



REPUBLIC OF KENYA



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**In re Estate of Samuel Amalemba Shivachi (Deceased) (Succession Cause
377 of 2006) [2025] KEHC 13062 (KLR) (22 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 377 OF 2006
AC BETT, J
SEPTEMBER 22, 2025**

BETWEEN

ALISTAR AMALEMBA MASINJIRA 1ST APPLICANT

BAVON SHIKALI AMALEMBA 2ND APPLICANT

AND

MARGARET MWARISI JOHNAH PETITIONER

RULING

1. This is a ruling on a protest to summons for confirmation of grant filed by the Applicant on 15.7.2024 pursuant to an order made by the court on 3.7.2024 when it dismissed the Petitioner's application dated 24.10.2028 for want of prosecution and directed that the Objectors do file summons for confirmation of grant within 14 days.
2. On 15.7.2024, the 1st Objector filed summons for confirmation of grant in which he proposed that the estate of the deceased be distributed as follows:-
 - (a) L.R. No. Kakamega/Iguhu/1149 – 6.2 hectares
 - (a) Margaret Mwarisi Johnah (to be divided among the children: Sylvia Mmbone and Bavon Shikali) 5.5 acres
 - (b) Isaac Ademba (To be divided among the children: Alistair Ademba, Edwin Amalemba, Phionah Amalemba) 5.5 acres
 - (c) The daughters:
 - (i) Recho Olaka
 - (ii) Elizabeth Makhungu Tsuma



- (iii) Rosemary Wanyama Aguduya 3.5 acres
 - (iv) Clera Khavai Khachina
 - (v) Phanice Lusanji Andemba
 - (vi) Emily Muteshi Andemba
 - (d) Patrick Mutasya Ongaya (Subject to verification of acreage and payment of balance of purchase price).
 - (e) Simeon Shivachi Shisala (his share to be ascertained as per the green card acreage).
 - (b) L.R. No. Kakamega/Iguhu/1752
 - (a) Baron Shikali and Sylvia Mmbone – 1.67 acres
 - (b) Akiff Andemba – 1.725 acres
 - (c) Recho Olaka and her five sisters to share 1 acre.
3. The Petitioner filed an affidavit of protest sworn on 5.11.2024 in which she set out her proposed mode of distribution as follows:-
- A. L.R. No. Kakamega/Iguhu/1149
- (a) Simeon Shivachi Shigali – 1.40 hectares as a liability.
 - (b) Alex Mukabwa – 0.46 hectares purchased from the daughters of the deceased.
 - (c) The balance of 4.34 hectares to be distributed to the two sons of the deceased as follows:
 - (i) Patrick Ongaya – 0.74 hectares purchased from Johnah on behalf of the estate of Isaac to facilitate funeral expenses.
 - (ii) The deceased’s daughters to share 0.202 hectares.
 - (iii) Estate of Isaac – 1.329 hectares
 - (iv) Estate of Johnah – 2.089 hectares as the share of Margaret Johnah Mwarisi L.R. No. Kakamega/Iguhu/1149
 - (a) Isaac’s estate 0.89 hectares
 - (b) Jonah’s estate – 0.47 hectares to be given to Bavon Shikali Andemba
 - (c) Newton Amiani, a purchaser of Isaac’s share – 0.42 hectares.
4. The matter proceeded to hearing vide viva voce evidence whereby the Objector called two witnesses while the Petitioner called three.
5. The Applicant testified as PW1 and adopted his witness statement dated 3.12.2024, his affidavit sworn in support for summons for confirmation of grant, and his further affidavit sworn in response to the protest on 18.1.2024. He further testified that he was aware that the deceased who was his grandfather wished that his property be subdivided among his children as follows:-
- (a) L.R. No. Kakamega/Iguhu/1149 to be divided into four portions and 0.43 hectares be given to the daughters, 5.5. acres to Isaac Amalemba and 5.5. acres to Johnah Amalemba. He



testified that the deceased had sold an acreage of the said land to Simon Shivachi but due to a misunderstanding, did not transfer the land to him.

6. The Objector testified that he did not know Patrick Ongaya who alleges to have purchased a portion of L.R. No. Kakamega/Iguhu/1149 as both his parents died when he was a minor after which he went to an orphanage. He stated that the family of Isaac his father never consented to Johnah selling any of Isaac's portion of land.
7. PW2 was Elizabeth Makhungu Tsumah, one of the six surviving daughters of the deceased. She testified that before his death, the deceased had subdivided his land among his children. According to her, he had subdivided L.R. No. Kakamega/Iguhu/1149 into three portions and given one portion to Isaac, one to Johnah and the other one to his daughters jointly. She denied knowing Patrick Ongaya or appearing before Mr. Mukavale Advocate on 18.8.2005 to witness an agreement of sale of land to him. She stated that she was present when PW1's mother died and none of Isaac's family consented to the sale of their father - Isaac's land. She said that to date, none of the daughters have been given their portion of land as it had been occupied by one Alex Mukabwa to whom they never sold the land.
8. When cross-examined, PW2 stated that the deceased showed them a specific portion of the land. She said that they have no problem with the land given to Timona by the deceased but with the portion given to him by Johnah. She averred that the portion that had been allocated to them is the one currently occupied by Alex and Patrick.
9. The Petitioner testified as DW1 and adopted her affidavits dated 5.1.2024 and 24.10.2018. In her affidavit dated 24.10.2018 which she swore in support of summons for confirmation of grant made to her on 19.9.2013, she listed fifteen daughters and grandchildren of the deceased as his survivors as well as herself as a daughter-in-law. She then proposed that L.R. No. Kakamega/Iguhu/1149 be distributed thus:-
 - (a) 3.075 acres to herself;
 - (b) Calistas Andemba alias Edwin Masinjira and Maureen Lidembekho to get 2 acres each;
 - (c) A purchaser Patrick Matasyo Ongayo - 2 acres which he purchased from the deceased's widow Deina Musavi and Johnah Shivachi Andemba;
 - (d) Simeon Shivachi Shikali – 3.5 acres on behalf of the estate of Timoni Shikali Shivachi who purchased from the deceased.
 - (e) Alex Jimmy Mukabwa – 0.925 acres who purchased the land from the deceased's widow Deina Musavi and Johnah Shivachi Amalema.
10. The Petitioner had further proposed that L.R. No. Kakamega/Iguhu/1752 be distributed as follows:-
 - (a) Bavon Shikali Amalemba – 1.7 acres
 - (b) Viona Mmbone – 1.025 acres
 - (c) Ackieft Shisukane – 1.025 acres
 - (d) Newton Amiani Nandoya who purchased from Johnah Shivachi Andemba – 0.70 acres
11. According to the Petitioner, the deceased's daughters were not entitled to any property as they were happily married and had sold their share. She produced the agreements of sale as exhibits D.Exh.1 and 2.
12. On cross-examination, the Petitioner said that before the deceased died, he had not settled any of his children nor subdivided the land. She said that the daughters of the deceased are not reflected as the



vendors of the land which she had sworn they requested her deceased husband to give them so they could sell. She also stated that she was enjoined to the cause as a substitute for her deceased husband Johnah.

13. DW2 was Patrick Mutasya Ongaya who testified that he was a purchaser. He adopted his witness statement dated 17.1.2025 and said that it was Johnah Shivachi Amalemba who sold the land to him after showing him a search that reflected the deceased as the registered owner and assuring him that he was undertaking succession. He said that he bought the land for Ksh. 120,000/= after Johnah requested him to buy it to enable them fund his sister-in-law's funeral and has used the said land from 2005 to date.
14. DW3 was Charles Kalihu Shikali who stated that the deceased was his father's younger brother. He adopted his witness statement dated 17.1.2025 and testified that he witnessed Patrick Ongaya purchase land from Johnah Shivachi to enable Johnah raise funds to foot the funeral expenses and dowry payment of his deceased sister-in-law. He also stated he had nothing to show that the land was demarcated nor that the funds were used for the funeral but had been invited to witness the demarcation. He said that he was informed that Isaac's wife family had threatened to stop the burial if dowry was not paid as Isaac had not paid dowry. He also said that Albert Amilechi, Shipwoni, Elizabeth, Naomi and Grela were present during the demarcation. He said that he was aware that the portion sold was part of Isaac's share.
15. At the end of the case, both parties filed written submissions. The Applicant submitted that he had adduced sufficient evidence to prove that the original Petitioner Johnah Shivachi sold land that formed part of the estate of the deceased before confirmation of grant as the agreements for the sale of the land were written on 18.8.2005 and 24.6.2006 whereas the grant was issued on 11.1.2007 and confirmed on 29.5.2008. The other agreement was entered into on 1.10.2008. He submitted that the said transactions were null and void as it amounted to intermeddling in the estate of the deceased. He relied on Section 82 of the Law of Succession Act and the case of *In re Estate of Jamin Inyanda Kadambi (Deceased) [2021] eKLR* and *Morris Mwiti Mwiti Mburungu v. Dennis Kimathi M'mburungu [2016] eKLR*. The Applicant further submitted that the Petitioner had failed to prove that the deceased's daughters sold their share of land to Alex Mukabwa as the sale transactions were done by only Johnah Shivachi.
16. The Petitioner submitted that the cause was filed in 2006, determined in 2008 before the implementation of the Constitution of Kenya 2010 and the equal right to property cannot be applied retrospectively. She further submitted that before 2010, parties agreed on distribution and implemented it as per the wishes of the deceased. She further submitted that the widow to the deceased and his daughters were aware of this cause and agreed that the administrator do file the cause. She pointed out that the daughters did not file any objection and their only claim was for their share of land. She contended that the deceased had only two sons and although he had not shared out his land, it was clear from the evidence that he wished that his two parcels of land be shared out equally between the two sons. She submitted that her deceased husband had sold some land to cater for funeral and ancillary expenses for his deceased sister-in-law and Simion Shigali had bought land from the deceased. She urged the court to distribute the property in line with her proposal.
17. The issues that arise for determination are as follows:-
 - (a) Whether the deceased shared out his estate prior to his demise and who are the beneficiaries of his estate.
 - (b) Whether Alex Jimmy Mukabwa, Patrick Ongayo and Newton Amiani are entitled to any share in the estate of the deceased.



- (c) How the estate of the deceased should be distributed.
18. None of the witnesses who testified were present when the deceased is alleged to have distributed his estate save for his daughter PW2. Her evidence was not corroborated. Although she stated that the deceased had subdivided L.R. No. Kakamega/Iguhu/1149 into three and given a portion each to his two sons and one to their daughters jointly, she did not specify whether the subdivision was equal. She also did not make any reference to Parcel No. 1752. No evidence was adduced to show that the parcel L.R. No. Kakamega/Iguhu/1149 was demarcated as alleged by PW2. PW1 was clearly a minor when the alleged subdivision took place. The only conclusion is that the deceased had not shared out his estate before his demise.
19. The beneficiaries of the deceased were not in contention. He had two sons and ten daughters and left surviving him the following dependants:-
- (a) Deinah Amalemba (widow, deceased)
 - (b) Johnah Shivachi Analemba (deceased) – Survived by the Petitioner Margaret Marisi Johnah, Silvia Mmbone, Bavon Shikali Amalemba and Maureen Lidembekho
 - (c) Elizabeth Makhungu Tsuma
 - (d) Rachel Olaka
 - (e) Rosemary Wanyama Agunduya
 - (f) Clera Khavayi Khachina
 - (g) Phanice Lusanyi Andemba
 - (h) Emily Amalemba Muteshi
 - (i) Isaac Amalemba (Deceased) survived by Alistair Ademba Masinjira, Edwin Amalemba, Phiona Amalemba and Ackift Amalemba Shitsukane
20. It is common ground that apart from his dependants, the deceased had sold a portion of his land to one Timona Shikali Shivachi whose personal representative is Simeon Shivachi Shigali between the year 1975 and 1976. The deceased passed away on 19.9.2003 and therefore the said purchaser was a liability of his estate. When the grant was first confirmed on 12.6.2008, it was indicated that the said purchaser's share was 4.8 acres. The purchaser's entitlement was affirmed by W. Musyoka, J. in his ruling dated 25.9.2018. According to the Petitioner however, Simeon is in occupation of a confirmed portion of 1.40 hectares which is 3.5 acres. Since there is no documentary evidence as to how much land the said Simeon is currently in occupation, I will not make a decision as to his entitlement until a survey is undertaken.
21. With respect to Patrick Ongaya, Alex Jimmy Mukabwa and Newton Amiani, it is clear that they purchased land from the late Johnah Shivachi before succession was complete. This was an unauthorized dealing in the estate of a deceased person and as held earlier by W. Musyoka J, they were invalid. In re Estate of Jamin Inyanda Kadambi (Deceased) [2021] eKLR the court stated that:-
- “A valid sale of estate property can only be by those to whom the assets vest by virtue of section 79, and who have the power to sell the property by virtue of section 82. Even then, immovable assets, like land, such as Kakamega/Kegoye/30, cannot be disposed of by administrators before their grant has been confirmed, and if land has to be sold before confirmation, then leave or permission of the court must be obtained. That is the purport of



section 82(b)(ii) of the Law of Succession Act. Clearly, the sale transaction that was carried out by the administrators was contrary to sections 45 and 82(b)(ii) of the Law of Succession Act, and was invalid for all purposes. It cannot be asserted at all, and am surprised that persons to whom administration of the estate herein can purport to support a sale transaction that was carried out contrary to the very clear provisions of the law.”

22. Section 82 stipulates that no immovable property of a deceased person shall be sold before confirmation of the grant. Taken cumulatively, the evidence on record points to the irrefutable conclusion that the initial administrator Isaac, intermeddled with the estate of the deceased. If indeed he needed funds to settle his sister-in-law’s funeral bills, he had the option of filing an application seeking leave to dispose of his deceased’s brother’s share of the land in view of the fact that the beneficiaries of his brother’s estate were all minors at that time. He could not lawfully deal with the assets of estate without grant of representation. The purchasers therefore did not acquire a valid interest. The sale of land to Alex Mukabwa, Patrick Angaya and Newton Amiani are null and void. It is my finding that the three purchasers aforesaid are not entitled to a share in the estate of the deceased. See *Morris Mwitwi Mburungu v. Dennis Kimanthi Mburungu* [2016] eKLR.
23. The Petitioner’s husband had shared out the estate of the deceased to his sons only. I have perused the summons for confirmation for grant dated 4.6.2007. It was not accompanied by any proof of renunciation of their rights by the daughters of the deceased. There was also no consent on distribution. In his affidavit in support of the summonses, the original Petitioner/Administrator did not disclose that the deceased had daughters.
24. Under the Law of Succession Act, dependants of a deceased person, regardless of their gender or marital status are entitled to inherit his estate. This right is reinforced by Articles 27 and 40 of the Constitution of Kenya 2010. The Law of Succession Act, came into effect in 1981 long before the deceased passed on and in it, dependants are defined in 29 as:-

“29. Meaning of dependant

For the purposes of this Part, "dependant" means—

- (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) ...
- (c) ...”

25. By virtue of the fact that PW2 and her sisters were children of the deceased, they are deemed to be dependants of the deceased notwithstanding the fact that any or all of them may be married. By dint of Section 38 of the Act, they are entitled to an equal share of their parents’ estate. Contrary to the Petitioner’s submissions, there has never been any law in Kenya denying daughters the right of inheritance. This was addressed in the case of *Mary Rono v. Jane Rono & Another* [2005] eKLR when the Court of Appeal held thus:-

“The deceased in this matter died in 1988, while the Succession Act which was enacted in 1972, became operational by Legal Notice No. 93/81, published on 23.06.1981. I must therefore hold, as the Act so directs, that the estate of the deceased falls for consideration under the Act. Section 2(1) provides: -

“2.



- (1) Except as otherwise expressly provided in the Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

The Appellate court went ahead to state that any law that discriminates against daughters is repugnant to justice and morality and against natural justice and good conscience.

26. Additionally, in the case of *Stephen Gitonga M’murithi v. Faith Ngiramuthi* [2015] eKLR, the Court of Appeal rendered itself as concerns daughters entitlements and stated as follows:-

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried.”

27. Having said that, and in absence of evidence of the deceased having distributed his property before his demise, I hold and find that PW2 and the other daughters of the deceased are entitled to an equal share of the estate of the deceased.
28. Regarding the Petitioner, she is not a direct beneficiary of the estate of the deceased as she is a daughter-in-law. However, she and her children are considered dependants and can inherit their deceased father’s share of the estate. However, from PW2’s evidence, it is apparent that all the six daughters are willing to settle for one-third share of the estate of the deceased to be inherited jointly by them in equal shares. The estates of Johnah and Isaac shall therefore each inherit one third of the estate.
29. The Petitioner proposed that her husband’s share do devolve to herself and their children but allotted to herself the lion share. By virtue of Section 35 (1) (b) she is entitled to a life interest in her husband’s estate. Section 35 (1) (b) provides that:-

“ 35. Where intestate has left one surviving spouse and child or children

- (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

- (a) ...

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.”

30. Since the Petitioner was enjoined to this cause on the basis of a limited grant of letters of administration, her deceased husband’s estate cannot pass to her in absence of certificate of confirmation of grant. In the circumstances, it is only prudent that the estate be held in trust for herself and her children in equal shares. In this, I am guided by the case of *Justus Thiora Kingu & 4 others v. Joyce Nkatha Kiugu &*



another [2015] eKLR where the Court of Appeal in determining competing claims by a mother and her children over her deceased husband's estate held thus:-

“We think we have said enough to demonstrate that there is no other legal way of distributing the deceased's estate other than the Law of Succession Cap 160.

Accordingly, the decree or certificate of confirmed grant ensuing from the judgment dated 28th November, 2013, is hereby set aside. All the assets of the deceased stated here below and others residue to shall be registered in favour of his widow Joyce Nkatha Kiugu to hold in trust for herself and the deceased children in equal shares.”

31. Flowing from the above, I rule and order as follows:-

- (a) The purchasers Alex Jimmy Mukabwa, Patrick Ongaya and Newton Amiani are not entitled to any share of the estate of the deceased.
- (b) The rightful share of Simon Shivachi Shigali can only be ascertained upon the survey of L.R. No. Kakamega/Iguhu/1149.
- (c) The net estate of the estate of the deceased shall be shared equally by his dependants upon ascertainment of the liabilities after survey.
- (d) The Petitioner shall within 90 days from today cause the survey of L.R. No. Kakamega/Iguhu/1149 for purposes of ascertaining the acreage and the area occupied by Simon Shivachi Shigali and file a report thereof.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 22ND DAY OF SEPTEMBER 2025.

A. C. BETT

JUDGE

In the presence of:

Mr. Mulama for the Applicant/Objector

No appearance for the Petitioner/Respondent

Court Assistant: Polycap

