



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Omary Maloba Makwali (Deceased) (Succession Cause
69 of 2002) [2025] KEHC 7127 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7127 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 69 OF 2002**

PJO OTIENO, J

MAY 29, 2025

BETWEEN

ASHA ANYONA NZIOKI 1ST ADMINISTRATOR

CHARLES OGWEL NZIOKI 2ND ADMINISTRATOR

ALIMA OMAR MALOBA 3RD ADMINISTRATOR

AND

RASHID OMAR MALOBA 1ST PROTESTOR

MUSTAFA BAKARI OMAR 2ND PROTESTOR

ZUBEDAH KABERE OMAR 3RD PROTESTOR

RUKIA OSIAGO MALOBA 4TH PROTESTOR

JUDGMENT

1. Following the death of Omary Maloba Makwali (“Deceased”) on the 26th day of February, 2001, Rukia Osialo Maloba in her capacity as a widow of the deceased, petitioned the court for the grant of letters of administration intestate for tht estate.
2. In the said petition, Rukia Osialo maloba disclosed that the deceased was survived by herself, Juma Maloba Omar (son), Swale Omar Maloba (son), Mustafa Omar Maloba (son), Asha Omar Maloba (daughter), Amina Omar Maloba (daugheter), Medinah Omar Maloba (daughter), Aziza Omar Maloba (daughter), Alima Omar Maloba (daughter), Zubeda Omar Maloba (daughter), Abubakar Omar Maloba (son) and Nuru Omar Maloba (son). She further indicated that the estate of the deceased comprised of property known as Butso/76 measuring 5.86HA.
3. A grant of letters of administration intestate was thereafter issued to Rukia Osialo Maloba on 28/4/2005.



4. By an application dated 23/8/2019, Abubakar Mubarak Omar, Asha Anyona Nzioki, Zainabu Adiochi Maloba alias Florence Adiochi Maloba, Charles Ogwei Makwali alias Juma Makwali Malona, Alima Omar, Aziza Omary Maloba, Nuru Omary Maloba and Stella Apiyo Wanjiru Makwali sought for the revocation of the grant on the ground that some of the deceased's widows and children who were legitimate beneficiaries were excluded from these succession proceedings.
5. The was allowed with the result that the grant was revoked and a fresh one issued on 25/1/2022 in the names of Asha Anyona Nzioki, Charles Ogwel Makwali, Alima Maloba and Rashid Omar Maloba as the new administrators.
6. The administrators then filed Summons for Confirmation of the Grant in which they indicated the survivors of the deceased to be as follows; -

1st House

Asha Anyona Nzioki (Daughter)

2nd House

- a. Abubakar Mubakar Omar (son)
- b. Saleh Ramadhan Omar (son)(Deceased)-survived by;
 - i. Nasrin Indече Saleh (adult)(granddaughter)
 - ii. Muhammed Saleh (minor)(grandson)
- c. Alima Omar Maloba (daughter)

3rd House

- a. Florence Adiochi Maloba alias Zainabu Adiochi Maloba-Widow
- b. Charles Ogweli Makwali (son)
- c. Maloba Harriet Okiria (daughter)
- d. Steven Maloba (son)
- e. Stella Apio Wanjiru Makwali (daughter)

4th House

- a. Mwanamisi Maloba (widow)
- b. Mustafa Omar (son)
- c. Medina Maloba (daughter)

5th House

- a. Rukia Osiako Maloba (Widow)
- b. Rashid Omar Maloba (son)
- c. Isa Omar (son)(deceased)-survived by;
 - i. Akollo Ruth-Daughter-in-law
 - ii. Jibril Mohammed Makwali (grandson)



- iii. Phoebe Osiako(granddaughter)(minor)
 - iv. Cliff Shaban (grandson)(minor)
 - d. Shaban Maloba (son) (deceased)-survived by;
 - i. Christine Tembesi Makwali (granddaughter)
 - ii. Zubedah Kavere Omar (daughter)
7. They are proposing that the estate of the deceased be distributed amongst his beneficiaries as follows;
- a. Asha Anyona Nzioki-0.08HA
 - b. Abubakar Mubarak Omar-0.85HA
 - c. Nasrin Indeché Saleh and Muhammed Saleh to jointly share 0.85HA
 - d. Alima Omar Maloba-0.08HA
 - e. Florence Adiochi Maloba alias Zainabu Adiochi Maloba to have life interested on the share of Charles Ogwel Makwali
 - f. Charles Ogwel Makwali-1.83HA
 - g. Maloba Harriet Okiria-0.08HA
 - h. Steven Maloba-0.59HA
 - i. Stellah Apio Wanjiru Makwali-0.08 HA
 - j. Mwanamisi Malona to have life interest on the portion of Mustafa Omar who is to get 0.1HA
 - k. Rukia Osiako Maloba to have a life interest on the portion of Rashid Omar Maloba
 - l. Akollo Ruth, Jibril Mohammed Makwali, Phoebe Osiako and Cliff Shaban to share 0.85HA and Akollo Ruth to hold in trust for the minors
 - m. Christine Tembeso Makwali-0.1HA
 - n. Zubedah Kavere Omar-0.08HA
 - o. Cemetery/Burial ground for the family allocated 0.05HA
 - p. Rashid Omar Maloba-0.85HA
8. The Summons for Confirmation of Grant attracted the protest by Rashid Omar Maloba, the 4th administrator, as first protestor who in his affidavit sworn on 16/5/2023 asserts that Rukia Osiako Maloba is the only surviving widow of the deceased, because others died while other remarried. He also asserts that other sons had been given land by the deceased without disclosing the particulars of such land. He adds that the estate land had been demarcated by the deceased and beneficiaries put in possession they hold to date. He thus proposes that the estate of the deceased be distributed as follows;
- a. Abubakar Mubarak Omar (son)-0.58HA
 - b. Saleh Ramadhan Omar(son)(deceased)-0.50HA-survived by;
 - i. Nasrin Indeché Saleh (daughter)
 - ii. Muhamed Saleh (son)



- c. Charles Ogwel Makwali alias Juma Omar Maloba-0.43HA
 - d. Steven Maloba alias Nuru Omar Maloba (son)-0.37HA
 - e. Mustapha Omar Maloba(son)-0.41HA
 - f. Rukia Osiako Maloba (widow) and her 4 sons and a daughter-3.25HA
 - i. Rashid Omar Maloba (son)
 - ii. Isa Omar (son)(deceased)-survived by;
 - Akollo Ruth-widow
 - Jobril Mohammed Makwali-son
 - Phoebe Osiako-daughter
 - Cliff Shaban-son
 - iii. Shaban Maloba(son) (deceased)-survived by Christine Tembesi Makwali(daughter)
 - iv. Zubedah Kavere Omar(daughter)
 - v. Fauza Omar Maloba(son)(deceased)
 - g. Daughters of Omary Maloba Makwali-0.32HA. They are
 - i. Asha Anyona Nzioki
 - ii. Alima Omar Maloba
 - iii. Maloba Harriet Okiria
 - iv. Stella Apio Wanjiru Makwali
 - v. Medina Maloba(deceased)-survived by;
 - Abdi Omar(son)
 - Juma Omar (son)
9. He claims that the proposed distribution is based on the existing boundaries on the ground as demarcated by the deceased.
 10. The Summons are further protested to by William Opuka Omungala, the interested party, who in his affidavit of protest sworn on 16th January, 2023 asserts being interested in a portion of the land by virtue of having bought from a buyer from the first administrator.
 11. In the affidavit, the deponent states that the estate land, Butsotso/Shibeye/76 had been subdivided into 3662, 3663, 3664, 3665, 3666, 3667, 3668 and 3669 by Rukia Maloba Osialo and that Butsotso/Shibeye/3666 was thereafter sold to Dorothy Nabalayo who in turn sub divided the same into 4170 and 4171 and that he purchased Butsotso/Shibeye/4171 from Dorothy and is therefore entitled to a share of the Rukia's share in the estate of the deceased which the petitioners have informed him that Rukia is not entitled to the estate of the deceased.
 12. Parties have filed their respective submissions on how to distribute the estate of the deceased which are as follows;



1st to 3rd Administrators' Submissions

13. On the affidavit of protest by William Omungala Opuka it is submit that Rukia Maloba Osialo did not have the locus standi sell the deceased's property and that any claim by William Omungala Opuka as a purchaser for value from Rukia Maloba Osialo on the estate of the deceased should be raised in the Environment and Land Court.
14. In opposition to the affidavit of protest by Rashid Omar Maloba, it is their submission that he is allocating himself and his house a larger portion to cover the shares sold to third parties. It is further argued that all the beneficiaries of the deceased's estate were noted in the affidavit by Charles Ogwel Maloba in support of the Summons for Confirmation of Grant.
15. It is the admitted that Rukia Osiako Maloba is the only surviving widow of the deceased and that she can only have life interest which should be on the share given to Rashid Omar Maloba, her son. To the administrators, the deceased had shown to all his children, portions of the land each would inherit and also set aside a portion of the land to be used as a cemetery for the family members. The administrators insist that the estate be distributed as proposed in the summons for confirmation of grant.

4th Administrator/Protestor submission

16. He reiterates his averments in the affidavit of protest and submits that prior to his demise the deceased had divided and distributed his estate to his five sons who were adults and to his 5th wife, Rukia Osikao Maloba to hold in trust for herself and her children who were minors and a portion was also allocated to his daughters and he demarcated the boundaries.

Submissions by the Interested Party

17. On his part the interested party maintains that he has a title as a purchaser for value from the administrator, without notice, has been in occupation of his portion and that the court, cannot in fairness ignore him in the scheme of distribution. He then blames the court for failure to take his interests into account when revoking the grant and canceling his title

Issues, Analysis and determination

18. Being a determination on protest to confirmation and distribution, the task of the court is to determine what property constitute the estate, determine who the beneficiaries are, establish if all insist on their right to inheritance or if any has renounced such right, then order the distribution in line with the provisions of the Act and the formula and principles laid down by stare decisis.
19. In this matter, the estate of the deceased is agreed by all to comprise of only one property known as Butsotso/Shibeye/76 measuring 5.86HA. The parties equally agree that the deceased died polygamous having married five wives and that each of the wives had at least a child with the deceased. The list of children given by both the administrators in the affidavit in support of summons for revocation and that by the protestors in the Affidavit of protest and written submissions, is the same if not for the order the names are enumerated.
20. Where the beneficiaries and property of the estate is common place, the court's task is reduced to just how much of the estate should each beneficiary get as an inheritance.
21. Before the court delves on the task of distribution, there is the protest by William Opuka Omungala. That protest does not present a claim on inheritance but as a purchaser from the 5th widow of a portion of the land that was once registered as Butsotso/Shibeye/4171.



22. That single issue was determined by the court in its ruling on summons for revocation of the grant. In the ruling the court found and held: -

“...there is no doubt that there could not have possibly have been any confirmation of the grant herein on 15th March 2009, and, therefore, the document purporting to be a certificate of confirmation of the said grant, dated 16th march 2009, can only be a false document, created to serve some nefarious ulterior purposes. There is absolutely no evidence that the grant herein has been confirmed. If the the property herein has been subdivided, then the same could only have been done on false or forged documents.

...there is evidence of subdivision of the land, and its transfer to individuals. The same must have been founded on false documents and should not stand.”

23. From the above excerpt, the Grant issued to Rukia Maloba Osialo by the court was and revoked together with the purported Certificate of Confirmation, which the court found to have been false of forged. The court found that with the forged or false grant, Rukia had no title to pass and thus the interested party received no title from her.

24. By dint of Section 82(b)(ii) of the *Law of Succession Act*, sale of an immovable assets of an estate before the grant confirmed, without the leave of the court is outlawed. Without legitimacy in law any such sale would remain and must be declared unlawful and unenforceable. It thus cannot be the basis to maintain a protest by the Interested party.

25. Secondly and more importantly, succession cause must remain a dispute between the persons entitled in inheritance and must be divorced from claim over land by way of sale. A claim on land is by constitution removed from the jurisdiction of the court and the invitation by the Interested Party must thus be resisted however presented.

26. The court finds that it has no jurisdiction to hear and determine the Interested party’s claim. The same is thus dismissed with costs. Moving on to the issue of how the estate of the deceased ought to be distributed, I have noted that parties agree that the deceased was survived by one spouse namely Rukia Maloba Osialo since the other wives left their matrimonial home and others got remarried.

27. On the merits, and proceeding from the agreed fact that the deceased died a polygamist, the applicable provision of the Act in distribution is section 40. The stipulation states:

“(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.”

28. From their affidavits filed and the submissions offered in writing, there appears a disagreement between the first three administrators on one side and the 4th administrator and his co-protestors. The difference is on what the protestors propose to go to the 5th house. That dispute is however belated and appears not genuine. Not genuine nor candid because, the administrators have exhibited to court a consent on distribution which is apparently signed by all, including the 4th administrator/1st protester, save for



the 5th widow, Rukia Osiako Maloba, mwanaisha Maloba and mustafa omar. Even though the three have not signed the consent, the court views the allocation to them to be a fair and just share of the estate due to them. The court, on the other side finds no justification to accept the proposal by the protesters which seem to give one house more than half of the estate.

29. The court thus adopts the distribution as proposed by the administrators, confirms the Grant and distributes the estate in line with the consent on distribution dated 4.11.2022 and filed as an annexure to the Summons for Confirmation of Grant.
30. For that reason, the protest by the protestors is dismissed but with no orders as to costs. The court now issues the following orders it considers appropriate: -
 - a. Let the administrators now move to have the estate transmitted within 90 days from today. Matter shall be mentioned on a date given by the Judge at the time this judgment is read.
31. It is so ordered.

DATED AND SIGNED THIS 29TH DAY OF MAY, 2025.

PATRICK J O OTIENO

JUDGE

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 29TH DAY OF MAY, 2025.

S. MBUGI

JUDGE

In the presence of:

Parties absent

C/A: Agong'a

