



In re Estate of the Late Daudi Imbache Mbagaya (Deceased) (Succession Cause 735 of 1994) [2025] KEHC 3099 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3099 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 735 OF 1994
SC CHIRCHIR, J
MARCH 13, 2025**

**IN THE MATTER OF THE ESTATE OF THE LATE
DAUDI IMBACHE MBAGAYA (DECEASED).**

BETWEEN

ANDREW MILIMU ASHIHUNDU RESPONDENT

AND

FRIDAH MUNG'OHE IMBACHE APPLICANT

AND

DIMANAH INDAKO ANGULU OBJECTOR

AND

EDWIN NGAIRA IMBACHE PROTESTOR

JUDGMENT

1. This cause relates to the estates of David Imbache Mbakaya (deceased). Following his demise, three different petitions were filed in respect to his estate. That is, this Succession Cause, SCC No. 124/2015 and SCC. 220 of 2008. On 25/7/2019, the three causes were consolidated and this cause was designated as the lead file. The court further revoked the grants that had been respectively issued in all the causes . Fridah Mong'ohe Imbache(The Applicant) was then appointed the Administrator of the deceased's Estate and directed to file the summons for confirmation of Grant.
2. The summons for confirmation of grant dated 9/2/2021 was filed on 10/2/2021. In her affidavit in support of the summons the Applicant listed 6 immovable properties, 15 heirs, and one purchaser, who had reportedly purchased parcel No. Kakamega/Shitochi/981.



3. She proposes that the shares belonging to the heirs who have since died, be given to their children(deceased's grandchildren) and that Parcel No. Kakamega/Shitochi/981(parcel No. 981) be given to Alice wijenje who had purchased it from the deceased. She further proposes that Parcel No. Isukha/Kambiri/3196,(parcel No. 3196) which is being occupied by Edwin Ngaira be left wholly to him. She has proposed the sharing of the other properties ranging in acreage between 0.25 hectares to 0.35 hectares.
4. On 2/11/2021, Edwin Ngaira Imbache, who described himself as the child of the deceased and step-child to the petitioner ,filed a protest to the confirmation of grant. He states that the deceased was a polygamous man of 4 wives.
5. He states that the deceased had distributed his properties between his wives as follows;
 - a). 1st wife (one child)- Nil
 - b). 2nd wife (7 children) – Isukha (Kambiri/616 and Isukha/Shitochi/765)
 - c). 3rd wife (Petitioner) – Isukha/Shitochi/786.
 SUBPARA d). 4th wife (with one child) – Isukha/Shitochi/985
6. He states that the property should be distributed as per his father's wish as aforesaid and as per houses.
7. Dimanah Indako, Mary Maraga, Dinah Ikohe, Enoch Milimu, Daniel Imbache filed affidavit in support of the protest.
 The petitioner filed a further affidavit dated 28/12/2021. She states that Parcel No. 3196 belonged to the deceased though it was still in the name of one Gabriel Majange; that even though she did not agree with the issues raised in the family meeting referred to by the respondent , the said minutes testify to the fact that parcel No. 3196 belonged to the deceased. She states that she has provided for the deceased' grand children whose parents have since died; that these include the children of Sebenzia Daudi, Consolata Ngina, Beatrice Payi and Rose Khatsinu.
8. She further sates that Alice Wichenje who had purchased parcel No. Isukha/Shitochi/981, occupied the land during the lifetime of the deceased and she is still in occupation. She further proposes that Florence Doryana Imbache whom she had left out, should be included and to get a share of 0.3 hectares from Isukha/Shitochi/765.
9. It is further stated that John Milimu had no house, and indeed was buried in the Applicant's homestead
 The hearing proceeded by way of oral evidence

Petitioner's Case

10. In summary the petitioner's case is that each child of the deceased both male and female should get a share of the estate; that the late Jeremiah Ashihundu & the protestor , both children of the deceased had been duly provided for during the life time of the deceased; that Jeremiah was given Kakamega / shitoshi/ 804 ,while the protestor got Kakamega/Shitochi/3196 .
11. She further states that parcel No. Kakamega/Shitochi/981 should go to one Alice Wichenje as she had been given the said land by the deceased; that the rest of the family knew about this fact and none of them had ever contested the occupation of the said parcel by Alice. She insisted that Alice did not buy the land but was given to her as a gift by the deceased..



12. Alice Wihenje however told the court that she purchased the parcel from the deceased; that she had a chief's letter confirming the purchase though she did not have the letter in court.

The protestor's case

13. The protestor's testimony and those of his witnesses however was that the deceased had divided the land between his sons; that the female heirs are not entitled to a share, as per the wishes of the deceased; the protestor also admitted that he was given parcel No. Kakamega/Shitochi/3196 by the deceased during his life time; and that Jeremiah was given Kakamega/Shitochi/804.
14. At the conclusion of the hearing, the petitioner filed submissions ,which I have considered.

Analysis and determination

15. I have considered the parties pleadings and the lengthy testimonies of the witnesses and I have identified the following issues for determination:
 - a). Whether Alice Wechinje is a beneficiary of the estate?
 - b). Whether there were gifts involves to some of the heirs?
 - c). How should the estate be distributed?

Whether Alice Wechinje is a beneficiary of the deceased estate

16. The petitioner told the court that Parcel No. Kakamega/Shitochi/981 was given to Alice Wichenje by the deceased; that the said Alice is her niece, the daughter of her brother. She further stated that Alice never purchased the land. However, during her testimony Alice Wihenje (PW4) told the court that she purchased the land from the deceased but only that she did not have any documents in proof of purchase.
17. Further, the petitioner (PW1) told the court that Alice Wihenje was using parcel No. 981 from the year 1982, that was during the lifetime of the deceased and that she built a house on the said land during the deceased's lifetime. Alice Wichenje testified as pw2 and told the court that she began using the land in 1982, that is when she bought it; that she had an agreement with the deceased but she lost it; that she buried her son, Victor Asango on the land and no one has challenged her in regard to the occupation of the parcel. She denied ever being given the parcel as a gift by the deceased. She also stated that she bought it in 1984. On cross- examination , she admitted that she was challenged in court through Civil No. 124/2005 but the court however allowed her to bury her child there.
18. However, Pw3 told the court that Alice Wichenje built on the land after the deceased had died. The witness was a retired Assistant chief.
19. There is a contradiction between the Applicant's testimony and Alice on how she later acquired the land. However, going by the fact that she was the one acquiring the land, I take it that Alice was more acquainted on how she acquired it, and her position is that she purchased the land parcel. However, she never produced any document of purchase .
20. There is a letter from the chief which indicate that she had bought the land for KShs. 30,000/- but a document not signed by parties to the transaction can not be said to be evidence of purchase .In any case , it is a requirement , under section 3(3) of the [Law of Contract Act](#) that contract for the disposal of an interest in land must be in writing.



21. In the absence of such a contract, the petitioner has failed to prove that Alice Wichenje had an interest in the deceased's land which had crystallized by the time the deceased died. It is only those third parties' rights which had crystallized at the time of the deceased's death that a family court has the mandate to effect. In the case of *Alexander Mbakaya Vs Royford Muruiki Rauni & 7 Others* (2016) eKLR the court held: "It is only where one has an established claim against the estate that has crystallized that he can litigate it before a family court. The claim is to be covered as a liability to the estate. This court in my view cannot be called upon to ascertain whether or not one has right to an estate of the deceased where such right has not that crystallized. The right must be shown to have crystallized before the family court can entertain it as a liability in succession proceedings."
22. The petitioner has failed to demonstrate that Alice Wichenje's proprietary interest over parcel No. 980 had crystallized by the time that the deceased died and therefore this court does not have the mandate to give it effect. In other words, I am not satisfied that Alice Wichenje was a liability to the deceased's estate.

Whether there were gift intervivos that had been made to some of the deceased's heirs

23. In the case of *Nyaga Versus Kargean* (2003) eKLR Justice Mwongo stated as follows; "A gift intervivos is a gift between the living. This is the Latin Phraseology and is the legal term that refers to a transfer of gift made during Grantor's life. In reality where a gift has been given intervivos it ceases to be free property, and is incapable of being inter-mixed with the free estate of the deceased."
24. Black's Law dictionary (11th Edition) defines intervivos as:

"between the livingInvolving property conveyed not by will or in contemplation of an imminent death but during the conveyors life time".
25. PW1 told the court that Parcel No. 3196, was bought by the deceased from one Ambeyi. She further stated that Jeremiah Shihundu was given land by the deceased and that was why she had not listed him as one of the beneficiaries. The protestor admitted that he and Jeremiah had been given land by their father. He stated that he had been given parcel No. 3196 and he already had the Title deed to the property. On parcel No. 804, he stated as follows; "Parcel No. 804 was allocated to Jeremiah. It was the ancestral land. It is the deceased who gave us land and settled there" He further stated that Jeremiah did not buy 804, but was given to him by the deceased; that he too did not buy parcel No. 3196 but was given to him by his father.
26. From the above testimonies, it is evident that the deceased had, during his life time, given two of his sons namely: Jeremiah Ashihundu Imbache and Edwin Ngaira Imbache parcel Nos. 804 and 3196 respectively I have seen the certificates of official search in respect of the aforesaid parcels. The certificate dated 13/2/2019 for parcel No. No. 3196 shows that it is about 0.29 hectares while parcel No. 804 dated 11/1/2019 is 0.37 hectares. The parcels are in their respective names.
27. Gift Intervivos can be granted through an instrument or by delivery inter alia. They must be complete to be valid. It was the testimony of DW1 that he had been in exclusive possession of parcel No. 3196 and the title deed is in his name. The title No. Kakamega/Shitochi/804 is also in the name of Jeremiah. I am therefore satisfied that the gifting was complete and each of the gifts met the requirements of a gift intervivos



Distribution of the Estate

28. Evidence show that the properties registered in the deceased's name are; Isukha/Shitochi/981 – 0.25 hectares (0.61 acres) Isukha/Shitochi/786 – 0.6 hectares (5 acres) Kakamega/Shitochi/765 – 0.6 hectares (5 acres) Kakamega/Kambiri/616 – 3.8 hectares (9.4 acres)
29. Kakamega/Kambiri/616 is registered under Andrew Malimu Ashihundu then as Administrator of the estate. Andrew was appointed as Administrator pursuant to Kakamega Succession No. 220/08. That grant was however cancelled and has no effect on the deceased properties.
30. Following the cancellation of the earlier grants the above properties now constitute free property of the deceased's estate and are available to be distributed to the beneficiaries. The total acreage available of the four properties stated in paragraph 28 hereof is 13.01 acres (i.e from the affidavit of the petitioner sworn on 9/2/2021 and protestor sworn on 1/11/2021).
31. I have identified the following as the survivors of the deceased
 1. Frida Mung'ohi Imbache – Wife
 2. Florence Doryewa Imbache
 3. Edna Atsewa Ashuke
 4. Benjamin Shitsukone (Deceased)
 5. Consolata Ngire (Deceased)
 6. Sebenzia Daodio (Deceased)
 7. John Milimu (Deceased)
 8. Mary Maraga
 9. Frida Mwatizi
 10. Dimiho Indako
 11. Sophie Imbache
 12. Pradides Sweetie Imbache
 13. Edwin Ngaira Imbache
 14. Rose Khatsinu
 15. Jeremiah Ashitundu Imbache
 16. Zuhura Eliano Kienze Imbache (Deceased)
32. From the affidavit of the Applicant sworn on 9/2/2021 and oral testimonies in court, it came out that that the following deceased's heirs left children behind: Benjamin Shitsukane Consolata Ngine Sebenzia Daudi John Milimo Rose Khatsini Beatrice Payi Zuhura Eliano Imbache
33. Edwin Ngaira and Jeremiah Ashihundu had already received Parcel Nos. Isukha/Shitochi/3196 (0.7 acres) and Kakamega/Shitochi/804 (0.9 acres). Based on the remaining size of the land, in comparison to what the two received, it is my finding that Edwin Ngaira and Jeremiah had been adequately provided for and will not benefit from the remaining properties.



34. This leaves 14 beneficiaries of the deceased without any provisions. with total acreage of Parcel Nos. 981, 986,985 and 616 coming to 13.1 acres, then each of the beneficiaries will get 0.936.acres
35. Parcel No. arcel No. 981 is approximately 0.61 acres. Dimana Indako , from the 4th house has asked to be given this portion . I consider her plea reasonable. In any event, this size is lower than the acreage
36. Doing the best I can I will proceed to distribute the remaining properties as follows:

Parcel No. 765.

- a. Frida Mung'ohe Imbache
- b. The estate of Imbache
- c. Benjamin Shitsukahe Imbache

In equal shares

Parcel No. 786

1. The estate of Sebenzia Imbache
2. The estate of Consolata Ngire

In equal shares

Parcel No. 616

- a. Florence Doryewa Imbache
- b. Edna Atsewa Ashuka
- c. The estate of John Milimu.
- d. The estate of Zuhura Eliano
- e. The estate of Beatrice Payi
- f. The estate of Rose Khatsini
- g. Mary Moraga
- h. Fridah Mwayizu
- i. Sophie Imbache
- j. Praxides Sweetie Imbache

In equal shares.

37. Final orders:
- a). The grant herein is hereby confirmed.
 - b). The distribution is as stated on paragraph 36 of this judgment.
 - c). The petitioner to carry out transmission process and complete it within the next 90 days.
 - d). Right of Appeal:- 28 days.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ISIOLO THIS 13TH DAY OF MARCH 2025 .



S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi- Court Assistant

Ms Luseno – for the protestor

