



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Walter Henry Odera (Deceased) (Succession Cause E009 of 2024) [2025] KEHC 12913 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE E009 OF 2024**

**A MABEYA, J
SEPTEMBER 19, 2025**

JUDGMENT

1. This Cause is in respect of the estate of the late Walter Henry Odera [“the deceased”] who died intestate on 3/1/1968. This Court, [Aburili J.] established in the Ruling delivered on the 16/1/2023, that the deceased left behind 3 widows and several children.
2. The Petitioner, Benard Okich Odera vide his Summons for Confirmation of Grant dated 26/9/2024, proposed a detailed mode of distribution of the deceased’s estate as detailed in his affidavit in support of the even date. He detailed the deceased’s estate to include the following assets: -
 - a. Kisumu/Municipality/Block 5/194
 - b. Kisumu/Municipality/Block 5/241
 - c. Plot No.12 Nyangoma Market
 - d. Plot No. 8 Wangapala Market
 - e. LR. No. 8504/22 – IR No. 37490
 - f. Kisumu/God Abuoro/108
 - g. Kisumu/God Abuoro/508
 - h. Siaya/Masumbi/1215
 - i. Siaya/Masumbi/1216
 - j. Siaya/Masumbi/1217
3. In opposition to the mode of distribution proposed by the Petitioner, the Protestor, Jane Atieno Odera, on her own behalf and that of Florence Ajwang Odera and Agnes Oloo, swore an affidavit of protest on the 29/1/2025.



4. The protestor deposed that the proposed mode of distribution submitted by the Petitioner is inequitable, discriminatory and contrary to applicable legal and constitutional principles as it allocated significant portions of the estate including matrimonial property belonging to the second house to the Petitioner.
5. That the proposed distribution discriminated against the deceased's daughters in violation of Article 27 of *the Constitution*. The Protestor proposed her own mode of distribution as detailed in her affidavit in support of the objection sworn on the 29/1/2025.
6. That the Petitioner has failed to provide official documentation confirming ownership, size and value of the properties forming the deceased's estate contrary to the court's directives issued on the 17/10/2024.
7. In response to the Protest, the Petitioner filed a Replying Affidavit sworn on the 1/4/2025 in which he deposed that he was the legally appointed administrator of the deceased's estate. That the deceased's estate is subject to Luo Customary Law as recognised by court in its ruling dated 16/1/2023 and section 2 [2] of the *Law of Succession Act*.
8. That even though Luo Customary Law is explicit that the right of inheritance is only available to sons of the deceased, the Petitioner voluntarily elected to bequeath each person known to him within the deceased's estate.
9. The Petitioner opposed the mode of distribution proposed by the Protestor on the grounds that the deceased was married to the late Grace Jawa through a civil marriage in the then African Anglican Church on 7/5/1946 and thus any marriage contracted thereafter was illegal for lack of capacity thus the Protestor was not a valid beneficiary to the deceased's estate.
10. The Petitioner proceeded to propose a new mode of distribution of the deceased's estate.
11. I have considered the pleadings filed herein. It is in not in doubt that the Protestor and her co-protestors are beneficiaries of the deceased's estate. The Petitioner has admitted as much in his testimony referring to them as his step-sisters and further went on to provide for them in his proposed mode of distribution.
12. The only issue for determination is the mode of distribution. The Protestor's case is that the deceased's estate should be distributed equally in line with the provisions of *the Constitution*. On his part, the Petitioner's case is that the deceased died before the commencement of the *Law of Succession Act* and as such the deceased's estate ought to be distributed in line with customary law as provided for under Section 2 [2] of the *Law of Succession Act*.
13. The scope of the *Law of Succession Act* is stated in section 2 thereof. For avoidance of doubt, the said section provides: -
 - a) "2[1] Except as otherwise expressly provided in this 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 persons dying after the commencement of this Act and to the administration of estates of those persons.
 - b) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless



the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

14. The effect of section 2[2] of the *Law of Succession Act* is that the substantive provisions of the said Act are not applicable to the estates of persons who died before the said Act commenced. It follows that the substantive law of succession for estates of the persons who died before 1st July 1981 is to be found in the written laws and customs that applied at the date of the death of the person in question.
15. In this case, it is not in dispute that the deceased died before the *Law of Succession Act* came into force. Consequently, the substantive law governing devolution to his estate is that stated in section 2[2] of the *Law of Succession Act* – that is the written laws and customs in force as at the time of his death.
16. From the material on record, the deceased died intestate. As of the time of the deceased’s death, estates of African Kenyans who died intestate were subject to customs of the community from which such African hailed. In this case, the deceased hailed from the Luo community. His estate was therefore subject to the Luo customs which governed devolution of the estate of a person who died intestate.
17. To prove customary law, a person seeking to rely on it must adduce evidence of existence of the same.
18. The Petitioner herein adduced evidence in the form of an authoritative publication titled “Kinship relations and land inheritance among the Luo of Western Kenya” by Paul Hebinck and Nelson Mango [Wagenigen University] extracted from Anderson J.A. and M. Breusers [eds], 2001, Kinship Structures and Enterprising Actors: Anthropological Essays on Development.
19. The aforementioned text detailed inheritance within the Luo community and under Luo customs that provide that only sons inherit the deceased’s property. It is on the aforementioned basis that the Petitioner proposed to distribute a substantive portion of the deceased’s estate.
20. The Protestor conversely proposed to have the deceased’s estate distributed equally in line with the provisions of Article 27 of *the Constitution*.
21. Article 27 of *the Constitution* provides that: -

“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”
22. The principle of equal distribution of the estate of a deceased to his children has been entrenched in our jurisprudence. The Court of Appeal in binding decisions has held that women should not be denied their rights to inheritance. In Douglas Njuguna Mungai v Jolin Bosco Maina Kariuki & Another [2014] eKLR the Court of Appeal held that;

“That –fully under *the Constitution* of Kenya 2010 all these rights are enshrined and they cannot be derogated against, they are ‘jus cogens’. The general rules of International Law also form part of the Law of Kenya.

See Article 2[5] of *the Constitution*. The yoke and burden of discrimination should not be worn by female gender any more, *the Constitution* set it apart.

Further the Court of Appeal referring to the decision of Rono-v- Rono on none discrimination on grounds of sex held as follows-

It would appear from the totality of the submissions made before us and the stance adopted by appellants all through this protracted litigation that the kernel of their disenchantment lies in the fact that their sister Florence, a married daughter of the deceased, became not



only a beneficiary but also an administratrix of the estate. That much was clear from Mr. Kioga's resort to Meru Customary Law which stipulated as captured by Dr. E Contran in his Restatement of customary Law. Vol. 2 page 30. Daughters receive no share of the estate. In the absence of sons, the heirs are the nearest paternal relatives of the deceased namely father, full brothers, half-brothers and paternal uncles with greatest respect such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny; not least because it is plainly discriminatory of and itself and its effects. It is anachronistic and misplaced notwithstanding that it was the norm for a fact majority of Kenya's communities. This court has long accepted that a child is a child, none being lesser on account of gender or the circumstances of his or birth. Each has a share without shame or fear in the parents' inheritance and may boldly approach to claim it. What *Rono v Rono* decided about the prohibition of discrimination of sex under the retired Constitution applies with yet another greater force under the current progressive Constitution."

23. In *Stephen Gitonga M'Murithi v Faith Murithi* [2015] eKLR, the Court of Appeal held that failure to accord equal distribution of the estate [to sons, daughters and widows] is a violation of section 38 of *the Constitution* by discriminating against the married daughters of the deceased.
24. Guided by these binding decisions, it follows that distribution of and administration which discriminates against daughters of a deceased should not be entertained by this Court.
25. There is no doubt that by dint of section 2[2] of the *Law of Succession Act* the applicable Law is Luo Customary Law as the deceased died before the *Law of Succession Act* came into force. However, the Court will shun the custom which discriminates women on account of gender and marital status as is inconsistent with *the Constitution*. We cannot at this time and age purport to apply outdated and oppressive customs of which Luo Customary Law on inheritance is one of them.
26. In view thereof, I direct that the parties herein do meet within the next 45 days and agree on an acceptable distribution of all of the deceased's assets and report back to this Court on a day to be fixed to record that settlement. In default, the Court shall, on the material on record, proceed to issue an appropriate distribution.

It is hereby so ordered.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF SEPTEMBER, 2025.

A. MABEYA, FCI Arb

JUDGE

