



REPUBLIC OF KENYA



**In re Estate of Odhiambo Amuga Olaka (Deceased) (Succession Cause
88 of 2015) [2024] KEHC 11851 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11851 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 88 OF 2015

WM MUSYOKA, J

OCTOBER 4, 2024

IN THE MATTER OF THE ESTATE OF ODHIAMBO AMUGA OLAKA

(DECEASED)

RULING

1. On 10th November 2023, I delivered a ruling herein, wherein I postponed confirmation of grant, to allow the parties comply with Article 27 of the Constitution, so that the cause was not caught up in Article 2(4) of the Constitution, for the daughters of the deceased had not been disclosed nor involved in the confirmation application placed before me. The specific order made, on 10th September 2023, was that the parties were to disclose the daughters of the deceased. The matter was to be mentioned on 13th December 2023.
2. Come 13th December 2023, I was informed, by Mr. Jumba, that the deceased did not have daughters, according to Mr. Ashioya. I allocated the parties more time to comply. 2 affidavits were subsequently lodged into the record, one alleged that there were no daughters; the other claimed that the deceased had 4 daughters, some dead, some alive. I delivered a ruling on 19th April 2024, where I indicated that that was not enough, for there ought to have been a disclosure of the offspring, by name, of the daughters who had died, and that the consents, if any, of the said offspring be filed. I granted more time.
3. I was informed, on 25th June 2024, that the further affidavits had been filed. I see an affidavit by Hannington Ndubi and another by Sylvester Omondi.
4. I deduce from these affidavits that the deceased had 4 daughters: Margarita Olaka, Rose Adika, Kelesenthia Awino and Getruda Awor. Of the 4 only Getruda Awor is alive. Although I required, in my order of 19th April 2024, that the parties disclose the survivors of the dead daughters of the deceased, Silvester Omondi Asimo has declined to do so, asserting that the said daughters were all married. Getruda Awor, the surviving daughter, swore an affidavit on 28th February 2024, surrendering her share to Augustine Wesonga Odhiambo. Obiero Alek, the son of Rose Odinga, has surrendered his share to Augustine Wesonga Odhiambo. Hannington Ndubi swore an affidavit to disclose that he was a son of Kelesenthia Awino, and to indicate that he was ceding his share to Augustine Wesonga



- Odhiambo. Augustine Wesonga Odhiambo swore an affidavit disclosing that the late Margaret Olaka Ongoma and Kelesentia Awino were survived by children, whose names he did not disclose.
5. I believe there is now adequate material, although full disclosure was not made to the court, despite my very clear orders. I shall proceed to distribute the estate based on the information at hand.
 6. As indicated in my ruling of 10th November 2023, the deceased died in 1973, before the [Law of Succession Act](#), Cap 160, Laws of Kenya, came into force. The intestate estates of Africans dying then were subject to the then prevailing customary law. Under the [Law of Succession Act](#), section 2(2) in particular, the law and custom in force at the time of the death of such an individual would apply, but administration would be subject to Part VII of the Act. See [In Re: Kiiru Mubia "A"](#) [2002] eKLR (Rawal, J) and [Wangari Mburu v. Mary Wairimu Kamau](#) [2017] eKLR (Muigai, J). However, the parties hereto did not address me on the applicable customary law, nor attempt to demonstrate the content or substance of any customary law. In the absence of such information, the fall-back would be the intestacy law in Part V of the [Law of Succession Act](#). See [In re Estate of Kageto Gitome](#) (Deceased) [2018] eKLR (Muigai, J).
 7. In that ruling, I also indicated that the legal paradigm has shifted, with the promulgation of the new Constitution in 2010, which reinforced gender equality and neutrality, through Article 27, and provided that any law, including customary law, which was contrary to the principles and provisions, set out in that Constitution, and any act in contravention of the [Constitution](#), would be nullities. See [Wanjiru & 4 others v. Kimani & 3 others](#) (Civil Appeal 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA). That watered down the application of customary law, to estates of Africans who had died intestate before the [Law of Succession Act](#) came into force. It meant that all the children of the deceased would be equal before the law, regardless of the date of the death of their parent. That equality principle also finds expression in the [Law of Succession Act](#), in sections 35(5) and 38, where the children of the deceased are treated equally, or neutrally, regardless of their gender. See [Grace Wangari Mwaura & another v. Wanjiku Mwaura](#) [2003] eKLR (Rawal, J), [Ejidiob Njiru Mbinga v. Mary Muthoni Mbinga & another](#) [2006] eKLR (Khaminwa, J), [Naomi Watiri Githuku v. Naphtali Kamau Githuku & another](#) [2006] eKLR (Kooome, J), [In re Estate of Lameck Omwoyo](#) (Deceased) [2008] eKLR (Musinga J), [Mwongera Mugambi Rinturi & another v. Josephine Kaarika & 2 others](#) [2015] eKLR (Waki, Nambuye & Kiage, JJA), [Ludiah Chemutai Bett v. Joseph Kiproop Tanui](#) [2017] eKLR (M Ngugi, J), [In re Estate of Francis Waita Mbaki](#) (Deceased) [2018] eKLR (Muriithi, J), [Noorfatma Mobamed Haji Abdulla & another v. Aslam Mobamed Haji Abdulla](#) [2020] eKLR (A. Omollo, J). I shall distribute the estate herein with that in mind.
 8. The deceased herein was survived by 7 children, being 3 sons and 4 daughters. The sons were James Odhiambo, Augustine Wesonga and Philip Asimo Odhiambo. The daughters were Margarita Olaka, Rose Adika, Kelesentia Awino and Getruda Awor. Of the 7 children, only 2 are alive, Augustine Wesonga and Getruda Awor. The demise of a child of a deceased person does not extinguish their right to inherit, especially where the said dead child is survived by children.
 9. The deceased died possessed of Marachi/Ebukhalalire/344. When section 38 of the [Law of Succession Act](#) is applied, that asset should be distributed equally between the 7 children of the deceased. All the 7 had children. So, all the 7 should get shares. I was told that all the daughters were married. However, marriage, under the new dispensation, does not disentitle one to inheritance. If the fact of marriage of a daughter were to be made a disentitling factor to inheritance, then there would be discrimination, based on gender and marital status, which would be contrary to Article 27 of the [Constitution](#), and which would be an invalid act under Article 2(4) of the [Constitution](#). See [In re Estate of M'Itunga M'Imbutu](#) (Deceased) [2018] eKLR (Gikonyo, J), [In re Estate of Stanley Mugambi M' Muketha](#) (Deceased)



[2019] eKLR (Gikonyo, J) and *Wanjiru & 4 others v. Kimani & 3 others* (Civil Appeal 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA).

10. None of the beneficiaries, particularly the daughters have renounced their shares. Getruda Awor is alive, and she has indicated that her share should be given to Augustine Wesonga. Rose Odinga is deceased. She was survived by a son, Obiero Alek. Kelesentia Awino is also deceased. Hannington Ndubi is her son. Under section 41 of the *Law of Succession Act*, a grandson, whose own parent, being a child of the deceased is dead, steps into the shoes of his or her own parent, to take the share that would have gone to that child. See *In re Estate of Veronica Njoki Wakagoto* (Deceased) [2013] eKLR (Musyoka, J), *In re the Estate of Joseph Gichuki Riunge* (Deceased) [2016] eKLR (Musyoka, J) and *Martin Munguti Mwonga v. Damaris Katumbi Mutuku* [2016] eKLR (Thande, J). As Rose Odinga and Kelesentia Awino are dead, Obiero Alek and Hannington Ndubi have stepped into their respective shoes, by virtue of section 41 of the Act, to take the shares that would have devolved to their mothers. They have both elected to surrender those shares to Augustine Wesonga, by way of the principle of variation. The survivors of Margarita Olaka Ongoma were not disclosed, but it was disclosed that she was survived by children. Those children are entitled, under section 41, to take her share.
11. The configuration of the distribution shall be as follows. There having been 7 children, the distribution should be equal for the 7, at the ratio of 7:7, with each taking a single share. However, 3 of the beneficiaries have indicated that they have surrendered or ceded their entitlements to another. That would mean that that other, Augustine Wesonga shall be entitled to 3 additional units, over and above the 1 due to him.
12. The final orders shall, therefore, be as follows:
 - a. That I hereby confirm Vitalis Omondi, Augustine Wesonga Odhiambo and Sylvester Omondi as administrators of the estate of the deceased, for the purpose of completing administration, by transmission of the estate;
 - b. That Marachi/Ebukhalalire/344 shall be distributed as follows:
 - i. to the estate of the late James Odhiambo – 1/7 share,
 - ii. to Augustine Wesonga – 4/7 share,
 - iii. to the estate of the late Philip Asimo Odhiambo – 1/7 share, and
 - iv. to the estate of the late Margarita Olaka – 1/7 share, and;
 - c. that a certificate of confirmation of grant shall issue to the administrators in those terms;
 - d. that the administrators have 6 months, in accordance with section 83 of the *Law of Succession Act*, to transmit the estate in accordance with the certificate of confirmation of grant to be issued to them from these orders;
 - e. that the matter shall be mentioned after 6 months, on 24th April 2025, for confirmation of completion of transmission/distribution and administration, so that the court file can be closed;
 - f. that the shares devolved to the estates of the late children of the deceased shall be distributed in succession proceedings to be initiated in the names of the said dead children of the deceased;
 - g. that each party shall bear their own costs; and



h. that any party, aggrieved by these orders, has leave of 30 days, to move the Court of Appeal, appropriately.

13. It is so ordered.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 4TH DAY OF OCTOBER 2024.

W.M. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Jumba, instructed by Balongo & Company, Advocates for Augustine Wesonga Odhiambo.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for Silvester Omondi Asimo and Patrick Odhiambo Onyango.

