



REPUBLIC OF KENYA



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**In re Estate of Adrian Wekesa Makokha (Deceased) (Succession Cause E004 of 2023) [2025] KEHC 10215 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10215 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE E004 OF 2023**

**MS SHARIFF, J**

**JULY 10, 2025**

**IN THE MATTER OF THE ESTATE OF ADRIAN WEKESA MAKOKHA (DECEASED)**

**BETWEEN**

**CHRISPINUS WEKESA MAKOKHA ..... 1<sup>ST</sup> PETITIONER**

**FELISTUS NEKESA ODANGA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**CAMILUS PETER WEKESA ..... OBJECTOR**

**RULING**

**Background**

1. The deceased herein one Adrian Wekesa Makokha died on 28<sup>th</sup> September 2000 while domiciled in Kabula within Bungoma County. The deceased was polygamous and had two wives namely Anna Kwena Wekesa, 1<sup>st</sup> wife and Mary Nasimiyu Makokha, 2<sup>nd</sup> wife.
2. Anna Kwena Wekesa begot 10 daughters and 4 sons with deceased namely:-
  - i. Felistus Jacinta Odanga - daughter
  - ii. Odilia Mshambala - daughter
  - iii. Gaudencia N Ashitiva - daughter
  - iv. Gerverve Wekesa Makokha – daughter
  - v. Roselyne W Wekesa – daughter
  - vi. Gladys K Kituyi – daughter
  - vii. Lorraine Machio – daughter



- viii. Evalyne K Odhiambo – daughter
  - ix. Regina Wekesa – daughter
  - x. Salome Odhiambo (deceased) – daughter
  - xi. Chrispinus Wekesa Makokha – son
  - xii. Anthony Wekesa (deceased) – son
  - xiii. Kennedy Wekesa (deceased) – son
  - xiv. Eugene Wekesa (deceased) - son
3. Mary Nasimiyu Makokha bore the deceased five sons and five daughters, namely:-
- i. Stella Wekesa Wasike – daughter
  - ii. Abscondita Wekesa - daughter
  - iii. Sabentia Wekesa – daughter
  - iv. Constance wekesa – daughter
  - v. Nancy A Wekesa – daughter
  - vi. Camilus Peter Wekesa – son
  - vii. Erick Wekesa – son
  - viii. Denis Wekesa – son
  - ix. Mathias Wekesa (deceased) – son
  - x. Charle Wekesa – son

### **Petition**

4. Subsequent to the demise of the deceased, the 1<sup>st</sup> and the 2<sup>nd</sup> petitioners petitioned this court for a grant of letters of administration intestate of the estate of the deceased Adrian Wekesa Makokha and on 26<sup>th</sup> June 2023, a grant of letters of administration of the estate of the deceased was issued to them.

### **Summons for confirmation of grant**

5. On 2nd January 2024 the 1<sup>st</sup> and the 2<sup>nd</sup> Petitioners jointly filed Summons for confirmation of grant which was supported by their joint affidavit sworn on even date. They attached a purported consent on the mode of distribution as outlined hereunder :-

L.P NO. W. Bukusu/S.Mateka/103



No.	Name	Id No.	Share (Acres)
1.	Chrispinus Wekesa Makokha	4371968	10 Acres
2.	Felistus Nekesa Odanga	4370224	1.5 Acres
3.	Gaudencia Nabwire Ashitiva	0393133	1.5 Acres
4.	Odilia Mshambala	0261788	1.5 Acres
5.	Genevive Wekesa	1341259	1.5 Acres
6.	Gladys Kuchio Kitui	1959573	1.5 Acres
7.	Everlyne Kituyi Odhiambo	6661403	1.5 Acres
8.	Roselyne Wekesa	9998875	1.5 Acres
9.	Lorraine Wekesa	10036282	1.5 Acres
10.	Regina Wekesa	21081779	1.5 Acres

L.P No. W. Bukusu/S.Mateka/139

To be shared out amongst the children of the deceased's 2<sup>nd</sup> wife namely Mary Nasimiyu.

L.P No. W. Bukusu/S.Mateka/40

To be shared out amongst Anthony Wekesa's widow; Kennedy Wekesa's widow for the 1<sup>st</sup> House; Camilus Peter Wekesa, Maithas Wekesa (late); Erick Wekesa for the 2<sup>nd</sup> House.

6. In the cause of these proceedings, it emerged that Camilus Peter Wekesa, one of the sons of the deceased from the 2<sup>nd</sup> House, had filed a similar petition in the subordinate court being Bungoma CMC Succession Cause No E290 of 2023. The said Cause was, on 15<sup>th</sup> April 2024, by consent of parties, consolidated with this Cause and the petitioner therein was thus appointed as the 3<sup>rd</sup> administrator herein. A will dated 7<sup>th</sup> march 1998 was then expunged from the record of this court as it did not meet the criteria for drawing a valid will and parties agreed to treat the estate as intestate. Parties that had pending applications opted to withdraw the same whereafter directions were taken for the matter to proceed by way of viva voce evidence. Parties duly filed their witness statements and lists of documents.



7. The 3<sup>rd</sup> administrator Camilus Peter Wekesa filed an Affidavit of Protest sworn on 21<sup>st</sup> June 2024, wherein he averred that that the deceased herein was the registered owner of the following parcels of land:
- a. West Bukusu/South Mateka/139.
  - b. West Bukusu/South Mateka/103.
  - c. Plot at harambee market to be hived out of North Wanga/Kholera/1012.
  - d. Plot at Watoya market-Plot No. 1
  - e. Plot at Kanduyi
  - f. West Bukusu/South Mateka/40 now West Bukusu/South Mateka/5500, 5501 and 5502.
8. The 3<sup>rd</sup> administrator's proposed mode of distribution is as follows :-
- a. Parce No. West Bukusu/South Mateka/103 be distributed to the 1<sup>st</sup> house as follows:
    - i. Anna Kwena Wekesa(1<sup>st</sup> widow)-5 acres.
    - ii. Chrispinus Wekesa Makokha, Felistus Wekesa Odanga and Camilus Peter Wekesa -1 acre.
    - iii. Chrispinus Wekesa Makokha-10 acres.
    - iv. Margaret Achieng Wekesa(widow to Anthony Wekesa)-2 acres.
    - v. Felistus Nekesa Odanga, Gaudencia Nabwire Ashitiva, Odilia Mshambala, Genevive Wekesa, Gladys Kuchio Kituyi, Everlyne Kituyi Odogina Wekesa Odhiambo, Roselyne Wekesa, Lorraine Wekesa and Regina Wekesa-6 acres (to be shared equally amongst them).
  - b. Parcel No. West Bukusu/South Mateka/139 be distributed to the 2<sup>nd</sup> house as follows:
    - i. Mary Nasimiyu Makokha (2<sup>nd</sup> widow)-1.11 acres to be registered in the name of Stella Nabwile Makokha and Abscondita N. Wekesa to hold in trust for her
    - ii. Erick Wekesa-0.59 acres
    - iii. Charles Wekesa-0.59 acres
    - iv. Denniss Wekesa-0.68 acres
    - v. Patricia Odhaimbo-6.74 acres
    - vi. Constance Wekesa -1 acre to be hived out of West Bukusu/South Mateka/40 now West Bukusu/South Mateka/5500
    - vii. Nancy Auma Makokha-Nil
    - viii. Stella Nabwile Makokha-Nil
    - ix. Abscondita N. Wekesa-Nil
    - x. Sabenzia Nabalayo Wekesa-Nil
    - xi. Camilus Peter Wekesa-Nil



- c. Parcel No. West Bukusu/South Mateka/40. currently West Bukusu/South Mateka/5500, 5501 and 5502 be distributed as follows:-
    - i. Camilus Peter Wekesa (5 acres) -West Bukusu/South Mateka/5500 measuring 6 acres and to surrender 1 acre to his sister Constance Khamala Wekesa thus
    - ii. Constance Khamala Wekesa (1 acre) - West Bukusu/South Mateka/5500
    - iii. Family of Kennedy Wekesa - West Bukusu/South Mateka/5501.
    - iv. Margaret Achieng Wekesa, the widow of Anthony Wekesa - West Bukusu/South Mateka/5502 measuring 10 acres.
  - d. Plot at Kanduyi be shared equally to all his sisters of the 1<sup>st</sup> House.
  - e. Plot at Harambee market to be hived out of West Bukusu/South Mateka/1012 and be share equally between himself and the widow of his late brother Anthony Wekesa-Margret Achieng Wekesa
  - f. Plot at Watoya market- Plot No. 1 to be shared as follows: widow of his late brother Kennedy Wekesa-front 2 doors; Chrispinus Wekesa Makokha-extreme left door; the hind building to Margaret Achieng Wekesa (widow of my late brother Anthony Wekesa).
9. Camilus Peter Wekesa averred that the family of his late brother Anthony Wekesa led by the widow Margaret Achieng Wekesa agreed with his brother Chrispinus Wekesa Makokha to hive 2 acres out of West Bukusu/South Mateka/40 now West Bukusu/South Mateka/5502 in exchange of a share of 2 acres given to his brother Chrispinus Wekesa Makokha in parcel No West Bukusu/ South Mateka /103. (according to the agreement marked CPW1).
  10. On 16<sup>th</sup> July 2024, one Constance Khamala Wekesa from the 2<sup>nd</sup> House filed an affidavit in protest to the mode of distribution. This prompted a reaction from the 3<sup>rd</sup> administrator who swore a replying affidavit on 17<sup>th</sup> august 2024 wherein he deposed that due to the refusal by Constance to be allocated 1 acre in parcel No West Bukusu/ South Mateka / 5500, the said sister should be allocated 1 acre from parcel No West Bukusu/South Mateka/139. He averred that a family meeting was held in 3<sup>rd</sup> May 2024, to discuss the mode of distribution but no agreement was reached and that he has no problem with his sisters from the 1<sup>st</sup> house getting a share from the estate of the deceased herein.
  11. Vide a Motion application dated 12<sup>th</sup> July 2024 and filed on 16<sup>th</sup> July 2024, the son of the late Anthony Wekesa, Tobias Namusonge Wekesa, craved for orders that the family of his father the late Anthony Wekesa be apportioned what he termed as it's rightful and fair share in West Bukusu/South Mateka/103; the current residential compound and 5 acres of the portion stretching to Muehusei and Wakhuleka farms. Further that the agreement with Chrispinus Wekesa Makokha, 1<sup>st</sup> Petitioner, of equitably exchanging an equivalent in value and significance, a portion of 2 acres from West Bukusu/ South Mateka/5502 be adopted, ratified, adhered to and protected by this court.
  12. Vide a Replying Affidavit sworn on 12<sup>th</sup> February 2024, the 2<sup>nd</sup> Petitioner herein, averred that the Objector's mode of distribution as proposed is frivolous, an afterthought and a waste of the Court's time. She averred that the Objector's proposed mode of distribution has excluded some of the assets of the estate of the deceased herein and some beneficiaries.
  13. In response, the Objector/Protestor swore his Supplementary Affidavit sworn on 8<sup>th</sup> April 2024, wherein he averred that the mother to the 2<sup>nd</sup> Petitioner herein, Anna Kwena Wekesa, is not in the ICU as alleged and that the Petitioners never sold any 4 ½ acres to cater to her medical needs rather they have



allocated themselves 13½ acres. He averred that while they have handed over 10 acres to Chrispinus Wekesa Makokha they excluded the family of the late Anthony Wekesa and that West Bukusu/South Mateka/103 measures 23 acres and not 28 as distributed.

14. In a Further Affidavit to the mode of distribution sworn by the 1<sup>st</sup> Petitioner herein, on 22<sup>nd</sup> August 2024, he averred that his late father had the following assets:
  - a. West Bukusu/South Mateka/103.
  - b. West Bukusu/South Mateka/139.
  - c. Kanduyi Plot No. 4.
  - d. Harambee/Kholera/Plot No. 1012.
  - e. Watoya Plot No. 1
  - f. M/V KYG 251
  - g. Motor Vehicle Registration KTN 420.
15. He proposed that the properties be distributed as follows:
  - a. West Bukusu/South Mateka/103 :-
    - i. Ann W. Kwena (widow)-3.5 Acres
    - ii. Homestead/Compund-1 Acre
    - iii. Chrispinus Wekesa Makokha-7 Acres
    - iv. Felistus N. Odanga-0.5 Acres
    - v. Odilia Mshambala-0.5 Acres
    - vi. Gaudencia Ashitiva-0.5 Acres
    - vii. Genevive Wekesa-0.5 Acres
    - viii. Gladys Kituyi-0.5 Acres
    - ix. Everylne Odhiambo-0.5 Acres
    - x. Roselyne Washiali-0.5 Acres
    - xi. Lorraine Wekesa-0.5 Acres
    - xii. Regina Wekesa-0.5 Acres
    - xiii. Tobias Namusonge (To hold in trust for the family of the late Anthony Wekesa Makokha)-7 Acres
    - xiv. Access road/pathway-0.5 Acres.
16. He averred that the initial land parcel West Bukusu/South Mateka/40 had been utilized by the family of the late Anthony Wekesa Makokha and they have agreed to surrender 3 Acres of the land from West Bukusu/South Mateka/40 to Chrispinus Wekesa Makokha.
17. He averred that the plot at Kanduyi No. 4 to be shared amongst his mother's 2<sup>nd</sup> house.



18. He averred that land parcel No. West Bukusu/South Mateka/139 to be shared out amongst the 2<sup>nd</sup> house.
19. He averred that plot No. 1 at Watoya/Kabula plot be shared amongst three members i.e: Front Doors has 3 doors – 2 doors to the family of Kennedy Wekesa and 1 door to the Chrispinus Wekesa Makokha, and the door behind and the undeveloped portion to be shared amongst Anthony’s family.
20. He averred that the plot at Harambee/Kholera/1012 to be shared amongst Chrispinus Wekesa Makokha and Anthony Wekesa’s family.
21. He averred that the Motor Vehicle Registration No. KYG 251 Matatu Pickup was to be allocated to his late brother Anthony Wekesa but the same was taken by Genevive Wekesa.
22. He averred that the Motor Vehicle Registration Number KTN 420 to be sold and the proceeds to be shared amongst:
  - i. Felistus N. Odanga
  - ii. Odilia Mshambala
  - iii. Gaudencia Ashitiva
  - iv. Gladys Kituyi
  - v. Everylne Odhiambo
  - vi. Roselyne Washiali
  - vii. Lorraine Wekesa
  - viii. Regina Wekesa
23. Mildred Apiyo Oleso, swore an Affidavit in Protest to the mode of distribution on 16<sup>th</sup> July 2024, wherein she averred that she is the daughter of the late Anthony Wekesa and that she is aware that her late father was allocated a share in land parcel number W. Bukusu/S. Mateka/40, currently West Bukusu/South Mateka/5502 which parcel of was registered in the name of her step- mother Margaret Achieng Wekesa by her uncle Camilus Peter Wekesa without regard to the fact that she is the 1<sup>st</sup> born child of Anthony Wekesa, born by a different mother. She thus craves for a share of a plot to be hived from N. Wanga/Kholera/1012 and a share in Plot No.1. Watoya Market.
24. This cause was referred to mediation and registered as Bungoma Mediation Case No. 005 of 2023. It however failed to bear fruit. This Court then proceeded to set the matter down for hearing and the Summons for Confirmation of Grant was canvassed by way of viva voce evidence.

### **Protestor’s Case**

25. Protestor-PW1, Chrispinus Wekesa Makokha, testified that he was the 1<sup>st</sup> Petitioner herein now Protestor and that the deceased herein was his father. At his request this Court adopted his recorded witness statement dated 16<sup>th</sup> September 2024, and a Further Affidavit on the mode of distribution dated 22<sup>nd</sup> August 2024, as his evidence in chief. He told this court that he was disassociating himself from the affidavit in reply that he swore jointly with Felistus Nekesa Odanga on 9<sup>th</sup> May 2024 and the joint affidavit in support of the summons for confirmation of grant sworn on 2<sup>nd</sup> January 2024. It was his testimony that the deceased herein had during his lifetime settled his sons on his land Parcels Number East.Bukusu/South.Mateka/103 and East.Bukusu/South.Mateka/139. Further that the deceased had inherited ancestral land parcel number East.Bukusu/South. Mateka/40 from his



father, the late Leo Makokha Ongaka vide Kakamega High Court P&A Cause No 289 of 1993. He told the Court that his endeavour as an administrator to have all the beneficiaries consent to the mode of distribution of the estate of the deceased bore no fruits. He proposes that all the daughters of the deceased should get  $\frac{1}{2}$  an acre each from land parcel number Bukusu/S.Matkeka/103 and the court be pleased to adopt his proposed mode of distribution.

26. On cross-examination, the 1<sup>st</sup> petitioner turned protestor told the Court that the deceased herein had 10 daughters and 4 sons in the 1<sup>st</sup> house and that each daughter should get  $\frac{1}{2}$  an acre as he is aware that the law in Kenya treats all the children of the deceased equally wherefore the  $\frac{1}{2}$  acre will suffice for daughters. He told the Court that he should be apportioned 7 acres and that his late brother Anthony Wekesa should also get 7 acres, Eugene Wekesa and Kennedy Wekesa should also get 7 acres each. According to him, these shares are from the land parcel number West Bukusu/South Mateka/103. In regard to parcel No. West Bukusu/South Mateka/40, he testified that his brother Camilus Wekesa, the Objector herein, was appointed the administrator to represent their deceased father in Kakamega High Court P&A Cause No 289 of 1993; in the matter of the estate of the late Leo Makokha Ongoka alias Leo Makokha Ongaka and that the objector divided that land into 3 portions whereat Kennedy Wekesa (deceased) and Anthony Wekesa (deceased) both from the 1<sup>st</sup> house got 3.5 hectares each while the objector remained with 7 hectares to hold in trust for the 2<sup>nd</sup> house. He told the Court that when he came up with his proposed mode of distribution he had in mind land parcels West Bukusu/South Mateka/103 and West Bukusu/South Mateka/40 and that the family of the late Anthony Wekesa already received their own share from West Bukusu/South Mateka/40 amounting to 8.75 Acres, and that the same is now duly registered under the name of Margaret Achieng Wekesa (widow to Anthony Wekesa) as parcel No West Bukusu/ South mateka/5502. He told the Court that the family of Kennedy Wekesa received their respective portion from West Bukusu/South Mateka/40 as subdivision No West Bukusu/ South Mateka/ 5501 and had sold the same to three individuals namely Sarah Nawakhosi, Kevin Bully Wakwabubi and Dennis Luhale Simiyu.
27. The protestor told the Court that his brother Anthony Wekesa used to reside in the portion that their father had settled the former and that the latter died before moving out to go and settle on his portion at Parcel No West Bukusu/South Mateka/40. He further told the Court that his father had apportioned him and his late brother Eugene Wekesa 10 acres each in land parcel West Bukusu/South Mateka/103. Further that he intended to settle on 7 acres and let the family of Anthony Wekesa remain in possession of the 3 acres that they currently occupy and in return the family of Anthony was to give him 3 acres from West Bukusu/South Mateka/40 currently known as West Bukus/South Mateka/5502. He proposed that the homestead should have 1 acre while the daughters ought to get  $\frac{1}{2}$  acre each, and that his proposal is based on his father's wishes. He told the Court that land parcel number West Bukusu/ South Mateka/103 has 23  $\frac{1}{2}$  acres and the proposal by his 10 sisters to be given the 10 acres that was meant for Eugene will inconvenience other stakeholders. He insisted that as long as his apportionment is not reduced, that of his brothers should also not be affected and that he will not accommodate equal sharing of the estate of the deceased herein among all the beneficiaries. PW1 denied that his proposed mode of distribution was gender biased and premised on male chauvinism.
28. On re-examination, he told the Court that he had initially considered all the family members and that the sizes of land of his late brothers were almost equal, and despite their demise he did not want their respective families to be disadvantaged. He noted that it was his father who distributed the land and that he proposes that each daughter should be given  $\frac{1}{2}$  of an acre.
29. On cross-examination by the Court, he told the Court that he had initially considered the total number of the family members as they are 18 in both households, and that he was basing his distribution on the portion of Eugene who died without an heir. He told the Court that his father did not do any



- subdivision and he understood that it is the duty of this Court to ensure equal distribution of the estate of the deceased, however if the court was to assign him ½ an acre he would consider such distribution as unfair to him.
30. The Protestor's witness No 2; PW2, Tobias Namusonge Wekesa, testified that he is the son of the late Anthony Wekesa and that the Protester-PW1 herein is his uncle. According to him, the deceased herein had two parcels of land namely West Bukusu/South Mateka/103 and 139, and that he was supposed to inherit two parcels namely West Bukusu/South Mateka/40 and Watoya Plot Kabula/1. Further that the deceased had bought parcel No North Wanga / Kholera/1012 that was pending distribution in Succession proceedings but the vendor later sold the land to a third party.
  31. PW2 told the Court that his late grandfather had a plot at Kanduyi but the same was repossessed by the County Government. He maintained that the deceased had a written a will and that parcel No. West Bukusu/South Mateka/103, measuring 23.5 acres, was bequeathed to the Protestor-PW1 and Eugene Wekesa, who were to agree on the mode of sharing given that Anthony Wekesa has constructed a house therein.
  32. As regards land parcel number West Bukusu/South Mateka/139, PW2 told the Court that the deceased herein had shared it amongst his second wife Mary Nasimiyu and his two sons namely Mathias and Dennis. He told the Court that the deceased inherited parcel West Bukusu/South Mateka/40 from his father and the same was shared between Anthony Wekesa(deceased) and Kennedy Wekesa(deceased), Charles Mgawane(deceased), Erick Wekesa, and Camilus Peter Wekesa and that it was utilized for farming.
  33. It was the testimony of PW2 that the Kanduyi Plot was given to the 2<sup>nd</sup> House of Mary but the same was taken over by the County Government. He also told the Court that Plot No.1 Kabula Market is still registered in the name of his great grandfather (Leo Makokha) and that it has a commercial building; 3 front doors were shared to Kennedy-2 doors and Eugene-1 door, while the late Anthony got the hind building.
  34. PW2 testified that the deceased had distributed his real properties in the year 2000 and that some have been occupied while one is by the river and is not habitable. He told the Court after the death of Eugene a meeting was convened by the brother to the deceased herein one Bilasio Mulongo Makokha and his grandmother Kwena Wekesa was present, and it was decided that his aunties should be given 5 acres jointly and the remaining 5 acres should be left for the late Anthony as he had built therein. He insisted that the daughters of the deceased should be contented with the given 5 acres instead of wanting the whole 10 acres on grounds that they intend to sell some portion to enable them cater for their mother's medical bill.
  35. On cross-examination, PW2 told the Court that he is not the son of the deceased herein and was only before this Court to secure the interests of his late father, Anthony Wekesa, although he conceded that he had not obtained a grant of letters of administration to the estate of his late father. Whereas he feigned ignorance of the transmission of parcel No West Bukusu/ South Mateka /40 and it's subdivision to parcel Nos West Bukusu/ South Mateka/5500,5501 and 5502, he told the Court that he heard that his mother, Margaret Achieng Wekesa was registered in one of the sub-divisions and that they are currently using the said West Bukusu/South Mateka/40 for farming purposes and that nobody has ever stopped them.
  36. In relation to parcel West Bukusu/South Mateka/103, PW2 told the Court that the same was to be shared between Protestor-PW1 and Eugene(deceased), and that his late father, Anthony Wekesa, had a building thereon and that the said land was never shared out wherefore he disputes the allegation that he is residing on the portion of Protestor-PW1. He testified that they (family of Anthony) had



entered into an agreement with the PW1 whereby they were to give him 4 acres in parcel No West Bukusu/ South Mateka /40 in exchange for 7 acres in parcel No West Bukusu/South Mateka/103; 2 acres for the homestead and 5 acres for farming. He maintained that the share belonging to the late Eugene Wekesa was shared in a meeting but failed to tender in evidence any minutes in proof thereof and he maintained that the minute were taken by the daughters of the deceased herein. He told the Court that he wants the daughters of the deceased person to get only ½ of an acre each. He said that in their custom they share land without effecting sub-division and transfer for generations. He said that his father got 8.75 acres from land parcel West Bukusu/South Mateka/40. He told the Court that he is strictly relying on the words of his grandmother who said in the meeting that the daughters of the deceased should get 5 acres jointly.

37. PW3, Patrick Barasa Mucheusi, testified that he was the neighbor of the deceased herein and on his request this Court adopted his recorded statement dated 16<sup>th</sup> September 2024, as his evidence in Chief. He told the Court that the deceased herein had 2 wives and several children. He told the Court that land parcel number West Bukusu/South Mateka/40 is ancestral. He told the Court that the deceased shared his land parcels numbers West Bukusu/South Mateka/139 and 103 and that land parcel number West Bukusu/South Mateka/40 had a swampy area and was not suitable for human settlement and that the land parcel number West Bukusu/South Mateka/103 and 139 were to be considered in sharing. He told the Court that he is aware that the daughters of the deceased are all married and that the sons had agreed to share the assets of the estate by giving them ½ an acre each so that they too can enjoy the estate of their deceased father.
38. On cross-examination, PW3 said that he was just a neighbor and that he was present during the meeting when it was agreed that the daughters should get 3 acres. He told the Court that he has no evidence in form of minutes to prove that the meeting occurred or that land parcel number West Bukusu/South Mateka/40 is not habitable.
39. Protestor's PW4, Ibrahim Bunyolo Masibo, testified that he knows the family of the deceased and that he is the clan chairman of the Awarende clan. At his request this Court adopted his recorded statement dated 16<sup>th</sup> September 2024, as his evidence in Chief. He told the Court that prior to the demise of the deceased herein, he had in the year 2000 shared his land parcels number West Bukusu/South Mateka/103 and 139 and that he also had another parcel of ancestral land which he was given by his late father Leo Makokha Ong'aka. He told the Court that the land was land parcel West Bukusu/South Mateka/40. He testified that he tried to solve the issue of land as the clan chairman but the parties could not agree and he supported the Protestor's proposal that the daughters of the deceased be given ½ of an acre each from the land parcel West Bukusu/South Mateka/103.
40. On cross-examination, PW4 told the Court that the daughters of the deceased should be given their shares and that the family members of the deceased should negotiate.

## **2<sup>nd</sup> Petitioner's Case**

41. 2<sup>nd</sup> PET-W1, Felisters Nekesa Odanga, testified that she is the 1<sup>st</sup> born daughter of the deceased herein and that Protestor-PW1 and the Objector are her siblings, with Protestor-PW1 hailing from the 1<sup>st</sup> house and the Objector hailing from the 2<sup>nd</sup> house. At her request this Court adopted the Replying Affidavit sworn on 9<sup>th</sup> June 2024, jointly sworn by the Protestor-PW1 and herself, her Supplementary Affidavit sworn on 9<sup>th</sup> July 2024 and her recorded statement dated 19<sup>th</sup> September 2024 as her evidence in chief. She also produced her documents as per her list of documents filed in Court and dated 19<sup>th</sup> September 2023, namely:

- i. Confirmed Grant in Kakamega P&A 289/1993 as 2PEXH.1,



- ii. Green card for land parcel W. Bukusu/S. Mateka/40 as 2PEXH. 2,
  - iii. Green card for land parcel W. Bukusu/S. Mateka/5500 as 2PEXH. 3,
  - iv. Green card for land parcel W. Bukusu/S. Mateka/5501 as 2PEXH. 4,
  - v. Green card for land parcel W. Bukusu/S. Mateka/5502 as 2PEXH. 5.
42. According to the second petitioner, the deceased herein had, prior to his demise, separately settled his widows and children as follows: land parcel W. Bukusu/S. Mateka/103 was given to the widow Anna Kwena Wekesa (3 acres), Chrispinus Wekesa Makokha (10 acres) and Eugene Wekesa (10 acres); land parcel W. Bukusu/S. Mateka/139 was given to Kennedy Wekesa (3.5Ha), Anthony Wekesa (3.5 Ha) and the balance of 7 Ha was to be divided between Camilus Peter Wekesa , Charles Wekesa and Eric Wekesa (as to be agreed amongst themselves); Plot at Kanduyi was given to the 2<sup>nd</sup> house (was repossessed by the County Government); Plot at Harambee (No. 1012/N. Wanga/Kholera) was given to the sons of the 1<sup>st</sup> House; Plot Watoya Market (Plot No. 1) the hind buildings was given to Anthony Wekesa, front 2 doors was given to Kennedy Wekesa and extreme left door was given to Eugene Wekesa. That the deceased herein died before transmitting the land parcel W. Bukusu/S. Mateka/40 into his name so the Objector herein substituted the deceased herein in the Succession Cause in Kakamega High Court and had the land transmitted to him as per EXH. 1 and EXH. 2 before this Court.
43. 2PW1 told the Court that her brother the objector transmitted land parcel W. Bukusu/S. Mateka/40 to his name and subsequently subdivided it into 3 subdivisions currently parcels Nos West Bukusu/ South Mateka 5500; in the name of the objector Camilus Peter Wekesa, 5501; in the name of Kennedy Wekesa who in turn sold his portion to 3 purchasers as evident from 2PEX3, 2PEX4 and 2PEX 5 and 5502 in the name of Margaret Achieng Wekesa (widow of Anthony Wekesa).
44. 2PETW1 She told the Court that her late brother Anthony Wekesa died before he could relocate to his portion comprised in then land parcel W. Bukusu/S. Mateka/40 and now land parcel W. Bukusu/ S. Mateka/5502, currently occupied by his widow and children. She told the Court that at the time of his demise, the late Anthony Wekesa was occupying a portion comprised in Chrispinus Makokha Wekesa’s share in land parcel W. Bukusu/S. Mateka/103, which they agreed on a mode of swapping between themselves. According to her, the daughters of the deceased herein have no problem with the way the 1<sup>st</sup> Petitioner and the family of the late Anthony Wekesa have agreed with regards to their respective shares in land parcel W. Bukusu/S. Mateka/103 and land parcel W. Bukusu/S. Mateka/5502. She insisted that if the Prostetor-PW1 has agreed to exchange some portions of land with the family of the late Anthony Wekesa then his share in land parcel W. Bukusu/S. Mateka/103 ought to be reduced by the share to be exchanged.
45. 2PETW1 testified that the daughters of the deceased herein are fully aware that they are equally entitled to a share from their father’s estate and have agreed and proposed that since their brother Eugene Wekesa died without a family, they should be given his 10 acres share in land parcel W. Bukusu/S. Mateka/103. She beseeched this Court to confirm the Grant as per the proposed mode of distribution dated 9<sup>th</sup> May 2024.
46. On cross-examination, she insisted that the deceased had 15 daughters, ten from the 1<sup>st</sup> house, with one deceased and 5 from the 2<sup>nd</sup> house. She told the Court that the daughters of the 2<sup>nd</sup> house have no issues. She told the Court that the deceased herein gave the 1<sup>st</sup> house land parcel W. Bukusu/S. Mateka/103 and it was for her mother and 2 brothers. She confirmed that she attended the “Lufu” ceremony upon the demise of her father and that she did not raise any complaint. She insisted that she just wants her share of the inheritance.



47. On re-examination, she told the Court that with regards to land parcel W. Bukusu/S. Mateka/40 the same is being used by the family of the late Anthony (1<sup>st</sup> House) and Objector (2<sup>nd</sup> house) and that the late Kennedy Wekesa sold his portion and that the purchasers are utilizing the same. She reiterated that she was not happy when her father gave her brothers land to the exclusion of his daughters and that they have no problem with agreement between Chrispinus and the family of the late Anthony Wekesa save that each daughter should get 1 acre from Eugene Wekesa's share.
48. 2PW2, Gaudencia Nabwire Ashitivia, testified that she is the daughter of the deceased herein and at her request this Court adopted her recorded witness statement dated 19<sup>th</sup> September 2024 as her evidence in chief. She also relied on the documents produced in Court by the 2<sup>nd</sup> Petitioner. According to her, she concurs with the evidence of 2<sup>ND</sup> PET-PW1 and she beseeched this Court to confirm the Grant as per the proposed mode of distribution dated 9<sup>th</sup> May 2024.
49. On cross-examination, 2PW2 told the Court that her brothers were all given their shares in land parcel W. Bukusu/S. Mateka/40. Upon re-examination, she reiterated that the people who bought land from the Objector herein have built thereon.

### **Analysis**

50. At the close of the parties hearing, this Court on 20<sup>th</sup> March 2025, directed that parties to file and serve their respective written submissions and both parties complied.
51. I have considered the affidavits filed herein, the evidence adduced and rival submissions of parties herein and of the issues that emerge for determination are as follows :-
- i. Which is the applicable law?
  - ii. What are the assets and liabilities of the estate of the deceased?
  - iii. Who are the beneficiaries of the estate of the deceased?
  - iv. What is their entitlement?
  - v. Who should meet the costs of this cause?

### **Applicable law**

52. The deceased herein died on 28<sup>th</sup> September 2000 long after the enactment in 1972 and commencement, on 1<sup>st</sup> July 1981, of the *Law of succession Act*, wherefore the applicable law is the *law of Succession Act* Chapter 160 laws of Kenya.
53. Section 40 of the *Law of Succession Act* will be applicable in this succession cause for the deceased was polygamous. It provides:
- (1) Where an intestate has married more than once under any of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
  - (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.
54. The definition Section 3 of the *Law of Succession Act*, defines the "house" as a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife.



There is no discrimination of the children on grounds of gender. All wives of the deceased and all their children are therefore entitled to a share of his net intestate estate equally as provided for by Section 40 of the Law of Succession Act. Beneficiaries of the male gender have no priority nor superiority in the distribution of the estate of the deceased. A beneficiary's marital status is not a determinant factor for consideration during such distribution of the estate.

55. This Court must take into account any benefit or gift that the deceased had given to any beneficiary during his life time as envisaged under Section 42 of the Law of Succession Act which provides as follows:

Where—

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

What are the assets and liabilities of the Estate of the Deceased.

56. The following assets have been enumerated as belonging to the estate of the Deceased :-

- i. West Bukusu/ south Mateka/103
- ii. West Bukusu/South Mateka/139
- iii. West Bukusu/ South Mateka/40
- iv. Plot No 4 Kanduyi
- v. North Wanga/Kholera/ 1012
- vi. Plot No 1. Watoya Market
- vii. Ford Tractor Registration No KLV816
- viii. Trailer Registration No ZA 2646
- ix. Motor vehicle registration No KYG251
- x. Motor vehicle registration No KTN 420
- xi. Money at bank Sh ??

Identity of beneficiaries

57. The beneficiaries of the estate of the deceased have been duly identified in paragraphs 2 and 3 hereinabove.

### **Entitlement of beneficiaries**

58. The principal purpose of confirmation of a grant is the distribution of the assets of the estate. It is now settled that distribution of the estate in circumstances of intestacy, can either be based on the consent of all the beneficiaries failing which the Court will distribute it in accordance with the rules enacted under Sections 32-42 of the Law of Succession Act.

59. This court is enjoined to promote Alternative Dispute Resolution by virtue of article 159(2) (c) of the Constitution. Parties herein were referred to Court annexed mediation but they could not agree on the suitable mode of distribution of the estate of the deceased.



60. I have considered the averments of the parties, and their divergent proposed modes of distribution of the estate of the deceased. I have also considered the authorities relied on, and the relevant provisions of the law cited. This inheritance is by descent. The claims of descent and all existing models and rules are set forth in the *Law of Succession Act* covering both real and personal property.
61. This Court shall place reliance on, Section 40 and 42 of the *Law of Succession Act* as the appropriate applicable law.
62. I find persuasion in the case of *Scolastica Ndululu Suva vs. Agnes Nthenya Suva* (2019) eKLR, wherein the court rendered itself thus;
- “It is therefore evident that although Section 40 of the *Law of Succession Act* provides a general provision for distribution of the estate of a polygamous deceased person, the court has the discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”
63. Upon my analysis of the evidence tendered by the parties and their witnesses, I find that there was no consensus in their proposed modes of distribution save that all male witnesses exhibited overt male chauvinism and kept referring to “my share” yet parties had approached this court to distribute the estate of the deceased.
64. It is noteworthy that whereas the Petitioners had annexed a document title as a consent to the mode of sharing, the said document did not bear the signature of the either the petitioners or the other beneficiaries. The lack of consensus was aggravated by the conduct of the 1<sup>st</sup> Petitioner who jumped ship, abandoned the 2<sup>nd</sup> Petitioner and reneged on their joint replying affidavit sworn on 9<sup>th</sup> may 2024. His proposed mode of distribution as outlined herein above is openly discriminatory towards his sisters, yet he told this court that he would be aggrieved were the court to distribute ½ of an acre to him.
65. The mode of distribution attached to the summons for confirmation of grant did not make any provision for the 1<sup>st</sup> widow, Anna Kwena Wekesa and the heirs of Salome Wekesa (deceased) in parcel No West bukusu/South Mateka/103. As regards parcel No West Bukusu/South Mateka/139, save for stating that it should be shared among the children of the 2<sup>nd</sup> house, there was no proposal on the individual shares of the beneficiaries from that house. While in relation to parcel No West Bukusu/South Mateka /40, the fact that Anthony Wekesa had a first born child, one Mildred Apiyo Oleso with another woman other than Margaret Achieng Wekesa was ignored and no provision was made for her and her affidavit of protest sworn on 16<sup>th</sup> July 2024 did not elicit any response from any quarter.
66. A perusal of the proposed mode of distribution put forth by the 3<sup>rd</sup> administrator/ objector dated 21<sup>st</sup> June 2024 made no provision for the daughters of the 2<sup>nd</sup> house and for Mildred Apiyo Oleso yet the same was extremely generous to Margaret Achieng Wekesa the widow of Anthony Wekesa. The objector omitted the money and vehicles that were distributed to him as a substitute of the deceased in Kakamega High Court Succession Cause No.289 of 1993 in Re the Estate of Leo Makokha Ongoka alias Leo Makokha Ongoka; a Ford Tractor Registration No. KLV 816 and a trailer registration NO. ZA 2624. Other vehicles that were omitted are Motor Vehicles Registration No KYG251 and No KTN 420. I do note that whereas the objector had averred that the beneficiaries from the 2<sup>nd</sup> house had consented to his proposed mode of distribution, the purported consent did not bear the signatures of the said beneficiaries and the figure prints embossed against some names, were superimposed over each other wherefore this court is unable to identify the beneficiaries who allegedly put their imprints on the document. Further there is no indication of the figure whose print was put. I thus make a finding that the beneficiaries from the 2<sup>nd</sup> house did not consent to the objector’s proposed mode of distribution.



67. PW2 who testified that he was representing the estate of his deceased father, Anthony Wekesa, had not obtained letters of administration to so act as is required of him by the provisions of section 54 of the Law of Succession Act and under section 45 of the said Act, he is prohibited from taking possession of any property of the estate of his father. His testimony and demeanor depicted him as a male chauvinist who had no regard for the rights of women. It is absurd that this witness, while admitting that the family of Anthony Wekesa are in possession of part of Parcel No West Bukusu/ South Mateka/40, precisely 8.75 acres thereof, still claims for 7 acres in parcel No West Bukusu/South Mateka/103 and maintains that the rightful heiresses of the deceased ought to get ½ of an acre each so as to enjoy part of the estate of the deceased. This witness denied, on cross examination, knowledge of the fact that his mother is the registered proprietor of parcel NO West Bukusu/ South Mateka/ 5502, yet his is affidavit sworn on 12<sup>th</sup> July 2024 in support of his notice of motion of even date, he deposes in paragraph 7 thereof that his family had agreed to relinquish ownership of two acres of parcel No West Bukusu/ South Mateka /5502 to the 1<sup>st</sup> Petitioner.
68. Section 38 of the Law of Succession Act provides for equal distribution of the estate amongst the children of the deceased. The language of Section 38 is gender neutral. It does not classify children into male and female, nor sons and daughters, nor men and women. There is no discrimination, differentiation, classification nor categorization along gender lines. The said section does not make marriage a factor in the distribution of the estate of a dead parent. Gender and marital status are factors that find relevance under customary law, but not under the Law of Succession Act. In any event, any custom that goes afoul Article 27 of the Constitution is unconstitutional and therefore null and void.
69. Section 38 of the Law of Succession Act must be read together with Article 27 of the Constitution, which outlaws all forms of discrimination on the basis of gender or marital status. It declares that men and women have a right to equal treatment in all spheres of life.

### **Disposition**

70. I have considered the affidavits, statements and the evidence of the parties and I do find that none of the proposed mode of distribution was equitable. I also note that the said proposed modes of distribution have been adversely influenced by the wording of the letter dated 13<sup>th</sup> April 2023 authored by the Chief of Kabula location, one Joseph K Mwanja who surprisingly use the words (married) or (unmarried) against the names of the female beneficiaries. This is outright discrimination based on gender. It has emerged that most of the male beneficiaries are also married yet no such disclosure was deemed necessary by the area chief. This practice of gender discrimination by chiefs who are mandated to identify heirs of a deceased person, is a rampant among the chiefs of Bungoma County and it is about time that they familiarized themselves with the provisions of the bill of rights as enshrined under the Constitution of Kenya 2010.
71. On the balance I hereby distribute the estate of the deceased as hereunder: -
- a. Parcel Number West Bukusu /South Mateka/103
    - i. Anna Kwena Wekesa – 3 acres
    - ii. Homestead; In the names of Chrispinus Wekesa Makokha, Felistus Wekesa Odanga and Camilus Peter Wekesa to hold in trust of the beneficiaries from the 1<sup>st</sup> household-0.5 acres.
    - iii. Road reserve-0.5 acres
    - iv. Felistus Nekesa Odanga-1.25 acres



- v. Gaudencia Nabwire Ashitiva-1.25 acres
  - vi. Odilia Mshambala-1.25 acres
  - vii. Genevive Wekesa-1.25 acres
  - viii. Gladys Kuchio Kitui-1.25 acres
  - ix. Everlyne Kituyi Odhiambo-1.25 acres
  - x. Roselyne Wekesa-1.25 acres
  - xi. Lorraine Wekesa-1.25 acres
  - xii. Regina Wekesa-1.25 acres
  - xiii. Carolyn Odhiambo – 1.25 acres to hold for herself and in trust for the children of Salome Wekesa(Deceased).
  - xiv. Chrispinus Wekesa Makokha-7 acres (inclusive of the residence of Anthony Wekesa)
- b. Parcel Number West Bukusu /South Mateka/139
- i. Mary Nasimiyu Makokha (2<sup>nd</sup> widow)-1.11 acres to be registered in the name of Stella Nabwile Makokha and Abscondita N. Wekesa to hold in trust for her.
  - ii. Road reserve-0.5 acres
  - iii. Erick Wekesa-0.59 acres
  - iv. Charles Wekesa-0.59 acres
  - v. Dennis Wekesa-0.68 acres
  - vi. Patricia Odhaimbo-3.24 acres
  - vii. Constance Wekesa -1 acre
  - viii. Nancy Auma Makokha- 0.5 acres
  - ix. Stella Nabwile Makokha-0.5 acres
  - x. Abscondita N. Wekesa-0.5 acres
  - xi. Sabenzia Nabalayo Wekesa-0.5 acres
  - xii. Camilus Peter Wekesa- Nil
- c. Parcel Number West Bukusu /South Mateka/5500
- i. Camilus Peter Wekesa-4 acres
  - ii. Erick Wekesa-1 acre.
  - iii. Charles Wekesa- 1 acre
  - iv. Denniss Wekesa – 1 acre
- d. Parcel Number West Bukusu /South Mateka/5501
- i. Kennedy Wekesa



- e. Parcel Number West Bukusu /South Mateka/5502
    - i. Margret Achieng Wekesa-
72. Whereas this property is already registered in the name of Margret Achieng Wekesa the same is to be held in trust for herself and all the children of her deceased husband, Anthony Wekesa. The said Margaret and the children of Anthony Wekesa are at liberty to effect the agreement between them and Chrispinus Wekesa Makokha
- f. Plot at Harambee (No. 1012/N. Wangu/Kholera) – this property is said to be subject of Pending litigation in Bungoma Environment and Land Court. No ownership document was availed either wherefore it's distribution shall await the determination of the said suit.
  - g. Plot Watoya Market (Plot No. 1)
    - i. Mildred Apiyo Olesao-Hind building
    - ii. Kennedy Wekesa-Front 2 doors
    - iii. Anna Kwena Makokha -extreme left door
73. On keen scrutiny of the Court records it is clear that this plot is still under the name of Leo Makokha, the father to the late Adrian Wekesa Makokha. The Objector, Camilus Peter Wekesa, was substituted in Kakamega HC Succession Cause No. 289 of 1993- In the matter of the Estate of Leo Makokha Ongoka in the place of his father, the late Adrian Wekesa Makokha (the deceased herein) when the latter died before the Grant was confirmed in that cause.
74. . The Objector was to hold and indeed held the properties in the said succession Cause in trust for the other beneficiaries of the deceased herein as evident from his act of distributing Parcel Number West Bukusu /South Mateka/40 to himself, Kennedy Wekesa and Anthony Wekesa. I wonder why the objector failed to transmit Plot Watoya Market (Plot No. 1) to the beneficiaries of the deceased. The protestor's advocates have in their submissions departed from the evidence and pleadings of the protestor as regards Plot No.1 Watoya Market and they have maintained that it is still registered in the name of the Leo Makokha hence not available for distribution in the estate of the deceased. This court finds that the said plot properly falls for distribution in this cause premised on the certificate of confirmation of grant issued on 28<sup>th</sup> July 2009 by Justice Chitembwe (as he then was) in Kakamega High Court Succession Cause No 289 of 1993: Re Estate of Leo Makokha Ongonka alias Leo Makokha Ongaka, which distribute the following properties of the said estate to his son Adrian Wekesa Makokha, who had then been substituted with Camilus Peter Wekesa, the objector herein, :-
- i. Parcel No West Bukusu/ South Mateka/40
  - ii. Known cash at bank –Kshs ZBA 5478
  - iii. Commercial Plot No 1 Watoya Market
  - iv. Ford Tractor Registration NumberKLV816
  - v. Trailer Registration Number ZA2646
45. In any event, fact that the deceased had during his lifetime settled some of his heirs on this property is not contested. I order that the objector Camilus Peter Wekesa do effect the transmission and transfer of plot No1 Watoya Market to the identified beneficiaries.
- h. Plot at Kanduyi no. 4



- i. There was consensus that this plot was repossessed by the County Government of Bungoma wherefore it is not available for distribution.
- i. Motor Vehicle Registration Number KTN 420, Ford tractor Registration No KLV816, and Trailer Registration No ZA 2646

To be sold and the proceeds to be shared amongst:

- i. Felistus N. Odanga
  - ii. Odilia Mshambala
  - iii. Gaudencia Ashitiva
  - iv. Gladys Kituyi
  - v. Everylne Odhiambo
  - vi. Roselyne Washiali
  - vii. Lorraine Wekesa
  - viii. Regina Wekesa
  - ix. Nancy Auma Makokha
  - x. Stella Nabwile Makokha
  - xi. Abscondita N. Wekesa
  - xii. Sabenzia Nabalayo Wekesa
- J. Motor Vehicle Registration No. KYG 251
    - i. Genevive Wekesa
  - K. Money in account of Leo Makokha Ongoka- Camilus Peter Wekesa to render accounts of these money and the use of the Ford tractor KLV 816 and trailer ZA 2646 within 60 days from the date hereof.

75. Given that this is a family matter I order that each party to bear it's own costs.

76. A certificate of confirmation of grant to issue accordingly

It is hereby so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 10<sup>TH</sup> DAY OF JULY 2025.**

**M.S.SHARIFF**

**JUDGE**

In the presence of:

Mr Masiga for the 1<sup>st</sup> petitioner/Protestor

Ms Wakoli for the 2<sup>nd</sup> Petitioner

N/A by Arnold Otundo & Associates for the objector

Peter Machoni – Court Assistant

