



REPUBLIC OF KENYA



**In re Estate of Mulindo Erema (Deceased) (Succession Cause  
545 of 2001) [2023] KEHC 20339 (KLR) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20339 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 545 OF 2001**

**WM MUSYOKA, J**

**JULY 21, 2023**

**IN THE MATTER OF THE ESTATE OF MULINDO EREMA (DECEASED)**

**RULING**

1. I delivered a judgment herein on 4 the February 2022, where I declined to confirm the grant, and postponed the summons for confirmation of grant, dated December 9, 2009. I directed the applicants to do a number of things, to bring the application into compliance with the proviso to section 71(2) of the [Law of Succession Act](#), Cap 160, Laws of Kenya, and Rule 40(4) of the [Probate and Administration Rules](#).
2. I required the applicants to do 3 distinct things. One, to file a further affidavit, disclosing all the survivors of the deceased, regardless of gender, according to the house to which they belonged, and indicating the share in the estate to which each one of them was entitled. Two, any survivor, male or female, not keen on taking up their share, to file a renunciation of the share due to them. three, A copy of the green card for Kakamega /Lukume/ 357 to be placed on record.
3. A number of affidavits have been placed on record, in purported compliance with those directions.
4. Stanley Mwangala filed one on April 12, 2022, sworn on even date. He discloses that the deceased had 6 wives, namely the late Asati Nekesa, the late Philister Barasa, the late Fatuma Khayumbi, the late Mwanaisha Nekesa, the late Mwariamu Asifa and the late Sania Nanjala. All of them had children, according to him. The children of the late Asati Nekesa were the late Ranson Mwangala, the late Noah Wanjala and Rael Nerima Hosea. The children of the late Philister Barasa are Alima Makokha and Charles Mulindo. The children of the late Fatuma Khayumbi are the late Simon Makhupe, Ariton Siminyu Mulindo and Musa Mulindo. The children of the late Mwanaisha Nekesa are Ibrahim Wanjala Mulindo, Ismael Wawire, the late Shaidu Wanyama and Naswa Mulindo. The children of the late Mwariamu Asifa Asmin Nawire, Naututu Mulindo, Naoba Mulindo, Saina Mulindo and Afisa Mulindo. While the children of the late Sania Nanjala are the late Nura Mulindo, Zainab Mulindo and Nafula Mulindo.
5. He has also detailed the children of the dead children of the deceased. In other words, the grandchildren of the deceased. The late Ranson Mulindo was survived by 9 sons and 11 daughters. The late Noah



- Wanjala Mulindo was survived by 25 children. The late Simon Makhupe was survived by a widow and an undisclosed number of children. The late Shaidu Wanyama was survived by 2 widows, and an undisclosed number of children. The late Afisa Mulindo was also survived by an undisclosed number of children. The late Nura Mulindo had 1 child, Ali Rashid Mukhenge.
6. He avers that the deceased died possessed of South Kabras/Lukume/342 and 357. He proposes that since the daughters of the deceased are happily married, they should be given 2 acres, to be shared equally between them, and the remainder of the acreage to be shared equally amongst the sons.
  7. He has attached copies of green cards for South Kabras/Lukume/357, and states that the same demonstrates that South Kabras/Lukume/960, registered in the name of the late Ranson Mwangala Mulindo, and South Kabras/Lukume/962, registered in the name of the late Noah Wanjala Mulindo, were not hived off South Kabras/Lukume/357.
  8. The next affidavit is sworn by Ibrahim Wanjala Mulindo, and was filed herein on November 21, 2022. He avers that the estate comprises of 5 houses, of Asati Mulindo, Fatuma Mulindo, Mwanamisi Mulindo, Mariamu Mulindo and Sania Mulindo. The 1<sup>st</sup> house, of Asati Mulindo, comprises of Ranson Wanjala Mulindo, Noah Wanjala Mulindo and Rael Nelima Mulindo. The 2<sup>nd</sup> house, of Fatuma Mulindo, comprises of Simon Makhube Mulindo, Ariton Siminyu Mulindo and Musa Mulindo. The 3<sup>rd</sup> house, of Mwanamisi Mulindo, comprises of Ibrahim Mulindo, Ismael Wawire Mulindo, Shadu W. Mulindo and Naswa Mulindo. The 4<sup>th</sup> house, of Mariamu Mulindo, comprises of Asmin Mulindo, Natutu Mulindo, Saina Mulindo, Rehema Naova Mulindo and Afisa Mulindo. The 5<sup>th</sup> house is of Sania Mulindo, and comprises of Sainabu Mulindo and Hellen Afula Mulindo. He states that the deceased also had a daughter, known as Alima Nakhungu Mulindo, whose mother he did not know, and who was never married to the deceased.
  9. He avers that the late Simon Makhure Mulindo was survived by a widow and children. The late Shadu Wanyama Mulindo was survived by 2 widows and children. The late Nura Mulindo was not survived by offspring.
  10. On distribution, he states that the late Ranson Mwangala Mulindo had benefited from an *inter vivos* distribution, in that the deceased had gifted and registered in his name, South Kabras/Lukume/960, measuring 7.4 acres, and for that reason, his estate ought not participate in the distribution of the remaining properties. He also states that Noah Wanjala Mulindo had been settled during the lifetime of the deceased, for South Kabras/Lukume/962, measuring 7 acres, was registered in his name. He proposes that the Simon Makhupe Mulindo, Ariton Simiyu Mulindo and Shadu Wanyama Mulindo should each get 6.5 acres out of South Kabras/Lukume/357. He proposes that Naswa Mulindo, Asmin Mulindo, Asha Namututu Mulindo, Saina Mulindo, Raema Naova Mulindo and Afisa Mulindo should get ½ acre each out of South Kabras/Lukume/357, and so should all the daughters in the 5<sup>th</sup> house. He proposes that Musa Mulindo, Ibrahim W. Mulindo and Ismael Wawire Mulindo should get 6.5 acres each out of South Kabras/Lukume/342. He asserts that all the sons are getting 6.5 acres each, except for the 2 eldest sons, Ranson Mwangala Mulindo and Noah Wanjala Mulindo, who were given 7.5 acres by the deceased during his lifetime, and the daughters who should get ½ acre each.
  11. There is another affidavit, signed and sworn by Amilah Naswa Okwaro, Asha Namututu, Joyce Sinapu Elima, Mary Mulindo Makhupe, Selina Nanyama, Alim Nakhungu Mulindo and Hellah Nafula Wawire, on November 11, 2022. They are daughters of the deceased, and support the proposals made by Ibrahim Wanjala Mulindo. They aver that the late Ranson Mwangala Mulindo and Noah Wanjala Mulindo benefited from inter vivos transfers from the deceased, and urge that they should not get more land. They aver that the sons who were not given land should be the ones to benefit from the remaining



- land, South Kabras/Lukume/342 and 357, with each getting 6.5 acres, and that they, as daughters, were satisfied with the 0.55 acres allocated to them.
12. There are written submissions by the administrators. They urge that the estate be shared out in the manner that they have proposed. They submit that no evidence was adduced to demonstrate that the registration of South Kabras/Lukume/960 and 962, in favour of Ranson Mwangala and Noah Wanjala Mulindo, respectively, was as gifts inter vivos, to them, from the deceased.
  13. The deceased herein died intestate, on August 17, 1998, long after the [Law of Succession Act](#) had come into force on 1<sup>st</sup> of July 1981. The estate is to be distributed strictly in accordance with the [Law of Succession Act](#). I stated in my judgment of February 4, 2022, that section 40 would apply, and I had set out, verbatim, what that provision states. The effect of it is that the estate is firstly distributed amongst the houses, proportionate to the number of children in each house, with any surviving widow being treated as an additional unit to the house to which she belongs. After that the share of each house is distributed within the house, depending on the configuration of the house. If the house comprises a surviving spouse and her children, the property would be distributed according to section 35 of the [Law of Succession Act](#), so that the property devolves to the surviving spouse during life interest, and thereafter, upon determination of the life interest, to the children in equal shares. Where the house comprises of a surviving spouse, who has no children, the share would devolve in the manner set out in section 36, so that the surviving spouse takes the first Kshs 10, 000.00 or 10% of the share, whichever is greater, and holds the life interest on the remainder, to devolve thereafter according to section 39 of the [Law of Succession Act](#), in the event of the determination of the life interest. Where the house comprises of children only, then section 38 will apply, where the share in that house is to be divided equally amongst the children.
  14. Perhaps I should say something about children. The [Law of Succession Act](#) is gender neutral. It does not categorize children into sons and daughters, or male and female. It treats them equally. That would mean then reference to children in the Act would be reference to both male and female, sons and daughters. Children should not be read to mean sons or male offspring. Likewise, the Act does not distinguish between married and unmarried children. They are all treated equally, regardless of their marital status.
  15. In addition to the provisions of the [Law of Succession Act](#) on children, the provisions of the [Constitution](#) are also relevant. Article 27 of the [Constitution](#) outlaws discrimination based on gender. It commands that men and women are to be treated equally in all spheres of life, including in succession and inheritance. That means that there ought to be no differential treatment of women when it comes to these matters. Article 27 should be read together with Article 2(4) of the [Constitution](#). Two points are made in that Article. The first is that any law, including customary law, which is inconsistent with the [Constitution](#), is void, to the extent of the inconsistency. Customary law is notorious for discriminating against women, and I take judicial notice of the fact that it excludes women from inheriting from the estates of their late fathers, particularly on the grounds of gender and marriage. I see in the proposals made here that the daughters are being treated differently, where puny allocations are being made to them, on the basis that they are happily married and settled. The [Constitution](#) and the [Law of Succession Act](#) do not qualify entitlement of daughters to a share in their fathers' estates on the basis of being happily married. The skewed proposed distribution is inconsistent with Article 27 of the [Constitution](#). Secondly, any act or omission in contravention of the [Constitution](#) is invalid. Proposing a distribution of an estate is an act. As indicated above, proposals that are discriminative against daughters, just because they are women and are married, is an act which contravenes Article 27 of the [Constitution](#), and that act is invalid. The effect of it is that the proposals placed before me, by the administrators and by Ibrahim Mulindo are invalid.



16. From the affidavits filed, it emerges that all the wives of the deceased are dead, and so the estate shall principally be distributed in accordance with section 38. Some of the children of the deceased are themselves dead. In such case, I should either apply section 41 of the *Law of Succession Act*, where the children of the dead children step into the shoes of their dead parents, to take the share that their dead parent would have been entitled to. The other option would be to devolve the share or entitlement of the dead child to the estate of that child, to be distributed in a succession cause to be initiated in the name of that child. I would prefer devolution to the estate of the dead child, for I have no way of telling whether there are other claimants to that share, being either other spouses or children not disclosed in these proceedings, or creditors of the estate of that dead child. Such persons would be disadvantaged, should that share be devolved directly to the grandchildren.
17. Have the persons beneficially entitled to a share in the estate of the deceased been ascertained and identified? There is concurrence on 5 of the wives of the deceased and their children. The administrators, however, talk of a 6<sup>th</sup> wife, identified as the late Philister, the mother of Alima Makokha and Charles Makokha. The interest agitated before me was of Charles Makokha. The administrators assert that he was a son of the deceased, and is entitled to a share. The other parties say that they did not know him. So, who should I believe? The administrators are grandchildren of the deceased, while the other side comprises of their uncles, the children of the deceased. The uncles called a paternal cousin of the deceased, Protus Wanjala Masai, as a witness. He said that the deceased had 5 wives, and that he did not know Charles Makokha. Between the grandchildren of the deceased and the cousin of the deceased, I would go with the cousin. He was more likely to know the composition of the family of his cousin, that the grandchildren of the deceased. The Chief, Zacharia Injendi, who also testified, said that he did not know Charles Mulindo. Charles Mulindo himself did not come forward to claim a share in the estate. So, I shall take it as a fact that the deceased had married 5 times, and had the children whose names are set out against the names of the 5 wives, in the affidavits of Stanley Mwangala and Ibrahim Mulindo.
18. Should all the children identified from the 5 wives be entitled to a share? Ibrahim advances the theory that the first 2 sons of the deceased, Ranson and Noah, should not get a share of the assets that are available for distribution, as they had benefited during the lifetime of the deceased from inter vivos distribution. It is argued that during land adjudication, as the deceased was getting registered as proprietor of South Kabras/Lukume/342 and 357, the 2 also, at the same time, got registered as proprietors of South Kabras/Lukume/960 and 962. Do I have evidence of an inter vivos distribution? I do not think so. It was merely argued that they were adults at the time land adjudication and registration happened, and that the deceased must have had his land directly registered in their names, as they were married by then, and that the land belonged to the father of the deceased. Beyond that no other evidence was led to support that contention. The cousin of the deceased, who I believe would know better, testified that these 2 got the land before land demarcation and adjudication. I have no concrete evidence that South Kabras/Lukume/960 and 962 originated from the deceased, to warrant being treated as gifts inter vivos from him to the 2 sons, to justify their exclusion from the distribution of South Kabras/Lukume/342 and 357.
19. How am I to deal with the affidavit sworn by the daughters, allegedly to accept a lesser share, as proposed in the affidavit of Ibrahim Mulindo? The affidavit by the daughters supports a mode of distribution, by Ibrahim Mulindo, that I have found and held, hereabove, to be invalid, for being in contravention of Article 27 of the *Constitution*. That being the case, the affidavit by the daughters cannot stand.
20. So, how is the estate to be distributed? I held in the judgment of February 4, 2022, that section 40 applies, as the deceased died a polygamist. South Kabras/Lukume/342 and 357 shall be initially shared



out between the 5 houses, proportionate to the number of children in each house. The 1<sup>st</sup> house had 3 children, the 2<sup>nd</sup> house 3, the 3<sup>rd</sup> house 4, the 4<sup>th</sup> house 4, and the 5<sup>th</sup> house 3. The ratio of distribution should work out to 3:3:4:4:3, making a total of 17. The 2 parcels of land shall, therefore, be divided into 17 units to be shared out amongst the 5 houses in that ratio. Thereafter, the share or units devolved to each house shall be distributed in accordance with section 38 of the Law of Succession Act, for each of the 5 houses are comprised of children but no surviving spouse.

21. The final orders are as follows:

- a. That the grant made to Stanley Mwangala, Wilfred Wechuli and Boaz Wanyama, on March 14, 2016, is hereby confirmed;
- b. That the assets of the estate, South Kabras/Lukume/342 and 357, shall devolve to the 5 houses of the deceased in the ratio of 3:3:4:4:3;
- c. That the share due to each of the 5 houses shall thereafter devolve upon the children in each house, including daughters, equally;
- d. That a certificate of confirmation of grant shall issue, accordingly;
- e. That the share due to any child of the deceased, who is dead, shall devolve upon the estate of the dead child, to be distributed in succession proceedings, to be initiated in the name of the dead child;
- f. That any of the daughters of the deceased, who does not desire to take the share due to them, is at liberty to surrender the same to any of her brothers, or to otherwise deal with it as she shall please;
- g. That the administrators have 6 months from the date herein, by dint of section 83(g) of the Law of Succession Act, to transmit the estate in terms of the orders above, and to complete administration of the estate herein;
- h. That the matter shall be mentioned, after 6 months, to confirm transmission of the estate, and completion of the administration, so that the court file herein can thereafter be closed;
- i. That each party shall bear their own costs; and
- j. That any party aggrieved, by the orders made herein, has leave of 30 days, to move the Court of Appeal, accordingly.

22. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 21<sup>ST</sup> DAY OF JULY 2023**

**WM MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Appearances**

**Mr. Munyendo, instructed by Oscar Wachilonga & Company, Advocates for the administrators.**

**Mr. JJ Mukavale, Advocate for the protestors.**

