



In re Estate of Alphone Musinde Mukisu (Deceased) (Succession Cause 59 of 2004) [2024] KEHC 10691 (KLR) (1 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10691 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 59 OF 2004
REA OUGO, J
AUGUST 1, 2024**

IN THE MATTER OF THE ESTATE OF ALPHONE MUSINDE MUKISU (DECEASED)

BETWEEN

RICHARD W MASINDE 1ST PETITIONER

CPT CHARLES MASINDE 2ND PETITIONER

AND

GLADYS NANYAMA MASINDE OBJECTOR

RULING

1. Alphonse Musinde Mukisu died on the 31st of August 1986. On the 25th May 2004 Richard W, Masinde (1st petitioner) and CPT. Charles Masinde (2nd petitioner) filed a petition for letters of administration of administration intestate of the estate of Alphonse Masinde Mukisu. The 1st and 2nd petitioners are sons of the deceased. In their affidavit in support of the petition, 5 persons survived the deceased namely; Richard W. Masinde, Chris Masinde, Captain Charles Masinde, James Masinde, and Henry Wafula Masinde. The assets listed are; East Bukusu/ North Kanduyi/ 699, East Bukusu/ South Kanduyi/ 2461, East Bukusu / South Mateka/ 1587, and East Bukusu/ North Kanduyi /700.
2. A grant of letters of administration was issued to the 2 petitioners dated 27th September 2004 appointing the 2 to administer the estate of the deceased as per law and to render a true account when they were required to do as per the law. An application dated the 2nd of August 2006 was filed to confirm the grant.
3. On the 19th of April 2007 Chris Makhanu Masinde applied to revoke the grant on grounds that he was not informed of the matter and that there were dependants who did not know the matter.



4. On the 5th November 2012 a consent dated 5th November 2012 was filed by the firms of Wasilwa and Company and Omkunda and Company advocates filed a consent as follows;

“The grant intestate issue on 29.9.2004 to the petitioner Richard Wafula Masinde be and hereby revoked. That the fresh grant issued in the joint names of Chriss Makhanu Masinde, Richard Wafula Masinde and Charles Masinde. That the administrators be at liberty either jointly or severally to apply for confirmation of the grant.”
5. After the above consent was recorded in court the following affidavits and written statements were filed. On the 6th of September 2016 Gladys Nanyama Masinde (Gladys, the protestor) filed an affidavit of protest sworn on the 2nd of September 2016. Thereafter a series of affidavits were filed as follows; An affidavit sworn by Richard Wafula Masinde and Chriss Makhanu Masinde was filed on 20.9.2018. Statements by the petitioners sworn by Richard W. Masinde, CPT. Charles Masinde and Rev Francis Wafula Walusaka filed on 1.10.2018, in response to the protest filed by Gladys. Statements by the Protestor, Gladys Nanyama Masinde, Timona Simiyu Mahaya and Willy Baraza Mahaya filed on 24.5.2019 and a statement by Calvin Wabomba Wekesa filed on 27.5.2019. The 2nd objector filed an affidavit in protest to the mode of distribution on the 9th of June 2022.
6. A grant was issued on the 5th of July 2023 to Chriss Makhanu Masinde, Richard Wafula Masinde, and Charles Masinde.
7. A summons for confirmation of the grant was filed on 17.7.2023. The application is supported by the affidavit of Chris Makhanu Masinde, Richard Wafula Masinde, and Charles Masinde dated 17.7.2023. The 3 administrators have through the said proposed their mode of distribution. They aver that the amended schedule of distribution of the assets dated 29th March 2022 and filed on the 30th March 2022 be adopted together with the consent to the proposed mode of distribution filed on the 9th March 2022. According to the 3 administrators, the deceased had no dependants but was survived by the following persons;
 - a. Richard Masinde
 - b. Fred Masinde (now deceased)
 - c. Kizito Masinde (now deceased)
 - d. Chrisantus Masinde
 - e. Justina Masinde
 - f. Charles Masinde
 - g. Everlyne Nasimuyu Masinde
 - h. Rose Nekesa Masinde.
8. At paragraph 9 they aver that identification and shares of all persons beneficially entitled to the estate have been ascertained and determined as follows;
 - a. LR No. East Bukusu North Kanduyi/699/700, 2309 and Market Plot No. 21 whole be registered in the name of Chrisantus Masinde.
 - b. 6 acres hived from LR No. East Bukusu North Kanduyi /1587 be registered in the name of Richard Wafula Masinde.



- c. Kabula Plot Market N0. 21 East Bukusu/ South Kanduyi/ 2321 whole be registered in the name of Richard Wafula Masinde.
 - d. LR No. East Bukusu/ North Kanduyi/2461. LR No. East Bukusu/ South Kanduyi/4988. Plot No. 27 Mayanja Market whole be registered in the name of Charles Masinde.
 - e. LR No. East Bukusu/ South Kanduyi/2326, 0.05 be hived out of LR No. East Bukusu/ South Kanduyi /4988 whole be registered in the name of Everlyne Masinde.
 - f. LR No. East Bukusu/ South Kanduyi / 2317 and 0.05 be hived out of LR No. East Bukusu South Kanduyi/ 4988 be registered in the name of Rose Masinde.
 - g. 1 ½ acres to be hived out East Bukusu/ South Kanduyi/1587 be registered in the name of Clement Masinde.
 - h. 1 ½ acres to be hived out of East Bukusu/ South Kanduyi/ 1587 to be registered in the name of Jacob Masinde.
9. Gladys Nanyama Masinde, the 1st Objector filed an affidavit on the 2nd September 2016. She depones as follows that ; the deceased left 2 houses and that the 1st and 2nd petitioners are the sons of the 1st house. The 1st house comprised of the following;
- a. Trutea Namemba Masine - Widow
 - b. Richard Masinde - son
 - c. Fred Masinde -son (deceased)
 - d. Kizito Masinde - son (deceased)
 - e. Christanus Masinde - son
 - f. Justino Masinde - son (deceased)
 - g. Charles Masinde - son
- The 2nd house comprises of ;
- a. Gladys Nanyama Masinde - Widow
 - b. Everline Nasimiyu Masinde- Daughter
 - c. Rose Nekesa Masinde - Daughter
 - d. Christine Nafula Masinde - Daughter
 - e. James Nyongesa Masinde - son (deceased)
10. According to the 1st Objector the deceased had several parcels of land which included the following;
- a. East Bukusu/ South Kanduyi/ 2461 - 0.22HA
 - b. East Bukusu/ South Kanduyi/ 2317 -0.05HA
 - c. East Bukusu/ South Kanduyi/2321 -0.05HA
 - d. East Bukusu/ South Kanduyi/2326 -0.85HA
 - e. East Bukusu/ South Kanduyi/2309 -0.14HA



- f. East Bukusu/ South Kanduyi/2313 -1 acre
 - g. East Bukusu/ South Kanduyi/699 -9 acres
 - h. East Bukusu/ South Kanduyi/700 -0.9 acres
 - i. West Bukusu/ South Mateka/1587 -9 acres
 - j. Plot No. 21 Mayanja Market -0.05HA
 - k. Plot No. 27 Mayanja Market -0.05HA
 - l. Plot No. 17 Kabula Market plot where Co-operative Bank and Khetias Wholesale are standing -0.05HA
11. The 1st objector avers that she was left out by the petitioners together with her children out of the succession cause. To her knowledge, the deceased had settled his two families (houses) separately whereby the 1st house was settled in Bungoma township and she and her children were settled in Mayanja on LR No. East Bukusu/ North Kanduyi/699 and 700. Parcel Number 699 was purchased in 1997 with the contribution of the deceased and herself. Parcel number 700 was allocated to her son James Nyongesa Masinde by the deceased but was later sold to Agbet Munialo to meet the medical expenses of James Nyongesa. She avers further that the petitioners have sold all the property left behind by the deceased in terms of parcels of land and that they now want to claim her share of her only lands. She has been given 3 acres and her daughters have been excluded. The petitioner's mother died in February 2016 and the petitioners forcefully buried her in the parcel of land instead of Bungoma township. She claims that she is the rightful owner of the property situated in Mayanja area plus her daughters as the rightful beneficiaries. The 1st objector filed a further affidavit dated the 5th June 2023 on her proposed mode of distribution as follows; she avers that she has been allocated 2 acres out of parcel no.1587 yet the said plot is not registered in the deceased's name. Her late husband Justino Nyongesa Masinde died on 9/9/1990 and left her with five children 4 boys and one girl. As the family of Justino they are entitled to an equal share as the rest of the deceased's children. Her proposed mode of distribution is paragraphs of her affidavit dated 5.6.2023.
 12. She avers further that Fredrick Masinde died in 1994, he left behind one son called Stephen Masinde who died and did not leave behind any child. The late Kizito Masinde died in 1975 together with his wife in a road accident and they did not leave any child. James Masinde died when he was young and did not leave behind any child. That 2nd petitioner transferred part of the deceased's property into his name, the properties are East Bukusu / South Kanduyi/ 2461 and 2313 from the deceased's name to his before filing the succession cause and he sold them to different persons without the consent of any family members. Likewise, the 1st petitioner disposed off the deceased's land and used the proceeds for his benefit and therefore he should not benefit. That her late father-in-law left LR East Bukusu/ South Kanduyi/ 2461 in 1980 and at the said time the land had some rentals and he gifted the said properties in her late husband to enable them to use it she still using the said land.
 13. Gladys Nasimiyu Nyongesa, the 2nd objector filed an affidavit of protestor dated 30.5.2023, on the 9th of June 2022. She too has her the mode of distribution (see paragraph 11)
 14. This matter was partly heard by Justice Riechi. Upon his transfer , I took over the matter. As per the court record, the parties agreed that Chris Makhanu Masinde, Richard Wafula Masinde and Charles Makhanu be the administrators. This order was made on 18.12.2012. The 3 administrators were to file an application to confirm the grant. On 6.2.2019 the court ordered that oral evidence will be adduced on the following issues;



- i. When the deceased died and when Christine Masika was born?
- ii. Whether Gladys Wanyama re-married to Wycliff Khisa.

Petitioners' Case

15. During the hearing Charles and Richard testified as petitioners/administrators of the deceased's estate. Charles adopted his statement filed in court on 1.10.2018. He avers as follows; Gladys was the 2nd wife of the deceased from 1974. She had 3 children with the deceased namely; Evelyn Manjaria Masinde born in 1975, Rose Masinde born in 1976 and James Masinde born in 1979. Before marrying the deceased Gladys was married to Mr. Bunyasi and he had 2 children with him namely Irene born in 1970 and Simon Wanyonyi born in 1972. At the time Gladys married the deceased he was the owner of Land Parcel No. East Bukusu/ North Kanduyi/ 699 and 700 in 1986. The deceased was paralyzed by a stroke for 5 years and during that time Gladys Nanyama got married to one Mukholi and she gave birth to Christine Nafula Makhanu on 26.7.1987. At the time the deceased died in 1986, Gladys was pregnant with the child of another person. The deceased had a stroke in 1980 and Christine was born on 17.10.1981. Gladys moved from the home of the Mukholi and married Councillor Wycliffe Khisa she is still married to Khisa and they are blessed with 2 children Simon Khisa and Mary Khisa. In the year 2013 they discovered that Gladys was intermeddling with the deceased's property in Mayanga and sold over 11 plots. She ceased being their stepmother when she married Wycliffe Khisa and therefore cannot claim the property of her previous marriages. They recognise their 2 sisters Evelyne Manjara Masinde Born in 1980 and Rose Masinde born in 1976. During cross-examination, he testified that at times Gladys stays in their home and that Gladys has children with Wycliff but he does not know if Wycliff paid dowry for her. He admitted that Christine was born after the deceased died and that he did not know if the deceased could not sire children.
16. Richard adopted too his statement dated 1.10.2018. His statement is a replica of Charles's statement. During cross-examination, he admitted that Gladys was the wife of the deceased and that they had children but he could not tell the number of children the 2 had.
17. Rev. Francis Wafula adopted his statement filed on the 1.10.2018. In it he states he attended the burial of the late Mama Turuteya Namaemba Masinde in February 2016 at Mayanja village and he did not hear or notice any dispute raised by anybody and that the burial was presided over by the Catholic Church priest peacefully.

1st Objector's Case

18. Gladys Nanyama Masinde the objector testified as follows; the deceased was her husband. They married in January 1974. He paid dowry and they stayed at Mayanja. When the deceased died she was staying with him. They had 4 children namely; Evaline Nasimiyu born in 1975, Rose Nekesa born in 1977, James Nyongesa Masinde born in 1979 and Christine Nafula Masinde born in 1981. She produced the baptismal card of Christine. She has 2 other children Simon Nyongesa born in 1985 and Mary Nafula born in 1986 who were sired by Wycliff. Wycliff did not marry her. It is the deceased who paid her dowry. She adopted her affidavit sworn on 2.9.2016 (see paragraph 10 of this ruling). During cross-examination, she testified that the deceased had a stroke in 1981 and that he died in 1986. He was in a wheelchair and Wycliff was his caregiver. Wycliff is her friend and they have children with him. She was not married to Mukholi. Christine was born in July 1981, she conceived Christine in 1980. She is no longer a friend of Wycliff Khisa.
19. Timona Simiyu Mayo testified as follows; He adopted his statement dated 22.5.2019. The deceased was his neighbour and Gladys was the wife of the deceased. Gladys has never moved from her late husband's



matrimonial home to re-marry. Gladys and the deceased were blessed with 4 children. Their son died three girls are left. During cross-examination, he stated that he knows Wycliff, he is a councillor in the area. Wycliff and Gladys stay together but he does not know if they have children. He knows Gladys has 6 children. Gladys's home is 200 meters from his home.

20. Calvin Wabomba Wekesa adopted his statement dated 22.5.2019. He testified that as a brother of the protestor Gladys, he witnessed the dowry negotiations between the deceased's family and his family. The dowry was paid in line with the Bukusu customary culture marriage. This dowry was received in 1977. He produced the dowry agreement in court. During cross-examination, he testified that Christine was born 2 weeks before the deceased suffered a stroke. Wycliff was not the master of ceremonies.
21. Wycliff Khisa Lusaka testified as follows; he knew the deceased, who was brother to his grandfather. He knows Gladys Masinde. She is the wife of the deceased. She had 6 children, 2 died. He did not marry Gladys. She stays at Mayanja. During cross-examination, he denied he is a boyfriend of Gladys and that he sired children with her. He denied marrying Gladys before the deceased died. Gladys never moved to his home.

2nd Objector Case

22. Gladys Nasimiyu Nyongesa adopted her statement dated 5.6.2023. She testified that the deceased was her father-in-law. Her husband was Justino Nyongesa. They married on the 10.5.1976. They had five (5) with Justino. Thomas Masinde was born in 1977, Clement Wafula Masinde was born in 1979, Jacob Barasa Masinde was born in 1981, the 4th child was born in September and the 5th child is Valteline Nanjala Masinde born November 1986. Justino died in 1990. She has not remarried since her husband's death. Tom and David are children of the deceased. During cross-examination, she testified she had 5 children with the deceased that her husband died in 1990, and that she was married to Justino died before distributing his estate.
23. Parties filed written submissions. I have read the said submissions. The petitioner raised three issues for determination as follows;
 - i. Whether the 1st objector and her daughter Christine are beneficiaries to the estate of Alphonse Masinde Mukisu?
 - ii. Whether the 2nd objector being the wife of the late Justino Masinde who was the son of the deceased is a beneficiary, whether she has taken out letters of administration intestate for late husband Justino Masinde?
 - iii. Whether Mary Nafula is the daughter of the deceased?
24. The petitioner submitted that Christine was not sired by the deceased but by Wycliffe Khisa as the deceased had suffered a stroke and was paralyzed in January 1981 and did not recover until he died in 1986. Further, the baptismal card produced is forgery as it indicates that Christine was born on the 26th of July 1981 and yet Christine was born on the 18th of August 1981. It was further submitted that the 1st objector got married to Mukhooli the father of Christine in 1980 and later got married to Councillor Wycliffe Khisa in 1984 and that they had two children Simon born in 1985 and Mary born in 1986 and that the 1st objector lived with Wycliffe in Mayanja and not the deceased's home. On the 2nd objector claims it was submitted that she is the wife of Justino who was the son of the deceased and she did not produce any birth certificates to support her evidence that she had five children with Justino. It was submitted that only 2 children namely Clement Wafula Masinde and Justina Jacob Masinde belong to Justino. It was submitted that as a daughter-in-law, she is not entitled to a share of the estate



of her parents in law, reliance was made on the decision in Succession Cause No. 661 of 2015 where the court held that “... A surviving spouse of a dead child of the deceased is not biological kin of the deceased parent in law”. Lastly, it was submitted that the 2nd respondent has no locus standi as she had not taken out letters of administration of her late husband Justino Masinde and therefore she has no share in the estate of Alphonse Mukisu Masinde.

25. The 1st objector the issues for determination are as follows;

- i. Whether or not the 1st objector was a wife of the deceased and hence a beneficiary to the estate.
- ii. Whether or not Christine Nafula Masinde is a daughter to the deceased and therefore a beneficiary?
- iii. Which mode of distribution is fair?

26. It was submitted that the 1st objector is the wife of the deceased in line with the provisions of section 29 of the *Law of Succession Act*. The 1st objector called witnesses who testified that she was married to the deceased and she never remarried as was alleged by the petitioners. Even if she remarried then she would still be a beneficiary to the estate by being a former wife. But this is not the case. The 1st objector still resides in the matrimonial home the deceased established for her. On the issue of Christine, it was submitted that Christine is the child of the deceased and therefore a beneficiary. She was sired by the deceased and the 1st objector as per the baptismal card and the petitioner failed to prove their allegation that she was not a child of the deceased. Even if she was not sired by the deceased Christine would still be recognized under section 29 (b) of the *Law of Succession Act* as a child whom the deceased had taken into his as his own having been maintained by him immediately before his death. There is no evidence or proof adduced to warrant the court reaching a contrary view on the paternity of Christine and therefore she is a child and a beneficiary of the deceased. On the issue of distribution of the estate, the 1st objector submitted that she has tendered an equitable and fair distribution compared to the petitioners' mode of distribution which is discriminatory and segregative. that the deceased had several land parcels which the petitioners have intermeddled with and sold everything. The deceased was a polygamous man and therefore his estate should be distributed per the provisions of section 40 of the *Law of Succession Act*.

27. The 2nd objector raised the following issues in her submissions as key;

- i. Whether the deceased established his wishes on how his land parcels were to be subdivided amongst the beneficiaries.
- ii. Which mode of distribution is fair?

It was submitted that the 2nd objector is the widow of the deceased's son Justino and that before he passed on he left her with five children and succession of her father's in-law estate had not been filed and therefore his share is still in the estate of the deceased. The petitioner left the family of Justino out intending to disinherit them from what belongs to them. The petitioner did not adduce evidence that Tom Masinde, David Masinde, and Phidelina Masinde are not the children of Justino. Only the deceased could claim that the 3 children were not his children. The 2nd objector has not remarried and she stays on the parcel of land her husband left. It was ordered by Justice Riechi that she be included in the mode of distribution. the mode of distribution should be equitable and fair. The land the 2nd objector is staying in was where her husband and she are entitled to it having settled in the said land. She submitted further that on the commercial land and some agricultural land, the deceased had not subdivided the same amongst his children and therefore the said land should be divided as the deceased's wish before his death but equitably and fair and that the court should be guided by the



provisions of section 40 of the *Law of Succession Act* Cap 160 (LSA or the Act). The petitioners agreed before Justice Riechi to include the 2nd objector. The petitioner distribution is not fair as they have intentionally left out some of the deceased's property. The petitioners have taken all the commercial properties and they want to give her 2 acres of agricultural land at Mateka the 2 proposed 2 acres of land parcel East Bukusu/ South Kanduyi/ 1578 does not exist, the land parcel No. 1578 is for West Bukusu/ South Mateka which is agricultural land. The 2nd petitioner has been intermeddling with the deceased's estate and has sold part of the estate. she adopts the proposal by the 1st objector.

Analysis and Determination

28. I have considered the evidence adduced by the parties their submissions and the law as per the LSA and in my view the issues for determination in this Ruling are 2 issues are; whether the 1st objector is the wife of the deceased and whether Christine is the child of the deceased. Whether the 2nd objector is entitled to inherit from the deceased estate?
29. On the first issue the petitioner contends that the 1st objector was the wife of the deceased and that after he died she re-married. This allegation in my view was not proved. The 1st objector has adduced evidence that she was married to the deceased and that she has never remarried. She called witnesses who witnessed the payment of her dowry and also told the court that she had never remarried. The petitioner's witness corroborated her evidence that she still stays in her matrimonial home where the deceased left her. In my view, the 1st objector has sufficiently rebutted the petitioner's claims that she remarried. I find that the 1st objector is the widow of the deceased and was his wife.
30. The next issue is whether Christine is the child of the deceased. The petitioner contends that the deceased could not have sired the said child as he was already paralyzed at the time she was born. There was no evidence to support this allegation. Paternity is proven through DNA or a birth certificate if the document is not challenged. This was not done. In *PKM V. SPM & another*, [2015] eKLR the court stated:

“If the applicant denies paternity what other quicker way to resolve the dispute exists than to undergo a DNA test.”
31. Christine was born in 1981 when the deceased was still alive I cannot only presume that she is a child of the deceased as claimed by the 1st objector. The petitioners have failed to persuade this court that she was not a child of the deceased. She was born in 1981 when the deceased was still alive and unless DNA is done to prove otherwise, Christine is a beneficiary to the deceased's estate. I also agree with the submission that even if it was proved that she is not a child of the deceased. She lived with the deceased from 1981 to the time he died assuming they were in the same home she must have been dependent on the deceased. In my view, Christine is a beneficiary and is entitled to inherit from the estate of the deceased.
32. On whether the 2nd objector she is the wife of the deceased son. I agree with the submissions of the petitioner that she has failed to show the court that she has taken out letters of administration. Her family is entitled to their portion of the inheritance that was due to her late husband. The 2nd objector family will not be left out when the estate is being determined, the court will award the estate of Justino Masinde the portion due to them.
33. In this ruling I have only dealt with the 3 issues. I have not made a ruling on the mode of distribution. This is because I need to carefully consider the documents attached to the parties' affidavits which have not been analyzed in detail by the parties. I defer the ruling on the mode of distribution to a date which



I will inform the parties. This is therefore a partial Ruling. The next Ruling will be on the Mode of Distribution.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 1ST DAY OF AUGUST 2024.

R.E.OUGO

JUDGE

In the presence of;

Petitioners - Absent

Mr. Juma -For the 1st Objector

Miss Natwati -For the 2nd Objector

Wilkister - C/A

