



REPUBLIC OF KENYA



**In re Estate of Ibrahim Sakwa Ambani (Deceased) (Succession Cause  
185 of 2001) [2023] KEHC 18391 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18391 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 185 OF 2001**

**WM MUSYOKA, J**

**JUNE 2, 2023**

**IN THE MATTER OF THE ESTATE OF IBRAHIM SAKWA AMBANI (DECEASED)**

**RULING**

1. What is for determination is a summons for confirmation of grant, dated June 21, 2021. It is brought at the instance of Shem Agide Osege. I shall refer to him as the applicant. He avers that the deceased died in 1998, and was survived by 3 children, Issa Ndunde Sakwa, Ahmed AB Kweyu and Omene Ambani Sakwa. Shem Agide Osege is listed as a dependant. The deceased is said to have died possessed of E. Wanga/Isongo/126, measuring 12 acres. It is proposed that E. Wanga/Isongo/126 be distributed as follows: Shem Agide Osege 3.125 acres or 1.25 Ha and Omene Ambani Sakwa 3 acres, with the balance or remainder being shared equally between Issa Ndunde Sakwa and Ahmed AB Kweyu. The application was filed contemporaneously with a Form 37, under Rule 40(8) of the *Probate and Administration Rules*, executed only by the applicant.
2. An affidavit of protest was filed herein, on November 24, 2021, by Issa Sakwa, sworn on November 22, 2021. I shall refer to him as the protestor. He is a child of the deceased. He describes the applicant as a stranger to the estate. He avers that the applicant had not demonstrated that he had bought land from the deceased. He states that a property was left out in the schedule for distribution, being E. Wanga/Isongo/2184. He avers that the deceased had been survived by 14 children, and not 3 as stated in the application. He names them as Issa Ndunde Sakwa, Ahmed AB Kweyu, Omene Ambani Sakwa, Button Muhammed Sakwa, Abubakar Ngala Sakwa, Ambani Sakwa, Zainabu Sakwa, Mwanaiti Sakwa, Amina Sakwa, Namukuru Sakwa, Chirusuwa Sakwa, Muyonga Sakwa, Njeri Sakwa and Boit Sakwa.
3. The application was canvassed orally, as per the directions given on November 23, 2021.
4. The oral hearing happened on February 17, 2022. The protestor was the first on the stand. He said that the deceased had 3 wives: Mwajuma Ibrahim, Arangi Injuri Ibrahim and Juma Ibrahim. Between them, the 3 wives, they had 14 children, 6 sons and 8 daughters. The deceased had 2 parcels of land, E. Wanga/Isongo/126 and 2184. He said that he did not recognize the applicant as a person beneficially entitled to a share in the estate, as he had not seen the sale transaction documents that he was relying



on. He stated that it was his elder brother who had brought him into the matter. He proposes that the property be shared out so that each of the sons get 2½ acres, with Ngala, Omene, Issa and Boit getting shares out of E. Wanga/Isongo/126, and Button 2½ acres and Omene 3 acres out of E. Wanga/Isongo/2184. He stated that he wanted the estate distributed as per Islamic law, as the deceased died a Muslim. He said that he would provide for his sisters.

5. The applicant testified on July 20, 2022. He stated that the deceased had sold to him 4 acres out of E. Wanga/Isongo/126. He said that the deceased died before he transferred the land to him. He said that he had a judgment against the estate, which he did not produce.
6. The protestor filed written submissions, the applicant did not. I have read through the written submissions, and noted the arguments made. In the written submissions, the protestor comes up with a proposal on distribution, which is different from what he had proposed when he testified orally. He proposes that Baton Muhammed Sakwa gets the whole of E. Wanga/Isongo/2184; Issa, Ahmed, Omene, Abubakr and Boit, each get 2 acres out of E. Wanga/Isongo/126; and Zainabu, Mwanaiti, Amina, Namukuru, Chirusuwa, Jane, Saituna, Muyonga and Njeri, all to share 2 acres, equally.
7. Parties should understand that written submissions are not the other name for applications and affidavits. Written submissions should carry nothing more than the arguments of the parties, based on what is articulated in the application and the affidavits. They are not a substitute for the application or the affidavit. They are not to be used to fill gaps in the affidavits and the applications. No new prayers should be introduced through written submissions. If a party desires to make fresh prayers, then they ought to file fresh applications. No new facts should be deposited in written submissions, precisely because written submissions are not affidavits, and whatever facts are carried in them would not be under solemn oath.
8. Confirmation of grant is provided for under section 71 of the *Law of Succession Act*, Cap 160, Laws of Kenya. Confirmation is of 2 items: appointment of administrators and distribution of the estate. The provision states as follows:

“71. Confirmation of grants

1. After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.
2. Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may-
  - a. if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
  - b. if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
  - (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or



- (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”

- a. if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
- b. if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

9. The applicant herein is not a child of the deceased. He claims to have had bought land from the deceased. Although he alleged that he had attached evidence of that sale transaction, I have not seen any such evidence. The affidavit, sworn in support, on 21<sup>st</sup> June 2021, has no annexures, and makes no reference to any annexure. At the oral hearing, he made no reference to any documents, and he produced none, as evidence of the alleged sale. Under section 3 of the Law of Contract Act, Cap 23, Laws of Kenya, an agreement or contract to dispose of an interest in land must be supported by some memorandum in writing, for it to be relied upon in court proceedings. Anyone coming to court, claiming to have bought land from another, ought to provide some evidence, in writing, that he did purchase such land. Without such evidence, I would have no basis whatsoever to find for the applicant.

10. The relevant portions of section 3 of the Law of Contract Act provides:

“3. Certain contracts to be in writing

- (1) ...
- (2) ...
- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
  - (a) the contract upon which the suit is founded—
    - (i) is in writing;
    - SUBPARA (ii)
  - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party ...”

11. Secondly, the claim by the applicant, that he bought the land, for which he has provided no evidence, was resisted, and has been under challenge for a long time. The probate court is not a land court, where rights to land can be asserted, agitated and determined. The mandate of the probate court is limited to distribution of property that is uncontested or which is said to be free. Where a dispute or contest arises, over the whole or a portion of the land, placed before the court for distribution, then the property



would not be free, and the court should not distribute it, until the dispute is resolved. That is the purport of Rule 41(3) of the [Probate and Administration Rules](#).

12. Rule 41(3) says:

“41. Hearing of application for confirmation

(1) ...

(2) ...

(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.

(4) ...”

13. My point is, as the applicant has always known that elements in the family of the deceased herein contest the alleged sale, then he should have placed that dispute before the appropriate court for determination of that issue. I cannot determine whether he has a right to that property here. One, because I sit as a probate court, and I can only deal with division of the free property of the deceased, where disputes are still not simmering. Two, sale of land is governed by the [Land Registration Act](#), No 3 of 2012, and the [Land Act](#), No 6 of 2012, both of which provide that the court with jurisdiction to deal with issues around land, inclusive of disposal of interests in land, is the Environment and Land Court, and empowered subordinate courts. Article 165(5) of the [Constitution](#) provides that the High Court shall have no jurisdiction over disputes that relate to title to land. Sale of property is about transfer of title to land, and a dispute around that is something that I cannot possibly have jurisdiction to determine, even if it is raised in probate proceedings. The applicant should have approached the Environment and Land Court, or the empowered subordinate courts, to agitate his rights there. Although he mentioned a judgement, he did not produce one.

14. Should I proceed under Rule 41(3) of the [Probate and Administration Rules](#), and appropriate and set aside the portion the applicant allegedly bought, to await determination of the validity of the alleged sale? The applicant has not demonstrated, by way of documentary evidence, that he executed any sale agreement with the deceased, which could form basis for determination by the Environment and Land Court or the empowered subordinate court. A *prima facie* case has not been made out of the existence of such a transaction, to warrant invocation of Rule 41(3) of the [Probate and Administration Rules](#). I shall proceed to consider distribution of the estate herein, without reckoning the applicant, for he has not provided any proof that he entered into some form of agreement for disposal of land with the deceased, and, in any event, I have no jurisdiction to purport to deal with that question.

15. On distribution, I am required to consider whether the persons beneficially entitled to a share in the estate have been ascertained, and, if they have, whether the shares due to them have been ascertained too. See [In the Matter of the Estate of Ephraim Brian Kawai \(Deceased\)](#), Kakamega High Court Succession Cause Number 249 of 1992 (Waweru, J) (unreported), [In Re Njoroge Mbote](#) [2002] eKLR



- (Khamoni, J), *In re Estate of Gaiitho Kimani (Deceased)* [2021] eKLR (Meoli, J) and *In Re Estate of Samson Amasini Adeya (Deceased)* [2022] KEHC 14839 (KLR)(Musyoka, J).
16. On ascertainment of the persons beneficially entitled, I note that the protestor has placed before me a long list of the sons and daughters of the deceased. He has also indicated who amongst them have passed on. So, I shall take it that there has been an appropriate ascertainment of the persons beneficially entitled to a share in the estate.
  17. On ascertainment of the shares due to the persons who have been ascertained as beneficially entitled to a share in the estate, I note that there are problems. The protestor does not appear to have a clear stand on the matter. At the oral hearing, he asserted that the estate should be distributed amongst the sons, so that each takes 2½ acres. He did not mention the daughters in that mode of distribution. Then when he filed written submissions, he made another proposal, bringing in the daughters, and allocating to them 2 acres, to be shared amongst all of them. The question is, which of these 2 proposals does he go by?
  18. Related to that is the law which should apply to these proceedings. I raise this because the deceased bears a Muslim name, and I suspect that he probably died a Muslim. When I asked the protestor about the law at the oral hearing, he said he wanted the estate to be subjected to Islamic law. He did not present any of his brothers and sisters to express their views on the matter. It is not for him to make those decisions for them. Section 2(3)(4) of the *Law of Succession Act* applies Muslim law to estates of Muslims. However, it would appear that there is room for parties to opt out of Muslim law, and to also choose between filing cases at the Kadhi's court and at the High Court. See *Saifudean Mohamedali Noorbhai vs. Shebnaz Abdehusein Adamji* [2011] eKLR (Bosire, Onyango-Otieno & Visram, JJA) and *CKC & another (suing through their mother and next friend JWN) vs. ANC* [2019] eKLR (Karanja, Musinga & M'Inoti, JJA). I raise this issue as choice of law has implications on how an estate is distributed. Under both Muslim law and the *Law of Succession Act*, there is no exclusion of daughters, unlike under African customary law, they are entitled to shares in their father's estate. However, the mode of distribution is different, for under Muslim law, daughters get lesser than the sons, so there is some measure of discrimination. See *Juma bin Mwenyezagu vs. Mwenye bin Abdulla* [1897-1905] 1 EALR 95 (Hamilton, J) and *In re Estate of Salim Juma Hakeem Kitendo (Deceased)* [2022] eKLR (Onyiego, J). Under the *Law of Succession Act*, it is envisaged that the estate is distributed equally between sons and daughters. The discrimination under Muslim law is tolerated under the *Constitution* of Kenya, by dint of Article 24(4). See *CKC & another (suing through their mother and next friend JWN) vs. ANC* [2019] eKLR (Karanja, Musinga & M'Inoti, JJA). Where the parties choose Muslim law, then the estate ought to be distributed in accordance with the Qur'anic principles, and daughters have to be provided for; where the parties elect to go by the *Law of Succession Act*, the provisions of Part V, for the purposes of this case, must be adhered to, where sons and daughters are treated equally.
  19. It would appear that the protestor assumes that customary law applies, hence his proposal at the oral hearing, no provision was going to be made for the daughters. Unfortunately for him, African customary law is of no application at all in this matter. The deceased died in 1998, after the *Law of Succession Act* had come into force in 1981. Section 2(1) ousts application of customary law to estates of Africans who died after July 1, 1981. With respect to intestate succession, sections 32 and 33 provide some window for application of African customary law, unfortunately that only covers some parts of the country, which do not include Kakamega. So, if what the protestor had in mind was customary law, he should understand that, that customary law does not apply to the distribution of the estate of his father. Even if customary law were to apply, but it does not, then the protestor will have to grapple with Article 2(4) of the *Constitution*, which renders any law, including customary law, which violates the *Constitution*, null and void, and any act, which is inconsistent with the *Constitution*, to be a nullity. Discriminating against daughters, because of their gender, or on account of their being women, violates



- Article 27 of the [Constitution](#), and that renders customary law null and void, and of no application. A proposal to divide an estate in a manner which is discriminatory, renders the proposal a nullity too.
20. In the proposals carried in the written submissions, much as I deplore the practice of such proposals being placed before the court in that manner, the protestor has not indicated whether he made them relying on Muslim law or the [Law of Succession Act](#). If he made them under Muslim law, he did not demonstrate whether or not they met the standard in the Quran, for he cited no Qur'anic verses, nor cited authoritative scrolls by Muslim scholars, or persuasive caselaw. The proposals are discriminative against the daughters, but that is permitted by the [Constitution](#), the portions allocated to the daughters, if Muslim law applies, should not be less than what the Qur'anic principles provide. If the proposals are purported to be made under the [Law of Succession Act](#), then the protestor should understand that they fall short, for the law provides for the estate to be distributed equally between the sons and daughters of the deceased, or equally between both the male and female children of the deceased. Any proposal on distribution, which discriminates against the daughters, because they are women, or because of their gender, is rendered a nullity by 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 vs. Kimani & 3 others](#) (Civil Appeal 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA).
21. Which law should I apply here, as between Muslim law and the [Law of Succession Act](#)? The parties herein opted to initiate these proceedings at the High Court, rather than at the Kadhi's court. These proceedings were initiated in 2000/2001, and have been maintained by the parties, at the High Court, all through. That presupposes that the parties did not desire to distribute the estate under Muslim law, for if that was their intent, they would have moved the Kadhi's court. I am persuaded that they intended to distribute the estate in accordance with the [Law of Succession Act](#). Distribution under the [Law of Succession Act](#) envisages equal distribution to all, including to daughters. The Act is gender neutral. There is room for departure, though, from the distribution envisaged under Part V. However, that would require the persons beneficially entitled executing consents to get less than what the act provides, or to get nothing at all. See [Justus Thiora Kiugu, & 4 others vs. Joyce Nkatha Kiugu & another](#) [2015] eKLR (Visram, Koome & Otieno-Odek, JJA) and [In re Estate of Juma Shiro \(Deceased\)](#) [2016] eKLR (Mwita, J). No consents or renunciations of that sort have been filed here. The protestor did not avail his siblings to state their case before me. The courts have stated that the mere fact that daughters do not attend court to stake a claim to a share in the estate of their father does not mean that they have abandoned their right, or that such right would be extinguished or diminished. The law has allocated to them a share, and that share they must get, whether they come to court or not. See [Christine Wangari Gichigi vs. Elizabeth Wanjira Evans & 11 others](#) [2014] eKLR (Emukule, J) and [In re Estate of Joyce Kanjiru Njiru \(Deceased\)](#) [2017] eKLR (Gitari, J).
22. Section 2(1)(2)(3)(4) of the [Law of Succession Act](#) provides:
- “2.
- Application of Act
- (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.



2. The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed
  - (3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of this death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.
  - (4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1<sup>st</sup> January, 1991.”
23. The proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the Probate and Administration Rules state as follows:
- “Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”
- “Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined”
24. The relevant portions of Articles 2 and 27 of the *Constitution* state as follows:
2. Supremacy of this *Constitution*
    - (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
    - (2) ...
    - (3) ...
    - (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
    - (5) ...”
  - “27. Equality and freedom from discrimination
    - (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
    - (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
    - (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.



- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) ...”

25. The deceased was survived by children only, and the estate falls, therefore, for distribution under section 38 of the *Law of Succession Act*. The estate shall devolve upon the children equally. The entitlement or share of a child who dies before distribution is undertaken is not extinguished, so long as he or she has children, and such share or entitlement passes under section 41. Sections 38 and 41 provide as follows:

“38. Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

“41. Property devolving upon child to be held in trust

Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”

26. Before I make final orders, I must state that confirmation of grant is not just about distribution, it is also about administrators. I have found that the applicant has not established his right or entitlement to a share in the estate of the deceased, for the reasons given above. Consequently, he cannot continue to be administrator of the estate herein. I shall, therefore, revoke the grant made to him on May 18, 2021, and make fresh appointments.

27. The final orders are as follows:

- a. That I hereby revoke the grant made herein, on May 18, 2021, to Shem Agida Osege, and I appoint Issa Ndunde Sakwa and Ahmed AB Kweyu, administrators of the estate, and direct that a grant of letters of administration intestate be issued to them;
- b. That I hereby confirm the grant that I have made in (a), above, so that E. Wanga/Isongo/126 and 2184 shall devolve upon Issa Ndunde Sakwa, Ahmed AB Kweyu, Omene Ambani Sakwa, Button Muhammed Sakwa, Abubakar Ngala Sakwa, Ambani Sakwa, Zainabu Sakwa, Mwanaiti Sakwa, Amina Sakwa, Namukuru Sakwa, Chirusuwa Sakwa, Muyonga Sakwa, Njeri Sakwa and Boit Sakwa, in equal shares;



- c. That a certificate of confirmation of grant shall issue accordingly;
- d. That if any of the children of the deceased are dead, their share shall devolve upon their estate, to be distributed in proceedings mounted under their names;
- e. That each party shall bear their own costs; and
- f. That any party aggrieved, by the orders made herein, has leave of 30 days, to move the Court of Appeal, appropriately.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 2<sup>ND</sup> DAY OF JUNE 2023**

**WM MUSYOKA**

**JUDGE**

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Mango, instructed by DSG Mango & Company, Advocates for the administrator.

Mr. Tanui, instructed by Samba & Company, Advocates for the protestor.

