



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of John Oduor Akwera (Deceased) (Succession Cause  
64 of 2008) [2024] KEHC 11913 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11913 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
SUCCESSION CAUSE 64 OF 2008**

**WM MUSYOKA, J**

**OCTOBER 4, 2024**

**IN THE MATTER OF THE ESTATE OF JOHN ODUOR AKWERA (DECEASED)**

**RULING**

1. This cause relates to the estate of the late John Oduor Akwera, who, according to certificate of death, serial number 754806, of 30<sup>th</sup> June 2003, died on 28<sup>th</sup> April 2003. There is a letter, on the record, from the Chief of Marachi Central Location, dated 9<sup>th</sup> January 2008, which indicates that he had married 4 wives, being Anastancia Atsieno Oduor, Anna Nabwire Oduor, Zainabu Shumira Oduor and Christine Amire. It is indicated that the land, presumably the subject of succession, was registered in the name of the deceased, but it was family land. The letter mentions some relatives, presumably those who have an interest in the land, being 2 brothers of the deceased known as Cyril Wekheye and Nicholas Ndubi; and nephews Joseph Opango on behalf of his late father Anerico Musundi Akwera, and Martin Ndubi on behalf of his father Bonaface Ndubi. Mary Omina and Yona Osunga are mentioned as individuals who have been resident on the land. It is indicated that the family had sat and agreed on Lambert Oundo Oduori, a son of the deceased herein, as the proposed administrator of the estate.
2. Representation, in intestacy, was sought by Anne Nabwire Oduori and Lambert Oundo Oduori, vide a petition filed herein on 26<sup>th</sup> April 2008, in their capacities as widow and son, respectively, of the deceased. The deceased was said to have been survived by the 4 widows named in the Chief's letter, being Anastancia Atsieno Oduor Anna Nabwire Oduor, Zainabu Shumira Oduor and Christine Amire. There was also a list of 23 individuals, named as dependants, being Kizito Omondi, Lambert Oundo, Consolata Aloo, Everleen Ongayi Oduori, Emily Akumu Oduori, Carolyne Oduori, Grace Akwera, Christine Nagira, Julia Wanyama, Fredrick Makhulo Oduori, Charles Oduori, Ambrose Oduori, Seif Martin Oduori, Danstane Kwena Oduori, Duncan Omari, Mary Akwera Oduori, Ceril Wekheye, Nicholas Ndubi Oduya, Joseph Opango, Martin Ndubi, Yona Osunga, Cecil Mary Omina and Alfred Chwele Musundi. The relationship between those individuals and the deceased was not disclosed. The deceased is said to have had died possessed of Marachi/Kingandole/249, Bukhayo/Mundika/868 and Bukhayo/Mundika/2971. Letters of administration intestate were made to the 2, on 6<sup>th</sup> May 2008, and a grant was duly issued on 5<sup>th</sup> May 2008.



3. One of the personal representatives, Anne Nabwire Oduor, filed a summons for confirmation of grant, dated 25<sup>th</sup> March 2010. She listed the survivors of the deceased as 10 individuals, all male. She also listed other individuals as dependants, some of whom were described as widows and purchasers. She proposed distribution of the 3 assets between the individuals listed as survivors and dependants. That application was never disposed of, although directions had been given for filing of protests and witness statements, with a view to conduct of an oral hearing. The filing of numerous interlocutory applications might have thwarted its hearing. It was last in court on 29<sup>th</sup> June 2022.
4. Anne Nabwire Oduor, then filed a chamber summons, dated 31<sup>st</sup> March 2021, seeking partial confirmation of the grant, during the pendency of the summons for confirmation of grant of 25<sup>th</sup> March 2010, specifically relating to the share that was due to her house, on grounds that the portion of the estate “bequeathed” to her and her children was not contested. The property that she proposed to be distributed was Bukhayo/Mundika/868, between Makhulu Alfred, Charles Oduori and Amboris Oduori, with the administratrix holding life interest in the portion that was to be allocated to Amboris Oduori. On 10<sup>th</sup> June 2021, Karanjah J expressed reservations about that application, on grounds that it sought partial rather than full distribution of the estate, and recommended that it be amended. The said application was never amended as directed, but the administratrix did file a supplementary affidavit, sworn on 24<sup>th</sup> June 2022, proposing distribution of the entire estate.
5. The chamber summons, dated 31<sup>st</sup> March 2021, was never heard and determined, for it was overtaken by events. The event that overtook it was the filing of a summons, dated 5<sup>th</sup> October 2022, seeking to have the grant revoked. That application was allowed, on 6<sup>th</sup> December 2022, and the grant made on 25<sup>th</sup> May 2008 was revoked. Kizito Omondi Oduori, Alfred Makhulo and Timothy Ndubi were appointed the new administrators of the estate. A grant of letters of administration intestate was duly issued, dated 6<sup>th</sup> December 2022. Alfred Makhulo and Timothy Ndubi then filed another summons for revocation of the grant made on 6<sup>th</sup> December 2022, dated 6<sup>th</sup> March 2023. I dismissed that second application for revocation of grant, for being in abuse of court process, and directed the administrators to move for confirmation of the grant instead.
6. An application for confirmation of grant was filed, dated 25<sup>th</sup> May 2023, and that is what I am tasked with determining. That application is brought at the instance of Alfred Makhulo and Timothy Ndubi. There is a curious thing about the affidavit in support of the application. It does not do what such an affidavit is supposed to, and that is to give an account of what the administrators did with the estate, upon their being appointed as such, in terms of ascertaining the assets and liabilities of the estate, ascertaining beneficiaries of the estate, collecting and gathering the assets for preservation and distribution, settling debts and liabilities, and proposing distribution. Instead, the administrators have gone into a tangent that does not help in pointing the court towards addressing the issues that arise in a confirmation application. The mode of distribution is set out in the body of the application, rather than in the affidavit. It proposes distribution of the 3 assets, and identifies the individuals to whom it is proposed to be devolved. The gist of the affidavit appears to be about the paternity of Kizito Omondi Oduori.
7. Kizito Omondi Oduori, who is one of the administrators, swore an affidavit of protest, on 30<sup>th</sup> June 2023. He identifies the children, wives, brothers and nephews of the deceased. The children are said to be 7 sons, being Kizito Omondi Oduori, the late Lambert Oundo Oduori, Seif Martin Oduori, Alfred Makhulu, Charles Oduori Omondi, Ambrose Oduor, Dennis Oduori and Danstone Kwena Oduori. The widows are said to be 4, being Anastancia Atsieno Oduori, Anne Nabwire Oduori, Zainabu Shumira Oduori and Christine Amiru Oduori. The brothers of the deceased are said to be 2: Siril Wekheye Akwera and Nicholas Oduya Okwera. The nephews are identified as Martin Musundi



- Ndubi, Joseph Opango Musundi and Alfred Chwere Musundi. He avers that the deceased had settled his wives on the 3 parcels of land, and that one of them, Marachi/Kingandole/249, was ancestral land, which the deceased shared with his brothers, and there were marked boundaries on the said land.
8. Siril Wekheye Akwera and Nicholas Oduya Akwera have filed a joint affidavit of protest, sworn on 18<sup>th</sup> September 2023. They aver that the deceased was their elder brother. They assert that Marachi/Kingandole/249 is ancestral land. They assert that the deceased died when they were young, and the deceased herein was registered as proprietor of Marachi/Kingandole/249 in trust for them. They propose that Marachi/Kingandole/249 be shared equally between the deceased, the late Heneriko Musundi Akwera and the late Boniface Ndubi Akwera, Siril Wekheye Akwera and Nicholas Oduya Akwera. They state that the deceased did not distribute Marachi/Kingandole/249 amongst the brothers, either after they all turned 18 or prior to his death. They accused the sons of the deceased of manipulating occupation of the land on the ground in their favour, and to the disadvantage of the siblings of the deceased. They go on to make proposals on the distribution of Marachi/Kingandole/249.
  9. Kizito Omondi Oduori has responded to the protest by Siril Wekheye Akwera and Nicholas Oduya Akwera, vide the affidavit that he swore on 17<sup>th</sup> November 2023. He points at a witness statement that Nicholas Oduya Akwera had filed on or dated 28<sup>th</sup> April 2003, where he had indicated that the deceased had distributed Marachi/Kingandole/249 amongst his siblings, and he had shown the acreages of the portions shared out. He equally points to an application, dated 17<sup>th</sup> January 2019, that Siril Wekheye Akwera had filed, where he had said that the deceased was entitled to 10 acres out of Marachi/Kingandole/249.
  10. The confirmation application, and the protests to it, were canvassed by way of viva voce evidence. The oral hearing was conducted on 28<sup>th</sup> May 2024.
  11. Alfred Makhulo was the first on the witness stand. He explained that the deceased had 4 wives. 2 wives occupied Marachi/Kingandole/249, while the other 2 occupied the other 2 parcels of land, Bukhayo/Mundika/868 and Bukhayo/Mundika/2971. He stated that there was no issue with Bukhayo/Mundika/868, and the same could be devolved to Anna Nabwire and her children. He said that there was an issue around Bukhayo/Mundika/2971, as both Christine Amiru and Kizito occupied it. he said that he did not oppose that parcel of land being devolved to Christine Amiru. He testified that Marachi/Kingandole/249 was ancestral or communal land. The deceased had a share in it, and his 1<sup>st</sup> and 3<sup>rd</sup> wives lived there. The other shares belonged to 2 brothers of the deceased, Siril Wekheye and Nicholas Oduya. He stated that there were boundaries on the ground, but he was not present when the same were fixed, save to say that that happened during the lifetime of the deceased. The witness stated that he occupied Bukhayo/Mundika/868. He stated that Marachi/Kingandole/249 emanated from his grandfather, who had 4 sons, all of whom lived on that land. He said he did not know whether his grandfather shared out the land amongst his sons, but the deceased was fronted to be its registered proprietor. He said that he was born in 1976, and the boundaries were fixed in the 1980s, and that since he lived on Bukhayo/Mundika/868, he was not privy to what was happening in or to Marachi/Kingandole/249. He said that he did not oppose equal distribution of Marachi/Kingandole/249 between the deceased and his siblings. He said that he and his brothers had agreed to Bukhayo/Mundika/868 being shared equally. He said that he did not challenge the proposals made by Siril and Ndubi.
  12. Kizito Omondi Oduori testified next. He stated that he did not oppose Bukhayo/Mundika/868 being devolved to Alfred and his brothers. He also said that he had no opposition to Bukhayo/Mundika/2971 being devolved upon Christine Amiru and her children. He testified that his issues



were with Marachi/Kingandole/249. He explained that the land originally belonged to his grandfather, but it was registered in the name of the deceased, in his capacity as the eldest son, to hold the same in trust for his siblings. He said that it was the deceased who shared out the land, and fixed the boundaries, adding that he did so in his capacity as trustee. He said that the court ought not interfere with those boundaries. He said that the deceased was entitled to 10 acres, Siril should be given the share he occupies, Nicholas should have 4 acres, Enrico 5 acres and Boniface 5 acres. He was opposed to Christine getting 2½ acres. He said that the deceased had 5 wives, 3 were settled on Marachi/Kingandole/249, and the other 2 on a piece of land in Sikoma. He stated that sharing Marachi/Kingandole/249 would interfere with the boundaries that were fixed by the deceased in 1989, asserting that the land ought not be distributed a second time. He said that that exercise was done without a surveyor, hence he could not tell the exact acreages allocated to each of the sons of his grandfather. He said that Siril had land at Sikoma, but he had no evidence to support that.

13. Dr. Chrisantos Ndubi testified next. He was a son of Siril Ndubi. He said that his father had sons and daughters, and he identified them. He explained that his father had no land in Sikoma, Marachi, as the land associated with him actually belonged to his brother, the late Oundo, whose widow he had inherited. He said that he was entitled to a share in Marachi/Kingandole/249. He asserted that the disputed boundaries on Marachi/Kingandole/249 were not fixed by the deceased, but by Kizito Omondi and Joseph Opango. He stated that he had no issues with respect to Bukhayo/Mundika/868 and Bukhayo/Mundika/2971. He asserted that Marachi/Kingandole/249 should be shared equally. He also stated that he objected to Nicholas and Enrico getting a share, but had no objection to Christine getting 2 acres. He also said that there were 2 sets of boundaries, one set that had been fixed during the period of his growing up, and the other later by Kizito, he pitched for those fixed earlier. He stated that he was born in 1976, while his grandfather died in 1959. He said that Oundo was buried in Marachi/Kingandole/249. He said that Oundo died before land adjudication, and when that exercise was carried out, his land at Sikoma was registered in the name of Siril, as Oundo was dead, to hold in trust for the Oundo family. He said that he was the one speaking for the family of Oundo.
14. At the close of the oral hearings, the parties opted not to file written submissions, and invited me to make my determination based on the evidence on record.
15. This cause relates to the estate of the deceased herein, John Oduori Akwera. He died in 2003. He had 4 wives. The papers filed herein only document the sons of the deceased, and their number was said to be 7. There was no mention of daughters, and I find it hard to presume that the deceased did not have a daughter with any of his 4 wives. Before I can determine the confirmation application on its merits, that issue will have to be laid to rest first.
16. I raise this because the High Court is a court of law, established under *the Constitution*, specifically Article 165(1). As a court of law, it should apply the law. As a creature of *the Constitution*, it should uphold *the Constitution*, which creates it and vests it with jurisdiction. A court established under *the Constitution* cannot operate outside *the Constitution*, and act on or generate material that contravenes or is inconsistent with *the Constitution*.
17. The High Court is the principal court, for the purpose of enforcement of the Bill of Rights, going by Articles 23 and 165 of *the Constitution*. Article 27 of *the Constitution*, falls within the Bill of Rights, and provides for gender equality and neutrality. It asserts that every person is equal before the law, and has equal right to protection and benefit under the law. It asserts that equality refers to equal enjoyment of all rights. It goes on to assert that men and women have a right to equal treatment, in all spheres of life. The provision enjoins the State not to discriminate against any person, on any ground, including sex and marital status. It also asserts that a person shall not discriminate against another person, whether directly or indirectly, on any ground, including sex and marriage. The High Court, being a creature



of *the Constitution*, and exercising a mandate donated to it by *the Constitution*, must be sensitive to Article 27 of *the Constitution*.

18. Article 2 of *the Constitution*, asserts the supremacy of *the Constitution*. It declares that *the Constitution* is the supreme law in the Republic of Kenya. It is above everything else in the Republic, and, for that reason, it binds all person in Kenya, and all State organs, including the High Court. The validity or legality of *the Constitution*, or of any of its provisions, cannot be challenged by the court, obviously because the courts are themselves creatures of *the Constitution*, they cannot possibly challenge or entertain a challenge to their creator. Of particular significance to these proceedings is Article 2(4) of *the Constitution*, which declares that any law, including customary law, would be void, if it is inconsistent with or contradicts *the Constitution*. Similarly, any act or omission, by any person or State organ, including the High Court, which is in contravention of *the Constitution*, would be invalid.
19. What am I getting at? What Article 2(4) of *the Constitution* is stating is that anything that may be done by any person or even any court, which is not faithful to the principles of *the Constitution*, would be void or invalid. I have flagged the issue of the daughters of the deceased. The picture painted is that the deceased had 7 sons with his 4 wives, no daughters are mentioned. It could be that there were none. It could also be that he had daughters, but they have not been disclosed. If the deceased had daughters, and the said daughters were not disclosed in these proceedings, there would be a contravention of Article 27 of *the Constitution*, for the said daughters will not have been accorded the right to equal protection and benefit of the law, and will not have been treated equally. That contravention would bring the matter under the radar of Article 2(4) of *the Constitution*, which would mean 2 things. That these proceedings would be rendered invalid, should it be established that the administrators contravened Article 27 of *the Constitution*, by concealing the existence of the daughters of the deceased from the court, thereby treating them differently and denying them the right to the equal protection and benefit of the law. If this court endorses discriminatory treatment of the daughters of the deceased, by proceeding to confirm the grant herein, the non-disclosure and concealment notwithstanding, the act by the court would also be void and invalid.
20. The application of Articles 2(4) and 27 of *the Constitution* played out in succession proceedings, in *Wanjiru & 4 others vs. Kimani & 3 others* [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA), where the deceased had made a will, devolving his entire estate to his sons, and excluded his daughters. That happened before enactment of Articles 2(4) and 27. The daughters challenged the will at the High Court, before *the Constitution*, 2010, was promulgated, and the court held that the said will was valid, for it had been made in proper form, by a person of mature age, who was of sound mind. At the Court of Appeal, the decision came after Articles 2(4) and 27 had come into force. It was held that the High Court had arrived at the correct decision, in that the will was properly made under the relevant provisions of the *Law of Succession Act*, Cap 160, Laws of Kenya, and, therefore, it was valid according to that law. However, when Articles 2(4) and 27 were applied to it, it became invalid, for its terms contravened Article 27 of *the Constitution*, by discriminating against the daughters of its maker.
21. In view of the above, I do not wish to labour in vain, should it turn out that the deceased had daughters, who have not been disclosed and involved in this process. There would be discrimination, making the process invalid, and a waste of judicial time and effort. I do not want to take that route, for I would be perpetuating a contravention of *the Constitution*.
22. I have stated that the High Court is a court of law. I mean by it that it applies and interprets the law. These are succession proceedings. The law which governs them is the *Law of Succession Act*. The succession proceedings, that I preside over, sitting as a member of the High Court, must comply with the *Law of Succession Act* and the Rules made under it. Similarly, the decisions that I should make, at the end of the proceedings, must be in conformity with that law.



23. The deceased herein died in 2003, after the [Law of Succession Act](#) had come into force, on 1<sup>st</sup> July 1981. His estate fell for administration and distribution in accordance with the [Law of Succession Act](#). It does not fall under any of the exceptions allowed under that law. He died intestate, and Part V of the [Law of Succession Act](#) envisages, at sections 35(5) and 38, that his intestate estate should be shared equally amongst his children. The [Law of Succession Act](#) is gender neutral, and reference in it to children means both male and female children, or sons and daughters. There is no distinction, or discrimination, or differentiation. That would then mean that if the deceased herein had daughters, such daughters, or their progeny, would be entitled to a share in their father's estate. To distribute the estate herein without considering the daughters of the deceased would mean the High Court, a court of law, would not be acting in accordance with the law, the [Law of Succession Act](#).
24. Regarding the process, section 51 of the [Law of Succession Act](#) provides for applications for appointment as administrators. Under section 51(2)(g) of the [Law of Succession Act](#), where the deceased died intestate, it is required that there should be disclosure of all who survived him. The list in there refers to spouses, children, parents, brothers and sisters, and children of any child of the deceased then dead. Again, the [Law of Succession Act](#) is gender neutral, and so the reference to children in that provision includes both male and female, sons and daughters. So, if the deceased herein had daughters, and they were not disclosed, there would be a contravention of section 51(2)(1) of the [Law of Succession Act](#). Non-compliance with section 51(2)(1) would amount to proceedings to obtain the grant being defective, and it would also suggest fraud, misrepresentation and concealment of matter from the court. All these are fertile grounds for revocation of grant under section 76(a)(b)(c) of the [Law of Succession Act](#). Section 71(2)(a) of the [Law of Succession Act](#) empowers the court, at confirmation, to remove an administrator, whose grant was not rightly made to him, having regard to non-compliances with section 51(2)(g). What is my point? Sitting as a court of law, makes it my duty to ensure that the parties before me comply with the law in whatever they place before me, and that, when I get to decide the matter eventually, I would myself comply with the law.
25. The suppression or concealment of daughters in this cause is perhaps informed by customary law, which holds that daughters are not entitled to share in the estates of their parents. That is what customary law provides, but it does not apply here. Succession to the estate of an African, with property within Busia County, is governed exclusively by the [Law of Succession Act](#), by virtue of section 2(1) of the Act. There are exceptions, under the Act, which allow the application of customary law to some estates, but these exceptions do not apply to estates within Busia County. The customary law position mentioned above no longer holds, for it is discriminatory, and it offends Article 27 of [the Constitution](#), as it treats daughters differently, and that position is now void under Article 2(4) of [the Constitution](#), for being afoul of Article 27.
26. I believe that I have said enough to demonstrate that there could be a gap in the proceedings herein. If that gap is not filled, there is a real chance that these proceedings would be a wasted effort. To obviate these proceedings being rendered invalid, I hereby give time to the administrators, to make disclosures as to whether the deceased had daughters with his 4 wives. Towards that end, I hereby direct that affidavits be filed, within 30 days, disclosing the names of any such daughters, with each being placed in their respective houses. Where any daughter is deceased, but had children of her own, the said offspring should be disclosed by name. To ease and facilitate distribution, let the said daughters or the children of any of the dead daughters of the deceased file affidavits, indicating whether or not they renounce their rights. The matter shall be mentioned on 26<sup>th</sup> November 2024, for compliance and further directions.

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 4<sup>TH</sup> DAY OF OCTOBER 2024.**



**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Magina, instructed by Kibet Adoli & Magina, Advocates for the applicants.

Mr. Bogonko, instructed by Bogonko Otanga & Company, Advocates for Kizito Omondi Oduori.

Mr. Maloba, instructed by Hammerton Maloba & Company, Advocates for Chrisantos Ndubi.

Messrs. Odhiambo & Associates, Advocates for Siril Wekheye and Nicholas Oduya.

