

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT HOMA BAY**  
**SUCCESSION CAUSE NO. 269 OF 2015**  
**IN THE MATTER OF THE ESTATE OF JOSEPH MUMA NDIEGE**  
**(DECEASED)**

**CYPRIAN OTIENO MUMA.....**  
**.....PETITIONER**

**AND**

**JANET ADHIAMBO**  
**MUMA.....RESPONDENT**

**RULING**

**[1]** This matter was commenced on 19<sup>th</sup> July 2013 vide a Petition for Letters of Administration Intestate in respect of the estate of **Joseph Muma Ndiege** (the deceased). The Petition was filed by the deceased's son, **Cyprian Otieno Muma** (hereinafter, the petitioner). In his Affidavit in Support of the Petition, the petitioner averred that the deceased died intestate on the 27<sup>th</sup> August 2000 and was survived by the following:

- [a] Janet Adhiambo Muma** (widow)
- [b] Cyprian Otieno Muma** (son, adult)
- [c] Stephen Otieno Muma** (son, 17 years old)
- [d] Ocadias Ochieng Muma** (son, 15 years old)
- [e] Mike Milton Muma** (son, 13 years old)
- [f] Catherine Awuor Muma** (daughter, adult)

**[2]** Upon complying with the applicable procedures and processes, the petitioner was issued with a Grant of Letters of Administration Intestate on 9<sup>th</sup> October 2013. The Grant was confirmed on 2<sup>nd</sup> August 2017, whereupon the proposed mode of

distribution was approved. The widow, **Janet Adhiambo Muma**, was to hold Land Parcel No. Kanyada/Kanyango/Kalanya/3989 for herself and in trust for **Mike Milton Muma** and **Ocadias Ochieng Muma** in equal shares. The petitioner was to hold Land Parcel No. Kanyada/Kanyango/Kalanya/3992 and 4043 in trust for his minor sibling, **Stephen Otieno**.

**[3]** Thereafter, the petitioner filed an application dated 16<sup>th</sup> December 2024 by way of Chamber Summons praying for the following orders:

**[a]** That the Court be pleased to issue an order of prohibitory injunction restraining the respondent from alienating Land Parcel No. Kanyada/Kanyango/Kalanya/3989 or any portion thereof by way of sale, gift or otherwise.

**[b]** That the Court be pleased to rectify the schedule set down in the Certificate of Confirmation of grant by deleting the names of **Janet Adhiambo Muma, Mike Milton Muma, Stephen Otieno Muma** and **Ocadias Ochieng Muma** and substitute in the place thereof the name of **Cyprian Otieno Muma** and **Catherine Awuor Muma**.

**[c]** That the costs of this application be provided for.

**[4]** The application was brought under **Section 35(1)(b) and 40(1)** of the Law of Succession Act, Cap 160 of the Laws of Kenya, and **Rule 49** of the Probate and Administration Rules. It was supported by the affidavit of the petitioner, sworn on 16<sup>th</sup> December 2024. That application was supplanted by the

petitioner's Amended Chamber Summons dated 16<sup>th</sup> July 2025. This time round, the petitioner asked for the following orders:

**[a]** That the Court be pleased to review the orders made in the Grant declaring that the respondent, **Janet Adhiambo Muma** and her sons do not qualify to be dependants of the deceased in accordance with the law of Succession Act.

**[b]** That the Court be pleased to rectify the Schedule appended to the Certificate of Confirmation of Grant by deleting the names of **Janet Adhiambo Muma, Mike Milton Muma, Stephen Otieno Muma** and **Ocadia Ochieng Muma** and replace the same with the names of **Cyprian Otieno Muma** and **Catherine Awuor Muma**.

**[c]** That the costs of the application be paid out of the estate of the deceased.

**[5]** In his Supporting Affidavit sworn on 16<sup>th</sup> July 2025, the petitioner reiterated the factual background of the matter and averred that the deceased lawfully married **Edith Atieno Muma** in the year 1982 or thereabout with whom they had three children. He furnished the names of the children as **Catherine Awuor Muma**, born on 6<sup>th</sup> October 1984 and himself, born on the 11<sup>th</sup> December 1988, as well as **Benard Kaut Muma** born in 1992 but died as minor. The petitioner produced copies of Certificates of Birth as Annexures "COM-3A " and "COM-3B ")

**[6]** The petitioner further averred that their mother **Edith Atieno Muma**, predeceased their father; having died on the 12<sup>th</sup> July 1996. He stated that, being a member of the Roman Catholic Church, the deceased stayed as a widower for a long time thereafter; and that it was not until the year 1999 or thereabout that the respondent who was a tenant at Kapita Market near their home, started to have an affair with their father, with marriage in view. The petitioner deposed that the deceased moved away from home and started cohabiting with the respondent in her rental house where she was staying with her children born in an earlier marriage to a husband from Mirunda sublocation, Waondo location in Mbita sub-county.

**[7]** The petitioner deposed that, by the year 2000 when the deceased died, he had lived together with the respondent for only one year; and that upon his demise, the respondent refused to fulfill the Luo rituals relating to burial of a husband, arguing that she had not lived long enough with the deceased. He added that the respondent had contended at the time that since no dowry had been paid by the deceased to her parents he did not qualify as her husband. The petitioner added that, in spite of the respondent's protestations, their grandmother, **Catherine Mwawade Ndiege** invited her to join her and the rest of the family at the family's homestead; and therefore the respondent lived in the family home from 2001.

**[8]** The petitioner explained that it was in the foregoing circumstances that he included the respondent and her sons as beneficiaries of the deceased's estate. He added that he did not

anticipate that the respondent would grab the estate of the deceased and thereafter return to her former husband.

**[9]** The petitioner pointed out that the homestead of their grandfather **Ndiege s/o Omwanda** as well as the homestead of the deceased are situate on Land Parcel No. Kanyada/Kanyango/Kalanya/3989 and that the graves of **Ndiege s/o Omwanda, Catherine w/o Ndiege, Edith Atieno w/o Muma** and **Joseph Muma Ndiege** are on the same parcel of land. He averred that when, in September 2024 he learnt that the respondent had sold a portion of the suit land, he caused his elder sister, **Catherine Awuor**, to register a caution against the title. They then engaged an Advocate to take appropriate legal action to preserve the property. A copy of the demand letter written by their Advocate was also annexed to the Supporting Affidavit and marked as Annexure "COM-4".

**[10]** With reference to **Section 35(1)(b)** of the Law of Succession Act, and on the basis of information received from his Advocate, **Mr. George Shane Okoth**, the petitioner contended that as a surviving spouse, the respondent was only entitled to a life interest in the net intestate estate; and that upon remarriage, she forfeited that interest and ought to surrender the title to the other the other dependants. The petitioner also pointed out that the respondent, **Janet Adhiambo Muma**, was registered as proprietor of the suit land to hold the same in trust for minors and the therefore has no power to sell the land without leave from the court.

**[11]** Lastly, the petitioner deposed that the respondent resisted service of court process and had to be served with the aid of police officers. He also pointed out that even after appearing in court she opted to not file any response to the instant application (which averment is not true because the respondent did file a Replying Affidavit). The petitioner exhibited copies of Affidavits of Service to his Supporting Affidavit as Annexures "COM-5A " and "COM-5B). The petitioner prayed that his application be allowed and orders granted as prayed.

**[12]** The petitioner filed a Further Affidavit sworn on 29<sup>th</sup> August 2025 by **Michael Onyuna Omwanda**, a brother to **Ndiege Omwanda** and therefore the uncle of the deceased. He averred that, before his demise, **Ndiege Owanda** cohabited with his wife and children on the land now registered as Land Parcel No. Kanyada/Kanyango-Kalanya/ 3989 which land was passed down to and registered in the name of his son, **Joseph Muma Ndiege**. He confirmed that in 1982, **Joseph Muma Ndiege** lawfully married **Edith Atieno Muma** with whom he sired two children, namely, **Catherine Awuor** and **Cyprian Otieno**.

**[13]** **Michael Onyuna Omwanda** further averred that **Edith Atieno** predeceased her husband and was buried in his home on Land Parcel No. Kanyada/Kanyango-Kalanya/3989; and that **Joseph Muma** stayed as a widower for a long time thereafter. He further confirmed that, in the year 1999, **Joseph Muma** brought home **Janet Adhiambo** together with her three sons, **Stephen Otieno, Mike Milton and Ocadias Ochieng** born in her earlier marriage; that on the 27<sup>th</sup> August 2000, **Joseph Muma** died leaving his children **Catherine Awuor** and **Cyprian**

**Otieno** together with the respondent, **Janet Adhiambo**, and her children living in his home on Land Parcel No. Kanyada/Kanyango/Kalanya/3989; and that **Joseph Muma** was buried next to the grave of his wife **Edith Atieno** on Land Parcel No. Kanyada/Kanyango-Kalanya/3989.

[14] **Michael Onyuna Omwanda** further deposed that, in the year 2013, **Cyprian Otieno** commenced succession proceedings with respect to the estate of his late father and included **Janet Adhiambo** and her children as beneficiaries to the estate. He explained that, given his tender age, **Cyprian Otieno** consented to have **Janet Adhiambo** registered as proprietor of Land Parcel No. Kanyada/Kanyango-Kalanya/3989 to hold the same in trust for **Mike Milton** and **Ocadias Ochieng** who were still minors at the time.

[15] Regarding the current state of affairs, **Michael Onyuna Omwanda** averred that sometime in the year 2024, **Janet Adhiambo** colluded with her children and started selling portions of Land Parcel No. Kanyada/Kanyango-Kalanya/3989 to buyers who have now subdivided and fenced off portions of the land denying the children of **Joseph Muma** access to their father's home. He added that **Janet Adhiambo** has since moved out of the home of **Joseph Muma** and gone back to her former husband in Waondo together with her children.

[16] In response to the application, the respondent filed a Replying Affidavit sworn by her on 11<sup>th</sup> July 2025. She averred that she got married to the deceased, **Joseph Muma Ndiege**, on the 4<sup>th</sup> April, 1993 in accordance with Luo customary law and

rituals and that the deceased husband duly formalized the said relationship by paying dowry, comprising of two (2) heads of cattle, to her parents in consideration of the said marriage. She annexed to her affidavit copies of Supplementary Affidavits as Annexures "JAM-2a" and "JAM-2b" respectively in proof of the assertion).

**[17]** The respondent further stated that they begot two issues of the said marriage, namely **Acadias Ochieng Muma** and **Mike Milton Ochieng Muma**. She likewise annexed copies of Certificates of Birth to her affidavit as Annexures "JAM-3a" and "JAM-3b" respectively). She conceded that the deceased died on 27<sup>th</sup> August, 2000 at home in Asego Sub-location, Homa Bay Town Location, as stated by the petitioner herein in paragraph 2 of his supporting affidavit.

**[18]** The respondent also conceded that the deceased was initially married to the late **Edith Atieno Muma** who was the biological mother to the petitioner herein and his sister, namely, **Catherine Awuor Muma**. She however denied the petitioner's averments as set out in paragraphs 5 and 6 of his Supporting Affidavit. She instead deposed that she was lawfully married to the deceased prior to his demise and that upon his demise she duly participated in, performed and/or fulfilled all the traditional rituals relating to his burial. She added that she thereafter faithfully remained in his homestead where she responsibly exercised her duties as the mother to all his children inclusive of the petitioner and his sister above named.

**[19]** The respondent deposed that, sometime in the year 2013, the dependants of the deceased amicably appointed the petitioner herein as administrator to the estate, after which he filed the instant succession proceedings in respect to the deceased's estate in which he duly included and/or listed all dependants of the deceased, including herself and her sons. She stated that the proceedings were not contentious and ultimately, the petitioner apportioned her and her sons Land Parcel Number Kanyada/Kanyango/Kalanya/3989 measuring approximately 0.32 of a hectare. She therefore asserted that the said land was duly and rightfully given to her and her said sons and was subsequently registered in her name as a legitimate beneficiary. She also conceded that she was to hold the land in trust for her sons who were minors at the time.

**[20]** The respondent therefore contended that, notwithstanding that the subject property comprised the homestead of the deceased as well as the graves of his forefathers, she had full rights of ownership thereto as a registered proprietor, and hence required no authority or consent of the petitioner or any third-party to utilize or dispose of the same. The respondent explained that, together with her sons who are now adults, they made a decision to sell the land in order to purchase a bigger piece of land in the rural area within Kanyach-Kachar Sub-location being Land Parcel Number East Kanyada/Kanyadier/836 measuring approximately 0.44 of a hectare, on which they now reside comfortably. She annexed the title deed for the property to her affidavit.

**[21]** In response to the respondent's Replying Affidavit, **Michael Onyuna Omwanda** explained that the respondent lied by stating that the deceased legally married her and paid dowry to her parents. He also disputed her assertion that **Mike Milton** and **Ocadias Ochieng** were sired by the deceased. He made reference to the Certificates of Birth exhibited by the respondent, which indicate that the children were born to **Joseph Muma** on the 7<sup>th</sup> August 1999 and 4<sup>th</sup> July 1999 respectively, and asserted that it is not humanly possible for a woman to have two children in the span of time stated in the certificates.

**[22]** From the material presented before this Court there is no dispute that, at the time the deceased died, he was cohabiting with the respondent as his wife. There is credible evidence that when they commenced cohabitation, the respondent had her own children from a previous marriage. After the demise of the deceased, the dependants agreed on how to distribute the assets comprising his estate. Accordingly, the respondent and her sons were given Land Parcel No. Kanyada/Kanyango/Kalanya/3989 measuring approximately 0.32 of a hectare. The land was transmitted to the respondent to hold in trust for her sons. There is also no dispute that the respondent thereafter proceeded to sell parts of the land and moved out of the matrimonial home with her sons.

**[23]** The petitioner essentially seeks a review of the orders of confirmation of Grant made on 2<sup>nd</sup> August 2017 and prayed that an order be made herein declaring that the respondent, **Janet Adhiambo Muma**, and her sons do not qualify to be

dependants of the deceased in accordance with the law of Succession Act. The application is expressed to have been brought under **Section 35(1)(b) and 40** of the Law of Succession Act as well as **Rule 49** of the Probate and Administration Rules. **Rule 49** simply states that:

**A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.**

**[24]** Needless to say that the **Law of Succession Act** was intended to be a stand-alone piece of legislation with its own rules of procedure. The Court of Appeal made this plain in **Josephine Wambui vs. Margaret Wanjiru Kamau & another** [2013] eKLR, wherein it stated thus:

**“We hasten to add that the Law of Succession Act is a self-sufficient Act of Parliament with its own substantive law and Rules of procedure. In the few instances where the need to supplement the same has been identified some specific rules have been directly imported to the Act through Rule 63(1).”**

**[25]** **Rule 63** of the Probate and Administration Rules states:

**“(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.),... shall apply so far as relevant to proceedings under these Rules.**

**(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased person shall be those existing and in force immediately prior to the coming into operation of these Rules.”**

**[26]** Accordingly, the pertinent enabling provision is **Order 45 Rule 1** of the **Civil Procedure Rules**, which has been expressly imported by dint of **Rule 63** aforementioned. It provides that:

**(1) any person considering himself aggrieved-**

(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

**[27]** From the aforesaid provision, a party seeking review is under obligation to demonstrate that:

**[a]** there has been discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at the material time; or

**[b]** that there is some mistake or error apparent on the face of the record; or

**[c]** that there was any other sufficient reason;

**[28]** As has been pointed out herein above, the petitioner knew all along that the respondent had children from an earlier marriage when she started cohabiting with the deceased. He acknowledged that, after the demise of the deceased, his grandmother invited the respondent to live with them in the family home. There was therefore nothing new that the petitioner could not have presented to the Court at the time of confirmation of Grant. In the same vein, it was not the contention of the petitioner that there is a mistake or error on the fact of the record. Accordingly, the issue for determination is whether there is any other sufficient reason for review, and if so what orders ought to issue.

**[29]** In **Nasibwa Wakenya Moses v University of Nairobi & another** [2019] eKLR it was held that:

28. An application for review may be allowed on any other “sufficient reason.” The phrase ‘sufficient reason’ within the meaning of the above rule means *analogous or ejusdem generis* to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in *Sadar Mohamed vs Charan Singh and Another*<sup>[13]</sup> where the court held that:-

*“Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter).”*

29. Mulla in the *Code of Civil Procedure*<sup>[14]</sup> (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that *the expression ‘any other sufficient reason’...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in the rules, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.”*

**[30]** The petitioner presented evidence to the effect that, upon the demise of the deceased, the respondent left the matrimonial home and remarried elsewhere. Consequently, he placed reliance on **Section 35(1)** of the Law of Succession Act, which provides that:

Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

- (a) the personal and household effects of the deceased absolutely; and
- (b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

**[31]** It is worth noting however that this provision has been found to be discriminatory and therefore inconsistent with the Constitution. For instance, in **Muigai v Muigai & another** (Civil Appeal 131 of 2012) [2014] KECA 753 (KLR) (21 January 2014) (Judgment) the Court of Appeal held:

**[17]** ...we are of the view that the provisions of *Section 35(b) and 40* are discriminatory against Jerioth and the female gender. The Legislature should consider those sections for amendment. Our findings on this issue

are not at all novel as shown below the State is obligated under *Article 27(b)* of the *Constitution* to take such legislative measures. To illustrate that *Section 35(1) (b)* and the proviso thereto provides for a differential treatment of a widow and a widower, this is what it states;

**“(b) a life interest in the whole residual of the net intestate: provided that if the surviving spouse is a widow, that interest shall determine upon re-marriage to any person.”**

[19] A plain reading of the above proviso is that a widower (a male) can remarry without losing the enjoyment of the ‘life interest’ of the spouse's estate while the widow (a female) loses her life interest upon re-marriage. It goes without saying that this is against the letter and spirit of the *Constitution*.”

[32] Following the above decision, the provision was declared unconstitutional in **Ripples International v Attorney General & another; FIDA (Interested Party) (Constitutional Petition E017 of 2021) [2022] KEHC 13210 (KLR) (29 September 2022) (Judgment)**. The Court held:

27. Sections 35(1)(b) and 36(1)(b) of the Act restricts a widow life interest in the property of her deceased spouse when she remarries unlike the widower who remarries.

28. Section 39(1)(a) and (b) gives priority to the father ahead of mother over the property of a child who dies intestate, unmarried and childless.

29. Article 27(4) of the *Constitution* prohibits discrimination of the grounds of sex and marital status among other grounds as follows:

**“(4)The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”**

30. The differential treatment of the female as against their male counterparts is indefensible, and the *Law of Succession Act* which predates the *Constitution* of Kenya 2010, has no explanation for the latent discrimination and restriction. Article 45(3) of the *Constitution* clearly recognises the equality of men and women in marriage set up as follows: “Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage”.

[33] In the premises, the mere fact that the respondent remarried is no ground for review. What, in my view is significant, is the fact that she disposed of the suit property by way of sale without recourse to the Court, yet the order of the Court upon confirmation was that she was to hold the property in trust for the children of the deceased who were minors at the

time. There is no indication as to when the sale took place and whether the consent of the Court was ever sought. In any event, it is now trite that even where consent is sought, it is not automatic that the same will be granted (see In **re Application by CWK as Trustee for Consent of Court to allow her to Sell the Properties for Purposes of Investing the Proceeds for the Benefit of the Minor (Environment & Land Miscellaneous Case E017 of 2024) [2025] KEELC 1328 (KLR) (19 March 2025) (Judgment)**).

[34] In the premises, I am satisfied that sufficient cause has been shown by the petitioner for review. The petitioner's Amended Chamber Summons dated 16<sup>th</sup> July 2025 is meritorious and is hereby allowed.

[35] That said, the last question to pose is what orders ought to issue? In the light of the factors highlighted herein above, I find pertinent the provisions of **Section 47** of the Law of Succession Act. It states that:

**"The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient..."**

[36] Moreover, **Rule 73** of the **Probate and Administration Rules** provides that:

**"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

[37] In the result, the orders that commend themselves to me and which I hereby grant are as follows:

[a] That the disposal, by way of sale, of the suit property, namely, Land Parcel Number Kanyada/Kanyango/Kalanya/3989 measuring approximately

0.32 of a hectare, by the respondent, **Janet Adhiambo Muma**, without recourse to the Court is null and void and is hereby reviewed and set aside. The said property to revert to the estate of **Joseph Muma Ndiege** for fresh distribution to the beneficiaries of the deceased upon a fresh application by the petitioner.

**[b]** That the Schedule appended to the Certificate of Confirmation of Grant dated 2<sup>nd</sup> August 2017 be and is hereby rectified by deleting the names of **Janet Adhiambo Muma, Mike Milton Muma, Stephen Otieno Muma** and **Ocadia Ochieng Muma** pending fresh distribution.

**[c]** That the costs of the application be paid out of the estate of the deceased.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 25<sup>TH</sup> DAY OF FEBRUARY 2026**

**OLGA SEWE**

**JUDGE**