



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**SUCCESSION CAUSE NO. E121 OF 2022**

**IN THE MATTER OF THE ESTATE OF THE LATE MARGARET AVUGWI**  
**LUSENO alias MARGARET MUNGASIA AVUGWI alias MARGARET**  
**ABUGWE LUSENO (DECEASED)**

**LYNETTE MADAGALE KADIMU.....1<sup>ST</sup> PROTESTOR**

**KHADIJA JOHANNA ERNST.....2<sup>ND</sup> PROTESTOR**

**VERSUS**

**DR. CHARLES AVUGWI LUSENO.....1<sup>ST</sup> ADMINISTRATOR**

**COL. DOUGLAS MUDAVE LUSENO.....2<sup>ND</sup> ADMINISTARTOR**

**JUDGEMENT**

1. The deceased herein died intestate on 5<sup>th</sup> March, 1995. The Letters of Administration Intestate were granted to **Dr. Charles Avugwi Luseno** and **Col. Douglas Mudave Luseno** on the 2<sup>nd</sup> of January, 2024
2. The Administrators filed Summons for Confirmation of Grant dated 8<sup>th</sup> July, 2024 with proposed mode of distribution. There are two

Affidavits of Protests filed by the Protestors' challenging the Administrators' mode of distribution.

3. The 1<sup>st</sup> Protestor's Affidavit of Protests sworn on 26<sup>th</sup> January, 2024 and the 2<sup>nd</sup> Protestor's Affidavit is sworn on 15<sup>th</sup> August 2024
4. The Administrators filed Affidavits in response Protests sworn on 24<sup>th</sup> October, 2024 in support of their proposed mode of distribution and in objecting the Protests.
5. According to the Administrators and the Chief's letter dated 20<sup>th</sup> April, 2023, the deceased was survived by
  - a) Evans Aggrey Luseno – Son
  - b) Grace Wambwa - Daughter-
  - c) Peter Ligale Luseno – Son
  - d) Harriet Hellen Muhonja Luseno - Daughter
  - e) Eliud Avugwi Luseno – Son
  - f) Beeson Lugasi Avugwi Son
  - g) Douglas Mudave Luseno – Son
  - h) Charles Avugwi Luseno – Son
  - i) Samuel Luseon – Son (deceased)
  - j) Eric Keya – Son. (deceased)
  - k) Lynette Mudagale Kidimu Luseno - Daughter
  - l) Flora Luseno Grand daughter
  - m) Leonard Isigi Luseno – Son (deceased)

6. The properties listed as being left behind by the deceased are;
  - a) LR. No. North/Maragoli/Lusengeli/890
  - b) LR No. 943 Sabatia/Vihiga
  - c) LR No. 668 Sabatia/Vihiga
  - d) LR No. Plot No. 3 Sabatia Market
  - e) LR No. 923 Sabatia/Vihiga/20
  - f) Plot No. 41 Mango Market
  - g) 5 % of LR No. 9615/Molo/Elburgon
7. The matter proceeded orally with the Court directing parties to file written submissions.

#### **Protestors' Submissions.**

8. The Protestors submitted that the judgment and subsequent order of the Honourable Justice J.N. Onyiego issued on 13<sup>th</sup> July 2017 directed that **LR NO. 9615/MOLO/ELBURGON** was to be distributed in accordance with Succession Cause No. 25 of 1969. That the proposed mode of distribution by the Administrators seeks to circumvent the decision.
9. They emphasized that under **Section 47** of the **Law of Succession Act**, the High Court is bound by its own prior decisions unless set aside on appeal or review citing *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1*, to submit that the Administrators have no legal latitude to re-litigate matters already determined, and this Court cannot purport to redistribute the estate contrary to the 2017 decision.

10. The Protestors, argued that the proposed distribution contravened **Article 27** of the **Constitution** by allocating non-arable land to them while allocating arable land to other beneficiaries contrary to the principle of equal distribution under **Section 38** of the **Law of Succession Act**.
11. Relying in *Rono v Rono* [2005] eKLR and *In re Estate of Musa Njoroge Ngugi (Deceased)* [2020] KEHC 9242 (KLR) they stressed that equality substantive and not merely numerical, particularly where the circumstances of the estate demand it. The Protestors proposed a transparent balloting process supervised by the court to ensure that each beneficiary receives a fair mix of arable and non-arable land.
12. They pointed to contradictions in the administrators' own testimony, the claim that only a small portion of the land is non-arable, yet only 120 acres out of more than 300 acres had been leased out. This, they argue, undermines the administrators' position and reveals manipulation aimed at allocating prime land to select beneficiaries, to their prejudice
13. With the subsequent passing of the deceased, the 5% share now forms part of her own estate and must be distributed strictly in accordance with **Section 38** of the Act to the rightful heirs, her children, including the Protestors herein. Any proposal by the administrators to allocate this share to persons other than her heirs constitutes unlawful interference with her estate.

14. The Protestors submit that the Administrators have unlawfully leased out estate property for decades without the consent or knowledge of the Protestors or other beneficiaries. That Under **Section 83(e) and (g) of the Law of Succession Act**, the Administrators are required to account for all income received on behalf of the estate and to complete administration within six months of confirmation of grant.
15. The place reliance **In Re Estate of George Mbori Nyauncho (Deceased) [2019] eKLR** where the Court ordered Administrators to account for rental income received over time from estate property, and barred further transactions until proper distribution was done. Similarly, **In re Estate of Sarastino M'chabari M'ukabi (Deceased) [2021] eKLR** the Court held that the duty of a personal representative to render accounts to beneficiaries echoing the pronouncement in **Re Estate of Julius Mimamo (Deceased)**
16. The Protestor's argued that remarriage as a basis for discrimination is unconstitutional and illegal and cited **Ripples International v Attorney General & another; FIDA (Interested Party) [2022] KEHC 13210 (KLR)**

### **Administrators' Submissions**

17. Through the submissions dated 19<sup>th</sup> June, 2025 and the Supplementary submissions dated 3<sup>rd</sup> July 2025, the Administrators submitted that the proposal of the 5% **LR NO.**

**9615/MOLO/ELBURGON** to be shared between **Grace Engesis Wambwa** and **Flora Kavulani Luseno** is as a result of the two beneficiaries being left out in the initial distribution of **LR NO. 9615/MOLO/ELBURGON 2004** where all the beneficiaries got a share of the parcel including the Protestors apart from the two. Reliance was placed in ***Chepkerich v Murei & Another [2022] KEHC 3115 (KLR)*** imploring on the Court to distribute the properties to the proposed beneficiaries

18. The Administrators further submitted that the rationale for the proposal of distribution of LR. **No. North/Maragoli/Lusengeli/890** is that the property is ancestral land where the homestead of the deceased was situated and according to Maragoli Customary Law it is to be left to the sons of the deceased.
19. It is argued that it is not only the Protestors who have been left out and therefore cannot claim it to be unfair or repugnant to justice and morality. That the Protestors have not raised any objection since the demise of the deceased and neither have they demonstrated any attachment to the property worth the Court's consideration.
20. The administrators submitted that the 2<sup>nd</sup> Protestor's husband died before the deceased herein and the two never had a child while the 2<sup>nd</sup> Protestor long relocated and lives abroad, therefore, their unexpected interest cannot be justified. That the mode of distribution

was per the wishes of the deceased and argued it was not controverted by the Protestors.

21. They relied on the case of ***Re Estate of Gakuya Marira (Deceased [2020] eKLR*** to submit that That the Protestors have not demonstrated that the distribution as per Maragoli Customary Law is repugnant to justice and morality
22. The Administrators have proposed that since there is a difference in share of 5% and 10% as per **Nairobi Succession Cause No. 25 of 1969** there should be balloting based on respective shares. That the Protestors have challenged this proposal but have failed to give a counter proposal.
23. The Administrators have submitted that the orders sought by the Protestors for provision of accounts for the alleged illegal leasing are not available and they ought to file a formal application and seek orders of provision of accounts and restrain against the alleged leasing
24. It is submitted that the issue of the proposed distribution of the 5% to non-beneficiaries of the estate is an afterthought as the issue was raised in submissions and submissions cannot take part of evidence. Reliance was made to **Mwavul v Waweru t/a Anttique Auctioneers [2024] KEHC 5988 (KLR)**

25. On whether this Court should uphold the judgment in Nairobi High Court **Succession Cause No. 3081 of 2004** with respect to **LR. No North/Maragoli/Lusengeli/890**, it is submitted that the proceedings were made in respect to the Estate of the late Japheth Avugwi Luseno and not the deceased herein, that there is legitimate expectation that Succession Cause No. 3081 of 2004 would be limited to the properties owned by the late Japheth Avugwi Luseno. To the property is owned by the deceased herein and not by the late Japheth Avugwi Luseno and therefore should form part of the properties in this succession and not **Succession Cause No. 3081 of 2014**.

### **Analysis and Determination**

26. Having considered the evidence presented and the documents filed in this matter, before delving into distribution of the estate, there are issues that have arisen that warrant the Court's attention. These issues touch on the identification of estate property, the entitlement of beneficiaries, all of which must be resolved prior to any lawful distribution of the estate

27. The Court notes that the Administrators have listed eight (8) properties as forming part of the estate of the deceased herein. However, supporting documentation has been annexed for only four (4) properties namely.

**a) North/Maragoli/Lusengeli/890**

**b) Five percent (5 %) share of LR No. 9615/Molo/Elburgon**

**c) Title No Kakamega/Lusengeli/943**

**d) Kakamega Lusengeli/923**

28. Courts have reiterated that mere listing of assets in pleadings is insufficient. Property of a deceased person will only vest on personal representatives only if it lawfully belonged to the deceased
29. This position is fortified by the holding ***In Re Estate of Job Ndunda Muthike (Deceased) [2018] KEHC (KLR)*** where the Court stressed that it is the Court's duty to confirm property ownership to prevent including third-party assets.
30. Similarly, the Jesse N. Njagi J ***In the Matter of the Estate of Guje Guyo (Deceased) [2021] eKLR*** stated;
- “[38] What it means in the whole of this process is that the property to be distributed by a succession court has to be identifiable and clearly defined. Where the property involved is land, it has to be identified by a land reference number. Otherwise where the land is not registered as in this case, a succession court would be engaging in an exercise in futility in dealing with such land as the process of transmission cannot be completed at the land’s office. Courts of law do not act in vain. In my considered view, unregistered land cannot be construed to mean “free property” of a deceased person. Distribution of such land does not fall within the mandate of a succession court. in***

***Re Estate of G.K.K (Deceased) [2017] eKLR, the Court held that “mere listing of assets without documentary proof does not suffice to bring them into the estate.”***

31. In the absence of supporting documentation for the remaining properties, the Court is constrained to consider only the above four properties as forming part of the estate for purposes of distribution.
32. The Court observes a further quagmire. The record shows that **Title No Kakamega/Lusengeli/943** and **Kakamega Lusengeli/923** are properties that were registered in the name of the deceased herein on 17<sup>th</sup> June, 1976 with title deeds issued on 19<sup>th</sup> June, 1990 based on the certificates of official search dated 1<sup>st</sup> July, 2022. It is not clear why the Administrators listed **LR No. 943 Sabatia/Vihiga** and **LR No. 923 Sabatia/Vihiga/20** and not these properties.
33. It is not clear whether **Title No Kakamega/Lusengeli/943** and **Kakamega Lusengeli/923** are the same as **LR No. 943 Sabatia/Vihiga** and **LR No. 923 Sabatia/Vihiga/20**.
34. Further if indeed **LR No. 943 Sabatia/Vihiga** and **LR No. 923 Sabatia/Vihiga/20** as listed form part of the estate of the deceased herein, it remains unclear how these properties were distributed in **Succession Cause No. 3081 of 2014** as forming part of the **Estate of the late Japheth Avugwi Luseno**.

35. The administrators have gone ahead and proposed that the same properties be transmitted to **Erick Keya** and **Hellen Muhonja** as they had previously been distributed in **Succession Cause No. 3081 of 2014**.
36. The Court notes that while the Administrators may list property and propose distribution, the Court must be satisfied that they form part of the estate. Of concern is neither of the parties addressed why **LR No. 943 Sabatia/Vihiga** and **LR No. 923 Sabatia/Vihiga/20** are listed in this cause and **Succession Cause No. 3081 of 2014** or the discrepancies in title numbers in their testimonies or submissions.
37. The administrators cannot list the properties and provide documentation that suggest otherwise. Unless clear documentation is produced indicating whether **Title No Kakamega/Lusengeli/943** and **Kakamega Lusengeli/923** are the same as **LR No. 943 Sabatia/Vihiga** and **LR No. 923 Sabatia/Vihiga/20** the Court cannot sanction their transmission.
38. Pertaining **LR. No North/Maragoli/Lusengeli/890**, the property was distributed in **Nairobi Succession Cause No. 3081 of 2014** relating to the **Estate of the Late Japeth Avugwi Luseno** on 13<sup>th</sup> July 2017. The Protestors contend that this Court should uphold the Court's judgement of 13<sup>th</sup> July 2017 in the said cause which included this property in the distribution.

39. The Administrators however contend that this property did not form part of the **Estate of the Late Japeth Avugwi Luseno** and the order issued therefrom cannot be effected.
40. On record, there is an official search certificate dated 1<sup>st</sup> July, 2022 confirming that the property belongs to the deceased herein, registered on 22<sup>nd</sup> August, 1974 and not to the **Late Japeth Avugwi Luseno**.
41. The Court observes that the Protestors' have not challenged ownership of the subject property but merely insist in upholding the finding in **Succession Cause No. 3081 of 2014** because they stand a chance to inherit a portion based on that decision.
42. It is trite law that a property can only be distributed by a Succession Court if it forms part of the deceased's estate. Considering the official search confirming that property belonged to a different person, then its inclusion in the **Estate of Japeth Avugwi Luseno** was erroneous.
43. Unless fraud or mistake in registration is proven by the Protestor's, the property belongs to the deceased in the current cause, not **in the Estate of Japeth Avugwi Luseno**. Orders purporting to distribute property not belonging to the deceased are unenforceable. **LR. No North/Maragoli/Lusengeli/890** forms part of the estate of the deceased herein.

44. Still on **LR. No North/Maragoli/Lusengeli/890**, The Court has been invited to determine whether the daughters of the deceased are entitled to inherit **LR. No North/Maragoli/Lusengeli/890**, notwithstanding the Administrators contention that the property is ancestral land and under Maragoli Customary Law land should devolve to the sons of the deceased.
45. The Administrators have relied on *In re Estate of Gakuya Marira (deceased)* [2020] KEHC 5269 (KLR). The Court in this regard was determining the distribution of the estate of a person who had died intestate in 1959 prior to commencement of the Law of Succession Act. The Court went ahead to cite the Court of Appeal case of *Mary Wanja Gichuru -versus- Esther Watu Gachuhe Civil Appeal No. 76 of 1998* and referenced President Jomo Kenyatta in his book **Facing Mount Kenya** to emphasize that according to according to Kikuyu customs married daughters do not inherit property.
46. The Administrators have failed to note that the case was involving a person who died before enactment of the **Law of Succession Act**. The deceased herein died in 1995 the distribution of deceased's property is therefore governed by the **Law of Succession Act** which came into effect on July 1, 1981.
47. Colonial era laws and customary practices prior often discriminated against women and prevented women from inheriting property. The enactment of the **Law of Succession Act** repealed archaic,

patriarchal and discriminatory customs and laws, ensuring daughters could inherit property just like sons. **Section 29** expressly lists dependants entitled to benefit from the estate. Further **Section 38** mandates equal distribution among children in cases of intestate succession. These provisions make it clear that daughters are entitled to inherit property equally, without discrimination.

48. The Constitution under **Article 27** further guarantees equality and freedom from discrimination, including, on the basis of sex. International instruments like the **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)**, the **African Charter on Human and Peoples' Rights (ACHPR)**, together with the **Maputo Protocol**, guarantee women's rights to property and inheritance. These instruments strengthen constitutional guarantees, meaning Kenyan Courts are required to protect daughters against any form of discrimination or attempted violation of their Constitutional rights on the basis of customary practices.
49. This Court is guided by precedent notably ***Rono v Rono (Civil Application No. 66 of 2002) [2028] 1 KLR 802*** where the Court of Appeal held that discrimination against daughter in matters inheritance is unconstitutional.
50. The argument that daughters must establish interest in the property by showing residence or homestead ties is equally untenable. Their interest is established by virtue of being dependants of the deceased

within the meaning of **Section 29** of the **Law of Succession Act**. Whether they have homes else elsewhere is immaterial to their right to inherit.

51. In conclusion, this Court finds that the exclusion of daughters from the distribution of **LR. No North/Maragoli/Lusengeli/890** unlawful, and the property shall be distributed equally among all children of the deceased, sons and daughters alike. If a beneficiary or dependant feels they do not wish to take part in the distribution of **LR. No North/Maragoli/Lusengeli/890**, they can renounce their interest.
  
52. Pertaining the five percent (5%) of **LR No. 9615/Molo/Elburgon**, the Court notes that pursuant to **Nairobi Succession Cause No. 25 of 1969** five percent (5%) of **LR No. 9615/Molo/Elburgon** was allocated to the deceased herein. The Assent was duly registered on 6<sup>th</sup> May, 1971, reflecting the 5% share transmitting it to the late **Margaret Avugwi Luseno** as a beneficiary of the **Estate of the late Japheth Avugwi Luseno** as a beneficiary.
  
53. The Protestors testified and submitted that they are entitled to the 5% as beneficiaries of the Estate of the deceased herein. The Assent the property distributed in the following terms
  - a) Margaret Avugwi Luseno 5%
  - b) Evans Aggrey Luseno 5%
  - c) Samuel Asiligwa Luseno 5%
  - d) Peter Luvanda Luseno 5%

- e) Erick Keya Luseno 10%
- f) Eliud Avugwi Luseno 10
- g) Margaret Luvanda Luseno 60 % share as Trustee for 6 minor Children namely **Douglas Mudave Luseno, Benson Lugasi Luseno, Charles Lundu Luseno, Hellen Muhonja Luseno, Lenard Isigi Luseno, Dr. Charles Lundum Luseno, Lynette Mudagale Luseno**

54. The Protestors have sneaked in an issue that the proposed distribution of the 5% share of the deceased in respect of L.R. No 9615/Molo/Elburgon would be to beneficiaries who were not beneficiaries of the deceased. The Administrators on the other hand contend that their proposal of the 5% **LR NO. 9615/MOLO/ELBURGON** be shared between **Grace Engesi Wambwa** and **Flora Kavulani Luseno** is because of the two beneficiaries being left out in the initial distribution of **LR NO. 9615/MOLO/ELBURGON**.

55. The Letter by the Chief stated that **Grace Engesis Wambwa** and **Flora Kavulani Luseno** are beneficiaries of the deceased. Grace as a daughter of the deceased and Flora as a granddaughter who was raised by the deceased following the demise of **Gladys Luhunga Ritho**.

56. The Protestors have intimated that a granddaughter cannot inherit property of a deceased person. Courts and **Section 29 (b)** of the **Law**

**of Succession Act** have affirmed that grandchildren can inherit if their parent (the deceased's child) has predeceased the deceased. Therefore, the Protestors' position that a granddaughter cannot inherit is not supported by law. A granddaughter may not inherit directly alongside children of the deceased if her parent is alive, but she is entitled to inherit if her parent has already passed away.

57. Further the Protestors have not challenged the evidence that **Flora Kavulani Luseno** was raised by the deceased following the demise of her mother or all intents and purposes, she was maintained by the deceased and is therefore entitled to be considered in the distribution of the estate.
58. Now therefore, any beneficiary left out of the initial distribution of **LR NO. 9615/MOLO/ELBURGON** was left out in **Succession Cause 25 of 1969**. What is up for determination is the 5% share of the deceased herein and its distribution.
59. It is unfortunate that that the two were left out of the initial distribution **Succession Cause 25 of 1969**. The other beneficiaries have identified the error and, in an attempt, to correct the error have opted to relinquish their claim from the five percent (5%). **Section 38** of the Act requires equal distribution among all surviving children of the deceased. The unfortunate omission of certain beneficiaries in the earlier cause of 1969 is a historical error, but it is an error that can only be rectified within that cause itself. It cannot be imported into this

succession cause to extinguish or diminish the rights of Protestors. The regimes are different as well as the applicable laws.

60. The other beneficiaries may choose to relinquish their claim to the five percent (5%) share to correct the historical omission, but such voluntary renunciation cannot bind the Protestors. Their claim is established by law and cannot be extinguished based on an error unrelated to this cause.
61. The Court is also invited to determine whether balloting is the most suitable mechanism for distribution and if so, what mode of balloting should be adopted. The beneficiaries were allocated 95% of **LR NO. 9615/MOLO/ELBURGON** in **Succession Cause 25 of 1969** and have not been able to agree on who gets what portion due to there being arable and non-arable land. They now pray for the Court to recommend the mode of balloting as some have been allocated 5% and other 10%.
62. It is important to note that 95% share of **LR NO. 9615/MOLO/ELBURGON** was already distributed in Succession Cause 25 of 1969 how the individuals share out the same is not for determination in this cause. This cause only deals with the 5% allocated to the deceased herein. Even if the Court were to assist the beneficiaries in determining who gets what portion of the 95% there is no valuation report to determine which part is arable or otherwise.

63. Accordingly, the Court makes the following orders

- a) It is hereby declared that LR No. North/Maragoli/Lusengeli/890 belongs to the deceased herein and forms part of this estate and shall be distributed equally among all the beneficiaries of the deceased
- b) Five Percent (5%) Share of LR No. 9615/Molo/Elburgon shall be distributed equally among all the beneficiaries of the deceased
- c) If a beneficiary or dependant feels they do not wish to take part in the distribution they can renounce their interest.
- d) Distribution of Title No Kakamega/Lusengeli/943 and Kakamega Lusengeli/923 shall be held in abeyance until the beneficiaries have addressed the issue of discrepancies.
- e) Administrators are directed to file a fresh schedule of distribution reflecting the above findings within sixty (60) days.
- f) This being a family matter, there shall be no orders as to costs

It is so ordered

**Dated, signed and delivered at Nakuru**

**On this 23<sup>rd</sup> day of February, 2026**

**Mohochi SM**

**JUDGE**