



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Estate of the Late Ayub Wakhanu (Deceased) (Succession Cause
749 of 2011) [2025] KEHC 15881 (KLR) (4 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 15881 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 749 OF 2011
S MBUNGI, J
NOVEMBER 4, 2025**

BETWEEN

ASMIN LIAKA WAKHANU PETITIONER

AND

KASSIM SIMIYU WAKHANU OBJECTOR

AND

LAND REGISTRAR, KAKAMEGA INTERESTED PARTY

COUNTY SURVEYOR, KAKAMEGA INTERESTED PARTY

JUDGMENT

1. The matter refers to the estate of Ayub Wakhanu, who died on 22nd September 2006 at Kakamega and was survived by the following beneficiaries;
 - a. Asmini Liaka Wakhanu—widow
 - b. Hassan Wechul Wakhanu- son
 - c. Mohammed Wandera Wakhanu-son
 - d. Issa Wawire Wakhanu-son
 - e. Mwanahawa Naututu Wakhanu-daughter
 - f. Amida Namukuchu-Daughter
 - g. Kassim Siminyu Ayub-son
 - h. Adija Nafuna Wakhanu- Daughter
 - i. Musah Waswa Wakhanu-son



- j. Sainabu Nakhumwa Wakhanu- Daughter
2. On 25th January 2023, the deceased widow Asmini Liaka Wakhanu applied for a grant of letters of administration intestate to administer the estate of the deceased, which included Land Parcel No. Bunyala/Budonga/421 measuring 23.0 hectares. On 12th June 2023, the petitioner, through a summons of confirmation of grant, applied for confirmation of the grant, suggesting the mode of distribution as follows;
- a. Hassan Wechuli Wakhanu- 4.97 Ha
 - b. Issa Wawire- 2.15 Ha
 - c. Mohammed Wandera- 3.22 Ha
 - d. Kassim Siminyu Wakhanu-2.35 Ha
 - e. Asmin Liaka Wakhanu-5.77 Ha
 - f. Mwanahawa Wakhanu- Nil
 - g. Hamidah Namukuchu Wakhanu- Nil
 - h. Hadija Hassan Wakhanu- Nil
 - i. Musa Waswa Wakhanu- 2.65 Ha
3. The deceased son, Kassim Simiyu Wakhanu, filed an affidavit of protest dated 5th August 2023 protesting against the mode of distribution, where he avers that the deceased, before his demise, had already subdivided the parcel of land amongst all his sons and himself, which was to be left to their mother, the protestor, upon his demise.
4. He avers that each son was allocated their portion, which they had each developed, and that their father had already drawn a mutation form showing each son's portion. He opposed the mode of distribution claiming that it allocated him 2.35 Ha which is less than what was already allocated to him by his father which he claimed was 4.24 Ha and further opposed the consent that the court was presented with claiming that he never consented to the mode of distribution since he had made some development on parcel that his father had already allocated to him.
5. He asserts that his deceased father made the following mode of distribution;
- a. Hassan-4.97 Ha
 - b. Issa-2.15 Ha
 - c. Mohammed- 3.22 Ha
 - d. Father-5.77 Ha (currently being occupied by his mother)
 - e. Musa-2.65 Ha
 - f. Kassim- 4.24 Ha.
- He annexed a copy of the mutation form, which indicated the mode of distribution dated 27th May 1994 and signed by the deceased.
6. When the matter came to this court for determination, Hon P.J. Otieno gave an order for a survey of the parcel of land to confirm the acreage of the land and the occupancy of each of the beneficiaries.



7. The county surveyor did a site visit on 15th March 2024 and made a report dated 20th March 2024 and confirmed the acreage and occupation of the land parcel as follows;
- a. Kassim Wakhanu (A and B)- 7.49 Ha
 - b. Musa Wakhanu- C- 2.70 Ha
 - c. Mohammed Wandera Wakhanu –D- 3.31 Ha
 - d. Issa Wawire –E- 3.64 Ha
 - e. Hassan Wakhanu- F-4.70 Ha
 - f. Asmin Liaka-C marked X on the diagram.

The petitioner's submission

8. In her submission dated 22nd January 2025, the petitioner, through her counsel, acknowledged that the objector, together with the other beneficiaries who were listed above and stated that the disputed deceased parcel of land L.P. No. Bunyala/Budonga/421 measured 23 Ha, and the deceased, before his demise, had already shared out his land among his sons and widow and subdivided it according to the mutation form dated 26th May 1994, as was stated earlier.
9. She contended that the deceased used his portion in planting crops until his demise, then she took over as his widow.
10. She avers that the objector took advantage that the widow occupied a separate portion where the deceased was buried and stated that the widow should continue staying in the portion that she was utilising and claims she had no problem with her son being given the portion where she resided.
11. Both parties are in agreement that the deceased had shared his property 12 years before he died and settled with his sons, and are both in agreement on the mode of distribution. They however claim that the protestor had discovered that the deceased had not distributed the 2 hectares out of the 23 hectares and wants to apportion himself 4.24 Ha instead of the 2.35 Ha that his father had given him claiming that his portion was rocky and he should therefore get more for which they oppose claiming that there was no basis why the protestor ought to be allocated more since he and already stopped his mother from utilizing her portion of land claiming that he had initially lied that the deceased allocated him 4.24 Ha as there was no portion in the mutation indicating the 4.2 Ha and further he had not presented any evidence that his share of the land was sitting on a rocky part to warrant him get more of the land.
12. They assert that the protestor had even moved boundaries set by the deceased disadvantaging the petitioner, who is his mother and pray that the extra land not allocated be given to the widow or even the deceased daughters who were left out as the protestor as going contrary to the wishes and the will of his deceased father and even developed on his father's portion of the land and prays that the protestor settle in his portion which is the 2.35 Ha which he was already allocated to him by the deceased.

Analysis and determination

13. I have carefully considered the summons for confirmation of grant, the affidavit of protest by the objector, the written submissions of both parties, the surveyor's report dated 20th March 2024, and the entire record before me.



14. The main issue that arises for determination is whether the protest to the proposed mode of distribution has merit and, consequently, how the estate of the late Ayub Wakhanu should be distributed.
15. What is uncontested is that the deceased died intestate on 22nd September 2006, leaving behind one widow and several children. The estate comprises a single property, Land Parcel No. Bunyala/Budonga/421, measuring approximately 23.0 hectares. Both the protestor and the petitioner admit that during his lifetime, the deceased had subdivided the said parcel among his sons and himself, and a mutation form dated 27th May 1994 was produced to that effect.
16. The dispute now arises from the objector's claim that he was allocated 4.24 hectares, whereas the confirmed mode of distribution by the petitioner allocates him 2.35 hectares. The protestor argues that the deceased distribution was final, and that the portion now proposed by the petitioner diminishes his rightful share.
17. Section 42 of the *Law of Succession Act*, Cap 160 Laws of Kenya, provides that where an intestate has during his lifetime made gifts to his children, those gifts are taken into account when computing the shares of the respective beneficiaries at confirmation. It follows, therefore, that where there is evidence of a lifetime allocation, the court should respect that arrangement unless it is shown to be inequitable or fraudulent.
18. The principle has been reiterated in the case of *re Estate of Mwaura Mutungi alias Mwaura Gichigo (Deceased)* [2018] eKLR, where Musyoka J. held that: "Where a deceased person distributed his estate during his lifetime and settled his heirs on their respective portions, such distribution should, unless vitiated by illegality or manifest injustice, be respected by the court at confirmation."
19. In the instant case, the mutation form dated 27th May 1994, signed by the deceased, demonstrates an intention to divide the property among his sons and to retain a share for himself and his wife, the petitioner, which, upon his demise, naturally fell to the widow. This evidence is corroborated by the county surveyor's report dated 5th November, 2024, which shows the division of the land which was occupied by the deceased sons, which was consistent with the arrangement by the deceased.
20. Accordingly, I am satisfied that the deceased substantially distributed his land during his lifetime and that such distribution ought to guide this court in confirming the grant.
21. The objector's contention in his protest is that his portion of the share is rocky and therefore less productive, and hence the need to be given the extra share, although his said allegation was not supported by any expert evidence or any documentation to support his allegations. There was no soil survey report or comparable valuation tendered before this court. The mere assertions cannot displace a documented inter vivos distribution. The burden of proof under Section 107 of the *Evidence Act*, Cap 80, rested upon the protestor, and in the absence of credible proof, his allegation remains speculative.
22. The court in *In re Estate of Gideon Karanja (Deceased)* [2020] eKLR (Musyoka J.) emphasised that:

"The court will not disturb a deceased inter vivos arrangement merely because one beneficiary feels disadvantaged, unless there is compelling evidence of unfairness, fraud, or coercion."
23. The same reasoning was echoed by Justice Mrima in *in re Estate of M'Mboroki M'Rimberia (Deceased)* [2019] eKLR, where the court held that long occupation and development pursuant to a deceased's allocation constitutes strong evidence of acceptance and implementation of the deceased's wishes.



24. The protestor’s attempt to enlarge his entitlement from 2.35 to 4.24 hectares is therefore without evidential or legal foundation. The court further notes from the survey report that the protestor occupies approximately 7.49 hectares (plots A and B combined), far exceeding both the alleged and the confirmed allocations. Such occupation points to encroachment beyond the boundaries established by the deceased, and hence cannot be legitimised by this court.
25. It is also noteworthy that the petitioner’s proposed mode of distribution completely excluded the daughters of the deceased. The *Law of Succession Act* at Section 38 provides that where an intestate is survived by a spouse and children, the estate shall be divided equally among them, subject to the life interest of the surviving spouse.
26. In *Rono v Rono & Another* [2005] eKLR, the Court of Appeal (Omolo, O’Kubasu & Waki JJA) held that discrimination in distribution based on gender is unconstitutional and contrary to the principles of equality under Article 27 of *the Constitution* of Kenya, 2010. The court observed:
- “Daughters are entitled to inherit equally with sons under our current legal framework. Customary considerations that tend to disinherit female children have no place in modern Kenyan succession law.”
27. Guided by the above authorities, it would be unjust and unlawful to entirely exclude the deceased’s daughters from benefiting from the estate, particularly where there remains unallocated land. The widow’s proposal that the residual portion or any excess from encroachment be shared among the daughters is reasonable and accords with equity and the law.
28. Having analysed the evidence, the applicable law, and the guiding precedents, I make the following findings:
- a) The deceased, during his lifetime, subdivided Land Parcel No. Bunyala/Budonga/421 among his sons and himself through a valid mutation dated 27th May 1994.
 - b) The said subdivision constitutes a lawful inter vivos distribution within the meaning of Section 42 of the *Law of Succession Act*, and shall be respected.
 - c) The protestor has failed to establish any legal or evidential basis for varying his allocation or claiming an enlarged share.
 - d) The occupation beyond the area allocated to him amounts to encroachment and must be rectified by the county surveyor.
 - e) Any residual or unallocated land, including any recovered from encroachment, shall be distributed equally among the deceased’s daughters in accordance with Section 38 of the *Law of Succession Act* and the principle in *Rono v Rono* (supra).
 - f) The widow, Asmin Liaka Wakhanu, shall retain a life interest in her portion and the homestead area, consistent with Section 35 of the Act.

Orders

29. Consequently, the court dismisses the protest dated 5th August 2023 and confirms the grant in the terms herein modified:
- a. That each son shall retain the portion allocated to him by the deceased as reflected in the mutation form signed by the deceased on 26th MAY, 1994 .



- b. That any unallocated or excess portion shall be distributed equally among the deceased's daughters; incase they need a share of the estate of their father.
- c. If they don't want excess or unallocated portion to be shared equally by the deceased sons if any dead by their children.
- d. The wife of the deceased to have a life interest over the unallocated/excess portion of land.
- e. This being a family dispute, each party shall bear their own costs.
- f. Right of Appeal 30 days.
- g. The file is closed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 4th DAY OF NOVEMBER, 2025.

S.N MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Mr. Songa holding brief for Magina for the objector present.

Parties present.

