



REPUBLIC OF KENYA



In re Estate of Mathias Lukale Mwani (Deceased) (Succession Cause 421 of 2002) [2023] KEHC 819 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEHC 819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 421 OF 2002
PJO OTIENO, J
FEBRUARY 9, 2023**

BETWEEN

JACOB MUSENI PETITIONER

AND

DAVID KHAYIYA LUKALE 1ST OBJECTOR

HENRY SHILABIKO 2ND OBJECTOR

JUDGMENT

1. Mathias Lukale Mwani (“deceased”) died on April 25, 1994 and was, according to the initial petition and the introduction letter by the chief, Shibuye Location, dated September 9, 2002, survived by the following: -
 - a) Rita Shihayo Lukale- Wife (Deceased)
 - b) David Khayiya-Son
 - c) Andrew Lwigado-Son
 - d) Wilson Alusa- son
 - e) Jacob Musevi-Son
 - f) Henry Shilabika-Son
 - g) Anthony Chitila- son
 - h) Alfred Ambosa-Son
2. At the time of his death, the deceased was the proprietor of parcel of land known as Kakamega/ Shiakungu/648 measuring 12 acres (4.8 Ha).



3. Rita Shihayo Lukale the widow then petitioned this court for the grant of letters of administration for the estate of the deceased but died on April 16, 2007 before the grant could issue. From the onset, it would appear that the petitioner proceeded on the basis that only her sons were heirs. An application was made for her substitution as the petitioner leading to the appointment of Jacob Museni as the personal representative of the estate of the deceased *vide* a grant issued on November 27, 2014. The administrator sought to confirm the grant by an application dated September 15, 2014. The only alteration to the list of beneficiaries was the inclusion of one Rosemary Tsisika described as a daughter –in-law and a widow to Anthony Chitila, a son, who was then deceased. The application exhibited a consent to distribution by which all beneficiaries were to get an acre each save for the administrator who was to get two acres.
4. That application then provoked protests by David Khayiya Lukale and Henry Shilabiga. The gist of the protests was that the administrator was proposing to share out only eight acres yet the estate comprised twelve acres. It was also contended that the deceased had shared out the estate in his life time and established demarcation which subsists on the ground to date.
5. The protests then propelled the administrator to seek advice and to revise his proposal on mode of distribution in which all sons would get 1.5 acres each while the now disclosed four daughters would get 1.5 acres to share equally.
6. Over and above the affidavits, witness statements were equally filed by Andrew, Wilson and Jacob as well as two none members of the family, who described themselves as neighbours, and all asserted that he deceased had shared out the estate and placed demarcations for each of the sons but leaving a portion for himself and the wife. All, however, do not assign any share to the daughters.
7. The daughters also filed statements in which Odillia A Lukake and Anne Busolo asserted that the portion that was retained by the parents should, in accordance with the wishes of the mother, go to the girls but registered in the name of the name of Jacob Museni while Julieta Shimoli and Selfin Shinali proposed that the portion goes to the girls outrightly.
8. Even though the matter had been directed to proceed by way of *viva voce* evidence and evidence had been partly taken before Njagi J, the parties by consent recorded in court on May 31, 2022 agreed that the evidence so taken be expunged and matter be determined on the basis of the affidavit evidence filed and submissions.
9. Having perused at the affidavits and statements of the children of the deceased, the only issue for determination is how to distribute the estate among the agreed beneficiaries. In seeking to execute that mandate, I appreciate the proposal given by both sides to be that there were wishes expressed by the deceased and implemented by establishment of boundaries on the ground as shown by the sketch map exhibited in the affidavit of David Khayiya Lukale.
10. Wherever there is no consensus on how to share the estate among the beneficiaries, the court has the ultimate mandate¹ to decide the matter based on the principle of equality in sharing the estate however subject to any proved wishes of the deceased deemed just by the court.
11. In this matter all the girls, four brothers and two neighbours concur that the deceased expressed the wish to share his estate into eight and demarcated the eight portions, seven of which were assigned to each son and the eighth reserved for himself and the wife. On that wish of the deceased there appears to be no serious contestation. That proposal would however have been outrightly discriminatory for excluding the girls but the girls have ceded ground and agreed to share what was retained by the parents.

¹ Section 66, [Law of Succession Act](#)



That is the same spirit of consensus on whose basis the agreement between the two objectors must be respected so that that David Khayiya having agreed to cede part of his share to his brother Henry Shilabiga, will make Shilabiga get a bigger share.

12. While all sons agree that prior to the demise of the deceased, they were all allocated land with the deceased remaining with a portion which upon his demise was taken up by their late mother, those sons do not contest the position of the objectors and the daughters that in her life, their mother had wished that her share being the portion where her house with the deceased stood would go to the daughter. That is the proposal that would cure the prospects of the daughters being left out merely on the basis that they are girls. Such would be an affront to the prohibition against unequal treatment on account of gender.
13. While there is near consensus that the deceased showed his sons their respective shares and put demarcations, the sketch exhibited to court does not show what portion he retained for himself and the wife. That however does not negate the fact that all sons have determinate portions of the estate they occupy and work upon. All must know where the parents' house stood or continue to stand unless it has been destroyed. The court therefore elects to maintain the status quo prevailing, provided it provides for the area reserved by the deceased for himself and his wife. That portion shall be marked out and assigned to the daughters.
14. In departing from the principle of equality in distributing the estate, the court is guided by the agreed deceased's wishes and his right to give out his bounty in sole discretion. The Court of Appeal in *Beth Wambui & another v Gathoni Gikonyo & 3 others [1988] eKLR*, the Court of Appeal observed:-

“On the question of preference, it is a well known fact that parents give to their children according to their intimate relationship. Some children carry more burden of their parents than others. If a parent wishes to reward his or her child for such services through love and affection other children or members of the family have no right to question the deceased's right.”
15. For that reason, it is directed that the administrator shall within 30 days from today cause the estate land to be surveyed in accordance with the demarcations on the ground so that each son retains what he occupied before the mother died and the portion the parents retained for themselves be surveyed in favour of the daughters.
16. Mention on April 18, 2023 to record progress.
17. Being a family matter I make no order as to costs.

DATED AND SIGNED AT KAKAMEGA, THIS 9TH DAY OF FEBRUARY 2023.

PATRICK J O OTIENO

JUDGE

In the presence of:

No appearance for parties

Court Assistant: Polycap

