



REPUBLIC OF KENYA



**In re Estate of Odipo Afwande Bwore (Deceased) (Succession Cause
23 of 2007) [2025] KEHC 9299 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9299 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 23 OF 2007

WM MUSYOKA, J

JUNE 30, 2025

IN THE MATTER OF THE ESTATE OF ODIPO AFWANDE BWORE (DECEASED)

RULING

1. The application, dated 11th January 2023, is what I am called upon to determine. It is for confirmation of grant. It is contested, for there are protests.
2. Before I consider it on its merits, it would suffice to set out the background.
3. The deceased died on 19th November 2004. There is a certificate of official search, indicating that he died possessed of Marachi/Elukhari/1781, measuring seven decimal two seven hectares, registered in his favour on 9th June 1987. A letter from the Chief of Elukhari Location, dated 3rd January 2007, indicates that he hailed from Sikarira Sub-Location. He had two sons: John Okwachi Odipo and Joseph Ngesa Odipo. John Okwachi Odipo died, and was survived by a widow and two sons, named as Catherina Atsieno Okwachi, Stephen Oduori Okwachi and Vincent Opondo Okwachi. There is also a mention of a cousin, Philip Okuwa Makomba, who is also dead, but allegedly survived by Joseph Odhiambo Okuwa. It is stated that the deceased had sold portions of his land to Margaret Okwero Simala and Roselida Nyongesa Nabwoba.
4. Representation was sought vide a petition filed by Catherine Atsieno Okwochi and Stephen Oduor Okwachi, in their purported capacities as widow and son of the deceased. In the supporting affidavit, the survivors are listed as Catherine Atsieno Okwachi as a widow, Joseph Ngesa Odipo as a son, Stephen Oduori as a grandson, Vincent Opondo Okwachi as a grandson and Joseph Odhiambo Okuwa as a cousin. Letters of administration were granted to Catherine Atsieno Okwochi and Stephen Oduor Okwachi, on 5th December 2007, and a grant, of even date, was issued.
5. Catherina Atsieno Okwachi and Stephen Oduori filed for confirmation of their grant, on 26th August 2008, vide an application, dated 28th August 2008. It was proposed to distribute the land between Roselida Nyongesa Nabwoba, Margaret Okwaro Simala, Vincent Opondo Okwachi, Joseph Odhiambo Okuwa, Joseph Ngesa Odipo and Stephen Oduor Okwachi. Joseph Ngesa Odipo protested, vide an affidavit, sworn on 30th October 2008, arguing that the deceased had only two sons,



who he named, as Joseph Ngesa Odipo and the late John Okwach. He asserted that daughters-in-law and grandchildren had not priority in intestate succession. He proposed distribution between John Ngesa Odipo, Catherine Atsieno Okwachi and Joseph Odhiambo Okuwa, and two purchasers JW Namatsi and Patrick Mango.

6. Another protest was raised, to the application of 28th August 2008, by Redemuda Akello Obonya and Margaret Atieno Odipo, vide an affidavit sworn on 4th May 2010. They were daughters of the deceased. They said the deceased had two sons and two daughters. They complained that their names were not disclosed as beneficiaries. They stated that they did not object to the administration being in the hands of the grant-holders, but they wanted to be included in the sharing of the estate of their father. They stated that they were not aware of the proceedings, otherwise they would have objected earlier. They expressed the fear that, if they were not included, they would lose out.
7. Before the application, dated 28th August 2008, could be determined, it was disclosed, on 4th November 2008, that another succession cause, over the same estate, had been initiated, being P&A No. 85B of 2008. That cause and the instant were consolidated, by orders made on 2nd March 2010, and Joseph Ngesa Odipo was appointed as an additional administrator.
8. Joseph Ngesa Odipo passed away, on 10th September 2010. An application, for his substitution, was made by his widow, Margaret Agola Ngesa. That application was dated 10th June November 2011. It was allowed on 15th November 2011. Margaret Agola Ngesa was made an administratrix in the place of her late husband, and an amended grant of letters of administration intestate was duly issued, dated 11th July 2012.
9. Catherina Atsieno Okwachi also died, on 9th September 2014, and an application, dated 6th January 2015, was filed for her substitution, with Vincent Opondo Okwachi, her son. That application was allowed on 21st April 2015.
10. On 11th June 2011, James Wanzala Namatsi filed an affidavit, sworn on 10th June 2019. He averred that he had, by written agreement, bought 5 acres out of Marachi/Elukhari/1781, from Joseph Ngesa Odipo. He took possession, of about three acres, and planted trees. He claimed an interest as a purchaser.
11. Margaret Okwero Simala and Roselida Nyongesa Nabwoba filed a protest on 23rd April 2018, sworn on 20th April 2018. They averred that they had bought land from the deceased. Roselida Nyongesa Nabwoba allegedly bought two acres and Margaret Okwero Simala bought four acres. Later the acreage was reduced to one acre for Roselida Nyongesa Nabwoba and three and a half for Margaret Okwero Simala, by agreement. They explained the circumstances of those purchases and asserted to be protected purchasers. They filed a further affidavit, sworn on 3rd May 2021, to attach documentary evidence to support their claims. However, those documents were not attached to that affidavit.
12. The application, dated 28th August 2008, was disposed of, vide a ruling delivered on 30th September 2021. It was dismissed, on the basis that the persons who petitioned for representation did not have prior right to administration, being a daughter-in-law and a grandson, over the surviving biological children of the deceased. It was declared that the actual and true beneficiaries were the surviving daughters and son of the deceased. It was ruled that all the other persons, listed in the Chief's letter, the petition and the summons for confirmation of grant, were not true beneficiaries of the estate. The grant of 5th December 2007 was revoked. It was directed that the parties agree on the administrators, after which they were to agree on distribution.
13. On 8th June 2022, the parties informed the court that they had agreed on Margaret Agola Ngesa and Vincent Opondo Okwachi as administrators. An appointment was accordingly made, and a grant of



letters of administration intestate was duly issued, on 16th June 2022. I shall refer to Margaret Agola Ngesa and Vincent Opondo Okwachi, hereafter, as the administrators.

14. Margaret Agola Ngesa then filed the instant summons for confirmation of grant, dated 11th January 2023. She declares the survivors of the deceased to be herself, Margaret Agola Ngesa, and a daughter-in-law, three grandsons, one son and four purchasers. The grandsons are said to be Fredrick Owino Ngesa, Vincent Opondo Okwach and Stephen Oduor Okwach. The son is said to be Joseph Odhiambo Okuba. The purchasers are said to be Timothy Simala, Roselida Nyongesa Nabwoba, Patrick Mango, James Namatsi and Thomas Olendo. Distribution is proposed amongst the eleven individuals. There is a consent signed by Margaret Agola Ngesa, Fredrick Owino Ngesa, Joseph Odhiambo Okuba, Margaret Okwero Simala, Roselida Nyongesa Nabwoba, Patrick Mango, James Namatsi and Thomas Olendo.
15. Vincent Opondo Kwach filed a protest, dated 20th June 2023. I shall refer to him as the protestor. He is the co-administrator and grandson of the deceased, being a son of John Odipo Okwach. He avers that the deceased had allocated one and half acres to Joseph Odhiambo Okuba, who then sold one acre to Gabriel Daala, and he was left with a half-acre. The deceased also sold four acres to Timothy Simala for Kshs. 20,000.00, but he only paid Kshs. 6,000.00, leaving a balance of Kshs. 14,000.00. He also sold one acre to Roselida Nyongesa Nabwoba, for Kshs. 26,000.00. Roselida Nyongesa Nabwoba paid Kshs. 20,000.00 leaving a balance of Kshs. 6,000.00. He states that he does not object to Roselida Nyongesa Nabwoba being allocated the quarter acre she occupies. He states that he does not know Patrick Mango, who has been allocated two acres in the application, and who is not in possession. He does not object to James Namatsi and Thomas Olendo getting shares out of what is due to Margaret Agola Ngesa. He proposes distribution after it is established the actual portions of the land due to the purchasers who bought from the deceased. He protests that the share due to his father was being distributed by the proposals being made by his mother Margaret Agola Ngesa. He then makes his own proposals. He has attached a handwritten sale agreement, in Ki-Luhya, whose contents I cannot fathom.
16. Margaret Agola Ngesa filed a further affidavit, on 1st August 2023, sworn on 19th July 2023. She contests the contents of the protest by Vincent Opondo Kwach. She proposes that the two acres meant for the late Joseph Odhiambo Okuba should devolve upon his widow Josephine Nafula Munialo, and the three and half acres share due to the late Timothy Simala should devolve upon his widow, Margaret Okwero Simala. She asserts that Margaret Okwero Simala should not be deprived of her share merely because the full purchase price was not paid. She asserts that Roselida Nyongesa Nabwoba should only get one acre, being the value of what she paid in monetary terms. Patrick Mango bought two acres, out of which one should come from the share of her late husband, Joseph Ngesa Odipo and the other from the share of what is due to John Odipo Okwach, the father of the protestor. She has attached a handwritten agreement, dated 28th December 1997, between the deceased and Roselida Nyongesa Nabwoba, where two acres were sold for Kshs. 26,000.00 each, and the buyer paid Kshs. 20,000.00.
17. Roselida Nyongesa Nabwoba and Margaret Okwero Simala filed a protest, on 14th December 2023, sworn on 13th December 2023. They assert that they paid for their portions fully. Part of the money was paid through a suit that had been brought by a third party against the deceased. Whatever was paid exceeded the purchase price, and was to be refunded. They assert that they were recognized as beneficiaries right from the beginning. They were allowed to take possession. They assert to be bona fide occupants. They have attached copies of sale agreements, purported to have been made between them and the deceased.
18. Directions were given, on 11th July 2023, for disposal of the application viva voce.



19. The oral hearings began on 15th November 2024. Margaret Agola Ngesa was the first to take the stage. She stated that the late Joseph Odhiambo Okuba had been given four acres by the deceased, and he had sold a portion of it, leaving him with one and half acres. She said Margaret Okwero Simala bought four acres from the deceased. She paid only a portion of the purchase price leaving a balance. She said she should get four acres, being the value of what she paid. She said she did not agree with her son and co-administrator, Vincent Opondo Kwatch, on what Margaret Okwero Simala should get. She said that Margaret Okwero Simala should get two acres, but if she paid the balance of Kshs. 6,000.00, she should get four acres. Then she said they had sat down and agreed that Margaret Okwero Simala should get three and half acres, and a consent was signed. Roselida Nyongesa Nabwoba was said to be entitled to get a quarter acre or zero decimal one four of a hectare, for that was what she occupied on the ground. She then said Roselida Nyongesa Nabwoba was entitled to one acre. Patrick Mango was said to have bought land from the deceased, and that it was she, Margaret Agola Ngesa, who was utilising that portion. She said the land had boundaries on the ground, and distribution should be based on those boundaries, as captured by the surveyor.
20. Patrick Mango testified next. He said that he had consented to two acres. He said he bought land from the deceased, brought a surveyor on the ground in 1995, and took possession, but moved out in 2014, after Vincent Opondo Kwatch assaulted his workers. He asked Margaret Agola Ngesa to utilise his portion after that. He said the administrators, Margaret Agola Ngesa and Vincent Opondo Kwatch, were not on the ground when the sale happened, and that they only came into the picture later. He said Margaret Agola Ngesa was a witness to the sale agreement.
21. Margaret Okwero Simala followed. She explained that it was her husband who had purchased the land, the four acres. He paid Kshs. 14,000.00. The deceased was said to have had a case, SRMCCRC No. 107 of 1998, where he was fined Kshs. 16,000.00, which he requested that it be paid, and she paid a total of Kshs. 30,000.00 to the deceased. She asserted that she was not indebted to the estate, and she should get her four acres. She said she was being pushed to accept three and half acres. She said Vincent Opondo Kwatch was a grandson who was not privy to the sale. She said she agreed with Margaret Agola Ngesa that she would accept three and half acres.
22. Roselida Nyongesa Nabwoba testified next. She said she bought four acres, but, as the land was small, it was agreed she should take one acre. She signed a consent to that effect. She averred that she would not take a quarter acre. She testified that the money that she paid was enough for one acre. She accused Vincent Opondo Kwatch of putting another person on her land.
23. Vincent Opondo Okwatch followed. He said he was a grandson of the deceased. He opposed the share of three and half acres being given to Margaret Okwero Simala and the one acre proposed for Roselida Nyongesa Nabwoba. He said he would give them one and quarter acres, respectively. He said he was born in 1981. He stated that Roselida Nyongesa Nabwoba bought her land in 1997, when he was sixteen years old; while Timothy Simala bought his in 1987, when he, Vincent Opondo Okwatch, was seven years old. He said that the deceased had two daughters, to whom he, Vincent Opondo Okwatch, had not allocated shares, as they should get their shares from their husbands. He said that he did not know Patrick Mango. He asserted that he, Vincent Opondo Okwatch, was the one in possession of Marachi/Elukhari/1781, which was registered in the name of the deceased.
24. James Wanzala Namatsi testified last. He said that he had bought five acres but was in possession of one or two and half acres. He said he would be contented with the two and half acres, in view of the prevailing conflicts. He said that he had bought the land from Joseph Ngesa, who sold to him the five acres in 2008, then he died in 2010.



25. After the oral hearing, the parties filed written submissions, which I have read through and noted the arguments made.
26. The deceased herein died in 2004, long after the *Law of Succession Act*, Cap 160, Laws of Kenya, had come into operation on 1st July 1981. He died intestate, and, therefore, distribution of his estate is subject to Part V of the *Law of Succession Act*. He was a resident of Busia County, hence the said estate is not exempt from the provisions of Part V, by virtue of sections 32 and 33 of the *Law of Succession Act*, and the customary law of his community does not apply to it.
27. Under Part V, the estate of an intestate will be devolved subject to whether he died a polygamist or a monogamist. For a monogamist, sections 35 and 36 apply, while section 40 will apply to that of a polygamist. Where the surviving spouses are dead, section 38 will apply. Where some of the children are dead, section 41 will apply. The deceased herein was survived by children only, some of whom had died, hence sections 35, 36 and 40 shall not apply. The applicable provisions shall be sections 38 and 41. Section 38 provides that property is shared equally amongst the children. Section 38 is not about sons only, but children, who include daughters. There is no discrimination. Section 38 should be read together with Article 27 of *the Constitution*. See *Mwongera Mugambi Rinturi & another vs. Josphine Kaarika & 2 others* [2015] eKLR (Waki, Nambuye & Kiage, JJA) and *Ludiah Chemutai Bett vs. Joseph Kiprop Tanui* [2017] eKLR (M Ngugi, J). Section 41 provides that where some of the children are dead the shares of the dead children would be distributed upon their progeny, if any, equally.
28. Sections 38 and 41 state as follows:

“ 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”

“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.”

29. Article 27 of *the Constitution* provides:

“Equality and freedom from discrimination.

27.

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.



- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (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.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) ...
- (7) ...
- (8) ...”

30. The material before me indicates that the deceased had two sons and two daughters. The sons were Joseph Ngesa Odipo and John Okwachi. Both are said to be dead, but were survived by children. The daughters were said to be Redemuda Akello Obonya and Margaret Atieno Odipo. The estate shall be shared equally, in the first instance, between Joseph Ngesa Odipo, John Okwachi, Redemuda Akello Obonya and Margaret Atieno Odipo, in accordance with section 38. If any of the four children of the deceased is dead, at the point of distribution, the share due to such dead child shall devolve upon their offspring, to be thereafter shared equally in his or her estate, to his or her offspring, in accordance with section 41. See *John Gitata Mwangi & 3 others vs. Jonathan Njuguna Mwangi & 4 others*, [1999] eKLR (Akiwumi, Shah & Bosire, JJA), *Elizabeth Wairimu Thimba & 2 others vs. Wilfred Njogu Mbutia & 2 others* [2014] eKLR (Emukule, J) and *Joyce Kabiti M’Turuchu vs. David M’Ntiritu Kiambi* [2016] eKLR (Gikonyo, J).
31. One may ask, but what about in-laws, be they sons or daughters-in-law? Part V is not about in-laws. Intestate succession, according to Part V, passes property to the blood relations of the deceased. See *In re Estate of Jafeth Birabu Rukokhe* [2020] eKLR (SM Githinji, J) and *In re Estate of Peter Njenga Kinuthia (Deceased)* [2022] eKLR (Achode, J). The only non-blood relative of the deceased, who inherits, is the wife of the deceased, if she or he survived the deceased. The wife of the deceased did not survive him. So, the issue of her inheriting from him or his estate does not arise.
32. There was talk of the deceased having sold property to third parties, before he died, and he had not transferred the portions sold to them before he died. Such buyers fall under the category of creditors. They should be settled first before the estate is distributed, for what is available to be distributed is the net intestate estate, according to sections 35, 36, 38, 82 and 83. Indeed, the administrators are expected to sort out the creditors first, after which the balance of the estate is then shared out amongst the survivors, that is to say the surviving spouses and children, and others.
33. The persons who bought land from the deceased were identified as Timothy Simala, Roselida Nyongesa Nabwoba and Patrick Mango. It would appear that the administrators have failed in their duty, to settle debts and liabilities first, before inviting the court to distribute the estate amongst the survivors. For, if they had done so, Margaret Okwero Simala, Roselida Nyongesa Nabwoba and Patrick Mango would not still be in the picture. The administrators ought to have had excised the portions sold to Timothy Simala, Roselida Nyongesa Nabwoba and Patrick Mango, obtained the requisite Land Control Board consents, and transferred the said portions to the buyers or creditors. Now that that



- was not done, the shares to Roselida Nyongesa Nabwoba, Patrick Mango and the estate of Timothy Simala shall be apportioned first, and whatever shall remain thereafter is what shall be shared between Joseph Ngesa Odipo, John Okwachi, Redemuda Akello Obonya and Margaret Atieno Odipo, or their children, or their estates.
34. Some of the buyers did not acquire the land from the deceased, but from the widows or children of the deceased, after the demise of the deceased, and prior to administration of the estate being committed to those selling to them. Such buyers would be intermeddlers in the estate of the deceased, by virtue of section 45 of the *Law of Succession Act*. See John Kasyoki Kieti vs. Tabitha Nzivulu Kieti & Annah Ndileve Kieti (2001) eKLR (Mwera, J) and Benson Mutuma Muriungi vs. CEO Kenya Police Sacco & another [2016] eKLR (Gikonyo, J). The property of the dead should not be sold, after he has died, by a person who does not hold a grant to his estate, and before the grant has been confirmed, according to sections 45, 79 and 82 of the *Law of Succession Act*. See In re Estate of Francis Kimani Muchiri (Deceased) [2018] eKLR (Musyoka, J) and In re Estate of Mbiyu Koinange (Deceased) [2020] eKLR (Muchelule, J).
 35. Intermeddling is an offence, capable of being committed by both the buyer and the seller, who are liable to pay fines, or to go to jail, or both, upon conviction. See Jane Kanyi Kahara vs. Waweru Titi Michael [2015] eKLR (Okong'o, J) and Benson Mutuma Muriungi vs. CEO Kenya Police Sacco & another [2016] eKLR (Gikonyo, J). Such a buyer cannot possibly have a claim against the estate, being an intermeddler and a law breaker, and the transaction having been tainted by criminality. See In re Estate of Tsimango Akafwale (Deceased) [2021] eKLR (Musyoka, J). He can only look up to whomever sold the land to him. He cannot be reckoned at the distribution of the estate of the deceased. James Wanzala Namatsi falls in that category.
 36. I see that these proceedings have been conducted in a manner that paid no regard at all to Redemuda Akello Obonya and Margaret Atieno Odipo, ostensibly as they are mere daughters. Vincent Opondo Okwachi, a grandson, even had the audacity to claim that they should inherit from their husbands. Redemuda Akello Obonya and Margaret Atieno Odipo, in the scheme of things under Part V, have a superior claim to the estate than that of Vincent Opondo Okwachi. The children of the deceased have a superior right to inheritance over grandchildren. Children are direct beneficiaries; grandchildren are secondary beneficiaries. The grandchildren only come in where their own parents, being the children of the deceased, are dead, and they only come in to take that which would have devolved upon their parents. See In re Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR (Musyoka, J), Elizabeth Wairimu Thimba & 2 others vs. Wilfred Njogu Mbutia & 2 others [2014] eKLR (Emukule, J), In re the Estate of Joseph Gichuki Riunge (Deceased) [2016] eKLR (Musyoka, J) and Martin Munguti Mwonga vs. Damaris Katumbi Mutuku [2016] eKLR (Thande, J). There is no way Vincent Opondo Okwachi can claim to be superior to Redemuda Akello Obonya and Margaret Atieno Odipo, so far as this estate is concerned.
 37. Redemuda Akello Obonya and Margaret Atieno Odipo have equal right, by virtue of sections 35(5) and 38 of the *Law of Succession Act* and Article 27 of *the Constitution*, with their brothers Joseph Ngesa Odipo and John Okwachi. See Wanjiru & 4 others vs. Kimani & 3 others [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA).
 38. I am surprised that, despite being represented by Advocates, the administrators herein are proceeding as if Redemuda Akello Obonya and Margaret Atieno Odipo do not exist, or as if the deceased had no daughters. Redemuda Akello Obonya and Margaret Atieno Odipo had filed an affidavit on 7th May 2010, sworn on 4th May 2010, indicating that they were not abandoning or surrendering or waiving their share. That affidavit was in protest to the confirmation application, dated 28th August 2008. When Karanjah J disposed of the said application, dated 28th August 2008, in the ruling of 30th September



2021, he addressed the position of Redemuda Akello Obonya and Margaret Atieno Odipo. Indeed, the exclusion of Redemuda Akello Obonya and Margaret Atieno Odipo, from the proceedings, was the principal reason for the dismissal of that confirmation application. Karanjah J described Redemuda Akello Obonya and Margaret Atieno Odipo as “the actual and true beneficiaries of the estate of the deceased.” I am surprised that this second confirmation application proceeds as if Karanjah J did not make the decision of 30th September 2021, with respect to Redemuda Akello Obonya and Margaret Atieno Odipo. Surely, court findings and holdings do not count for nothing, and are not to be ignored in that fashion.

39. Redemuda Akello Obonya and Margaret Atieno Odipo cannot be ignored or forgotten, in view of the ruling of 30th September 2021. They are “the actual and true beneficiaries of the estate of the deceased.” The application of 28th August 2008 was dismissed because they had been ignored and excluded, by persons who had a lesser right or entitlement to the estate. They have been ignored and excluded in the application, dated 11th January 2023. I should just take the route, that Karanjah J charted, in the ruling of 30th September 2021, and dismiss the summons for confirmation of grant of 11th January 2023, for leaving out “the actual and true beneficiaries of the deceased.” The administrators learnt nothing from that ruling of 30th September 2021. If they had, they would have involved Redemuda Akello Obonya and Margaret Atieno Odipo in these proceedings.
40. The contempt that Vincent Opondo Okwachi showed for Redemuda Akello Obonya and Margaret Atieno Odipo, in the oral hearing of the application of 11th January 2023, can only translate to contempt of the order of 30th September 2021, which declared Redemuda Akello Obonya and Margaret Atieno Odipo to be “the actual and true beneficiaries of the estate of the deceased.” There is no way a distribution of the estate of their father can be carried out to their exclusion, in view of the ruling of 30th September 2021, sections 35(5) and 38 of the *Law of Succession Act*, and Article 27 of *the Constitution*. Any attempt to exclude them would render the distribution invalid and a nullity, in view of Article 2(4) of *the Constitution* and *Wanjiru & 4 others vs. Kimani & 3 others* [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA).
41. So, how is Marachi/Elukhari/1781 to be distributed? I will first start by allocating the shares due to the persons who bought land from the deceased. They were identified as Timothy Simala, Roselida Nyongesa Nabwoba and Patrick Mango. I will go by the proposals by Margaret Agola Ngesa. She is older than Vincent Opondo Okwachi. She says she was privy to the transactions, and was around when the transactions happened. Vincent Opondo Okwachi opposes them, yet he was a minor when they happened. He would not have known about them or participated in them. He was seven years old, for heaven’s sake, when one of the transactions happened!
42. It is common ground that the parties have settled on the estate of Timothy Simala getting three and half acres, Roselida Nyongesa Nabwoba getting one acre and Patrick Mango two acres. That would mean that six and half acres in total, should be hived off first, and the survivors or family of the deceased shall share what shall remain thereafter.
43. What shall remain, after the excising of the six and half acres, shall be divided equally between Joseph Ngesa Odipo, John Okwachi, Redemuda Akello Obonya and Margaret Atieno Odipo, the children of the deceased, in accordance with sections 35(5) and 38 of the *Law of Succession Act*. If any of the children is dead, then their share shall be distributed in separate succession proceedings, to be initiated in the names of the dead child, by his or her survivors, or members of his or her family.
44. The claim by James Wanzala Namatsi, being an intermeddler in this estate, shall be handled in the succession proceedings, to be initiated in the estate of the person who purportedly sold part of the estate of the deceased to him, from the share that ultimately shall pass to the estate of that person.



45. There was a lot of talk about survey works and how the land is occupied on the ground. Let me make it very clear, that the probate court does not distribute an estate based on how the land is occupied on the ground. Distribution is based on what Part V of the [Law of Succession Act](#) requires. The court follows that law, and not occupancy on the ground. See *In Re Arusei* [2003] KLR 76 [2003] eKLR (Nambuye, J) and *Leah Chepkemei Kipyego vs. Mary Chesenge Kipyego* [2007] eKLR (F. Ochieng, J). Those who have gone about occupying the lands of the deceased, in the hope that the court will not follow the law, but occupancy, should know that. The land in question belongs to the estate of the deceased. It has to be distributed in accordance with the law laid down by Parliament. The applicable law, for the time being, is the [Law of Succession Act](#), guided by [the Constitution](#) of Kenya, 2010.
46. Then there was the issue of the cousin that the deceased allegedly gifted some land to, one Philip Okuwa Makomba. The portion gifted to him, inter vivos, is said to be two acres. The parties appear to agree on this gift. It is at the same league with the six and half acres sold to Timothy Simala, Roselida Nyongesa Nabwoba and Patrick Mango. The two acres shall be hived off first, before the estate is distributed amongst the children, that is to say Joseph Ngesa Odipo, John Okwachi, Redemuda Akello Obonya and Margaret Atieno Odipo.
47. The final orders are:
- a. that I declare that the children of the deceased are Joseph Ngesa Odipo, John Okwachi, Redemuda Akello Obonya and Margaret Atieno Odipo;
 - b. that I declare that Timothy Simala, Roselida Nyongesa Nabwoba and Patrick Mango bought land from the deceased prior to his death;
 - c. that I declare that Philip Okuwa Makomba benefited from an inter vivos gift of two acres from the deceased;
 - d. that, in view of the above, Marachi/Elukhari/1781 shall, in the first instance, be distributed as follows:-
 - i. Roselida Nyongesa Nabwoba – one acre,
 - ii. Timothy Simala – three and half acres,
 - iii. Patrick Mango – two acres, and
 - iv. Philip Okuwa Makomba – two acres;
 - e. that the balance of the land, after the distribution in (d) above, shall be shared equally between Joseph Ngesa Odipo, John Okwachi, Redemuda Akello Obonya and Margaret Atieno Odipo;
 - f. that, in the event of any of the individuals above being deceased, the share due to them shall devolve to their respective estates, to be distributed in succession causes relating to those estates;
 - g. that a certificate of confirmation of grant shall issue, in accordance with (d) and (e) above;
 - h. that the administrators have six months, in accordance with section 83 of the [Law of Succession Act](#), to transmit the estate, in accordance with the orders in (d) and (e) above;
 - i. that the matter shall be mentioned on 17th December 2025, to confirm whether transmission has happened, and the administration of the estate completed, so that this court file can be closed;
 - j. that each party shall bear its own costs; and



k. that any party aggrieved has thirty days to challenge these orders at the Court of Appeal.

48. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 30TH DAY OF JUNE 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Redemuda Akello Obonya and Ms. Margaret Atieno Odipo, daughters of the deceased, in person.

Advocates

Mr. James B. Were, instructed by Mr. Gabriel Fwaya, Advocate for Margaret Agola Ngesa.

Mr. EM Bogonko, instructed by Bogonko Otanga & Company, Advocates for Vincent Opondo Okwachi.

Mr. Moses Wanyama, instructed by Wanyama & Company, Advocates for Patrick Mango.

Mr. Tony Omeri, instructed by Omeri & Associates, Advocates for Roselida Nyongesa Nabwoba and Margaret Okwero Simala.

