



REPUBLIC OF KENYA



In re Estate of Ibrahim Likabo Muhieso (Deceased) (Succession Cause 172 of 2008) [2025] KEHC 1433 (KLR) (18 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 172 OF 2008**

AC BETT, J

FEBRUARY 18, 2025

IN THE MATTER OF THE ESTATE OF IBRAHIM LIKABO MUHIESO

BETWEEN

CLEMENT LUCHITIO LIKABO PETITIONER

AND

CLEMENT BOYIA LIKABO ADMINISTRATOR

AND

JUDITH NYAWINA APPLICANT

JUDGMENT

Background

1. By a Judgement dated 16th October 2020, W. Musyoka J. made the following orders:-
 - (a) That I hereby allow the summons for revocation of grant, dated 22nd December 2018, with the result that the grant made on 30th June 2008 is hereby revoked;
 - (b) That I hereby appoint Clement Luchitio Likabo, Alexander Muhambe Likabo and Clement Boyio administrators of the estate of the deceased, and direct that a grant of letters of administration intestate issues to them;
 - (c) That as a consequence of the revocation ordered in (a) above, the confirmation orders made on 17th February 2010 are hereby vacated, and the certificate of confirmation of grant dated 22nd February 2010 is hereby cancelled;
 - (d) That the Land Registrar, responsible for Kakamega County, is hereby directed to cancel the subdivision of Isukha/Shitochi/1064 into Isukha/Shitochi/3353, 3354 and 3355, and to have the said property restored back to the name of the deceased;



- (e) That the administrators appointed under (b), above, shall, whether jointly or severally, file for confirmation of their grant, to pave way for a fresh distribution of the estate, in a manner that fully complies with section 71 of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules;
 - (f) That the matter shall be mentioned thereafter for compliance with (e) above, and for further directions;
 - (g) That each party shall bear their own costs; and
 - (h) That any party aggrieved by the orders made herein shall be at liberty to appeal against the same at the Court of Appeal within the next twenty-eight days.
2. Subsequent to the said Judgement, Grant of Letters of Administration intestate was issued on 22nd January 2021 to Clement Luchito Likabo, Alexander Muhabe Likabo and Clement Boiya as Administrators of the estate of the deceased.
 3. On 18th March 2021, the 3rd Administrator lodged an application praying for confirmation of the Grant of Letters of Administration earlier issued to them. According to the Applicant, the deceased had two wives namely Sulemana Indagasi and Sulemana Ambalwa. Further, Sulemana Indagasi, had one child namely Clement Likabo Boiya who is the Applicant while Sulemana Ambalwa had two (2) children namely Clement Luchito Likabo and Alexander Muhambe Likabo who happen to be the Applicant's co-administrators.
 4. The Applicant proposed that the estate of the deceased, which comprises two parcels of land, he distributed as follows:-
 - a. L.R. No. Kakamega/Shitochi/1064 being 0.7 hectares to the Applicants wholly.
 - b. L.R. No. Kakamega/Virembe/761 being 0.9 hectares be shared equally by his aforesaid two co-administrators.
 5. By an Affidavit of protest, Fredrick Muhanji Nangala whom I shall refer to as the 1st Protestor, objected to the confirmation of Grant as prayed and stated that in the first instance, he was never served with any of the processes that led to the Judgement dated 16th October 2020 as he was at the time, remanded in Industrial Area Prison, Nairobi. He denied ever instructing one Mr. Kofuna Advocate to act on his behalf and that Mr. Kofuna appeared on his behalf was a scheme conjured by the Applicant to mislead the court into making the orders that it made.
 6. The 1st Protestor averred that he was an innocent purchaser for value of a portion of land comprised in L.R. No. Isukha/Shitochi/1064 having purchased the same at Kshs. 3.2 million on the 5th August 2013. The 1st Protestor attached a copy of the agreement of sale to his Affidavit.
 7. It was he 1st Protestor's averment that he conducted due diligence before purchasing the land and that he purchased the land long after succession had been conducted and was shocked that after seven (7) years his certificate of title was cancelled. According to him, 1st and 2nd Administrators had passed the title to him 7 years ago before and the Applicant had slept on his rights and should not disrupt everyone else now.
 8. Another Affidavit of protest was filed on 16th August 2021 by the 1st Administrator, Clement Luchitio Likabo who deponed that the Applicant was acknowledged later in life by the deceased hence they did not grow up together. It was the 2nd Protestor's averment that before his demise, the deceased had allocated the land comprised in L.R. No. ISUKHA/SHITOCHI/1064 to each of his three sons in



three equal portions with the 2nd Administrator's portion being at the centre of the homestead near the graves because the 2nd Administrator was the youngest son. According to the 2nd Protestor, his portion was in the middle while that of the Applicant was at the bottom portion of the land further to the homestead.

9. The 2nd Protestor further averred that the land comprised in L.R. No. Kakamega/Virembe/761 is only available for distribution between him and the 1st Administrator because it was a gift from his maternal uncles to the deceased under Luhya custom. It was his averment that although the said land was registered in the deceased's name, traditionally, and by Luhya customs, the same could only be devolved to those of the deceased's children who came from the maternal lineage of the in-laws who gifted the land to him.
10. In further protest, the 2nd Protestor averred that they had included the Applicant in the proceedings and ensued that he got his rightful share of the deceased's property and after confirmation, disposed of their respective shares to Fredrick Muhanji Mangala the 1st Protestor, and one Margaret Masitsa Luchesi by way of sale. According to the 2nd Protestor, he and the 2nd Administrator had settled on the respective portions of land as allocated by their father before moving out.
11. On 9th March 2022, the 2nd Administrator (now the 3rd Protestor) filed his affidavit of summons. He reiterated the contents of the protest and went further to state that the Applicant has never lived on L.R. No. Kakamega/Virembe/761 but they all used to live together with L. R. No. Kakamega/Shitochi/1064 until he and his brother chose to move away due to bad blood between them and the Applicant.
12. The 3rd Protestor, further averred that the Applicant's proposed mode of distribution would see the Applicant get a lion share of the deceased's estate being 0.7 hectares while he and his brother would have to be content with 0.45 hectares each. Further, the 2nd Respondent averred that after the 2nd Respondent sold his portion of land to the 1st Protestor, the 1st Protestor took possession and has been openly in occupation of the same for almost ten (10) years with the knowledge of the 1st Applicant who had no objection but due to the fact that the disputed land is now prime land, the Applicant wants the land for himself so that he can sell it for a higher price.
13. In paragraph 11 of his Affidavit of protest, the 3rd Protestor averred that traditions aside, the court should distribute each of the two parcels of land belonging to the deceased equally between the three brothers.
14. The court directed that the protest be heard by viva voce evidence and the parties proceeded to testify.

Evidence

15. The Applicant testified that he did not wish to get a share in the Virembe land as the 2nd and 3rd Administrator should live there. Since the deceased had directed so. In cross-examination, he said that his brother was born in Shitochi as he was. He also stated that his mother was buried in Virembe. According to him, his brothers should not get a share at Shitochi since the deceased had left him there.
16. The 1st Protestor testified as DW1 and after adopting his affidavit as his evidence, testified that they had an earlier understanding and after 2008, the land at Shitochi had been shared out. He proposed that both the land at Virembe and the one at Shitochi be distributed equally amongst themselves although it is the 3rd Protestor who lives at Virembe in compliance with the deceased directive. According to him, the Applicant had refused to take his share at Virembe. He further stated that the deceased had shared out the Shitochi land before his demise but he sold his share to Fredrick while his brother sold his share to Margaret because the Applicant had assaulted him.



17. On re-examination, the witness said that the Virembe land had been given to their mother by a relative. The Protestor also stated that Fredrick the 1st Protestor and his wife bought the land at Shitochi after confirmation of letters of administration and have lived on it for over 10 years.
18. The 1st Protestor, who was allowed to come on record and defend his claim testified on 6th November 2023. He adopted his Affidavit dated 26th July 2021 and said that he bought the land from the 1st and 2nd Administrators after succession had been completed and that at the time of purchase, each parcel had a title although still in the name of the deceased. The witness was referred to the Green card annexed to the application which reflected on entry showing the three Administrators as owners pursuant to Succession Cause No. 172 of 2008. He testified that by the time he was buying the land in the year 2013, the Grant had been registered. The 1st Protestor urged the court to give him the two portions of 0.45 hectares each which he had purchased from the 1st and 2nd Protestor.
19. Before finalization of the proceedings, the Applicant passed away and on 24th June 2024, his wife Judith Nyawina was substituted in his place.
20. After the parties closed their case, the court directed that they do file their submissions.

3rd Administrator's (Applicant) Submissions

21. The 3rd Administrator/applicant submitted that the deceased was polygamous and although Section 40 of the *Law of Succession Act* applies to polygamous households, the same is a general provision to guide the courts in distribution the estate with the court having the final discretion in the final distribution without necessarily applying the provisions of Section 40. She cited the case of Re Estate of Nzolove Kisuke alias Daudi Nzolove Kisuke (Deceased) [2022] eKLR in support of her submissions.
22. The Applicant further submitted that from the evidence, the Applicant was left as the only occupant in the Shitochi land after the 2nd Administrator was moved to the Shirembe land during the lifetime of the deceased. The Applicant stated that the 1st Administrator had also moved out of the land several years later and that the fact that he remained the sole occupant of the Shitochi land is a clear demonstration and confirmation of the deceased's wishes that the Applicant settles on the Shitochi land while his stepbrothers settle on the Virembe land.
23. The Applicant's further submissions that the extra land that is in the Shitochi land was to cover for the decease's absence in his life and a sign of compensation of the paternal love that he was never accorded. The Applicant therefore urged the court to exercise its discretion and allocate the Shitochi land to the Applicant and the Virembe land to the Respondents.
24. The Applicant further submitted that in the event the court finds Section 40 of the *Law of Succession Act* applicable, the it should allocate shares to the parties in accordance with their current occupation and development. The Applicant referred to In Re Estate of Chesimbili Sindani (Deceased) [2021] eKLR.
25. It was the Applicant's further submissions that since the Respondents had depend that the Applicant is not entitled to the Virembe land due to its origins, then the court should allocate the Applicant's entire share out of the Shitochi land only while Alexander could get a share from both parcels of land since has never lived on any of the two places. According to her, clement should be assigned his full share from the Virembe land.
26. Finally, the Applicant submitted that the Purchaser's interest should lie in the shares of the people who purportedly sold the land to him, leaving the 1st and 2nd Administrators and his claim should not in any way interfere with the manner in which the estate of the deceased is distributed.



1st and 2nd Administrators (Respondents) Submissions

27. The Respondents submitted that they carried out succession to their deceased father's estate and upon receiving Certificate of Confirmation of Grant of Letters of Administration, sold their shares three years later to Fredrick Mangala Muhanji and Margaret Muhanji who took possession and had been in use and occupation of the land which is next to the Applicants for 5 years before the Applicant decided he had an issue with the way the deceased's land was subdivided.
28. It was the Respondents' submission that they had every right, as beneficiaries of the land, to dispose of the same by way of sale.
29. It was the Respondents' submissions that the proposed mode of distribution by the Applicant would place them at a disadvantage as they would receive 0.45 hectares each of the share of the estate of the deceased as opposed to 0.7 hectares by the Applicant. The Respondents further submitted that the Shitochi land is far much more valuable than the Virembe land and the resultant distribution would be unfair and unjust.
30. The Respondents submitted that a more reasonable mode of distribution would be that both parcels of land be divided equally into three portions and that would cater for the interests of all the parties including the purchaser.

Analysis and Determination

31. Arising from the proceedings and the submissions, the following are the issues for determination:-
 - i. Whether the deceased had subdivided his land among his three sons in his lifetime.
 - ii. Whether L.R. No. Kakamega/Virembe/761 was gifted to the deceased by the Respondents' maternal relatives.
 - iii. How the estate of the deceased should be distributed.

i. Whether the deceased had subdivided his land among his three sons in his lifetime

32. There was no evidence led by the Applicant to prove the assertion that the deceased had subdivided his land among his sons during his lifetime. It was his word against that of the Respondents. The Applicant did not adduce any evidence to support his assertion. I believe that where a father has made a decision to subdivide his property to his children, the process is not done in the presence of the affected parties alone. The father would naturally summon his kinsmen and the village elders as well as a surveyor to witness the subdivision.
33. From the Applicant's Affidavit in Support of Summons for Confirmation of Grant, he said that the deceased had two wives, one of them being his mother. When cross-examined, he said that his mother was buried in Virembe.
34. From his earlier evidence in support of objection proceedings, the Applicant said that he is on the portion of land or Shitochi upon which he had built his home. It is also evident that Alexander, the Respondent moved out of the Shitochi land after purchasing land at Shamberere.



35. Based on the aforesaid, I find and hold that the deceased did not subdivide his land during his lifetime. Perhaps what he did was to point out to each child where he should build and that did not constitute subdivision but a licence as held in *Re Estate of Chesimbili Sindani (Deceased)* [2021] eKLR that:-

“... I am persuaded that the deceased had only licensed the sons to utilize certain assets, and as a result they had put up structures on those assets, any distribution of the assets ought to take into account those assets, and ensure that the particular sons are allocated shares in the parcels of land where they have put up structures.”

ii Whether L.R. No. Kakamega/Virembe/761 was gifted to the deceased by the Respondents’ maternal relatives

36. The Respondents asserted that the Virembe land was given to their mother as a gift by her relatives and although registered in the name of the deceased, did not form part of the estate of the deceased. The Respondents did not adduce any witness to support their assertion. They also went ahead to propose that the Virembe land be distributed equally between the three brothers.

37. I have analysed the evidence as a whole and compared it to the evidence earlier adduced by the parties during the objection proceedings and I have come to the conclusion that none of the parties have been candid to the court. In absence of any evidence to the contrary, I find that there is no proof that the Virembe land was a gift from the Respondents’ maternal relatives. I am further persuaded by the fact that the Applicant himself said that his mother was buried in the Virembe land.

38. African customs are very strict and if at all it was true that the Virembe land had been gifted to the deceased’s wife, the deceased would not have buried his other wife being the Applicant’s mother on that land. Secondly, the Respondents would have been extremely reluctant to propose that the said land be subdivided into three and the Applicant who would not be entitled to the same, be given an equal portion. What I can deduce from the entire evidence is that the Respondents had hatched a plot to deny the Applicant his rightful portion in the Virembe land and that is why the land was not included in the inventory from the outset. The exclusion from the inventory had nothing to do with the beneficial ownership of the land but with a scheme by the Respondents to inherit the land by themselves to the exclusion of their step-brother.

iii. How the estate of the deceased should be distributed

39. Having held that the deceased had not distributed his properties before his demise and that the Virembe land was not gifted to the deceased and/or his wife by the Respondents’ maternal relatives, I find that the parcels of land comprise the estate of the deceased and are available to be distributed.

40. I have perused the Chief’s letter dated 21st April 2008. It states that the deceased left the following sons:-

1. Clement Luchitio Likabo
2. Alexander Muhembe Ligabo
3. Clement Boiyo

I have noticed a trend in this area where sons do not consider daughters of a deceased person as dependants who are entitled to benefit from the estate of the deceased. It may be that the deceased had no surviving daughter. However, considering the fact that the parties are making reference to themselves as “sons” rather than “dependants of the deceased”, there is a possibility that the parties have sisters who may not be aware of the proceedings.



41. Article 27 of the Constitution of Kenya provides as follows:-

“ 27.

- (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.”

42. In referring themselves as sons of the deceased, the three Administrators are no doubt influenced by the predominantly African patriarchal culture where it is only male children who qualify to inherit their father’s land.

43. The deceased herein died on 12th December 2005 and therefore the provisions of the Law of Succession Act apply to his estate. Since it was the evidence of the Applicant that the deceased did not make a Will and since the court has found that the deceased had not distributed his property before his death, then Section 38 of the Law of Succession Act applies to his estate. Section 38 states as follows:-

“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.”

44. It follows that every child who survives the deceased is entitled to an equal share of the estate of the deceased. Section 3 (2) of the Law of Succession Act does not distinguish between the male child and female child for purposes of succession.

45. To forestall further objection proceedings, the distribution of the estate should only be done once I am satisfied that no other child who would be entitled to a share in the estate of the deceased has been left out.

46. In the end, I make the following orders;

- a. That L.R. No. Kakamega/Shitochi/1064 and L.R. No. Kakamega/Virembe/761 form part of the estate of the deceased.
- b. That any of the Administrators shall within 30 days from today, file a letter from the area Chief listing all the male and female children of the deceased.
- c. That in the event there are daughters of the deceased who have no interest in his estate, the said daughters shall file an affidavit to renounce their claim.
- d. That final orders on distribution shall be made upon compliance with order (b) and (c) above.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF FEBRUARY 2025.



A. C. BETT

JUDGE

In the presence of:

Ms. Rauto for the Appellant

1st Respondent in person

Court Assistant: Polycap

