



In re Estate of Raphael Katsemba Limolwa (Deceased) (Succession Cause 632 of 2007) [2023] KEHC 20579 (KLR) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 632 OF 2007**

WM MUSYOKA, J

JULY 21, 2023

RULING

1. Administrators were appointed herein on February 23, 2022, and a grant of letters of administration intestate issued, on even date. A summons for confirmation of grant was then filed on May 12, 2022, by one of the administrators, Fanuel Okulo Katsemba, dated May 11, 2022. He identifies the survivors of the deceased as the late Festo Mbinji Katsemba, the late Samson Oyamo, Solome Nyangasi, Phanice Ukwisa, Fanuel Okulo, Aggrey Omulando, Starical Omuravi and the late Luciana Ejarega. He identifies 2 assets as available for distribution: Kakamega/Mautuma/85 and Bunyore/Ebunangwe/860. He proposes that Kakamega/Mautuma/85 should devolve upon Fanuel Okulo Katsemba, Aggrey Omulando and Starical Omuravi equally; while Bunyore/Ebunangwe/860 should devolve upon Martha Mbinji Katsemba and Trufosa Awinja Oyamo equally. I shall hereafter refer to Fanuel Okulo Katsemba as the applicant.
2. Martha Mbinji Katsemba and Trufosa Awinja Oyamo have protested. They aver to be widows of the late Festo Mbinji Katsemba and the late Samson Oyamo. Their complaint is that the land being allocated to them, Bunyore/Ebunangwe/860 was just some 0.7 acres, while the administrator and the other 2 have allocated to themselves the larger piece, Kakamega/Mautuma/85, measuring 12.75 acres. They say that the 2 parcels of land should be shared equally between all of them. I shall refer to the 2 as the protestors.
3. The matter was disposed of by way of oral evidence.
4. Aggrey Mulando Katsemba was the first to testify. He said that the deceased had 8 children. He stated that the deceased had 3 parcels of land, Kakamega/Mautuma/85 and Bunyore/Ebunangwe/860, and another whose details were not given. He said that the other piece of land was given to the late Samson Oyamo. The said Samson Oyamo was said to have had sold the land given to him by the deceased, and bought another, where his remains were buried after he died. He said that they had sat and agreed on settling a loan that the deceased had taken to buy the land. He said that the husbands of the 2 protestors attended the meeting, but did not contribute the money for repaying the loan, although they were party to the agreement that the property be shared out as proposed by the applicant.



5. Martha Nyaloya Mbinji testified next. She said that the deceased had only 2 parcels of land, which were not equal. She proposed that the 2 pieces of land be put together and distributed equally. Truphosa Awinja Oyamo followed. She said the piece allocated to her and the other protestor was too small. She stated that her late husband had bought land at Lugari, where she lived, and where her husband was buried. She said she was unaware of any land that was sold. She said that she was aware that the land at Mautuma had a loan, which was settled by the applicant.
6. There is no dispute on the survivors of the deceased. The dispute centres around the distribution. The sons argue that the protestors husbands had been allocated Bunyore/Ebunangwe/860 by the deceased, while Kakamega/Mautuma/85 was meant for them. The protestors aver that they are not aware of that, and Bunyore/Ebunangwe/860 is just too small compared with Kakamega/Mautuma/85. Was there some sort of distribution during lifetime by the deceased of his lands amongst some of the sons? I have not seen evidence of that. The applicant alleges that the husbands of the protestors had conceded to Kakamega/Mautuma/85 being left for the 3 sons who are now alive. That allegedly happened after the demise of the deceased. Some handwritten record was placed on record. It was denied by the protestors. It comprises of photocopies. No independent witness was called to authenticate the said documents, and the meetings they were supposed to support.
7. There is no material upon which I can hold that there was inter vivos settlement of the husbands of the protestors by the deceased. I also have no authentic material before me, which establishes that the husbands of the protestors had agreed to let the applicant and his 2-surviving brothers would take Kakamega/Mautuma/85, to their exclusion.
8. I note from the letter of the Chief of Mautuma Location, of December 8, 2006, that the deceased had 3 daughters: Solome Nyangasi, Phanice Okwisa and Lucy Ejaleka. They are listed in the petition as such. However, they have not been featured in the confirmation proceedings. I have not seen any Form 37 signed by them, or any renunciation by them or their successors.
9. The deceased herein died intestate, on November 12, 1990, long after the [Law of Succession Act](#), Cap 160, Law of Kenya, had come into force on July 1, 1981. The estate is to be distributed strictly in accordance with the [Law of Succession Act](#). 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.
10. 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, they are completely excluded, and there is no mention of them at all with respect to distribution. The proposed distribution, which completely excludes the daughters of the deceased, 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, a proposal



that is discriminative against daughters, to the extent that it makes no provision for them, 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 both sides, are invalid.

11. Should I proceed to distribute the estate nevertheless? The law provides that daughters of the deceased are entitled to a share in the estate, and I shall allocate to them their due shares, for they have not renounced them. At this stage, the deceased is survived only by children. No life interest arises. Section 38, which provides for equal distribution amongst the children, regardless of their gender or marital status, is the applicable provision on distribution.
12. The final orders are:
 - a. That the grant made to Fanuel Okulo Katsemba and Maritha Nyaloya Mbinji Katsemba, on February 23, 2022, is hereby confirmed;
 - b. That the assets of the estate, Kakamega/Mautuma/85 and Bunyore/Ebunangwe/860, shall devolve equally to Fanuel Okulo Katsemba, Aggrey Omulando, Starical Omuravi, the late Festo Mbinji Katsemba, the late Samson Oyamo, Solome Nyangasi, Phanice Okwisa and the late Luciana Ejarega;
 - c. That a certificate of confirmation of grant shall issue, accordingly;
 - d. 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;
 - e. 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;
 - f. That the administrators have 6 months from the date herein, by dint of section 83(g)(i) of the Law of Succession Act, to transmit the estate in terms of the orders above, and to complete administration of the estate herein;
 - g. 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;
 - h. That each party shall bear their own costs; and
 - i. That any party aggrieved, by the orders made herein, has leave of 30 days, to move the Court of Appeal, accordingly.

13. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 21ST DAY OF.....JULY.....2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Athung'a, instructed by Athung'a & Company, Advocates for the applicant.

Maritha Mbinji Katsemba and Truphena Awinja Oyamo, the protestors in person.



