



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Wepukhulu Wanambisi Maundende (Deceased) (Succession Cause 124 of 1986) [2025] KEHC 628 (KLR) (29 January 2025) (Ruling)

Neutral citation: [2025] KEHC 628 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 124 OF 1986
S MBUNGI, J
JANUARY 29, 2025
IN THE MATTER OF THE ESTATE OF WEPUKHULU
WANAMBISI MAUNDENDE (DECEASED)**

RULING

Application dated 15th April, 2024

1. The Application dated 15.04.2024 is brought by Albert Ngutuku Wepukhulu a son of the deceased for orders that:
 - i. Spent
 - ii. Spent
 - iii. The summons of confirmation of grant herein be re-opened for hearing
 - iv. The distribution set out in the certificate of confirmation of grant dated 25th June 2021 be reviewed as set out in paragraph 3 of the affidavit of David Wafula Wepukhulu sworn on the 2nd day of September 2020 in support of the summons for confirmation
2. The application is supported by affidavits sworn by 3 beneficiaries his sister Beatrice Nanyama Wepukhulu and brothers, Wilberforce Muatambo Malotelo and Joseph Wanambisi Wepukhulu.
3. The application impugns the distribution handed down by this court on 18th June, 2021 in a ruling.
4. The deceased died on 12th December, 1980 and as per section 2 (2) of the *Law of Succession Act*, LR No. East Bukusu/North Sangalo/661, the only asset in the Estate was subject to Bukusu customs on distribution of the deceased property.
5. The administrators during the succession process failed to explain to the court the Bukusu customary law that had informed the subdivision LR No. East Bukusu/North Sangalo/661 among the sons. The deceased was polygamous married to three wives who besides daughters were blessed with the combination of 9 sons.



6. Summons for confirmation dated 27th September, 2013 filed by Moses Maundende Wepukhulu excluded the daughters but included the purchasers as 'other dependents'. The proposed mode of distribution and the shares of the sons and purchasers was indicated.
7. The court postponed the confirmation of grant and directed that the administrators file affidavits detailing all the beneficiaries of the deceased, male or female, and if dead, indicate their children. The court also directed that the administrators file supplementary submissions addressing the issue as to which law applies to the distribution of the estate (the [law of Succession Act](#) or The Luhya Customary Law).
8. David Wafula Wepukhulu then filed a further affidavit containing necessary consents of the beneficiaries. In the Affidavit, he set out the survivors in each house, however, he still included the purchasers clearly indicating acreage and from whom it was bought from. He also included the information on how they had in their own way taken care of the widows and their sisters. He pointed out that the two surviving widows had been given an acre and the sisters 2 acres which they sold to Christine Naswa Sifuna and shared the proceeds equally. After taking care of the widows and sisters, he shared out the remainder among the sons and purchasers as well.
9. In its Ruling on 18th June 2021, the court did not adopt the proposed mode but instead imposed its own as follows;

“With the above in mind, I shall proceed to dispose of the estate of the deceased, guided by section 40 of the [Law of Succession Act](#). The deceased died a polygamist. His household comprises of three houses and therefore, I shall distribute his estate according to the three houses, by taking into account the number of children in that house, adding any surviving widow in each house as an additional Unit. After allocating each house its portion based on the number of children in each house, each house shall thereafter share out settlement in terms of sections 35 to 38 of the [Law of Succession Act](#).”
10. In imposing the above, the court laid blame on administrators for failure to submit the evidence on substance of Bukusu Customs on distribution of property of the deceased.
11. This is in paragraph 6 of the Ruling of 18th June 2021, where the court stated as follows;

“I note though that the administrators have not addressed me on the substance of the Bukusu customs on intestate distribution. It would appear that they are leaving it to the court to ascertain the said customs. Customs are a matter of fact, and I cannot ascertain the same in the absence of evidence being adduced. In the absence of that, I shall revert to part V of the [Law of Succession Act](#).”
12. A certificate of confirmation of grant was issued including the daughters but excluded the purchasers, a reverse of the mode of distribution proposed by the administrators.
13. The statements of Pius Simiyu Wanjala, Wilson Webi Misiko and Timothy Sinbad Wepukhulu establish that the distribution, according to Bukusu customs is done between the 40th day to 12 months. Land is shared among the males only as daughters are taken care of by the clan in which they would or will marry. The widow remains in possession of her homestead which is included in the portion allocated to her last born son in whom the portion will escheat on her death. The deceased had 9 sons among whom the land was shared equally.



Application dated 18th June, 2024.

14. The 2nd application dated 18th June 2024, is by Beatrice Njeka seeking the following orders:
- i. Spent
 - ii. This cause be reopened;
 - iii. The applicants listed herein below be enjoined in this cause as interested parties;
 - a) Benedict Wafula Kokonya
 - b) Amos Kunikina Marani
 - c) Petronilla Khakasa Wati
 - d) Daniel Kweyu Maili
 - e) Fredrick Wamalwa Nyongesa
 - f) Rouben Makokha Barasa
 - g) Mary Nelima Wanyama
 - h) George Makinda Nyongesa
 - i) David Biketi Wali
 - j) Nancy Nyagoha Kidiavai
 - k) Jamilla Wafula Nanjala
 - l) Wanambisi Stephen Juma
 - m) Teresa Nakhungu Wati
 - n) Concepta Naliaka Juma
 - iv. Pending the hearing of this application, the Land Registrar-Bungoma do implement this Court's order dated 13.02.2013 and an order be issued restraining any activities on the said title, threats of eviction or entry in the lands occupied by the applicants.
 - v. The certificate of confirmation of grant dated 25th June, 2021 be reviewed, set-aside and an order that the applicants are entitled to the acreages in E. Bukusu/N. Sangalo/ 661 as set out in paragraph 3 of the affidavit of David Wafula Wepukhulu sworn on the 18th day of September, 2020 do issue.
 - vi. The applicants' names and shares be included in the final certificate of confirmation of grant.
15. The application seeks for enjoinder of the purchasers who have each sworn an affidavit exhibiting agreements for sale with respective sons of the deceased.
16. They have similarly applied for review in line with the application of 15th April, 2024 by Albert Ngutuku Wepukhulu.
17. The court directed and gave time for anybody in need of filing an affidavit to do so.
18. Vide an affidavit dated 16th October, 2024, the two administrators, Moses Maundende Wepukhulu and David Wafula Wepukhulu raised the issue of want of locus on the part of Beatrice Njeka(applicant),



jurisdiction, incompetence, there being no good grounds for review and the application being prejudicial and embarrassing to the administrators.

19. The parties canvassed the applications by way of written submissions.

Applicants' Submissions.

20. The applicants filed joint submissions to the two applications and submitted that Beatrice Njeka did not purchase land from the deceased, but she was acting under donated authority of her husband who had similarly so averred in his affidavit. Further, it was her husband Daniel Kweyu Maili who bought land from Albert Ngutuku Wepukhulu which fact the two confirm in paragraph 6 of the affidavit.
21. They submitted that the agreement for sale is countersigned by David Wafula Wepukhulu, the 2nd administrator as a witness, a fact he does not deny.
22. The applicants averred that nowhere in their replying affidavits do the administrators deny the purchasers occupation and possession of their respective portions of the estate. In the agreements for sale, the purchasers came in the estate at the invitation of the respective sons, including Moses Maundende Wepukhulu and David Wafula Wepukhulu, and further, the administrators' signatures and names appear in majority of the sale agreements. In their respective affidavits, the purchasers have exhibited agreements for sale entered into with the beneficiaries, asserted occupation and possession.
23. On the submission by the administrators that the applicants should have appealed instead of seeking for review since this court does not have jurisdiction to review its Ruling of 18th June 2021, the applicants disagreed, and submitted that an appellate court does not take evidence but rather evaluates the evidence captured in the record of the trial court. Customary law which the applicant has asked the court to consider is proved by evidence which cannot be done by an Appellate court.
24. They submitted that although review of court orders is not directly provided in the [Law of Succession Act](#), it is imported into probate practice by Rule 63 of the Probate and Administration Rules which adopts a number of procedures from the Civil Procedure Rules, including Order 45 of the Civil Procedure Rules.
25. Moreover, the applicants submit that courts have ruled that any interested party in East Bukusu/North Sangalo/661 should ventilate their concerns in this succession cause. This position was held in the Court of Appeal in Kisumu Civil Appeal No. 22 of 2014 which referred the case back to this court for resolution.
26. It was their submission that review is granted on account of discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge or could not be produced by an applicant 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 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. They submitted that failure to adduce evidence on the substance of Bukusu customs on distribution of an estate of the deceased was a mistake and that the applicants have produced material evidence that was not produced by the administrators.
28. The applicants further submitted that the betrayal of the trust bestowed on administrators to the estate was a sufficient reason to review the distribution as ordered by the court. They cited Re: Estate of Julius Mimano 2019 (EKR). They averred that administrators were represented and were aware of the law on



how to prove customary law thus It was not enough for David Wafula Wepukhulu to allege without elaborating the custom as required by section 51 of the Law of [Evidence Act](#).

29. They submitted that the primary beneficiaries (male and female) consented to the modes of distributions of 2013 and 2019 proposed by the co-administrators which upheld status quo and took into account the purchasers' share of the estate.
30. They averred that the secondary beneficiaries(the purchasers) paid the full purchase price and are in possession of the land thus given the conduct of the beneficiaries including the administrators, they prayed that this Honourable Court subjects the interests of the primary beneficiaries to constructive trusts created in favor of the purchasers entrenching them in the deceased estate, since equity, being a constitutional principle ranks higher than the dictates of the rule of intestacy spelt out in the [Law of Succession Act](#).
31. On the issue of delay, the applicants submitted that neither Albert Ngutuku Wepukhulu nor the purchasers as well had administrative powers. It was when the administrators failed that they took the burden on themselves of approaching the court. Had Albert Ngutuku Wepukhulu known of hostility from the administrators, he and the purchasers would have applied as per clause (e) of the directives of the court.
32. The applicants submitted that the betrayal on the part of the administrators became apparent later in the day when they stopped the surveyor from completing a survey plan of the delineation of boundaries of East Bukusu /North Sangalo/661.
33. Further, they submitted that the purchasers now fear for their lives and security of their possessions, are stand to suffer loss if their houses are demolished or the land is sold by the administrators who have since become hostile.
34. The applicants averred that they have shown how and when Bukusu customs vested proprietary interest in E. Bukusu/N. Sangalo/661 in the 9 sons and who, by the dint of sale created an overriding interest, which, Equitable estoppel cannot allow the beneficiaries to deprive the purchasers.
35. They submitted that the purchasers have a stake in equity and prayed to be enjoined now that the administrators are back -tracking on duties enshrined in Section 83 of the [Law of Succession Act](#).
36. They also prayed that evidence of the 3 elders be admitted and the same do instruct the review of the grant date 25th June, 2021 back to the mode set out in paragraph 3 of the affidavit of David Wafula Wepukhulu sworn on the 2nd day of September, 2020 in support of the summons for confirmation and the costs of these proceedings be provided for.
37. The applicants filed further joint submissions and submitted that the principles for enjoinder were set in Petition No. 37 of 2017 Kenya Medical Laboratory Technicians Technologists Board & 6 others V Attorney General & 4 Others (2017) eKLR which outlined the elements to be satisfied where a party seeks to be enjoined in the proceedings as an interested party as that; the intended interested party must have an identifiable stake or legal interest or duty in the proceedings.
38. They further submitted that enjoinder is not as of right but is at the discretion of the court hence sufficient grounds must be laid before the court on the basis of the following elements:
 - i. The personal interest or stake that the applicant has in the matter must be set out in the application and the interest must be clearly identifiable and be proximate enough to stand apart from anything that is merely peripheral.



- ii. The prejudice to be suffered in the case of a non-joinder must be demonstrated to the satisfaction of the court and clearly outlined and not something remote.
- iii. Applicant must set out the case and or submissions it intends to make before the court and demonstrate the relevance of those submissions and that the submissions are not merely a replication of what the other parties will be making before the court.

Administrators'/Respondents Submissions.

39. The administrators submitted that It was unclear from the applications and submissions, who the applicants and Respondents were as there are no titles in the applications and submissions.
40. They submitted that there was no evidence of service of heirs/ beneficiaries who shall be affected by the orders sought by the present applications on record.
41. They averred that there is no evidence of purchase exhibited, thus it is not clear for instance from whom and when was the purchase. Consequently, the applicant Beatrice Njeka or her husband was not a creditor of the estate hence it is unclear in what capacity she has moved this court.
42. The administrators further averred that Albert Ngutuku Wepukhulu participated in the proceedings and supported the proposed mode of distribution when the learned judge addressed and made a determination as regards purchasers in the judgment of 26.06.20.
43. Further, they submitted that the court in the judgment considered all the issues being raised as evidenced from the record and the issues can only be dealt with on appeal, which the present applications are not. They placed reliance on paragraph (g) of the final ruling of 18.6.21 where the court ordered that any party aggrieved by the orders made had leave and the right to appeal and that to date, no appeal has been preferred against the said orders.
44. It was their submission that the applications by the applicants for review prayed that this court considers/seats on a judgment by a concurrent judge and review or set it aside, which amounts to this court sitting on its own judgment.
45. Further, they averred that there is no provision for review and in any event even if review was provided for, no reason has been advanced to warrant the same since the ruling sought to be reviewed was delivered on 18.6.21, yet the present applications were filed over 3 years later, and no explanation has been offered for the delay.
46. They submitted that the applications lacked merit and prayed that they be dismissed with costs.

Analysis.

47. I have looked at the applications, the supporting affidavits, the replying affidavits, submissions and authorities cites.
48. I isolate the following issues for determination:
 - i. Whether this court has jurisdiction to entertain the application.
 - ii. If so, has the applicant met the threshold set out under Order 45 of the Civil Procedure Rules.



Determination

49. The respondents (administrators) argue that this court has no jurisdiction to review a judgment of a fellow court of similar jurisdiction. In doing so, it will be like the court sitting on appeal of its own judgment. Thus, the proper way to challenge the court's judgment is to proffer an appeal.

50. In the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] Eklr, it was held that:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

51. In rebuttal, the applicants maintain that this court has jurisdiction to review its ruling of 18.06.2021 for the applicants seek to avail new evidence which was not availed to the court before it made that ruling and that an appellate court does not take evidence but rather evaluates the evidence captured in the record of the trial court. However, In Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed and 3 others [2018] eKLR, the Supreme Court held to the contrary and laid out the guidelines on admission of additional evidence. The Court stated as follows:

"Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by Counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- a. The additional evidence must be directly relevant to the matter before the Court and be in the interest of Justice;
- b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive
- c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was within the knowledge of, or could not have been produced at the time of the suit or Petition by the Party seeking to adduce the additional evidence;
- d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has direct bearing on the main issue in the suit;
- e. the evidence must be credible in the sense that it is capable of belief;
- f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- g. whether a Party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- h. whether the additional evidence discloses a strong prima facie case of willful deception of the Court;



- i. the Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence;
- j. the Court must find the further evidence needful;
- k. A Party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the Omissions or patch up the weak points in his/her case.”

52. Order 45 of the Civil Procedure Rules states:

Application for review of decree or order [Order 45, rule 1.]

- (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 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.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

53. Rule 63 of the probate and administration rules adopts as follows;

“Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

- (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.), together with the High Court (Practice and Procedure) Rules (Cap. 8, 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 persons shall be those existing and in force immediately prior to the coming into operation of these Rules.”

54. While Rule 73 of the probate and administration rules states as follows;



Saving of inherent powers of court

“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.”

55. This court has jurisdiction because it is being called upon to consider new evidence in respect to customary law which was not availed to the court before it made its ruling dated 18.06.2021 which was premised on the provisions of Section 40 of the *Law of Succession Act* whilst the deceased died before the commencement of the Succession Act. The court was very clear in its ruling that it resorted to this because the administrators failed to avail evidence on the Bukusu Customary Law on distribution of the deceased’s estate despite several orders to do so. If the evidence had been availed to the court and the court considered the evidence before rendering its ruling of 18.06.2021 then this court would have no jurisdiction.
56. The applicants approached the court saying that the evidence is now available and the administrators deliberately concealed the same from court for their ulterior motives aimed at dispossessing some of the beneficiaries and acknowledged purchasers of some portions of land comprising the estate.
57. To me, the issue of purchasers was settled when the administrators that is Moses Maundende Wepukhulu and David Wafula Wepukhulu in their affidavits in support of the summons for confirmation of grant dated 27.09.2013, 04.03.2019 and a further affidavit sworn on 13.09.2019 acknowledged the purchasers as dependants of the estate of the deceased as follows:
- a. Wanambisi Stephen Juma
 - b. Benedict Wafula Kokonya
 - c. Amos Kunikina Marani
 - d. Petronila Khakasa Wati
 - e. Reuben Makokha Barasa
- Wanambisi Stephen Juma
- b. Benedict Wafula Kokonya
 - C. Amos Kunikina Marani
 - d. Petronila Khakasa Wati
 - e. Reuben Makokha Barasa
 - f. Mary Nelima Wanyama
 - g. George Makinda Nyongesa
 - h. Daniel Kweyu Maili
 - i. David Biketi Wati
 - j. Carolyne Naliaka Njalale/Allan Wafula Mabuka
 - k. Christine Naswa Sifuna
 - I. Fred Wamalwa Nyongesa



- m. Concepta Naliaka Juma
 - n. Wickliffe Malaa Wakhungu
 - f. Mary Nelima Wanyama
 - g. George Makinda Nyongesa
 - h. Daniel Kweyu Maili
 - i. David Biketi Wati
 - j. Carolyn Naliaka Njalale/Allan Wafula Mabuka
 - k. Christine Naswa Sifuna
 - l. Fred Wamalwa Nyongesa
 - m. Concepta Naliaka Juma
 - n. Wickliffe Malaa Wakhungu
58. Now the administrators cannot purport to retract their averments contained in those affidavits.
59. If they had not acknowledged them as beneficiaries, then the proper forum for determination whether there was a valid sale or not, or whether there was constructive trust or not would be the Environment and Land Court.
60. Having said so, there is need for additional evidence on Bukusu Customary Law for the court to be able to assess the proper law to apply in distribution of the deceased's estate.
61. The delay in bringing up the application for review is understandable. From the conduct of the administrators it is clear they want to change from their earlier position as captured in the affidavits filed in support of confirmation of grant. It is noteworthy that other beneficiaries supported that position. It is very well captured in the court proceedings of 20.11.2019 as follows:

Everlyne Naliaka Akeso ID No. 800XXXX

I am agreeable to the proposed distribution

Fevour Machuma Wepukhulu ID No. 968XXXX

I know what is allocated to me. I agree to that proposal

Teresia Nekesakhachila ID No. 760XXXX

I agree with what has been allocated to us.

Emily Lumonya Wepukhulu ID No 7609XXXX

I am aware of what is allocated to me. I do not oppose.

Everline Nasimiyu Barasa ID No. 340XXXX

I am aware of the proposed distribution. I accept the portion allocated to me.

Rose Nanjala Wamukota ID No. 3735XXXX

I understand the proposals. I support them

Aglipina Nafula Wanjala ID No. 7962XXXX

I support the proposed distribution



Wilberforce Mutambo Malotelo ID No. 0924XXXX

I support the distribution proposed.

Moses Maundende Wepukhulu ID No. 13317XXXX

I am aware of the proposed distribution. I support the distribution.

Fredrick N. Wepukhulu ID. No. 2449XXXX

I am aware of the proposed distribution. I support it.

Francis Muyindi Wepukhulu ID No. 2284XXXX

I am aware of the proposed distribution. I support the proposal.

Albert Ngutuku Wepukhulu ID No. 968XXXX

I support the proposed distribution.”

62. I find that this is a proper case to exercise the powers conferred to this court by Order 45 of the Civil Procedure Rules, Rule 63 and Rule 73 of the Probate and Administration Rules.

63. From the foregoing, I give the following orders:

- i. The ruling of 18.06.2021 is hereby set aside.
- ii. The succession cause is re-opened for purposes of taking additional evidence in respect to Bukusu Customary Law on distribution of land left by a deceased person who died before the commencement of the *Law of Succession Act*.
- iii. Any party interested in this matter is at liberty to avail such evidence for it is evident that the administrators are not ready to do so in view of earlier court orders which they refused to honor.
- iv. Any party interested in this matter will be at liberty to test the evidence adduced through cross-examination in court.
- v. Witness statements on the evidence on distribution of Land under Bukusu Customary Law be filed within the next 30 days and served upon all the interested parties.
- vi. Mention on 24.04.2025 for compliance and further directions.

64. Right of appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF JANUARY, 2025.

S.N MBUNGI

JUDGE

In the presence of :

Mr. Wekesa holding brief for Esther Nafula for Beatrice Njeka

Mr. Wati holding brief for Apollo for Albert Wepukhulu

Ms. Hellen Masakha holding brief for Mr. Fwaya for the respondents but not audible could be seen on the platform.

Parties absent.

