



In re Estate of Zakaria Gwayumba Khayumbi alias Zakaria Kahayumbi alias Khayumba (Deceased) (Succession Cause 413 of 2013) [2024] KEHC 5541 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 413 OF 2013**

PJO OTIENO, J

MAY 6, 2024

**IN THE MATTER OF THE ESTATE OF ZAKARIA GWAYUMBA KHAYUMBI
ALIAS ZAKARIA KAHAYUMBI ALIAS KHAYUMBA (DECEASED)**

BETWEEN

SAMSON KHAYUMBI ZAKARIA ADMINISTRATOR

AND

**REBECCA MUKUBILANI KHAYUMBI (NOW DECEASED AND
SUBSTITUTED WITH JANE AYESA KHAYUMBI) ADMINISTRATOR**

JUDGMENT

1. Following the death of Zakaria Gwayumba Khayumbi Alias Zakaria Kahayumbi Alias Khayumba (“deceased”) on the 26th day of January, 2013, the 1st administrator moved the court for the issuance of a grant of letters of administration intestate. In the said petition, the petitioner listed himself, Zakaria Gwayumba Khayumbi, Rebecca Zackaria Gwayumba, Fridah Zackaria Khayumbi, Jane Zackaria Khayumbi and Supa Zackaria Khayumbi as being the beneficiaries of the estate which comprised of properties known as KAKAMEGA/SHIKULU/182, KAKAMEGA/SHIKULI/369 and KAKAMEGA/SHIBUNAME/158.
2. After the grant was issued to the 1st administrator, the second administrator filed summons for revocation of the grant on the ground that the petitioner had failed to include all the beneficiaries.
3. The grant was revoked and a fresh one issued on 29th July, 2015 appointing Rebecca Mukubilani and Samson Khayumbi as administrators of the estate of the deceased.
4. Joint summons for confirmation of grant were subsequently filed by the administrators identifying the survivors of the deceased to be as follows;
-Rebeccah Mukubilani Khayumbi (widow)



- Fridah Khayumbi (daughter)
- Charles Khayumbi Mwikali (son)
- Evans Khayumbi (grandchild)
- Felix Shikhuyu Abdalla (grandchild)
- Vein Khayumbi (grandchild)
- Jane Ayesa Khayumbi (daughter)
- Samson Khayumbi (son)
- Alice Atisa Khayumbi(daughter)
- Widkins Khayumbi Mbelesia (grandson)
- Violet Supa (daughter)
- Vein Kerubo Khayumbi (grandchild)

5. The estate of the deceased was captured to comprise of the following properties;

Plot No. 4 Isulu Market

Grant No. 21103-LR No. 209/6586- Nairobi City Jericho area

Kakamega/Shibuname/517 (0.41Ha)

Kakamega/Shikulu/182 (7.5 acres)

Kakamega/Shikulu/369 (3.8Ha)

Kakamega/Shibuname/540 (0.34Ha)

Kakamega/Shikulu/1298 (2.4Ha)

Kakamega/Shibuname/158 (1.4Ha)

Kakamega/Shikulu/1316 (1.4Ha)

6. On the mode of distribution of the estate of the deceased, the 1st administrator proposes that since the deceased had married two wives; the 2nd administrator and one Teresia wanjiku who bore him and left the home when he was young, the estate of the deceased should be distributed according to households as espoused under section 40 of the [Law of Succession Act](#). Specifically, he proposes that the estate of the deceased be distributed as follows;

- a. He be given wholly Kakamega/Shikulu/182 which measures 3.0Ha (7.5 acres) but if the 1st house is minded to keep the same then he be given Kakamega/Shikulu/369 which measures 3.8Ha (10acres).
- b. He be given 1 door plot No. 4 Isulu Market but if the same is sold he be given priority to buy the same.
- c. Kakamega/Sibuname/517 which measures one acre and where he has a homestead be share equally between himself, Charles Mwikali Khayumbi and the sons to Henry Abdalla Khayumbi (Deceased) namely; Evans Khayumbi and Felix Shikhuyu Abdalla.
- d. Nairobi property known as plot No. LR 209/6586 be sold and the proceeds thereof be equally shared amongst the deceased's 9 children.



- e. The rest of the property to go to the 1st house to divide as they wish.
7. The 2nd administrator on the other hand is of the opinion that the deceased's estate should be distributed to each beneficiary and proposes the distribution to be as follows;
- Kakamega/Shibuname/514
- Charles Mwikali Khayumbi- ¼ acre
- Samson Khayumbi- ¼ acre
- Evans Khayumbi- ¼ acre
- Felix Shikhuyu Abdalla- ¼ acre
- Kakamega/Shikulu/182
- Samson Khayumbi-4 acres
- Felix Shikhuyu Abdalla- 2 acres
- Vein Kerubo Khayumbi-1.5 acres
- Kakamega/Shikuli/369
- Vein Kerubo Khayumbi-0.5acres
- Charles Mwikali Khayumbi-4.0acres
- Widkins Mbelesia Khayumbi-2 acres
- Evans Khayumbi-0.5 acres
- Kakamega/Shikuku/1316
- Evans Khayumbi-0.5 acres
- Jane Ayesa Khayumbi-2acres
- Kakamega/Shikuku/1298
- Alice atisa Khayumbi-3 acres
- Violet Supa Khayumbi-3 acres
- Kakamega/Shibuname/540 and Kakamega/Shibuname/158 to be sold and the proceeds be used to complete succession and the balance to be equally shared amongst the beneficiaries.

Issue, Analysis and Determination

8. The only issue that arises for my determination by the court, and based on the marital status of the deceased, is how the estate of the deceased ought to be distributed.
9. It not contested that the deceased was survived by two wives and children. The applicable law for the distribution of such an estate is section 40 of the *Law of Succession Act* which was interpreted by the court in the case of Rono –v-Rono Civil Appeal No. 66 of 2002 when the court observed as follows;

“More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number



of children.” A “house” in a polygamous setting is defined in section 3 of the Act as a “family unit comprising a wife and children of that wife.”

10. The above quote follows the position of the law that section 40 of the Act calls for interpretation that serves the purpose of justice fusing equality and equity and always guarding against absurd outcomes. Where equal sharing between the households leads to inequity among the beneficiaries, interests of justice demand that each of the beneficiary be independently entitled to a share of the deceased’s estate.
11. With that appreciation, the proposition by the 1st administrator would lead to inequity and unfairness for he would get more than all else for the sole reason that he is a sole child in his mother’s house.
12. To the contrary, the court finds the proposition by the 2nd administrator on distribution, supported by all save, for the 1st administrator, to be just and equitable position. The court thus adopts the same and directs that the estate of the deceased be distributed as follows;
 - a. Kakamega/Shibuname/517 shall be shared and equally distributed between Charles Mwikali Khayumbi, Samson Khayumbi, Evans Khayumbi and Felix Shikhuyu Abdalla
 - b. Kakamega/Shikulu/182 shall be distributed as follows;
Samson Khayumbi-4 acres
Felix Shikhuyu Abdalla- 2 acres
Vein Kerubo Khayumbi-1.5 acres
 - c. Kakamega/Shikuli/369 shall be distributed as follows;
Vein Kerubo Khayumbi-0.5 acres
Charles Mwikali Khayumbi-4.0 acres
Widkins Mbelesia Khayumbi-2 acres
Evans Khayumbi-0.5 acres
 - d. Kakamega/Shikuku/1316 shall be distributed as follows;
Evans Khayumbi-0.5 acres
Jane Ayesa Khayumbi-2 acres
 - e. Kakamega/Shikuku/1298 shall be distributed and shared equally between Alice Atisa Khayumbi and Violet Supa Khayumbi.
 - f. Kakamega/Shibuname/540, Kakamega/Shibuname/158, Plot No. 4, Isulu Market and Grant No. 21103-LR No. 209/6586- Nairobi City, Jericho area, to be sold by the administrators jointly and the proceeds used to meet the costs of administration including the legal fees for this succession cause. Any surplus after settlement of administration cost shall be shared equally amongst all the beneficiaries.
 - g. In selling Plot No., 4 Isulu Market, priority be given to Samson Khayumbi Zakaria in the said sale provided he offers the best price acceptable to all the family members.
13. On costs, the court appreciates this to a family matter and makes no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF MAY, 2024.

PATRICK J. O. OTIENO



JUDGE

In the presence of:

Mr. Nyikuli for the 1st Administrator

N/A for Odek for the 2nd Administrator

Court Clerk - Polycap

