



REPUBLIC OF KENYA



**In re Estate of Zakayo Murwayi Awori (Deceased) (Succession Cause 20 of 2015) [2025] KEHC 327 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 327 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
SUCCESSION CAUSE 20 OF 2015**

**WM MUSYOKA, J  
JANUARY 24, 2025**

**IN THE MATTER OF THE ESTATE OF ZAKAYO MURWAYI AWORI (DECEASED)**

**RULING**

1. On 24<sup>th</sup> July 2024, I delivered a ruling, wherein I postponed determination of the summons for confirmation of grant, dated 26<sup>th</sup> May 2021, to enable the administrators comply with directions that I gave in that ruling, and in an earlier ruling delivered on 2<sup>nd</sup> February 2024.
2. The directions given in the ruling of 2<sup>nd</sup> February 2024 were to the effect that:

“... The administrators shall file affidavits disclosing the names and addresses of the 6 daughters of the deceased, and if the daughters have since died, the names and addresses of their children. I shall allocate a date, when I shall confirm compliance with these directions, and when the said daughters, or their successors, shall be availed to state their position, for avoidance of any doubt. I shall also require that Matayo Obonyo Murwayi and Lucas Nyongesa Murwayi, or their successors, be availed to state their position, for avoidance of any doubt. I shall thereafter allocate a date for the final ruling on distribution.”
3. Those directions required 2 actions: the filing of affidavits to disclose the names of the 6 daughters and the production of Matayo Obonyo Murwayi and Lucas Nyongesa Murwayi in court. The production of Matayo Obonyo Murwayi and Lucas Nyongesa Murwayi in court was to follow the filing of the affidavit disclosing the names of the 6 daughters.
4. An affidavit was filed, sworn by Rodgers Otieno Murwayi, on 28<sup>th</sup> March 2024. It indicates that the deceased had 7 daughters. The first house of Nelima Murwayi, had 2, namely the late Iliana Murwayi and the late Victorina Akoth Murwayi. The second wife, Bwibo Murwayi, had 2, being Matha Ojwang Murwayi and the late Mary Adhiambo Murwayi. The third wife, Veronica Nekesa Murwayi, had 1 daughter, known as Margaret Auma Murwayi. The fourth had daughters only, 2 of them, the late Selinah Asiolah and Rispah Awori Murwayi. The fifth wife, Margaret Awoko Murwayi had no children. There is also a statement by Margaret Awoko Murwayi. I had not given directions for the filing of a statement by the widow.



5. It emerged, from that affidavit, that of the 7 daughters, 4 are deceased. The names of the children of the deceased daughters were not disclosed, being the children of Iliana Murwayi, Victorina Akoth Murwayi, Mary Adhiambo Murwayi and Sellinah Asiolah, are disclosed. Hence, I directed, in the ruling of 24<sup>th</sup> July 2024, that a further affidavit along those lines be filed.
6. I have gone through the court file, after the ruling of 24<sup>th</sup> July 2024, and I have noted that the parties have not filed further papers since then, to make the disclosures required in that ruling. That being the case, I shall proceed to determine the matter, based on the evidence on record.
7. According to the affidavit of Rodgers Otieno Murwayi of 28<sup>th</sup> March 2024, the deceased died a polygamist, having married 5 times. His wives, in order of seniority, were Nelima Murwayi, Bwibo Murwayi, Veronica Nekesa Murwayi, Nyakeri Murwayi and Margaret Awoko Murwayi. The first 4 wives had children, but the 5<sup>th</sup> wife was childless. The children of the 1<sup>st</sup> wife, Nelima Murwayi, who is deceased, are 6, being 4 sons and 2 daughters, namely Lucas Murwayi Nyongesa, Matayo Murwayi Obonyo, Juma Murwayi, Michael Murwayi, the late Iliana Murwayi and the late Victorina Akoth Murwayi. The children of Bwibo Murwayi, who is deceased, are 1 son and 2 daughters, being the late Stephine Ouma Murwayi, Matha Ojwang Murwayi and the late Mary Adhiambo Murwayi. The children of the 3<sup>rd</sup> wife, who is also deceased, are 5 sons and 1 daughter, being Jonadhan Opondo, the late Simon Otieno Murwayi, Joseph Ogutu Murwayi, Josphat Okwero Murwayi, Henry Nyakwa Murwayi and Margaret Auma Murwayi. The 4<sup>th</sup> wife, now deceased, had 2 daughters: the late Selinah Asiolah and Rispa Awori Murwayi. The 5<sup>th</sup> wife is the sole surviving spouse, who had no children.
8. The property that has been ascertained as available for distribution is Bukhayo/Buyofu/430.
9. In my ruling of 2<sup>nd</sup> February 2024, I determined that the deceased died in 2012, long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force in 1981. That meant that the estate fell for distribution in accordance with the provisions of the Law of Succession Act. He died intestate, according to the petition lodged herein, and the grant of letters of administration intestate issued. No will was brought forth. Having died intestate, his estate should be distributed in accordance with Part V of the Law of Succession Act, which regulates distribution upon intestacy. As he died a polygamist, the estate should be distributed in accordance with section 40 of the Law of Succession Act, which regulates distribution of the estate of an intestate polygamist.
10. Section 40 of the Law of Succession Act states:
  - “ 40. Where intestate was polygamous
    - (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.”
11. According to section 40 of the Law of Succession Act, the property of the intestate polygamist is initially shared out amongst the houses, depending on the number of children in each house. After that the property is shared in each house, in accordance with sections 35 to 38, depending on the



configuration of each house. Section 35 caters for a house comprised of a surviving spouse and children; section 36 covers the house of a surviving spouse who has no children; while section 38 is for the house that has children only, that is with no surviving spouse. The relevant provisions herein would be sections 36 and 38, which state as follows:

- “36. Where intestate has left one surviving spouse but no child or children
- (1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—
    - (a) the personal and household effects of the deceased absolutely; and
    - (b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and
    - (c) a life interest in the whole of the remainder:  
Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.
  - (2) The Cabinet Secretary may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1).
  - (3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in section 39.”

“38. Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

12. As stated above, there were 5 wives, each and her children, if any, would make a unit. The 5th wife had no children, she shall be treated as a separate unit. That would mean that the polygamous household comprises of 5 houses. The 1st house comprises of 6 children, with no surviving spouse, making a total of 6 units. The 2nd house comprises of 3 children, but no surviving spouse, which would mean it is made up of 3 units. The 3rd house has 6 children, with no surviving spouse, and comprises of 6 units. The 4th house has 2 children, and no surviving spouse, meaning that it has 2 units. The 5th house comprises of 1 unit, being the surviving spouse, who has no children. In total, the household of the deceased comprises of 18 units. The sole asset available for distribution shall be divided into 18 units, after which the 18 units shall be shared out in the ratio of 6:3:6:2:1. See *Kuria and another vs. Kuria* [2004] KLR (Musinga, J), *Rono vs. Rono & another* [2005] 1 EA 363 [2005] eKLR (Omolo, O’Kubasu & Waki, JJA), *In re Estate of Katama Nyaki (Deceased)* [2019] eKLR (Muchemi, J) and *Munyole vs. Munyole* [2022] KECA 373 (KLR) (M’Inoti, Kiage & M Ngugi, JJA).
13. That configuration could change, however, for I am told that the deceased had distributed some of his land amongst some of his children, being the 3 eldest sons, and the lands given to them were registered in their names. The names of the 3 sons and the lands registered in their favour are as follows: Stephine Ouma Murwayi was given Bukhayo/Buyofu/427; Matayo Obayo Murwayi was



given Bukhayo/Buyofu/428; and Lukas Nyongesa Murwayi was given Bukhayo/Buyofu/429. There has been no contest to that.

14. Inter vivos transfer or the gifting of property by the owner during his lifetime is allowed in law, and the Law of Succession Act envisages that, at intestacy, such inter vivos gifting be considered. It is referred to as bringing the property to the hotchpotch. It is intended to achieve fairness, so that those who have already benefitted from the wealth of the deceased, during his lifetime, should not get a second helping after his death, by participating in the distribution of what he died possessed of, unless they demonstrate that whatever they got inter vivos was small comparative to what those who did not benefit would get upon intestacy.

15. The Law of Succession Act deals with it at section 42, which provides as follows:

“ 42. Previous benefits to be brought into account

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

(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.”

16. 2 of those 3 sons, who benefitted from lifetime gifting, are from the 1<sup>st</sup> house, while 1 son is from the 2<sup>nd</sup> house. The property gifted to them shall be considered, in terms of section 42. They shall be removed from the ratio worked out above, which means that the new ratio of distribution, founded on section 40, as read with section 42, should be 4:2:6:2:1. That would mean that the estate shall comprise of 15 units. Bukhayo/Buyofu/430 shall be divided into 15 units, which shall be shared out in the ratio of 4:2:6:2:1, so that the 1st house shall have 4 units, the 2nd house 2 units, the 3rd house 6 units, the 4th house 2 units, and the 5th house 1 unit. The share or units devolved to each of the 5 houses, shall thereafter be distributed in accordance with sections 35 to 38 of the Law of Succession Act. As indicated above, the only relevant provisions would be sections 36 and 38. Section 36 would apply to the share due to the 5th wife, where she shall be entitled to the first 20% of the net intestate estate devolving to that house, with a life interest on the remainder. Section 38 shall apply to the rest of the houses, where the property devolved to them shall be shared out equally amongst the children, both male and female, in those houses.

17. Where any of the children of the deceased are dead, section 41 of the Law of Succession Act shall apply, so that the share due to the dead sons or daughters of the deceased shall devolve upon their children, to be distributed equally amongst them. However, for the time being, the share of any such dead children shall devolve upon their estates, to be distributed in succession proceedings initiated in their names, to obviate the possibility of any other claimants against those estates being shortchanged or locked out.

18. Section 41 states as follows:

“ 41. Property devolving upon child to be held in trust

Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein



shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”

19. Do I have material before me establishing that these 3 sons had these assets registered in their names? I have seen a copy of a green card for Bukhayo/Buyofu/427, from the record before me, which shows that it was registered on 26<sup>th</sup> January 1971, in the name of Stephen Ouma Murwai, who I suppose is the same person as Stephine Ouma Murwayi. It was subsequently transferred to the name of Jethro Mudi Enonda, on 14<sup>th</sup> February 1992, by a chargee. It measures 3.2 hectares. It lends credence to the narrative that the late Stephine Ouma Murwayi had been gifted his own land by the deceased, for it was registered on the same date, 26<sup>th</sup> January 1971, with Bukhayo/Buyofu/430, belonging to the deceased. There would be justification for not including the late Stephine Ouma Murwayi, in the sharing of Bukhayo/Buyofu/430. Regarding the other 2 sons, I note that the documentation relating to the assets said to have been gifted to them by the deceased has not been filed herein. I note too that they have not participated in these proceedings, and that the administrators have not tried to bring them into the process, despite my earlier orders. I shall, however, presume that they benefitted inter vivos, as alleged, to justify their exclusion, based on what I have seen on record relating to Bukhayo/Buyofu/427.
20. There was mention that some people may have purported to have bought portions of Bukhayo/Buyofu/430 from prospective beneficiaries. If there was anything of that nature, then the purported buyers should understand that that amounted to intermeddling with the estate of the deceased, as the sellers had no title to whatever they sold, and such sales were illegal, on account of sections 45 and 82(b)(ii) of the Law of Succession Act. The buyers acquired no valid titles, and should look up to the sellers for recompense, either by way of refunds of the sales money paid, or transfer of the portions allegedly bought, once transmission is done after confirmation. The law takes such a dim view of intermeddling that it makes it a criminal offence under section 45(2)(a) of the Law of Succession Act.
21. For avoidance of doubt, sections 45 and 82(b)(ii) provide as follows:
- “45. No intermeddling with property of deceased person
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
  - (2) Any person who contravenes the provisions of this section shall—
    - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
    - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which



he has intermeddled after deducting any payments made in the due course of administration.”

“82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- (a) ...
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—
  - (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
  - (ii) no immovable property shall be sold before confirmation of the grant;
- (c) ...”

22. I believe that I have set out a sufficient background to justify the making of final orders, which I do hereby make as follows:

- a. That I do hereby confirm Robert Wema Ouma and Rodgers Otieno Murwayi as administrators of the estate herein;
- b. That I declare the deceased died a polygamist, having married 5 times, and his survivors are Margaret Awoko Murwayi, Lucas Murwayi Nyongesa, Matayo Murwayi Obonyo, Juma Murwayi, Michael Murwayi, the children or survivors of the late Iliana Murwayi, the children or survivors of the late Victorina Akoth Murwayi, the children or survivors of the late Stephine Ouma Murwayi, Matha Ojwang Murwayi, Jonadhan Opondo, the children or survivors of the late Simon Otieno Murwayi, Joseph Ogutu Murwayi, Josphat Okwero Murwayi, Henry Nyakwa Murwayi, Margaret Auma Murwayi, the children or survivors of the late Mary Adhiambo Murwayi, the children or survivors of the late Selinah Asiolah and Rispa Awori Murwayi;
- c. That the asset available for distribution is Bukhayo/Buyofu/430;
- d. That the said asset shall be distributed in the manner spelt out in paragraphs 16 and 17 hereabove, the distribution in each house shall be as follows,
  - i. To the house of the late Nelima Murwayi, 4/15 share, devolving upon Juma Murwayi, Michael Murwayi, the estate of the late Iliana Murwayi and the estate of the late Victorina Akoth Murwayi, equally,
  - ii. To the house of the late Bwibo Murwayi, 2/15 share, with the said share devolving equally between Matha Ojwang Murwayi and the estate of the late Mary Adhiambo Murwayi,
  - iii. To the house of the late Veronica Nekesa Murwayi, 6/15 share, which shall devolve upon Jonadhan Opondo, the estate of the late Simon Otieno Murwayi, Joseph Ogutu



Murwayi, Josphat Okwero Murwayi, Henry Nyakwa Murwayi and Margaret Auma Murwayi, equally,

- iv. To the house of the late Nyakeri Murwayi, 2/15 share, which shall devolve upon the estate of the late Selinah Asiolah and Rispa Awori Murwayi, equally, and
- v. To Margaret Awoko Murwayi, 1/15 share, which shall devolve to her absolutely.
- e. That a certificate of confirmation of grant shall issue accordingly, and the administrators shall have 6 months, from date hereof, to transmit the estate, as required of them by section 83(f) (g) of the Law of Succession Act;
- f. That, in the event the asset cannot be conveniently subdivided, for distribution purposes, the same shall be valued, sold, and the proceeds of the sale distributed in the ratio of 4:2:6:2:1, as worked out in paragraph 16 hereabove;
- g. That the matter shall be mentioned, after 60 days, on 24th July 2025, for compliance and further directions;
- h. That each party shall bear their own costs; and
- i. That any party aggrieved, by the orders made above, has leave of 30 days, to challenge the orders made herein, at the Court of Appeal.

**RULING DATED, SIGNED AND DELIVERED, VIA EMAIL, AT BUSIA, THIS 24<sup>TH</sup> DAY OF JANUARY 2025.**

**WM MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Luchivya, instructed by Marisio Luchivya & Company, Advocates for the applicant.

Mr. Shihemi, instructed by Maloba & Company, Advocates for the protestor.

