



In re Estate of Tabitha Kalekye Mulwa (Deceased) (Succession Cause E46 of 2024) [2025] KEHC 10596 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10596 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE E46 OF 2024
RC RUTTO, J
JULY 17, 2025**

IN THE MATTER OF THE ESTATE OF TABITHA KALEKYE MULWA (DECEASED)

BETWEEN

BERNARD MUTINDA MULWA ADMINISTRATOR

AND

MICHAEL WAMBUA MULWA 1ST PROTESTOR

MONICAH NTHENYA MULWA 2ND PROTESTOR

RULING

1. The Administrator herein filed the summons dated 3rd June 2024 brought pursuant to Section 71 of the *Law of Succession Act* and Rule 40 (1) of the Probate and Administration Rules in which the Administrator herein sought orders that the grant of letters of administration be confirmed as follows;
 - a. Mavoko Town Block 3/2299-
 - 6 acres to be registered in the name of Bernard Mutinda Mulwa,
 - 6 acres to be registered in the name of Michael Wambua Mulwa,
 - 6 acres to be registered in the name of Benson Mutuku Mulwa,
 - 6 acres to be registered in the name of Handson Muinde Mulwa,
 - 6 acres to be registered in the name of Nicholas Muthama Mulwa,
 - 6 acres to be registered in the name of Japheth Mulwa Nzioki,
 - 2 acres to be registered in the name of Monica Mthenya Mulwa and 2 acres to be registered in the name of Jane Mueni.
 - b. Mavoko Town Block 3/2935-



6 acres to be registered in the name of Michael Wambua Mulwa,

6 acres to be registered in the name of Benson Mutuku Mulwa,

6 acres to be registered in the name of Handson Muinde Mulwa and 2 acres to be registered in the name of Monica Nthenya Mulwa.

- c. Shares with Cooperative Bank of Kenya Member No. 500XXXX41- to be shared equally among all six sons namely Bernard Mutinda Mulwa, Michael Wambua Mulwa, Benson Mutuku Mulwa, Handson Muinde Mulwa, Nicholas Muthama Mulwa and Japheth Mulwa Nzioki.
 - d. Shares with Kenya Airways Account No. 70XXXX2-to be shared equally among all six sons namely Bernard Mutinda Mulwa, Michael Wambua Mulwa, Benson Mutuku Mulwa, Handson Muinde Mulwa, Nicholas Muthama Mulwa and Japheth Mulwa Nzioki.
 - e. Plot measuring 2 1/2 acres Katelembo Athiani Muputi Farming & Ranching Society Limited- 2 acres to be shared equally among all six sons namely Bernard Mutinda Mulwa, Michael Wambua Mulwa, Benson Mutuku Mulwa, Handson Muinde Mulwa, Nicholas Muthama Mulwa and Japheth Mulwa Nzioki, ½ acres to be registered in the names of Monica Nthenya Mulwa & Jane Mueni Mulwa.
 - f. Plot No. 12 Lukenya Ranching-
that the whole plot of land be registered in the names of Monica Nthenya Mulwa & Jane Mueni Mulwa.
2. In response to the summons for confirmation of grant, the Protestors filed an affidavit of protest sworn on 8th July 2024 challenging the proposed distribution of Land Parcel No. Mavoko Town Block 3/2299. They claimed that in 1985, the 1st protestor Michael Wambua Mulwa contributed to the acquisition of the shares that enabled the deceased to obtain ownership of the property. It was further stated that his youngest sister (the 2nd protestor) witnessed the transaction, during which he gave the deceased Kshs.4,000/= for shares at Lukenya Ranching & Farming Cooperative Society Limited.
 3. On 9th July 2024, the court issued an order partially confirming the grant dated 3rd June 2024. The confirmation covered all properties listed in the schedule except for Mavoko Town Block 3/2299, which remained in dispute. Consequently, the protest proceeded to a viva voce hearing on 28th April 2025
 4. The Protestor's first witness, Michael Wambua Mulwa, adopted his witness statement dated 28th October 2024 and the affidavit of protest sworn on 8th July 2024. He produced the Protestor's list of documents dated 28th October 2024, which included a letter from Lukenya Ranching & Farming Cooperative Society Limited marked as Exhibit 1. In his testimony, he stated that in 1985 he contributed Kshs.4,000/= towards his mother's share in Lukenya Ranch which subsequently led to the acquisition of Land Parcel No. Mavoko Town Block 3/2299. He asserted that he was gainfully employed at the time and had the financial means to make the contribution. Based on his claim of financial input, he urged the Court to allocate him a larger portion of the disputed property specifically 15 acres out of the total 40 acres.
 5. During cross-examination, he confirmed that the family held a meeting on 14th December 2023 during which he initially agreed to the proposed distribution of the estate. He admitted, however, that he lacked documentary evidence proving that he paid the Kshs.4,000/= as claimed. He stated that the payment must have been received under the deceased's name. He also testified that his



youngest sister Monica Nthenya Mulwa, born in 1973, was present when he handed over the money to their late mother in 1985. He noted that their mother, being illiterate, did not provide any written acknowledgment of the payment. During re-examination, he clarified that although he attended the meeting of 14th December 2023, he was not satisfied with the agreed distribution and remained opposed to the proposed share allocation.

6. The 2nd Protestor's witness, Jackson Kingi Nzioki, testified that he knew the deceased as the wife to his elder brother. He adopted his witness statement dated 28th October 2024, in which he stated that both he and the deceased were members of Lukenya Ranching & Farming Cooperative Society Limited, where each member was required to pay Kshs.4,000/=. He told the court that the deceased had personally informed him that she received Kshs.4,000.00 from her son, Michael, which she then used to settle her membership payment with Lukenya.
7. However, during cross-examination, Jackson admitted that he was not present when the alleged payment was made and did not witness Michael handing over the money. He also confirmed that he had no documentary evidence or official communication from Lukenya showing that the deceased owed or paid the said amount. Furthermore, he stated that he is illiterate, does not know how to read or write, and uses his thumb print as a signature. As a result, he recanted the claim that he had personally signed the witness statement
8. The Administrator's sole witness, Benard Mutinda Mulwa, adopted his affidavit in response to the protest, sworn on 12th September 2024, along with his witness statement dated 9th April 2025. He also produced the list of documents dated 28th March 2024. In his testimony, he stated that the protestor did not pay the Kshs.4,000.00 for the shares in Lukenya Ranching & Farming Cooperative Society Limited as alleged. He emphasized that their father was financially capable and had personally paid for the property in question. He further clarified that their father had two wives, and that the Protestor is his biological brother.
9. During cross-examination, he confirmed that the family members had agreed on the distribution of all properties in the estate. He noted that it is only the Protestor who had raised objections regarding one property, claiming that his financial contribution warranted a larger share. The witness reiterated that their father was a man of means and personally funded the acquisition of the Lukenya property. He concluded that the protestor's claims were unsubstantiated and lacked merit.

Analysis and Determination

10. After evaluating the pleadings, oral testimonies, and supporting documentation presented by all parties, the sole issue for determination in this matter is whether the Protestor, Michael Wambua Mulwa, is entitled to a larger share of Land Parcel No. Mavoko Town Block 3/2299 than the other beneficiaries
11. The Administrator filed summons for confirmation of grant proposing an equal distribution of the said property among the sons, while Monica Nthenya Mulwa and Jane Mueni were to receive comparatively smaller shares. The Protestor, Michael, opposed this arrangement and claimed that he contributed Kshs.4,000.00 toward the acquisition of the property. He sought 15 acres out of the total 40 acres, arguing that he gave the money to his mother, the deceased, in 1985, and that his sister Monica witnessed the transaction. Michael further asserted that the payment was likely receipted under the deceased's name due to her illiteracy. However, he conceded that he lacked documentary proof of the payment. His claim was supported by a second witness, Jackson Kingi Nzioki, who testified that the deceased told him Michael had provided the money. Yet, Jackson also admitted that he did not personally witness the transaction, nor did he produce any supporting documentation from Lukenya



Ranching & Farming Cooperative Society Limited. He also admitted not to have signed the witness statement as it appeared since he only used his thump print as a signature.

12. In rebuttal, the Administrator testified that the deceased's husband, who was also Michael's father, was a man of means and had personally funded the acquisition of the property. He emphasized that all beneficiaries had agreed to the proposed distribution except for Michael, who was contesting only this specific parcel.
13. The question then becomes whether Michael has proved, on a balance of probabilities, that he made a financial contribution toward the purchase of Mavoko Town Block 3/2299, justifying a preferential allocation. The evidence presented by Michael was entirely oral, unsupported by receipts or written acknowledgments. Although the court accepts that familial transactions may not always be formally documented, the absence of any corroborative testimony from Monica, who allegedly witnessed the payment, weakens Michael's position. Moreover, the property is registered in the name of the deceased, with no indication that Michael's alleged payment directly resulted in its acquisition.
14. It is also worth noting that Section 107(1) of the *Evidence Act*, Cap 80, Laws of Kenya, places the burden of proof on the party asserting the existence of a fact:

“107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

15. Subsection (2) reinforces this principle:

“(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

16. Further, Section 109 of the Act provides:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on a particular person.”

17. In the case of *Alice Wanjiru Ruhiru Vs Messaic Assembly of Yahweh* [2021] eKLR the court had the opportunity to assert the principles by holding that;

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence



given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence"

18. From the above, it is trite law that he who alleges must prove. It is clear that the burden rested on the protestor to substantiate his claim. Applying these principles to the present case, it is clear that the legal and evidential burden rested squarely on the protestor, Michael Wambua Mulwa, to prove his claim of contributing Kshs.4,000.00 towards the acquisition of Land Parcel No. Mavoko Town Block 3/2299, and thereby justify a larger share.
19. However, the evidence adduced was insufficient. Michael admitted to having no documentary proof of the alleged payment. His claim relied solely on oral testimony, which was neither corroborated nor supported by credible witness evidence. Notably, the only witness called in support of the protestor's case Jackson Kingi, recanted having signed the witness statement since he uses his thumb print as a signature. He also confirmed that he did not personally witness the alleged payment. Furthermore, Monica Nthenya Mulwa, who was purportedly present during the transaction, did not testify, thereby denying the court an opportunity to evaluate her direct account and thus, leaving the protestor's claim as being unsubstantiated and speculative.
20. In succession proceedings, claims of financial contribution toward property acquisition must be supported by clear, consistent, and preferably documentary evidence. Where oral testimony is the only evidence presented, it must be cogent and corroborated by other reliable proof. In this case, the protestor's oral evidence fell short of this standard. There was no credible link between the alleged payment and the acquisition of the disputed property, which remains registered in the name of the deceased.
21. Accordingly, the protestor has not discharged the burden of proof, and his claim does not meet the threshold required under Sections 107 and 109 of the Evidence Act. The presumption of equal or agreed distribution among beneficiaries remains intact.
22. In light of the above, I hereby direct as follows;
 - a. The protest dated 8th July 2024 is dismissed.
 - b. Mavoko Town Block 3/2299 shall be distributed as proposed in the summons for confirmation of grant dated 3rd June 2024.
 - c. Each party to bear their own costs.
23. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 17TH DAY OF JULY, 2025

RHODA RUTTO

JUDGE

In the presence of;

.....Administrator

.....Protestor

Selina Court Assistant

