



**In re Estate of Kokabo Inyama Lusala (Deceased) (Succession Cause 21 of 1988) [2025] KEHC 12842 (KLR) (17 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12842 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 21 OF 1988**

**AC BETT, J**

**SEPTEMBER 17, 2025**

**IN THE MATTER OF THE ESTATE OF LIKABO INYAMA LUSALA (DECEASED)**

**BETWEEN**

**DR MACHANJA LIKABO ..... PETITIONER**

**AND**

**RUTH SHISASABALE LWOYELO ..... 1<sup>ST</sup> OBJECTOR**

**ELIZABETH AGIZA ..... 2<sup>ND</sup> OBJECTOR**

**ESTHER LIHAVI INDUNGU ..... 3<sup>RD</sup> OBJECTOR**

**INYAMA LIGABO ..... 4<sup>TH</sup> OBJECTOR**

**CLEOPHAS MUSITIA INJETE ..... 5<sup>TH</sup> OBJECTOR**

**RULING**

1. On 24<sup>th</sup> May 2022, the parties to this cause recorded a consent requiring the Petitioner/Administrator to take the witness stand and give an oral account of his administration of the estate of the deceased to enable any of the beneficiaries who may wish to cross-examine him. The matter then proceeded before W. Musyoka, J on 20<sup>th</sup> May 2022 when the Petitioner/Administrator gave his evidence and was stood down for further cross-examination on 20<sup>th</sup> July 2022. Thereafter, the matter was adjourned severally at the instance of the parties.
2. On 23<sup>rd</sup> October 2024, the parties appeared before me when the Petitioner was granted a last adjournment. While the matter was pending in court, the daughters to the deceased had filed summons for rectification of grant dated 22<sup>nd</sup> October 2024. On 20<sup>th</sup> November 2024, the court gave directions that the said Applicants be deemed to be the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Objectors. The matter was stood over to 22<sup>nd</sup> January 2025 for hearing. On the scheduled hearing date, Ms. Khadenyi for the Petitioner submitted that there were only three issues outstanding with respect to the estate of the deceased. In regard to the



prayer for accounts, she submitted that the Petitioner had given his statement of accounts and had been cross-examined by Mr. Khayumbi for the 1<sup>st</sup> Objector and therefore there was nothing outstanding in respect to the accounts. She urged the court to deem the Petitioner as having complied with the order of the court to render accounts and to be discharged accordingly. Secondly, in regard to the application by the 2<sup>nd</sup> Objector dated 19<sup>th</sup> October 2023 to have the property comprised in L.R. No. ISUKHA/MUHONJE/2040 included in the estate of the deceased, she submitted that the Petitioner had filed a Replying Affidavit in which he contested the application on the grounds that the deceased had sold the said property before his demise. In regard to the application by the deceased's daughters, she submitted that her client was willing to surrender half an acre from the portion comprised in L.R. No. ISUKHA/SHITACHI/3213 whereof the 1<sup>st</sup> Objector should surrender the half acre where the deceased's homestead stands on L.R. No. ISUKHA/SHITACHI/3212 in order to satisfy their daughters' claim as the original title had long been closed on subdivision.

3. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Objectors' Advocate submitted that he would be relying on the Affidavit sworn by the said Objectors on 22<sup>nd</sup> October 2024. The matter was then adjourned to give the 1<sup>st</sup> and 2<sup>nd</sup> Objectors time to file a rejoinder and on 12<sup>th</sup> February 2025, the parties were directed to file written submissions in response to the application.
4. Although the daughters' application was expressed to be brought under Section 74 of the Act, the daughters based their submissions on Section 76 (a), (b) and (c) of the [Law of Succession Act](#) which provides that a grant can be revoked or annulled at any time for reasons listed in the Act. They submitted that as daughters, they had not been included in the succession proceedings and that the Petitioner had no objection to them getting the house, kitchen and store of their late mother because under Luhya custom such a house is normally left to the daughters of the deceased. They posited that since the Petitioner was willing to cede half an acre from his own parcel of land, it would only be just if the 1<sup>st</sup> Objector was ordered to cede the half acre portion of his land upon which the homestead of the deceased stands in their favour. They further submitted that as children of the deceased, they ought not to have been left out during distribution and that there is no statutory limit to their claim.
5. The 1<sup>st</sup> Objector submitted that that he had been in continuous occupation of the homestead since 1984 and distribution of the property in issue had been determined. He further contended that the 3<sup>rd</sup> Objector died in the year 2018 and could not be laying claim on any portion of the estate. He argued that his sisters were in collusion with the Petitioner to deny him his rightful share of the estate of the deceased. He also submitted that as the last born, he is entitled to inherit the family home and hence the reason the court allocated the home to him on the basis of family resolutions contained in minutes filed in court on 9<sup>th</sup> February 1999. He contended that the Petitioner ought to render an account so the daughters of the deceased can claim from the net estate that is available.
6. The issues that arise for determination are:-
  - (a) Whether the Petitioner/Administrator has rendered a full account of the estate of the deceased.
  - (b) Whether the application dated 19<sup>th</sup> October 2023 should be dismissed for want of prosecution.
  - (c) Whether the daughters' summons for rectification of grant should be allowed as prayed.
7. The duties of a personal representative as set out in Section 83 of the [Law of Succession Act](#) is as follows:-

“Personal representatives shall have the following duties—

  - (a) to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;



- (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
- (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
- (d) to ascertain and pay, out of the estate of the deceased, all his debts;
- (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- (f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
- (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.
- (h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- (i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”

8. The office of an Administrator, once appointed is for life and enjoins the Administrator to complete the administration of the estate of the deceased. I have perused the proceedings and established that the Petitioner did give an oral account of his administration and was partially cross-examined by the 1<sup>st</sup> Objector’s Advocate before being stood down. The subsequent failure to have the witness further cross-examined is attributable to both parties.
9. The application dated 19<sup>th</sup> October 2023 was for cancellation of the titles resulting from subdivision of L.R. No. ISUKHA/MUKHONJE/2040 which created title numbers 1644, 1645, 1647, 1648, 1649 and 1651 respectively. The 1<sup>st</sup> Objector avers that the subdivision and transfer of the said titles was irregular as the Petitioner did not list the said property as part of the estate of the deceased. From the Petitioner’s Replying Affidavit and certified true copy of the register, L.R. No. ISUKHA/MUHONJE/2040 comprising 3.6 hectares which was transferred to the Petitioner from the deceased on 18<sup>th</sup> February 2000 then closed on subdivision on 3<sup>rd</sup> October 2007. By his own admission, the Petitioner transferred the land, which he alleges had been sold by the deceased to one Shikoli Asmani, to third parties whom he did not specify. The said title was never included in the schedule of assets of the deceased who died in 1984. It is curious that the Petitioner claims that he excluded the said property from the assets of the estate because it had been sold by the deceased yet he listed an engine and crusher that had already been sold. How he managed to effect transfer of the title to his name in absence of



certificate of confirmation of grant is a mystery that could only have occurred as a result of irregularity or fraud. It is trite law that no land belonging to a deceased person can be transferred in absence of a certificate of confirmation of grant. Section 82 (b) (ii) of the *Law of Succession Act* provides:-

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

(ii) no immovable property shall be sold before confirmation of the grant.”

10. Section 55 of the *Law of Succession Act* forbids the distribution of capital assets before confirmation of Grant. Land is a capital asset. Section 82 of the Act reinforces the law forbidding anybody from transferring immovable property of a deceased before confirmation of grant. It matters not that the deceased had sold the land prior to his death. The minute a proprietor dies, the law steps in to protect his assets and even if he had executed completion documents that are capable of effecting transfer of land, his demise renders the document a nullity and the succession comes into effect and governs how the deceased’s assets should be dealt with.
11. In re Estate of Paul M’Maria (Deceased) [2017] eKLR, Gikonyo J in considering the effect of Section 55 and 82 of the Act stated:-

“These facts impels a re-statement of what courts of law have boldly stated; that, it is axiomatic under section 55 and 82 of the *Law of Succession Act*, no immovable property of the deceased shall be sold before confirmation of grant. For clarity, the relevant parts of Section 55 and 82 thereto are reproduced below:

55. No distribution of capital before confirmation of grant

- (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71.
- (2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.

82. Powers of personal representatives Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;



- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that:

- (i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
- (ii) no immovable property shall be sold before confirmation of the grant.”

12. The Petitioner intermeddled in the estate of the deceased by acting contrary to Section 45 of the Law of Succession Act and transferring the deceased’s land before confirmation of grant and therefore the subdivision and transfer was null and void. However, since the current registered owners of the titles were not enjoined to the application, to nullify the titles would be to condemn them unheard. I therefore disallow the 1<sup>st</sup> Objector’s application but grant him leave to file a fresh application in which he should enjoin the current registered owners, within 14 days.
13. Having said that, I turn to the application by the daughters. Under the law, all the biological children of a deceased person are deemed to be dependants. Section 29 of the Act defines the meaning of dependant as follows:-

“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) ....\*\*\*
14. Section 38 of the Act provides that the estate of a deceased person should be distributed equally amongst his children. The law does not distinguish between the male and the female. Article 27 of the Constitution forms the bedrock upon which daughters can claim for equal share in their parents’ estate regardless of their marital status.
15. In the instant cause, the daughters seek only one acre from their father’s vast estate. The said acre should be hived off the land that was previously comprised in L.R. No. Isukha/Shitochi/1104. The Petitioner is in agreement with the Applicants. This would have been easy as the 1<sup>st</sup> Objector is also agreeable to the application albeit with the rider that the deceased’s daughters can only claim from the net estate that is still available. The challenge is that the deceased’s daughters have claimed their mother’s house, kitchen, and store. I note that by a ruling dated 8<sup>th</sup> February 2000, B.K. Tanui J, had ruled that the portion where the house and grave stands do devolve to the 1<sup>st</sup> Objector who was by then living with the mother who is now deceased.
16. According to the Petitioner and the Applicants, under Luhya customary laws, the daughters to the deceased person are entitled to inherit their mother's house. Conversely, the 1<sup>st</sup> Objector submitted that culturally, as a last born, he is the one to inherit his parents’ home. None of the parties adduced independent evidence in support of their claim.



17. The *Constitution* of Kenya 2010, overrides any customary law that would tend to be discriminatory to any party. However, the courts have severally resorted to customary law when dealing with issues touching on personal law which includes marriage, burial disputes, and succession, among others. Section 3 (2) of the *Judicature Act* provides that:-

“The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

18. In seeking to assert their right over their parents’ house and homestead, the daughters averred that under Luhya customary law, daughters inherit their mother’s house. By dint of Section 51 of the *Evidence Act*, the Applicants ought to have adduced the evidence of persons who are well versed with the said customary law. This was the holding in *Nyaribo Nyankomba v. Mary Bonareri Munge* [2010] eKLR when the court held that:-

“Time and again it has been stated that cases resting purely on customary law, it’s absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions.”

19. The onus of proving the existence of the customary law rested on the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Objectors and in failing to adduce evidence in proof of the custom, the Objectors did not discharge this burden. Section 109 of the *Evidence Act* provides that:-

“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 any particular person.”

20. Having claimed that the Luhya customary law favours their application, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Objector needed to adduce evidence in support of their claim, and failure to do so renders that particular claim moot.

21. It is noted that this cause has been pending since 1988. Numerous applications have been filed and determined or withdrawn. I note that the main protagonists are the Petitioner and the 1<sup>st</sup> Objector who are children from the first house of the deceased. The Petitioner has decided to support their sisters in their claim for their mother’s house. From the record, the 5<sup>th</sup> Objector/Applicant is deceased and that leaves two daughters of the deceased. Clearly, there could be bad blood flowing between the two brothers which is now spilling over to their sisters.

22. The 3<sup>rd</sup> and 4<sup>th</sup> Objectors/Applicants claim that the family, including the 1<sup>st</sup> Objector/Respondent sat and resolved that all the daughters of the deceased be allocated the one acre portion to include the homestead of the deceased, the store block and the graveyard. This was contested by the 1<sup>st</sup> Objector/Respondent. According to the Applicants, they intend to use the house as a family converging centre for ceremonies and meetings. My understanding is that the Applicants are settled elsewhere. Both of them are elderly and having settled elsewhere, would not be in a position to maintain the homestead from afar. Conversely, the 1<sup>st</sup> Objector/Respondent is in occupation of the homestead as directed by B.K. Tanui, J. The court needs to consider the practicality of granting the Applicant’s prayers as they are. I find that to grant the said prayers would be impractical and would border on the ludicrous.



23. Where beneficiaries of a deceased agree on an unequal mode of distribution, the court will allow such distribution. See the case of *Justus Thiora Kingu & 4 others v. Joyce Nkatha Kingu & Another* [2015] eKLR. In this case the Applicants have asked for one acre of land from the deceased's land inclusive of the deceased's homestead. I have found the claim over the homestead untenable. L.R. No. ISUKHA/SHITOCHI/1104 comprised 2.0 hectares (5 acres). In order to compensate the Applicants for their failure to secure the family homestead, it is necessary for them to get a larger share than that initially claimed. In my opinion, an extra acre would be adequate compensation over and above that which they initially claimed. I note that the land is still in the name of the Petitioner although one of the parcels was allocated to the 1<sup>st</sup> Objector. It has therefore not been transmitted.
24. The final orders shall be as follows:-
- (a) I decline to discharge the Petitioner as he has not rendered full and proper accounts of his administration of the estate.
  - (b) The application dated 19<sup>th</sup> October 2023 is dismissed with leave to the 1<sup>st</sup> Objector to file a fresh application as directed in paragraph 12 of this ruling.
  - (c) The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Objector/Applicant's application is allowed as follows:-
    - (i) The Petitioner shall excise one (1) acre each of undeveloped land from L.R. No. Isukha/Shitochi/3212 and 3213 respectively and transfer it to the Applicants.
    - (d) This being a family matter there shall be no order as to costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Mrs. Kadenyi for the Administrator

Mr. Machafu for 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Objectors

No appearance for Mr. Khayumbi for 2<sup>nd</sup> Objector

Court Assistant: Polycap

