



REPUBLIC OF KENYA



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In re Estate of Henry Wanyonyi Cheloti alias Wanyonyi Cherodi (Deceased) (Succession Cause E014 of 2022) [2025] KEHC 1051 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1051 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE E014 OF 2022**

REA OUGO, J

FEBRUARY 27, 2025

**IN THE MATTER OF THE ESTATE OF HENRY WANYONYI
CHELOTI ALIAS WANYONYI CHERODI (DECEASED**

BETWEEN

WISDOM NABISWA WANYONYI 1ST ADMINISTRATOR

LUCAS CHELOTI WANYONYI 2ND ADMINISTRATOR

AND

DAVID MUSUNDI KUMALI PROTESTOR

RULING

1. Henry Wanyonyi Chelotu alias Wanyonyi Cherodi died on the 3rd of July 2004. He died intestate. The deceased was survived by 2 widows and twelve (12) children. He left behind one asset, Land Reference Bokoli/ Chwele/100. On the 13th of March 2023, a grant of letters of administration was issued to Wisdom Nabiswa Wanyonyi (Wisdom) and Lucas Cheloti Wanyonyi (Lucas). They applied to have the grant confirmed in an application dated the 20th of September, 2023.
2. David Musundi Kumali filed an affidavit of protest to the confirmation of the grant dated 20th November 2023. This protest is the subject of this Ruling. He avers that he is the surviving brother to the late Ann Nalika Wanyonyi who died in 2022. The late Ann was married to the deceased but was not blessed with any child. The deceased had two other wives namely Rael Nasipwondi Wanyonti and Grace Nangu'unda Wanyonyi. Since his sister was childless, her husband allocated her a share of his estate which was 1 ½ cares where she was living and farming. This was made clear even to the clan elders of the Basaba clan, as per the letter from the Basaba Welfare Secretary. After her husband's death, the children of the co-wives became abusive towards her with the intention of disinheriting her of her share of the land. Due to the constant attacks, she sold her share and moved to Chesaki where she died and was buried. The petitioners after her death wrote to him demanding for her body to be buried on



her late husband's land parcel Bokoli/ Chwele/100. The petitioners have omitted her name and share from the list of beneficiaries. He has the authority to represent her estate as the only surviving sibling. Confirming the grant together with the mode of distribution will prejudice his late sister's right to own her property since her estate has been left out and it would be in the interest of justice and fairness that he be included on the list of beneficiaries of the estate of the deceased representing his late sister before the grant is confirmed.

3. Wisdom Nabiswa filed a further affidavit dated 24.11. 2023. He depones that the following beneficiaries have passed on; Laeli Nasipwondi Wanyonyi wife to the deceased, Annah Naliaka Wanyonyi wife to the deceased, John Wambulwa Wanyonyi son to the deceased and Timothy Khisa Wanyonyi son to the deceased. The rest of his affidavit is on the mode of distribution to the surviving beneficiaries.
4. Mr Wangila for the petitioner filed a notice of preliminary objection dated 27.11.2023. The petitioners raise the following issues; the court has no jurisdiction to determine the affidavit of protest to confirm the grant dated 20.11.2023 pursuant to order 40 as read with sections 55 and 71 of the Law of Succession Act. The protestor is not a dependant of the deceased's estate and therefore lacks the *locus standi* to bring this suit on behalf of the deceased.
5. Parties canvassed the preliminary objection and the protest by way of written submissions. The protestor raised two issues as follows; whether the has *locus standi* to sue and claim on behalf of the deceased and whether the estate of Ann Naliaka Wanyonyi can be awarded a share of the estate. The protestor relies on section 39 of the Law of Succession Act and claims to be the only surviving brother of the Ann and that he has already been issued with a letters of grant ad item to sue on behalf of the estate of Ann. Reliance was made on the case of Mirikwa Werimo (deceased) Kakamega High Court Succession Cause No 296 of 2004 . On the 2nd issue it was submitted that Ann's estate can be allocated its share. Reliance was made in the case of Re the Estate of Rachael Wairimu Mbugua (Deceased) [2006] eKLR. It was submitted that the deceased pre-deceased Ann and she left a share of his property which was 1 ½ acres of land where they had stayed with her husband for over 50 years. Reliance was also made of Articles 40 (1) and 60 (1) of the Constitution 2010.
6. The petitioner submitted as follows; they have raised a preliminary objection on the court's jurisdiction to hear and determine the affidavit of protest. It was submitted that the court has no jurisdiction to hear and determine the affidavit of protest to confirm the grant dated 20.11.2023 pursuant to section 40 read together with sections 55 and 71 of the Law of Succession Act(the Act) . Section 40 of the Act addresses succession and survivorship and there is no portion for the dead amongst the living (see Court of Appeal decision in Francis Mwangi Thiongo & 4 others v Joseph Mwangi Thiongo [2015] eKLR. It was further submitted that the protestor's claim is founded on the fact that he is an administrator of Ann Naliaka's estate. The protestor has no right before this court and by extension cannot donate the same posthumously, considering she has no estate emanating from the late husband. The protestor has no *locus standi* to bring a suit on behalf of the deceased in this succession cause. After the death of Ann, her rights abated and or were extinguished. Reliance was made in the cases of Rono v Rono Civil Appeal No 66 of 2002 and Muthemba v Mungai Civil Appeal 448 of 2018 [2021] KECA 118 (KLR). It was further submitted that order of consanguinity cannot apply as purportedly cited by the protestor to bring in section 39 of the Law of Succession Act. Section 39 comes in after the application of section 40 and does not apply as the first pot of call. It was further submitted that the protestor has no right and by extension this court has no jurisdiction to hear and determine the protest. It was further submitted that through the doctrine of stare decisis the court lacks the jurisdiction to reverse a decision of the Court of Appeal.



Analysis and Determination

7. I have considered the rival submissions on the preliminary objection raised by the administrators. The circumstances under which a Preliminary Objection can be raised were set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, where it was held that:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

The Supreme Court in the case of *Hassan Ali Joho & another v Suleiman Said Shabal & 2 others* SCK Petition No 10 of 2013 [2014] eKLR held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”.

8. The two issues raised in the preliminary objection are; whether this court has the jurisdiction to hear the protest and whether the protestor has the *locus standi* to file the protest. Section 68 of the *Law of Succession Act* Cap 160 and Rules 17 of the *Probate & Administration Rules* provide that a party can raise an objection in a succession matter. In this matter, the protestor has raised an objection to the mode of distribution. The Act empowers this court to listen to an objection/protest. In my view, this court has the jurisdiction to determine an objection or protest raised by a party in a succession matter.
9. On whether the protestor has *locus standi* to file his protest. The protestor is a brother of a wife of the deceased, who is also deceased. His claim is over a portion of land that had been given to the late Ann by her deceased husband when she was still alive. The protestor has moved this court under section 39 of the Law of Succession, which states that “where an intestate has left behind no surviving spouse or children, the net estate shall devolve upon the kindred of the intestate in the following orders of priority- father, mother, brother, and sister..”. The protestor is not a beneficiary of the deceased in this matter. He is a brother of the deceased’s wife. He is not a dependent of the estate of the deceased either. Indeed, an objection can be raised by a party who is aggrieved, however, the concerned party must demonstrate that they have the locus to challenge the grant or mode of distribution. The court of appeal in the case of *Muthemba v Mungai* (Civil Appeal 448 of 2018 [2021] KECA 118 (KLR) whilst considering the rights of a deceased’s widow stated as follows;

“Back to our question – who is a surviving spouse? The words “surviving spouse” are self-explanatory. They can only mean a spouse who lives on after the demise of his or her spouse. Such a spouse can only benefit from the distribution of the capital assets or net intestate estate and, in the case of a widow, enjoy a life interest therein if, but only if, she is alive at the time of distribution. It follows, therefore, that, for a widow in a polygamous marriage to be considered as “an additional unit” for the purpose of distribution, she must necessarily be alive during the distribution. This means that death prior to distribution, as was the case here, extinguishes the widow’s life interest and the right to be reckoned as an additional unit. If this were not the case, one would only wonder what benefits would be conferred to



a deceased widow while the law creates a life interest for her, and for her benefit only. The short answer is “none”.

10. My understanding of the above decision is that only a surviving spouse has a right to share in the estate of the deceased. Ann died after the deceased. Her share in the estate of the deceased was extinguished, and her share of land reverted to the deceased upon her death. Unfortunately, she had no children to get her share. The protestor claims that under section 39, he has a right to claim the land that the deceased had given to the late Ann. I agree with the protestor’s submission that the order of consanguinity cannot apply as purported by the protestor, as section 39 only comes in after the application of section 40. In this case, there are children of the deceased to whom the estate will devolve. The letters of administration obtained by the protestor does not, in my view grant him the status or locus to apply to be awarded a portion of the deceased’s estate. The letters he obtained relate to the estate of the late Ann. In the case of *Mirikwa Werimo (deceased) Kakamega High Court Succession cause no 296 of 2004*, it was held that the sons of the deceased being themselves deceased their share could pass to their respective estate to be distributed in the cause to be inherited by the survivors in the matter of their respective. The protestor is not a son of the deceased. If Ann sold her share, then the person she sold it to can sue the administrator of the estate of the deceased for the portion he bought. I find that the objection has merit, and the protest is struck. Each party to bear its own costs.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 27TH DAY OF FEBRUARY 2025.

R.OUGO

JUDGE

In the presence:

Mr. Wangila -For the petitioners

Mr. Wanjala - For the Protestor

Wilkister - C/A

