



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Nicodemus Asili Ajinga (Deceased) (Succession Cause
785 of 2007) [2025] KEHC 2308 (KLR) (5 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 785 OF 2007**

AC BETT, J

MARCH 5, 2025

IN THE MATTER OF

HERBERT AJINGA ASILI PETITIONER

AND

FLORA SHITIVA SUBSTITUTE PETITIONER

AND

HENRY MUSITA OYANDO OBJECTOR

AND

JACKSON ANDATI INTERESTED PARTY

SIMON ASILI INTERESTED PARTY

JUDGMENT

1. These proceedings relate to the estate of the above named deceased Nicodemus Asili Lutiko a.k.a Nicodem Asili Lutiko who died on 14th September 2024.
2. By a petition for Letters of Administration Intestate filed on 21st September 2007, Herbert Ajinga Asili sought representation to the estate of the deceased and named the following as having survived the deceased:-
 - a. Isaac N. Asili
 - b. Henry L. Asili
 - c. Zacharia A. Asili
 - d. Henry M. Ayando



- e. Kefa M. Iumba
3. Grant of Letters of Administration were issued on 19th June 2008 and confirmed on 13th October 2010 and a Certificate of Confirmation of Grant issued in which the deceased's land comprised in L.R. No. Kabras/Shamberere/1054 devolved to:-
- i. Herbert Ajinga Asili the Administrator to hold in trust for other beneficiaries Isaac N. Asili, Zakaria A. Asili, Henry M. Oyamba) – 6.4 hectares
 - ii. Kefa Makani – 1 hectare
4. On 14th June 2011, the Objectors, referred to as 'Interested Parties' being Jackson Andati and Simon Asili filed an application praying for revocation and for annulment of the Grant issued to the Petitioner.
5. By an affidavit of protest dated 31st July 2012, the Protestor Henry Ajinga Asili objected to the Confirmation of Grant of Letters of Administration on the grounds that the Petitioner did not disclose to the court that the estate of the Protestor's deceased father Sila Oyando Musula was entitled to 3.5 hectares from the above named deceased's estate.
6. The Protestor averred that he and his five brothers who he named in the affidavit of protest lived on the subject land and that the Petitioner had forcefully curved out part of their land and sold the same to one Kefa Makani.
7. Directions were issued that the dispute be resolved by way of viva voce evidence.

The Evidence

8. The Objector, Jackson Andati Asili testified as PW1. He said that the deceased, who was his grandfather had six (6) children two of whom were married daughters. He further stated that three (3) of the deceased's sons had died but were survived by their spouses and or children.
9. According to PW1, the Petitioner did not involve them when he filed succession. He stated that the deceased had subdivided the land before his demise and apportioned the land to his sons as follows:-
- a. Zakaria Asili father to PW1 – 3.9 acres
 - b. Henry Asili – 3.5 acres
 - c. Isaac Asili – 4 acres
 - d. Herbert Asili – 3.9 acres
10. PW1 prayed that the land be distributed in the manner earlier done by the deceased. The deceased had not given any land to the daughters.
11. On cross-examination, PW1 said that the position on the ground had not changed. According to him, the Safaricom structure was on his father's share of the land. He said that the deceased only put boundaries on the land. He further said that Herbert uses 3.9 acres of the land. The witness said that he knew Kefa Makani who bought land from Herbert and his father. He said that the land was sold to Kefa's brother Mulwa in the year 2002 and Kefa went to take possession of his brother's plot before his father died in 2003.
12. In re-examination PW1 said that although the Safaricom structure is on his father's land, Herbert takes the proceeds.



13. PW2 was Sarah Lutiko who is a widow to Henry Lutiko who died in February 1992. She testified that the deceased had subdivided the land before he died and the sons' families still live on the land apportioned to them. She denied knowing Kefa Makani and that he bought the land.
14. On cross-examination, PW2 said that there was a buyer known as Henry Oyando who bought land from the deceased. She said that the deceased's daughters had not asked for any share. She said that she uses "3 point something" acres.
15. PW3 was Prisca Zakaria Asili, a daughter-in-law to the deceased by virtue of her relationship to Erick Zakaria Asili. She said that the deceased had subdivided the land and her portion is 3.9 acres. She testified that there is a Safaricom Mast on the land which is on Zakaria's portion of land. She said that Henry Oyando and Kefa Makani bought land. Henry Oyando bought the land from the deceased and the purchase was before she got married. According to her, Kefa bought land from Herbert.
16. The Petitioner died on 18th September 2012 and by a Chamber Summons dated 30th October 2012, his widow Florah Ashitiba applied for revocation and/or annulment of the Grant and for substitution of her name with that of the Petitioner on the ground that there were objection proceedings pending in respect of the estate of the deceased.
17. The application was allowed on 22nd November 2012 and a fresh Grant issued to the Applicant.
18. In defence, the widow to the Petitioner testified as DW1. Petitioner was her husband who married her in the year 1979. She testified that her father-in-law had already died without subdividing the land and it was Henry the first born who used to show the other dependants of the deceased where they would cultivate. She said she found Henry Oyando on the plot. She also said that Kefa Makani bought land from the deceased, her husband and Zakaria and has been cultivating the land for about 10 years. She prayed that each dependent gets an equal share. She had no objection to the purchasers being given their share. She further stated that she took up the case of Isaac's children when they were orphaned and although Kennedy is over 18 years, can be tempted.
19. During cross-examination, DW1 said that the deceased who died in 1974 had not subdivided the land. She said that Kefa did not buy land from her husband but from her mother-in-law, her husband and two brothers-in-law and his portion could be 2 ½ acres. With respect to the Safaricom booster, she prayed that the proceeds be shared equally.
20. Kefa Makani Simba testified as DW2. According to him, he bought the land from his nephew about seven (7) years before the hearing. He says there is an agreement that shows that Herbert Asili received Kshs. 5,000/=. Another agreement shows that Isaac Ndaluh Asili received Kshs. 4,000/= and in another one, Herbert Asili received another sum of Kshs. 30,000/=. This was in 1994.
21. In cross-examination, DW2 said that Herbert divided the land in 1992 and sold the portion to his family and then died in 1992.
22. The court directed the parties to file written submissions. The court also directed that the parties undertake a survey of the subject land.

Objector's Submissions

23. The firm of Elungata & Co. Advocates filed submissions that are at odds with the proceedings. I have gone through the record and established that on 18th February 2013, when the matter was already part heard, Henry Misakhu attended court and indicated that his Advocate was Elung'ata who was not present in court on the said date. The matter proceeded later without Henry Misakhu testifying and on



23rd July 2013, after one of the interested parties Kefa Makani Simba testified, Mr. Elungata informed the court that that was the close of the Interested Partys' case.

24. In his submissions dated 5th March 2024, Mr. Elungata alludes to evidence that was submitted by the Objector Morris Okalo Oyando. I do not see such evidence on record. However, I can see an affidavit of protest sworn by Henry Musita Oyando on 31st July 2012 and filed on 9th October 2012. Since there is nothing in the record to confirm whether Morris Okalo Oyando substituted Henry Musita Oyando, and in absence of any viva voce evidence by either of the forestated two persons, I find that the submissions of Mr. Elungata are misconceived and I will therefore not set them out herein.

Petitioner's And Interested Party's Submissions

25. Ms. Munihu for the Petitioner and Interested Part relies on the affidavit and viva voce evidence on record. She further submits that the survey report that was filed has identified how the parties have settled on the land. They submit that the court should distribute the estate of the deceased as per the survey report which is as follows:-
- i. Kefa Makani - 0.56 ha = 2.13 acres
 - ii. Henry Musita - 0.93 ha = 2.29 acres
 - iii. Prisca Zakaria Asili - 1.46 ha = 3.60 acres
 - iv. Sarah Lutiko - 1.50 ha = 3.70 acres
 - v. Ken Asili - 1.1 ha = 2.72 acres
 - vi. Flora Ashitiva - 1.77 ha = 4.4 acres

Analysis And Determination

26. The issues for determination arising from the objection proceedings are as follows:-
- i. Whether the deceased had subdivided the land before his demise?
 - ii. Who are the beneficiaries of the estate of the deceased?
 - iii. How should the estate of the deceased be distributed?
- i. Whether the deceased had subdivided the land before his demise
27. I have analysed the evidence adduced by the parties. The Objector who claims that the deceased had subdivided his land amongst his sons before his demise is a grandchild. He did not say that he was present during the subdivision. However, he indicated that the position on the ground had not changed. PW2 and PW3 who are both daughters-in-law of the deceased also insisted that the deceased had subdivided his land. The only person who averred that the deceased had not subdivided his land before his demise was DW1 who is also a daughter-in-law of the deceased.
28. Neither the Objector nor the Petitioner adduced independent evidence. It was incumbent on the Objector to prove on a balance of probabilities, that his position as regarding subdivision of the land by the deceased was correct. It is inconceivable that an African man who intends to subdivide his land amongst his children would do so in absence of his extended family and clan members. A Surveyor's presence is also necessary during such an exercise as would be the presence of some village elders. An independent witness would have buttressed the Objector's case and more so in view of the fact that the three (3) witnesses who testified in support of the objection were not the sons to the deceased.



29. Upon comparing the shares PW1 avers were allocated to each son with the survey report that identified the area currently occupied by each party, I find that there is a significant discrepancy that raises further doubts in respect to the Objector's claim that the deceased had subdivided his land to his sons.
30. DW1 testified that her husband Henry, the first born son used to show the other dependants of the deceased the area they should cultivate. I am inclined to believe her testimony on this. I therefore hold that the deceased died before subdividing his land amongst his dependants.
- (ii) Who are the beneficiaries of the estate of the deceased
31. The deceased died intestate without a surviving spouse and therefore the provisions of Section 38 of the *Law of Succession Act* apply to his estate. Section 38 provides 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.”
32. In this case, all the sons of the deceased have also passed away. The parties to this cause are the grandson and daughters-in-laws respectively. Aside from them, there are interested parties who are said to be purchasers.
33. Section 29 of the *Law of Succession Act* defines dependency as follows:-
- “(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) Such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”
34. From the provisions of Section 29 of the *Law of Succession Act*, all the biological children of the deceased are automatically deemed to be dependants of the deceased and hence beneficiaries of his estate.
35. From the evidence adduced, the Objector and Ken Asili are grandchildren of the deceased. The Objector is a son to PW3 while Ken Asili is an orphan.
35. A grandchild is not an automatic beneficiary of a deceased. He only becomes a beneficiary by virtue of his relationship with the deceased and can only inherit his parents share of the estate by taking their place. In *Re Estate of Wahome Njoki Wakagoto* [2013] eKLR, the court held as follows:-
- “Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”



36. In regard to PW2, PW3 and DW1, they are entitled to inherit the share of their deceased husbands subject to the provisions of Section 35 (1) of the Law of Succession Act which provides:-

“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.”

37. In the case of *Tau Kakungi v. Margethe Thorning Katungi v. Another* [2014] eKLR, the court held as follows:-

“The effect of section 35 (1) is that the children of the deceased are not entitled to access the net estate so long as there is surviving a spouse. The children’s right to the property crystallizes upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income she would be the person entitled exclusively to the income so generated.

The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance.”

38. My understanding of Section 35 (1) is that the daughters-in-law of the deceased can only be entitled to inherit from the deceased if their husband’s left them with no children. Where there are children, then the daughters-in-law are to hold their husband’s beneficial share of the estate of the deceased in trust for themselves and the other dependants of the deceased husbands.

39. From the evidence on record, I am persuaded that the direct beneficiaries of the deceased are:-

- (a) Henry Ludilu Asili (deceased) – Represented by his widow Sarah Ludiko.
- (b) Zacharia Eric Asili (deceased) – Represented by his widow Prisca Khasacyuli Asili
- (c) Nicodemus Asili Lutiko (deceased) – Represented by his widow Flora Ashitiva
- (d) Isaac Ndalul Asili (deceased) – Represented by his son Kennedy Asili

40. I have perused a letter from the Chief, Shianda location dated 19th January 2011 addressed to this court. From the letter, I can deduce that each of the deceased’s sons had several children.

41. By virtue of the express provisions of Section 38, the net estate of the deceased should devolve in equal shares upon each of the named beneficiaries.

42. It is the duty of the court to ascertain whether the listed dependants are the only beneficiaries of the deceased.



43. The Administrator is required to identify all persons entitled to a share in the estate of the deceased as stipulated in Rule 40 (4) of the Probate and Administration Rules which stipulates that:-
- “Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.”
44. It was the parties concurrent evidence that the deceased had sold some land to one Henry M. Ayando. None of the witnesses stated how much land the said Henry Oyando had purchased but from the survey report, it is stated that he occupies 0.93 hectares which is 2.29 acres.
45. The Protestor Henry Musita Oyando in his Affidavit of protest sworn on 31st July 2012, and filed on 9th October 2012 deponed that his deceased father Sila Oyando Musila purchased land from the deceased. He claimed that his deceased father was entitled to 3.5 hectares, but their share of the land had been allocated to Kefa Makani by the deceased Administrator. I have perused the record and established that Henry Musita Oyando produced two documents as exhibits being D.Exh 2(a) and D.Exh 2(b). On scrutinizing D.Exh 2 dated 10/6/72, I find the same to be suspect as clearly the words “Plot No. 105A 3.5 (HT)” inscribed on the agreement are clearly not in the same handwriting as the handwriting in the rest of the Agreement. I am therefore constrained to reject the contents of the agreement in regard to the size of the land bought from the deceased.
46. Currently, the Objector is said to be in occupation of 2.29 acres. This was confirmed after a survey was undertaken in compliance with directions given by Chitembwe J. on 26th February 2014 when he noted that the share bought by Morris Okalo Oyando father to Henry M. Oyando was not clear to him.
47. In the absence of any definite proof of the acreage of the land sold by the deceased to Morris Okalo Oyando, I hold that the family of Morris Okalo Oyando is entitled to 2.29 acres of the land, which is the land they took possession of and are in occupation of.
48. In regard to the other purchaser namely Kefa M. Isumba, the parties were in agreement that he did not buy the land from the deceased. The said purchaser gave evidence and claimed that he bought 2 ½ acres of land from Victor Anyika who is his nephew. At the time he was giving evidence on 23rd July 2013, he testified that about 7 years had lapsed since he bought the land. He produced several agreements which are not clear but they are acknowledgements of receipt of payments by Herbert Asili and Isaac Ndalul Asili. It is thus evident that neither Kefa nor Victor Anyika purchased any land from the deceased and if there was such purchase, it was from Herbert Asili and Isaac Ndalul Asili.
49. Section 82 (b) (ii) of the *Law of Succession Act* states as follows:-
- “No immovable property shall be sold before confirmation of the grant.”
50. The import of Section 82 (b) (ii) is that selling off immovable property of a deceased person before confirmation of grant is prohibited. Any person who sells or any person who purchases the immovable property of a deceased person before confirmation of Grant is considered an intermeddler. The law regards intermeddling in the estate of a deceased person seriously and it can attract penal sanctions as prescribed by Section 45 of the *Law of Succession Act*.



51. In the case of *Morris Mwiti Mburugu v. Dennis Kimantheni M'mburugu* [2016] eKLR, the court held as follows:-

“Where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of sections 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of the innocent beneficiaries who may have been affected by the act but were not involved in the same.”

52. The position of a person who buys the immovable property of a deceased person before confirmation of Grant was further considered in *Re Estate of Paul M'Maria deceased* (2017)eKLR where the court stated:-

“The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the *Law of Succession Act* is tainted with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under article 40(6) of *the Constitution*. See the claw-back provision of *the Constitution* that:-

40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

53. Based on the foregoing, I find that Kefa M. Isumba is not a beneficiary of the estate of the deceased. The purported sale of land to him by some of the beneficiaries was bereft of legal authority. He has no right or interest that is protected by law. He can pursue the Vendors' families after confirmation of the Grant.

(iii) How should the estate of the deceased be distributed?

54. Having concluded that the deceased had sold 2.29 acres to the Protestor's father, then the net estate available for distribution is 6.47 hectares. The said 6.47 acres should devolve in equal shares of 1.617 hectares to each of the four beneficiaries of the estate. Each beneficiary shall hold their share in trust in equal shares for themselves and the other dependants of the sons of the deceased.

Dated, signed and delivered at Kakamega this 5th day of March 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Munihu for the Petitioner

No appearance for Mr. Ondieki

No appearance for Mr. Elung'ata

Beneficiaries present

Court Assistant: Polycap

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