



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Bilasio Sylvester Opondo Opiyo (Deceased) (Succession Cause 131 of 2007) [2025] KEHC 3448 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3448 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 131 OF 2007
WM MUSYOKA, J
MARCH 21, 2025**

RULING

1. The deceased herein died on 28th September 1997, according to the certificate of death on record, serial number xxxxx, of 13th December 2006. According to the Chief of Bumala East Location, by his letter, dated 20th June 2007, he died possessed of Bunyala/Mudembi/1084. He died without a wife and children, and his parents had predeceased him. His sole survivor was said to be his brother, William Ouma Opiyo.
2. The said William Ouma Opiyo sought letters of administration intestate, through a petition that was lodged herein on 19th July 2007, in his capacity as brother. He described himself as the sole survivor of the deceased, and that the deceased had died possessed of Bunyala/Mudembi/1084. A grant of letters of administration intestate was accordingly made and issued on 22nd October 2007.
3. The said grant was confirmed, on 6th October 2010, vide a summons for confirmation of grant, dated 3rd December 2008. It was proposed, in that application, that the entire estate be devolved upon William Ouma Opiyo, being the sole survivor. A certificate of confirmation of grant in those terms was issued, dated 6th October 2010.
4. Thereafter, a summons for revocation of grant, which was undated, was filed by Augustino Malingu, on 14th February 2018. He stated that the deceased and William Ouma Opiyo were his brothers. He confirmed that the deceased died without a wife and children. He said that the deceased had 4 siblings, being himself, William Ouma Opiyo, the late Peter Okumu and the late Patrick Wangira. He averred that William Ouma Opiyo had caused the estate to be devolved solely to himself, without consideration to his siblings.
5. William Ouma Opiyo defended himself, in an affidavit that he swore on 12th November 2018. He agreed wholly with Augustino Malingu, that the deceased was their late brother, and that he was not survived by a wife or children. He asserted that he was solely entitled to the estate of the deceased, as he was the one who used to take care of him during his lifetime, to the total exclusion of Augustino Malingu. He further averred that the deceased had given him the land, so that he could take care of



- him, and cater for his burial expenses. He asserted that he was the one in occupation of the land, and Augustino Malingu had no entitlement to it whatsoever.
6. That application was determined by Kiarie J, in a ruling that was delivered on 26th February 2019. The court cited section 39 of the *Law of Succession Act*, Cap, 160, Laws of Kenya, which caters for situations where a person dies intestate, and is not survived by a spouse, children and parents, and which declares that in such a scenario the property devolves upon the brothers and sisters, of the deceased, and any children of any deceased brother or sister of the deceased, equally. Based on that provision, the court found merit in the application. It revoked the grant made to William Ouma Opiyo, and appointed William Ouma Opiyo and Augustino Malingu, as the joint administrators, and directed them to apply for confirmation of their grant. The court did not expressly state it, but the language of the ruling meant that the distribution ordered by the confirmation orders of 6th October 2010, had been vacated.
 7. Following that ruling, the parties filed affidavits for proposed distribution. Augustino Malingu filed his on 16th April 2019, sworn on even date, proposing that the property be shared equally between him and William Ouma Opiyo. William Ouma Opiyo filed his, on 30th July 2019, sworn on even date. He identified the survivors of the deceased as himself, Augustino Malingu and a sister, Susan Nerima. He proposed equal distribution between the 3 of them. Susan Nerima filed hers on 3rd March 2020, of even date. She renounced her entitlement to a share, on grounds that she was satisfied with the property that she had inherited from her late husband.
 8. A grant of letters of administration intestate was issued to William Ouma Opiyo and Augustino Malingu, on 8th July 2022, based on the orders of 26th February 2019.
 9. David Okumu Opiyo, filed a summons for confirmation of grant, on 24th May 2024, dated 16th May 2024. He did not disclose how he was related to the deceased. What was certain, however, was that he was not one of the administrators of the estate of the deceased, and he could not possibly apply for confirmation of grant when he did not hold one, contrary to what is required by section 71(1) of the *Law of Succession Act* and Rule 40(1) of the Probate and Administration Rules. I struck out that application on 27th June 2024, on grounds that it was incompetent, and directed the administrators, William Ouma Opiyo and Augustino Malingu, to apply for confirmation of their grant.
 10. It was Augustino Malingu who hearkened to that call, by filing a summons for confirmation of grant, on 29th July 2024, of even date. I shall refer to him hereafter as the applicant. He identified the survivors of the deceased to be 4, being 2 brothers, that to say himself and William Ouma Opiyo, and 2 nephews, David Okumu Opiyo and Boniface Wangira, who I suppose are the children of his 2 dead brothers, the late Peter Okumu and the late Patrick Wangira. He proposed an uneven distribution, so that he took 0.50 Hectare of the property, with William Ouma Opiyo taking 0.30 Hectare, and the 2 nephews 0.10 Hectare each.
 11. I have come across only 1 reaction to that application, being a joint affidavit of protest by the 2 nephews, David Okumu Opiyo and Boniface Wangira, filed on 18th September 2024, and sworn on an undisclosed date. I shall refer to the 2 as the protestors. They agree with the contents of the confirmation application, save for the proposed distribution, where they propose equal distribution between all 4 survivors, at 0.25 Hectare each.
 12. I gave directions on 19th September 2024, that, in view of the protest by the 2 nephews, the confirmation application was to be heard orally.
 13. The oral hearings commenced on 22nd January 2025. The applicant, Augustino Malingu, was the first to take the witness stand. He confirmed that the deceased was only survived by his siblings, who he said were 1 sister and 4 brothers. He said that the sister had renounced probate. He said that 2 of the



brothers were dead. The late Patrick Wangira was survived by 6 children, while the late Peter Okumu had only 1 child, David Okumu. He asserted that he had allocated himself a larger share as he had developed the land. He also asserted that he had incurred expenses in administration costs. He further claimed that he settled his son on the land of the deceased, based on an agreement with the deceased, that upon his demise his property shall revert to that son. He also stated that he and William Ouma Opiyo had sat and agreed to share the land equally between the 2 of them, on the basis that the nephews had not cooperated, so far as administration of the estate was concerned.

14. David Okumu Opiyo testified next. He stated that he was a nephew of the deceased, and named the 4 brothers and 1 sister of the deceased. He stated that he did not agree with the distribution proposed, for the applicant had allocated to himself $\frac{1}{2}$ of the land, leaving the other $\frac{1}{2}$ to be shared amongst the other 3 survivors.
15. At the conclusion of the oral hearings, the parties, who were not represented, did not submit.
16. The deceased died in 1997, after the *Law of Succession Act* had come into force, on 1st July 1981. His estate, therefore, falls for distribution in accordance with that law. He died intestate, for no will was produced, whether oral or written. His estate shall, therefore, be distributed in accordance with Part V of the *Law of Succession Act*. The property is situated within Busia County; hence it does not fall within the exceptions contemplated in sections 32 and 33 of the *Law of Succession Act*.
17. The intestate provisions in Part V run from sections 32 to 42 of the *Law of Succession Act*. They cover distribution of estates of persons who died without having made a will. They envisage 5 possible scenarios, and give guidelines on how distribution should proceed, in each scenario.
18. The first is where the deceased was survived by a spouse, whether or not without children. In that case, the surviving spouse would take priority over everybody else, and the distribution would take the form of devolution to the surviving spouse, during life interest, and thereafter, upon termination of the life interest, to the children, if there be any, equally. See section 35 of the *Law of Succession Act*. In the absence of children, the property would devolve upon the relatives, in the manner of section 39 of the *Law of Succession Act*. See section 36 of the *Law of Succession Act*.
19. The second scenario would be where the deceased does not have a surviving spouse, but there are children. The children would have priority over every other relative. They would share the property equally, regardless of their gender. See section 38 of the *Law of Succession Act*.
20. The third scenario would be where the first 2 groups, the surviving spouse and children, are not there. The next in line would be the nearest or closest relatives of the deceased. Those relatives are ranked in priority. The priority would go to the parents of the deceased. If there are no parents, the next in line would be the brothers and sisters of the deceased. They would share the property of their dead brother or sister equally. Where any of the brothers and sisters of the deceased are themselves dead, the share due to them would devolve upon their own children, equally. See section 39(1)(a)(b)(c) of the *Law of Succession Act*.
21. The fourth scenario arises where the immediate family members are not there, that is the spouse, children, parents and siblings. The next in line would be the other relatives of the deceased, going up to the eighth degree in consanguinity. That would mean the individuals who have the same blood line with the deceased. See section 39(1)(d)(e) of the *Law of Succession Act*.
22. The fifth and final scenario would arise where no relatives of the deceased can be traced, up to the eighth degree in consanguinity, the property would devolve upon the State. The State holds radical title to all land in Kenya, and where there is no inheritor, the State becomes the inheritor of last resort. The



property would be sold, and the moneys raised paid into the Consolidated Fund. See section 39(2) of the *Law of Succession Act*.

23. Sections 35(1)(5), 36, 38 and 39 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.”

“36. 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.”

24. The circumstances of this case are that the deceased did not have a spouse and children, and his parents were dead. That meant that distribution was to follow the third scenario, where the property is shared out equally between the brothers and sisters of the deceased. Where any of the brothers and sisters of the deceased is dead, the share due to him or her would go to his or her children, who would divide the share equally amongst themselves, in terms of section 39(1)(c) of the *Law of Succession Act*. The children of the dead siblings step into the shoes of their late parents, in terms of section 41 of the *Law of Succession Act*.
25. The deceased herein had 5 siblings, 4 brothers and a sister. 2 brothers are alive, 2 are dead. The 2 who are dead were survived by children. The sister has renounced probate, so she shall not feature in the distribution. The property, Bunyala/Mudembi/1084, shall be shared equally between the 4 brothers of the deceased, in accordance with section 39(1)(c) of the *Law of Succession Act*. For the 2 who are dead, their share shall devolve upon their children. 1 brother was survived by 1 child, that share shall devolve upon that child absolutely.
26. The other brother was survived by 6 children. There would be no basis for devolving that share to the son who is active in these proceedings, Boniface Wangira. All 6 are entitled equally to that share. I have not seen documents showing that Boniface Wangira has been appointed administrator of the estate of his late father, Patrick Wangira Opiyo, to facilitate the share due to his father being devolved to him as administrator. He has also not presented any consents from his 5 siblings, authorising him to take their father’s share, either absolutely or in trust. The way out should be to devolve that share to the estate of the late Patrick Wangira Opiyo, where it shall be distributed in succession proceedings initiated in that estate, where all 6 children should participate in those proceedings.
27. The applicant has proposed a larger share of the property to himself. He has given his reasons. Section 39(1)(c) of the *Law of Succession Act* envisages equal distribution. There is nothing in that provision, and no other has been cited to me, which would allow the court to award a share to a surviving sibling which is larger than what section 39(1)(c) of the *Law of Succession Act* prescribes.



28. He alluded to agreements or understandings between him and the deceased, which entitled him to get a larger share. No documents were presented to support that. I have not seen one. Getting into a property of a dead person, and developing it, without leave of the court, is outlawed. It is a criminal offence, known as intermeddling, and the intermeddler exposes himself to being jailed, or fined, or both, according to section 45 of the [Law of Succession Act](#). I have not seen any order in the file herein, allowing the applicant to move into the land and to develop it. If that is what he did, then he intermeddled with an asset of the estate of a dead person, he committed an offence, and the police should prosecute him.
29. He argues further that he incurred administration expenses, and the 2 nephews did not contribute to the same. Administration expenses are a cost to the estate. It is up to the administrator to recoup them from the estate, and not from the beneficiaries. There is nothing, in the [Law of Succession Act](#) and the Probate and Administration Rules, which requires beneficiaries to shoulder the cost of administration. That cost is shouldered by the estate. The administrator cannot pass it to the beneficiaries. If he understood his role as administrator, he would have known where to raise the funds for administration purposes.
30. Both administrators, separately, argue that they had some arrangements with the deceased, which would have seen the property accrue to them exclusively upon his death. No documents were presented to support any such arrangements. For William Ouma Opiyo, that argument was dismissed by Kiarie, J, in the ruling of 26th February 2019, which cited section 39(1) of the [Law of Succession Act](#). That ruling has not been challenged by way of appeal, and it has not been vacated by a higher court. The only way that the deceased would have taken the property away from intestate succession was if he had made a will, willing away the property to them, or he had made inter vivos transfers in their favour. He did none of those things. His property is available for distribution, in accordance with section 39(1)(c) of the [Law of Succession Act](#). It is available to his 4 brothers.
31. I think that I have said enough to set an adequate background for the orders that I am just about to make, which are as follows:
 - 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 Bunyala/Mudembi/1084 shall be shared equally between Augustino Malingu Opiyo, William Ouma Opiyo, the late Peter Okumu Opiyo and the late Patrick Wangira Opiyo;
 - c. That the ¼ share due to the late Patrick Wangira Opiyo herein shall devolve upon his estate, to be distributed in succession proceedings to be filed in that estate, where all his 6 children shall participate;
 - d. That the ¼ share due to the late Peter Okumu Opiyo shall devolve directly and absolutely upon his only child, David Okumu Opiyo;
 - 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, in accordance with the certificate of confirmation of grant, to be issued, in terms of (e), above, in 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.

32. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA ON THIS 21ST DAY OF MARCH 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Augustino Malingu Opiyo and Mr. William Ouma Opiyo, the administrators, in person.

Mr. David Okumu Opiyo and Mr. Boniface Wangira, the protestors, in person.

