



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Marth Eladi Obelai (Deceased) (Succession Cause
75 of 2010) [2025] KEHC 1826 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1826 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 75 OF 2010

WM MUSYOKA, J

FEBRUARY 21, 2025

IN THE MATTER OF THE ESTATE OF MARTH ELADI OBELAI

(DECEASED)

RULING

1. On 2nd February 2024, I ruled on a summons for revocation of grant, where I declined to revoke the grant, as it had been made by the judge, based on another revocation application. Instead, I set aside the orders made at confirmation, on 23rd September 2021, on grounds that that distribution was ordered when a substantial part of the family had been excluded from the succession process, and did not benefit from it. I directed that the administrators mount a fresh confirmation application, in which they were to disclose every member of the family, or survivor of the deceased, or beneficiary of the estate.
2. In compliance, 1 of the administrators, Asare Vincent Eladi, filed a summons for confirmation of grant, on 22nd March 2024, of even date. He identified 10 individuals, being 1 widow, 2 daughters, 4 sons and 1 daughter-in-law, 1 grandson and 1 sister-in-law, being Felesta Amoding Eladi, Jennipher Itupati Okute, Mary Aunty Irukan, Crescent Ouma Eladi, Vincent Asare Eladi, Peter Obelai Eladi, Moses Arakit Eladi, Francisca Atyang, Justus Alimori Eladi and Leah Midesha Kaburu. He identified the property that the deceased died possessed of as South Teso/Amukura/1692, measuring 5.97 hectares or thereabouts. He proposed equal distribution of that property, so that each of the 10 survivors took 0.597 hectare. I shall refer to Asare Vincent Eladi as the applicant.
3. Leah Midesha Kaburu sowe an affidavit of protest, on 20th May 2024, and filed it herein on 21st May 2024. She explains that South Teso/Amukura/1692 was a subdivision from South Teso/Amukura/910, which belonged to her father-in-law, Itulia Obelai. The said Itulia Obelai had 2 sons, Emmanuel Kaburu Itulia and Martin Eladi Obelai, both of whom are deceased. She further explains that Itulia Obelai, before he passed on, caused South Teso/Amukura/910 to be demarcated into 2 equal portions, in favour of his 2 sons, with the intention that each one of them took a ½ portion. The deceased herein caused South Teso/Amukura/910 to be transferred to his name, after which he created South Teso/Amukura/1692 and 1693, and retained South Teso/Amukura/1692, rendering



- the family of his brother landless. She asserts that the land should be shared equally between the 2 sons of Itulia Obelai.
4. She identifies the survivors of the deceased herein as 1 widow, 4 sons, 2 daughters, 1 grandson and 1 daughter-in-law, namely Felista Amoding Eladi, Asare Vincent Eladi, Crescent Ouma Eladi, Peter Obelai Eladi, Moses Arakit Eladi, Jenipher Itupati Okute, Mary Aunty Irukan, Justus Alimori Eladi and Francisca Atyang. She identifies the survivors of her late husband as 1 widow, 3 sons, and 3 daughters, namely Leah Midesha Kaburu, Thomas Opero, Daniel Omusugu, Ginistone Umonya, Joyce Osiya, Betty Atogot and Mercyline Emase. She avers that her side of the family had agreed that their share be devolved to her. She has attached a certificate of official search for South Teso/Amukura/1692. I shall refer to Leah Midesha Kaburu as the protestor.
 5. The application was canvassed vide viva voce hearing. 6 witnesses testified on 17th September 2024.
 6. The applicant was the first to take the stand. He stated that he was unaware that South Teso/Amukura/1692 was ancestral land, as all he knew was that it belonged to the deceased. He said that the protestor was the widow of his uncle, Emmanuel Kaburu, and he conceded that he had proposed that she be allocated a share in South Teso/Amukura/1692. He stated that when she came, she was allocated a portion, but she never settled on it. He asserted that the land ought not be shared equally between the deceased and his brother, Emmanuel Kaburu. He denied that the deceased had acquired title to the land fraudulently.
 7. The protestor followed. She stated that after the deceased died, the applicant chased her out of South Teso/Amukura/1692, forcing her to hire residential premises at the shops. She asserted that the land ought to be shared equally between the 2 sons of Itulia Obelai. She said that her late husband was buried on South Teso/Amukura/1692, because the land was ancestral. She said that she and her late husband lived at KIpkabus for a long time, where he worked as a forester, and that the family only relocated to Busia in 2003.
 8. Francis Okumu Emuria was the next witness. He was a relative of both the deceased and the late husband of the protestor. He asserted that the protestor should get a share of the land. He explained that the said property belonged to the original owner, being Itulia Obelai, who had 2 children, the deceased herein and the late husband of the protestor. He explained that the land ended up in the hands of the deceased in 1972, during land adjudication, at a time when the husband of the protestor was working away as a forester. He stated that the applicant chased the protestor from the land. He stated that on the ground, South Teso/Amukura/1692 had been shared equally, by the clan and family, between the 2 sons of Itulia Obelai.
 9. Africanus Juma testified next. He identified the protestor as a widow of a brother of the deceased, adding that she was entitled to a share of the land in dispute. He testified that the land was registered in the name of the deceased at a time when the husband of the protestor was way at work. After her husband died, the protestor came back to Busia, and the witness showed her where to settle on South Teso/Amukura/1692, but the applicant frustrated her. He asserted that South Teso/Amukura/1692 was ancestral land.
 10. Jenipher Itupati Okute was the last witness. She was a brother of the applicant, and a daughter of the deceased. She said that she did not know the protestor. She was in support of the distribution proposed by the applicant. She identified Emmanuel Kaburu as her uncle, being a brother of her father, the deceased. She, however, said that she did not know that the protestor was a widow of her late uncle.
 11. At the end of the oral hearing, both sides filed written submissions. I have read through them and noted the arguments made.



12. The deceased herein died on 9th October 1984, after the *Law of Succession Act*, Cap 160, Laws of Kenya, had come into operation, on 1st July 1981. His estate shall, therefore, be subject to distribution in accordance with the said law. He died intestate, for representation herein was sought and granted in intestacy. No will was presented, neither was it alleged that he had died testate. That would mean that distribution of his estate shall follow Part V of the *Law of Succession Act*.
13. Distribution under Part V is dependent on the categories of individuals who survived the deceased. Where the deceased was survived by a spouse and children, section 35 of the *Law of Succession Act* would apply, the estate would be shared between the surviving spouse and the surviving children, so that the estate is initially devolved to the surviving spouse, during life interest, to hold until life interest terminates, whereupon the property would pass to the children equally. See *Florence Kithiru & another vs. Jackim Ikunda M'twerandu & another* [2017] eKLR (Gikonyo, J). Where the deceased is survived by a spouse only, that is without children, section 36 would apply, where a portion of the estate would devolve upon the surviving spouse absolutely, with the remainder being held by him or her, during life interest, and upon termination, to be distributed to the surviving relatives set out in section 39. See *Willingstone Muchigi Kimari vs. Rahab Wanjiru Mugo*, Nairobi Court Appeal Civil Appeal Number 168 of 1990 (Gachuhi, Muli & Akiwumi, JJA) (unreported) and *In Re the Estate of Rachael Wairimu Mbugua (Deceased)* [2006] eKLR (Rawal, J). Where the deceased is not survived by a spouse, but by children only, section 38 would apply, and the estate would devolve equally between the children. See *In re Estate of Ruth Nyakanini Rukwaro (Deceased)* [2016] eKLR (Mativo, J) and *Martin Munguti Mwonga vs. Damaris Katumbi Mutuku* [2016] eKLR (Thande, J). Where the deceased is not survived by a spouse or children, for whatever reason or under whatever circumstances, the property would then pass to the relatives set out in section 39, priority going to the parents, followed by the siblings, and then the others. See *In Re the Estate of Wamuhu Murimi (Deceased)* [2005] eKLR (Koome, J) and *Hellen Muthoni vs. Simon Njoroge Gitau & 3 others* [2015] eKLR (Muigai, J).
14. Sections 35(1)(5), 36, 38 and 40 provide as follows:
- “ 35. Where intestate has left one surviving spouse and child or children
- (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
- (a) the personal and household effects of the deceased absolutely; and
- (b) a life interest in the whole residue of the net intestate estate:
- Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.
- (2) ...
- (3) ...
- (4) ...
- (5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole



residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

(6) Where intestate has left one surviving spouse but no child or children

(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—

(a) the personal and household effects of the deceased absolutely; and

(b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and

(c) a life interest in the whole of the remainder:

Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.

(2) The Cabinet Secretary may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1).

(3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in section 39.”

38. Where intestate has left a surviving child or children but no spouse

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

39. Where intestate has left no surviving spouse or children

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

(a) father; or if dead

(b) mother; or if dead



- (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none.
- (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
- (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares..”

15. The deceased herein was survived by a spouse and children. Ideally, therefore, distribution should follow section 35, so that the surviving widow would take the property during her lifetime, to pass to her children, equally, upon termination of the life interest, either through her death or upon her remarriage.
16. What would complicate the matter herein, would be the claim by the protestor. She is not the surviving spouse of the deceased, or his surviving child. She would not be entitled under section 35. She claims as a sister-in-law of the deceased, on grounds that the property in question was ancestral land, to which her late husband was entitled, but which was registered in the name of the deceased herein. She asserts entitlement to inherit what was due to her late husband.
17. Ideally, the claim by the protestor would not be a succession issue. It would be an issue founded on trust. The probate court would not be vested with jurisdiction to determine questions of trusts in succession proceedings. The proper thing should have been for the protestor to seek a declaration of trust in separate proceedings. The property herein is registered in the name of the deceased, and there is nothing, in the face of the registration documents filed herein, which suggest a trust in favour of the husband of the protestor. See *In Re The Estate of Kipyego Chepsiror Kolil* [2007] eKLR (Ibrahim, J), *In re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim, J), *In re Estate of Julius Wachira (Deceased)* [2013] eKLR (Musyoka J) and *In re Estate of Mwangi Gikonyo* [2017] eKLR (Waweru, J). I would be reluctant to entertain her case, in the circumstances.
18. I note, though, that this matter has been in court for a long time. The deceased died in 1984. There would be a need for closure. My colleague, Karanjah J, made findings which pointed to the protestor being entitled to a share. The parties have not been very helpful to the court, in terms of the information they disclose, and at the time the matter was before Karanjah J, the impression created was that the husband of the protestor was a son of the deceased, rather than his brother, as turned out to be the case later. Based on the finding by Karanjah J, that the protestor had entitlement to the estate, I shall proceed to make orders on distribution, without having to point the parties to Rule 41(3) of the Probate and Administration Rules, to require them to initiate separate proceedings, for a determination of whether there was a trust in favour of the husband of the deceased. See *In re Estate of Muthiani Mutule (Deceased)* [2017] eKLR (C Kariuki, J), *In re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR (Gikonyo, J) and *In re Estate of Kariuki Ngunyuu (Deceased)* [2019] eKLR (Ngaah, J).
19. Although the applicant claims that he does not know the protestor, or he does not recognize her as a widow of his uncle, he has listed her in his papers, as such widow, describing her as a sister-in-law of the deceased. His sister, Jenipher Otupai Okute, takes a similar position, but adds that he supports the proposals by the applicant, which include giving the protestor a share in the estate as a sister-in-law of the deceased.



20. A sister-in-law would have no entitlement to a share in the estate of a brother-in-law, under the scheme in Part V, for where a person is survived by a spouse and children, no other relative would be entitled, and entitlement is founded on a blood connection. See *In re Estate of Joshua Orwa Ojode (Deceased)* [2014] eKLR (Musyoka J). Other relatives would only be entitled under section 39, in cases where the deceased is not survived by a spouse and or children. Acknowledging that the protestor is entitled as a sister-in-law of the deceased can only mean that the applicant has conceded to her case, that her late husband had a stake in South Teso/Amukura/1692. Having listed her as such in his affidavit in support of his application, the applicant cannot now run away from that, without risking committing the offence of perjury. He cannot possibly swear an oath in his affidavit saying one thing, and then he takes to the witness stand, at the oral hearing, lifts the Bible and swears to something different. Such can only lead to perjury. I shall take it that the protestor is a sister-in-law of the deceased, and has a stake in South Teso/Amukura/1692.
21. As these proceedings relate to the estate of the deceased herein, I will have to deal with the share due to the late husband of the deceased. Her stake can only be on the basis that South Teso/Amukura/1692 was ancestral land, and if it was, then South Teso/Amukura/1692 must be shared equally between the estate of the deceased herein, and the estate of her late husband. The protestor, as sister-in-law of the deceased, has no direct stake in the estate herein. She can only take on behalf of the estate of her late husband. She can only do so if she has a grant of representation to that estate. See *In re Estate of Luka Modole (Deceased)* [2019] eKLR (Musyoka, J) and *In re Estate of Imoli Luhitse Paul (Deceased)* [2021] eKLR (Musyoka, J). I have not seen any. Consequently, the share due to that estate shall devolve to that estate, to be distributed in separate proceedings, initiated in that estate. For no 2 estates should be distributed in a single succession cause, filed for the purpose of 1 individual estate.
22. Having determined that the estate of the late husband of the deceased is entitled to ½ share of South Teso/Amukura/1692, and that that ½ share should be distributed in separate succession proceedings, let me now turn to the other ½ share, that is the share due to the late Martin Eladi Obelai. That should go to the estate herein, to be shared amongst the individuals who survived the deceased.
23. The material on record indicates that the deceased was survived by a widow and children. That should mean that the ½ share should devolve to the widow, during life interest, and thereafter to the children, equally, upon termination of the life interest. See *Florence Kithiru & another vs. Jackim Ikunda M'twerandu & another* [2017] eKLR (Gikonyo, J). The deceased had 8 children, sons and daughters. Children of both genders are entitled to a share in the estate of their late parent. Part V does not discriminate, for it does not create any distinctions between male and female, or sons and daughters. See *Mwongera Mugambi Rinturi & another vs. Josphine Kaarika & 2 others* [2015] eKLR (Waki, Nambuye & Kiage, JJA), *Ludiah Chemutai Bett vs. Joseph Kiprof Tanui* [2017] eKLR (M Ngugi, J) and *In re Estate of Chepleke Chemusany (Deceased)*[2020] eKLR (Sitati, J)In any case, any discriminatory distribution, founded on gender, would flounder, by virtue of Articles 2(4) and 27 of the *Constitution*, and *Wanjiru & 4 others vs. Kimani & 3 others* [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA). See *In re Estate of M'Itunga M'Imbutu (Deceased)* [2018] eKLR (Gikonyo, J) and *In re Estate of Stanley Mugambi M' Muketha (Deceased)* [2019] eKLR (Gikonyo, J).
24. Articles 2(4) and 27 of the *Constitution* provide as follows:
 2. Supremacy of this Constitution
 - (1) ...
 - (2) ...



- (3) ...
- (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
- (5) ...”

27. Equality and freedom from discrimination

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) ...
- (7) ...
- (8) ...”

25. I note that 2 of the sons of the deceased are dead. Section 41 of the [Law of Succession Act](#) would apply, to deal with that situation. The children of the dead sons would step into their fathers’ shoes, and if they are more than 1 child, the estate is shared equally between them. See *Martin Munguti Mwonga vs. Damaris Katumbi Mutuku* [2016] eKLR (Thande, J). I cannot tell from the filings herein how many children the dead sons had each, and whether representation has been granted to their estates. The best approach would be to devolve their shares to their estates, for administration and distribution in separate proceedings.

26. The final orders shall be:

- a. That I hereby confirm the administrators to go on to complete the administration of the estate herein, by way of transmission of the estate in the manner that I shall order here below;
- b. That South Teso/Amukura/1692 shall be shared equally between the estate herein and the estate of Emmanuel Kaburu Obelai;
- c. That the ½ share due to the deceased herein shall devolve, in the first instance to his widow, Felesta Amoding Eladi, during life interest, and thereafter to her 8 children, that is to say Asare Vincent Eladi, Crescent Ouma Eladi, Peter Obelai Eladi, Moses Arakit Eladi, Jenipher Itupati Okute, Mary Aunty Irukan, Andrew Itulia Eladi and Fobian Alimor Eladi, equally, and where



any of her children are dead, to the estates of such dead children, to be distributed amongst their survivors in separate succession proceedings;

- d. That the ½ share due to the late Emmanuel Kaburu Obelai shall devolve upon his estate, to be distributed in separate succession proceedings, to be initiated in his name;
- e. That a certificate of confirmation of grant shall be issued in those terms;
- f. That the administrators shall move to have the estate transmitted within the next 6 months, in accordance with section 83(g) of the *Law of Succession Act*;
- g. That the matter shall be mentioned on 23rd September 2025, for the administrators to confirm that they have completed transmission of the estate, to pave way for the closure of the court file herein;
- h. That each party shall bear its own costs; and
- i. That any party aggrieved by these orders has 30 days to challenge the same at the Court of Appeal.

27. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA ON THIS 21ST DAY OF FEBRUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Vincent Asare Eladi, co-administrator, in person.

Advocates

Mr. Ouma, instructed by Ouma & Company, Advocates for Jenipher Itupati Okute and Mary Aunty Irukan.

Mr. Shihemi, instructed by Maloba & Company, Advocates for Leah Midesha Kaburu.

