In re Estate of Joram Mwimani - Deceased (Succession Cause 22 of 2014)
[2025] KEHC 17618 (KLR) (28 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17618 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION CAUSE 22 OF 2014

S MBUNGI, J

NOVEMBER 28, 2025

IN THE MATTER OF THE ESTATE OF JORAM MWIMANI - DECEASED

BETWEEN

BETWEEN

THOMAS MWIMANI ..... 1ST APPLICANT

MAURICE LIKARE ..... 2ND APPLICANT

AND

CIDRICK MWIMANI MWIMANI ..... 1ST PROTESTOR

JARED MIHESO ..... 2ND PROTESTOR

JUDGMENT

1. This succession matter is about sharing the estate of Joram Mwimani Mudalungu, who died intestate on 29th January 2004. He had two wives and several children.

2. Two of his sons, Thomas Mwimani and Maurice Likare, were appointed by the family to manage the estate and have asked the court to approve their plan for sharing it.

3. On 23 October 2024, all beneficiaries attended court and expressed no objection to the proposed mode of distribution, save for two grandchildren, Cedrick Mwimani and Jared Miheso, who raised an oral protest and were granted leave to file an affidavit of protest.

4. Two of his grandchildren, Cedrick Mwimani, the son of the Geoffrey Mudalungu (deceased) and Jared Miheso, son of the Moses Mwimani (deceased), have objected to this plan.

5. Their joint affidavit of protest was filed on 18 March 2025, and the administrators filed a replying affidavit sworn on 15 May 2025. Parties filed submissions in compliance with court directions.

6. The issues for determination based on the affidavits and submissions are:

   a. Whether the cause should be treated as a standalone matter and whether historical issues raised fall for determination.

   b. Whether the administrators were properly appointed.

   c. Whether all rightful beneficiaries have been included.

   d. Whether land parcel KAKAMEGA/SANGO/1736 forms part of the estate.

   e. Whether properties allegedly given as gifts during lifetime should form part of the estate.

   f. Whether the deceased's alleged oral testamentary intentions are enforceable.

   g. Whether the proposed distribution is just, lawful, and in compliance with the *Law of Succession Act*.

7. On whether the cause should be treated as a standalone matter. The protestors object to counsel's suggestion, that the matter be determined purely within the parameters of the 2014 cause, arguing that historical wrongdoing such as intermeddling, forged records, prior arrangements must be considered. The Court agrees that succession proceedings are inquisitorial as held in re Estate of Rahab Wanjiru Evans (Deceased) [2025] KEHC 2573 (KLR), where the court while delivering the judgment, reiterated that:

> " These Succession proceedings are inquisitorial and not adversarial and this court detests weaponization of litigation or family members litigating for Wins that further drives a wedge within the family."

8. However, the Court must also respect the statutory framework and avoid converting a succession cause into a civil trial over historical land use. The Court will therefore consider only historical matters that directly affect the composition of the estate or entitlement of beneficiaries. This is in line with the remarks of the judge in re Estate of the Late Simon Douglas Kibaara Mutegi (Deceased) (Succession Cause 88 of 2001) [2024] KEHC 14253 (KLR), that:

> " Succession proceedings are not adversarial; they are more of inquisitorial. But as would emerge the intensity of adversity manifesting is a complete opposite as to what would be expected of the parties. This Court equally abhors weaponization of litigation contrary to the constitutional predicates on the dispensation of delegated judicial authority."

9. On whether the administrators were properly appointed, the protestors allege that the administrators appointed themselves, contrary to Section 66, *Law of Succession Act*.

> " When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:
>
> (a) surviving spouse or spouses, with or without association of other beneficiaries;
>
> (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V"

10. The administrators are sons of the deceased. The court notes that a letter from the assistant chief dated 11th November 2013 confirmed that the family had appointed one administrator from each house. In the case of Mercy Njoki Irungu vs. Lucy Wamuyu Maruru [2016] eKLR the court held as follows:

> " It is a requirement that a party to a probate claim must have 'interest' in the estate. The foundation of title to be a party to a probate or administration action is "interest" so that whenever it can be shown that it is competent to the Court to make a decree in a suit for probate or administration, which may affect the interest or possible interest of any person such person has a right to be a party to such a suit in the character either of plaintiff, defendant, protestor or intervener.....Interested person" or "person interested in an estate" includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, word, or protected individual or a person that has priority for appointment as personal representative and a fiduciary representing an interested person. The Blacks' Law Dictionary defines "interested party as a party who has recognizable state (and therefore standing) in the matter.

11. During the process of appointing administrators, the fathers of the protestors, who were themselves the children of the deceased, had already passed away and were therefore incapable of giving consent to the agreement. Additionally, the protestors were minors at the time and thus lacked the legal capacity to consent.

12. Accordingly, the court dismisses the objection raised by the protestors regarding the appointment of the administrators.

13. Section 29 of the Laws of Succession Act defines who a dependant is.

> " A dependant means:
>
> (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
>
> (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
>
> (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

14. The protestors challenge inclusion of:

    a. David Shikumba, who is the alleged son of the late Robert Yidah;

    b. Joan Chemei, whom the administrators claimed daughter of Robert Yidah;

    c. Esther Alivitsa, who is the alleged daughter of Robert Yidah but listed under another.

15. The administrators did not provide any evidence such as birth records, acknowledgment, or proof of dependency to establish the alleged relationship. Accordingly, the Court does not uphold the inclusion of the disputed beneficiaries, and they are therefore not entitled to inherit their purported parent's share of the estate.

16. Individuals emerging after the death of a deceased person to claim a share of the estate must demonstrate attempts to be recognized as family members during the deceased's lifetime or provide compelling evidence of paternity or familial connection. In the case of Re Estate of Patrick Mwangi Wathiga, supra, the court held that:

> " ... The practice of persons emerging after the demise of a deceased person purely to claim a share of properties of the deceased should be discouraged unless the alleged claimant can demonstrate attempts to be recognized as a beneficiary during the deceased's lifetime, or the deceased left clear instructions to that effect. Where someone remains delinked from a family for 24 years and only emerges after death, the burden lies on him/her to establish the claim beyond reasonable doubt..."

17. On whether KAKAMEGA/SANGO/1736 forms part of the estate, the administrators claim that parcel 1736 belongs to Thomas Mwimani personally as a purchaser. A certified copy of the register shows Thomas as proprietor, hence the parcel was not registered in the name of the deceased. This court has established that KAKAMEGA/SANGO/1736 is not part of the estate.

18. The protestors assert that KAKAMEGA/SANGO/5 had been subdivided in the lifetime of the deceased into parcels 856 for Thomas Mwimani and 858 for Moses Mwimani, constituting a completed gift. Gift inter vivos are provided under Section 42 of the *Law of Succession Act* that:

> " Where:
>
> (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
>
> subpara (b)
>
> property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house."

19. Evidence shows that the subdivisions existed before death., the administrators themselves confirm the subdivisions, and the deceased had allocated each son their portion. Thus, the parcels were already transferred beneficially and do not form part of the estate. The High Court in Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 Others [2021] eKLR observed that:

> " The concept of gifts is divided into two categories. First gifts inter vivos and gifts causa mortis. Gifts inter vivos as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of death. In any event the person who makes such a gift must have the capacity and competency to gift the property and the gift must be perfected. In the case of inter vivos the gift must be given absolutely during the lifetime of the donor. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee."

20. The Court of Appeal in Shah & Another v Shah (Civil Appeal 268 of 2019) [2024] KECA 76 (KLR) (9 February 2024) (Judgment) when addressing the aspect of gift inter vivos in the deceased's estate remarked thus:

> " We are satisfied that section 42 of the *Law of Succession Act* applies, and that the gift made in the deceased's life time amounted to a gift inter vivos, which has to be taken into account in distributing the deceased's assets.(Emphasis Added)...With this finding, we are satisfied that the trial judge was not only correct in finding that the entire suit property was part of the residual estate, but also that the general intention of the deceased was for her daughters to have an equal share of the residual estate. Having considered the gift inter vivos in favour of the appellants, it was only logical that the remaining 1/3 of the share of the suit property be allocated to the respondent."
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> As evidenced by the Land Control Board letter, parcel number KAKAMEGA/SANGO/856 and KAKAMEGA/SANGO/858 doesn't form part of the deceased estate as it had been transferred by way of gift to Thomas Mwimani and Moses Mwimani, by the deceased.

Findings

21. After looking at all the evidence, I find that the following properties are the only ones that belonged to the deceased and are to be shared:

    a. KAKAMEGA/SANGO/102

    b. KAKAMEGA/ISUKHA/SHITOTO/976

    c. KAKAMEGA/MURHANDA/64

    d. KAKAMEGA/SANGO/5 (Excluding parcels KAKAMEGA/SANGO/856 and KAKAMEGA/SANGO/858)

22. I have removed KAKAMEGA/SANGO/1736 from the list, because Thomas Mwimani showed us a lands registry report proving it belongs to him, not his late father.

23. Where the deceased died intestate having more than one wife and one wife surviving, Section 40 of the Laws of Succession Act reads:

> "(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
>
> (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38."

24. The basic theme is in line with the principles expounded in the following cases Rono v Rono Civil Appeal NO. 66 of 2002, where Waki J.A stated inter alia that;

> " More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the "houses according to the number of children in each

house, but also adding any wife surviving the deceased as an additional unit to the number of children." A "house" in a polygamous setting is defined in section 3 of the Act as a "family unit comprising a wife and children of that wife."

25. The deceased had two families, the first wife, Dinah Mwimani, and her children:

    a. Thomas Mwimani (Son)

    b. Moses Mwimani (deceased)

    c. Mark Mwimani (Son)

    d. Jones Mwimani (Daughter)

    e. Truphosa Mwimani (Daughter)

    f. Emily Mwimani (Daughter)

    g. Elica Mwimani (Daughter)

    The total house units is 8.

26. The second wife, Esther Mwimani, and her children:

    a. Maurice Likare (Son)

    b. Geoffrey Mudalungu (Son, but deceased)

    c. Robert Yidah (deceased)

    d. Mary Shisiali (deceased)

    The total house unit is 5.

27. The share of the late Robert Yidah will be held by the administrators in trust for a period of 90 days. If, within this time, any person provides proof such as a birth certificate or other official document showing they are a child of Robert Yidah, they will be entitled to his share. If no one comes forward with such proof, his share will then be divided equally among the other proven beneficiaries of the second house.

28. The protest by Cedrick Mwimani and Jared Miheso is partially successful. They were right to point out that some properties did not belong to the estate and that some people were wrongly included as beneficiaries. Their claim that the administrators were not properly appointed cannot be ignored. The chief's letter shows the family chose them. However, considering that Geoffrey Mudalungu and Moses Mwimani are deceased, it is necessary that a representative from their children steps up in their slots.

Distribution

29. I disapprove the distribution plan suggested by the family in both the chief's letter and the administrators supporting affidavit dated 28th March 2024. The unequal and unexplained allocation is not in accordance with Section 40 (1) of the Laws of Succession Act.

> "Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in

each house, but also adding any wife surviving him as an additional unit to the number of children."

30. The property in each house will be divided equally, in accordance with the units, among all the children, whether they are sons or daughters. This is in line with the principle of equality in matters inheritance. This was held in re Estate of Francis Andachila Luta (Deceased) (Succession Cause 875 of 2012) [2022] KEHC 16900 (KLR) (23 December 2022) (Judgment), where Musyoka J stated as follows;

> " Let me revisit section 38 of the *Law of Succession Act*. It provides for equal distribution of the estate amongst the children. The language of section 38 is gender neutral. It does not classify children into male and female, nor sons and daughters, nor men and women. There is no discrimination nor differentiation nor classification nor categorization along gender lines. That would mean that sons and daughters of a dead person are entitled on equal basis to a share in the estate of their dead parent. Section 38 does not make marriage a factor in the distribution of the estate of a dead parent. Gender and marital status are factors under customary law, but not under the *Law of Succession Act*. The estate herein is not subject to customary law, for the reasons that I have discussed in paragraphs 13, 14 and 15 a foregoing. The estate is subject to the *Law of Succession Act*, which is blind on biases founded on gender and marital status."

31. If a child has died, their share will go to their own children, the grandchildren of the deceased. The share of the late Moses Mwimani will go to his son, Jared Miheso. The share of the late Geoffrey Mudalungu will be shared between his sons, Cedrick Mwimani and Derrick Sechero. The share of the late Mary Shisiali will go to her children. In re Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR (Musyoka J), it was held that:

> " a grandchild of the deceased was not entitled directly to the estate of their late grandfather in intestacy, so long as their own parents, being children of the deceased, were alive and were taking their righful share. The argument was that such a grandchild would take indirectly through her own parents. I went on to state that a grandchild would be entitled to inherit directly from the intestate of their grandparent where his or her own parent, the child of the deceased, was dead, and, therefore, not available to take their share directly. In such case, the grandchild would be entitled to take directly by virtue of section 41 of the *Law of Succession Act*, Cap 160, Laws of Kenya. In re Estate of Florence Mukami Kinyua (Deceased) [2018] eKLR (T. Matheka J), the court pronounced a grandchild to be a direct heir to the intestate estate of their grandparent, where his or her own parents have predeceased the grandparent, or, should I add, the parent dies before the estate is distributed. The court asserted that such a grandchild steps into the shoes of the deceased parent so as to take the share that such parent would have taken from the estate of the grandparent's estate."

Orders

32. Cedrick Mwimani is hereby declared entitled to his distributive share arising from the house of the late Geoffrey Mudalungu, whereas Jared Miheso is declared entitled to his distributive share arising from the house of the late Moses Mwimani.

33. Certificate of grant to issue in accordance with the court judgment on distribution.

34. The administrators shall:

    a. Commission a licensed surveyor

b. Subdivide the estate into 12 equal units. The share of the late Robert Yidah shall be held in trust for 90 days to allow for any of his proven children to come forward. If none is identified, then the share of Joram Mwimani will be subdivided in 11 units each unit having equal share.

35. The subdivision shall be done in such a way that no one is displaced from where he/she had developed, but this should not affect the equal distribution.

36. The estate shall be distributed exactly as stated in this judgment.

37. Administrators given six months to implement the certificate of confirmed grant

38. Each party to bear its own cost.

39. Right to appeal in 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF NOVEMBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Parties present.

Mr Isiaho present for the Petitioner present online.

Jared Miheso present .

Agnes Misinza present.

Mr. Isiaho I pray for a copy of the Judgment.

COURT: A copy be availed upon payment of requisite fees.