence in form of minutes to prove that indeed a meeting occurred. In general, when it comes to the distribution of an estate, Courts



typically require clear and convincing evidence to establish the deceased's intentions or any previous distribution of assets. This evidence can come in the form of a valid will, documented statements made by the deceased, or other reliable evidence. In this case, most of the parties' witnesses alleged to have witnessed the deceased distributing the estate during a meeting that was held in 2004, but failed to provide any evidence supporting their claim. This Court is sceptical about their assertions. Courts generally require concrete and verifiable evidence to substantiate claims related to estate distribution, as this is a critical matter with significant financial and legal implications subject to the dints of the Evidence Act. In all the circumstances, I am not satisfied that the deceased expressed any wishes regarding the distribution of his estate.

58. This means that the estate of the deceased can only be distributed in accordance with section 40 and section 35 of the Law of Succession Act. Section 40 of the Law of Succession Act will be applicable in this succession cause as the deceased was polygamous. It provides:

- “(1) 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.
- (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

59. Section 3 of the Law of Succession Act, defines the “house” as a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife. There is no discrimination of the children on grounds of their sex. All wives of the deceased and all their children are therefore entitled to a share of his net intestate estate equally as provided for by section 40 of the Law of Succession Act.

60. In this case, there shall be two units as the deceased had married two wives. The distribution shall factor any benefit the deceased had given to any beneficiary during his lifetime as envisaged under section 42 of the Law of Succession Act which provides as follows:

Where—

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

61. As noted above, in distributing the balance of the estate of the deceased, this court shall place reliance in section 40 and 42 of the Law of Succession Act as the appropriate applicable law. In any event, the 13 beneficiaries in the proposed schedule of distribution have agreed to adopt deceased's mode of distribution in exception of the three beneficiaries.



62. I agree with the holding in *Scolastica Ndululu Suva v Agnes Ntbenya Suva* (2019) eKLR that;
- “It is therefore evident that although section 40 of the *Law of Succession Act* provides a general provision for distribution of the estate of a polygamous deceased person, the court has the discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”
63. In their affidavit in protest, the Objectors claimed that the land parcel LR. No. Bungoma/Kiminini/83 was part of the estate of the deceased prior to its distribution to John Luvisia Malaba but the Petitioner refuted the claims. The availed certificate of official search indicated the proprietor of this property is John Luvisia Malaba and that the same title was closed on subdivision Nos. 1176-1178 and the filed form P&A 5 clearly did not indicate the same as the assets of the deceased. As noted above, it is essential that Objectors availed concrete and verifiable evidence to substantiate claims related to estate distribution, which they didn't.
64. This then leaves out the four properties namely Ndivisi /Mihuu/13; Ndivisi /Mihuu/120; Ndivisi /Mihuu/1179 and Ndivisi /Mihuu/121 for determination as to how the same will be distributed.
65. It is imperative to note that the Grant for letters of Administration for the estate of the deceased Malaba Kuya was partially distributed upon the appointment of an administrator, the deceased herein, Dinah Malaba. Unfortunately, the deceased was not able to complete the confirmation process as she died prior to the distribution of the estate of the deceased and it is clear that prior to her demise she had transferred all the four properties to herself and that she held it in trust for the beneficiaries of the estate of the deceased.
66. The Petitioner herein, took up the completion of confirmation of Grant that was issued under his name and it is clear that subject to the proceedings of the Court that a total of 13 beneficiaries consented to the fronted deceased's mode of distribution. The Petitioner in his response to the affidavit in protest made it very clear that the mode of distribution before the Court was what the deceased had decreed and that the same was accepted by most of the beneficiaries.
67. According to the Objectors, they objected to the proposed mode of distribution, as per the affidavit in support of the summons for confirmation of the grant, as it excluded them and that it allegedly left out some of the assets of their late father, Malaba Kuya. The Petitioner vide a supplementary affidavit in support of the summons for confirmation of the grant filed on 4<sup>th</sup> February 2021, concurred with the averments of the Objectors requesting the inclusion of names of the Objectors to his mode of distribution.
68. It is noted that the Objectors have not convinced this Court that the deceased distributed his properties in the presence of his clan members sometime in January 2004 and that the parcel of land LR. No. Bungoma/Kiminini/83 was part of the estate of the deceased prior to its distribution to John Luvisia Malaba.
69. The Petitioner alleged that his proposed mode of distribution was in line with the confirmed grant that was issued to the deceased herein and that it is clear from the court proceedings that the only contention is the exclusion of the Objectors names from the mode of distribution as proposed. That being the position, I find that the point of divergence between the objectors and the petitioner is narrowed to the inclusion of the objectors in the distribution of the remaining assets. To that end, it is my finding that the mode of distribution fronted by the petitioner is the most suitable in the circumstances in view of the fact it is backed by a majority of the beneficiaries.



70. In view of the forgoing observations, the following orders are hereby made.
- i. The mode of distribution proposed by Patrick Malaba Kuya on the properties namely land parcel Nos. Bokoli/Kituni/344; Ndivisi /Mihuu/13; Bungoma/Kiminini/83; Ndivisi /Mihuu/120; Ndivisi /Mihuu/1179 and Ndivisi /Mihuu/121 lacks merit and is dismissed.
  - ii. The claim by the Patrick Malaba Kuya on parcel number Bungoma/Kiminini/83 that it is part of the estate of the deceased is not proved on a balance of probabilities and is dismissed. However, he is at liberty to pursue his claims if any in the Environment and Land Court against the beneficiary, John Luvisia Malaba, who is the registered owner thereof since the certificate of official search indicates the same title was closed on subdivision Nos. 1176-1178.
  - iii. The mode of distribution proposed by Wafula Malaba on the four properties namely land parcel Nos. Ndivisi /Mihuu/13; Mihuu/120; Ndivisi /Mihuu/1179 and Ndivisi /Mihuu/121 is allowed as prayed.
  - iv. The deceased's estate land parcels Ndivisi /Mihuu/13; Mihuu/120; Ndivisi /Mihuu/1179 and Ndivisi /Mihuu/121 to be distributed as follows;
    - L.R No. Ndivisi/Mihuu/13
      - a. Wafula Malaba-3.56 acres
        - L.R No. Ndivisi/Mihuu/121
          - a. Eddah Namachanja Malaba-1 Acre
          - b. Jones Nekesa Malaba-1 Acre
          - c. Mary Nasambu Malaba-1 Acre
          - d. Alice Namwaya Malaba-1 Acre
          - e. Evans Kisembe Malaba-6.47Ha
          - f. Richard Khwatenge Malaba-6.47Ha
        - L.R No. Ndivisi/Mihuu/120
          - a. Grace Nalonja Malaba-1 Acre
          - b. Dorcas Nangekhe Malaba-1 Acre
          - c. Jones Nekesa Malaba-50 ft × 100ft
          - d. Esther Khasiro Malaba-1 Acre
          - e. Eunice Malaba-1 Acre
          - f. Lornah Nasimiyu Malaba-3 Acres
          - g. Gladys Nafula Malaba-1 ¼ Acres
      - (All beneficiaries to get 50 ft × 100ft.)
      - L.R No. Ndivisi/Mihuu/1179
        - a. Patrick Wanyonyi Malaba-0.4 Ha
        - b. Richard Khwatenge Malaba-0.4 Acres



- c. Evans Kisémbé Malaba-0.4 Acres
- d. John Luvisia Malaba-0.4 Acres
- v. That grant of letters of administration made on 6<sup>th</sup> September 2018 to Petitioner is hereby confirmed and that the estate of the deceased shall be distributed as directed vide clause (iv) above.
- vi. A Certificate of Confirmation of grant shall issue to the Petitioner.
- vii. Each party to meet their own costs.

**DATED AND DELIVERED AT BUNGOMA THIS 18<sup>TH</sup> DAY OF DECEMBER 2023.**

**D.KEMEI**

**JUDGE**

**In the presence of :**

No appearance for Khakula for Petitioner

Wamalwa R for Objectors

**Kizito Court Assistant**

