



In re Estate of John Palapala Shivachi alias Balalabala Shivachi (Deceased) (Succession Cause 980 of 2007) [2024] KEHC 6423 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6423 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 980 OF 2007
SC CHIRCHIR, J
MAY 30, 2024**

BETWEEN

VALENTINE A. DAVE PALAPALA ADMINISTRATOR

AND

EUGENE GODFREY PALA 1ST PROTESTOR

EDWIN BULEMI LUVEGA 2ND PROTESTOR

JUDGMENT

1. The summons herein relate to the Estate of John Palapala Shivachi alias Balalabala Shivachi.(Deceased)
2. Through the summons dated 02/11/2021 the petitioner seeks for confirmation of the Grant of letters of Administration intestate issued to him on 29th July 2021. He took over the Administration of the estate following the demise of the first Administrator, one late Ronald Joseph Luvega who died on 31st March 2008.
3. He avers that the deceased was survived by the following heirs/ dependants;
 1. Sophie Mwabishi Palapala(daughter)
 2. Hellen Isichi Masimbwa(Daughter)
 3. Juliana Chumba Mutambi (Daughter)
 4. Teresa KhaKai alias Ruth Lipomo Khakai(Daughter)
 5. Valentine A. Dave PalaPala (son)
 6. Eugene Godfrey Pala (son)
 7. Chrispin Wendo Palapala (deceased- son)survived by Sarah Witambila Ali (Daughter- in-law)



8. Ronald Joseph Luvega (deceased-son) survived by Edwin Bulemi Luvega (Grandson)
 9. Henrietta Muhonja PalaPala (deceased-daughter) survived by Tobias Alern Butama (Grandson)
 10. Angelina Palapala Mbakaya (deceased-daughter) survived by Kevin Nuru Mbakaya -Grandson
4. He further states that the deceased's Estate comprised of Land parcel No. Idakho/Iguhu/1164 measuring 12.35 Acres and proposed the mode of distribution according to the beneficiaries as follows;
- a. Sophie Mwabishi PalaPala -1 Acre
 - b. Hellen Isichi Masimbwa- 1 Acre
 - c. Juliana Chumba Mutambi-1 Acre
 - d. Teresa Khakai alias Ruth Lipomo KhaKai-1 Acre
 - e. Valentine E. Dave PalaPala- 1 Acre
 - f. Eugene Godfrey Pala- 1 Acre
 - g. Sarah Witambila Ali- 1 Acre
 - h. Edwin Bulemi Luvega- 1 Acre in addition 2 acres allocated to the late Hillary Lumumba Luvega on behalf of Ronald Joseph Luvega in total Edwin Bulemi Luvega gets 3 acres.
 - i. Tobias Alern Butama- 1 Acre
 - j. Kevin Nuru Mbakaya- 1 Acre
 - k. Road access- 0.35 Acres
5. The Application attracted a protest by two of the beneficiaries namely, Eugene Godfrey Pala and Edwin Bulemi Luvega who identify as beneficiaries.
6. Eugene Godfrey pala avers that the deceased prior to his demise was survived by the following heirs and or beneficiaries;
- a. Ronald Luvega Joseph Palapala (son-Deceased)
 - b. Chrispinus Wendo Palapala-(son-deceased)
 - c. Valentine Dave Arthur Shivachi Palapala –son
 - d. Eugene Godfrey Pala Mutsoli Palapala-son.
7. He further states that the late Ronald Luvega Joseph Pala Pala son to the deceased, was survived by the following;
- a. Late Clara Khalamesi Luvega-widow (deceased)
 - b. Late Hillary Basil Lumumba Luvega
 - c. Bulemi Edwin Keith Luvega
 - d. Dr. Collins Kizito Luvega
 - e. Konstatine Asutsa Luvega



- f. Apollonia Adema Luvega
 - g. Charlly Lwanga Chimakati Luvega
 - h. Dr. Cyrillah Ingado Luvega
8. That the late Chrispinus Wendo PalaPala was survived by the following
 - a. Sarah Witambila Ali (widow)
 - b. Jolex Wendo PalaPala- child
 - c. Jims Veel Wendo Palapala- child.
 9. According to the protestor, the deceased was the duly registered proprietor of the parcel of land Idakho/Iguhu/1164 measuring 5.0 HA and that prior to his demise, the deceased had already distributed the land as follows;
 1. Idakho/Iguhu/1169 –Valentine Arthur David Shivachi Palapala
 2. Idakho/Iguhu/1168 – Eugene Godfrey Pala Mutsoli
 3. Ronald Joseph Luvega Palapala- nil
 4. Idakho/Iguhu/1166 –Chrispinus Wendo PalaPala (deceased).
 10. He states that the only land parcel available for distribution is land parcel Idakho/Iguhu/1164 measuring 5 hac which should be shared equally among the children of the deceased . He proposes the mode of distribution as follows :
 - a. Ronald Luvega Joseph Palapala-Son (deceased)
 - b. Chrispinus Wendo PalaPala- son (deceased)
 - c. Valentine Dave Arthur Shivachi PalaPala- son
 - d. Eugene Godfrey Pala Mutsoli.
 11. He disagrees with the mode of the distribution by the applicant, whom he claims did not seek the consent of the other beneficiaries and in any event not in agreement with the wishes of the deceased.
 12. He argues that the administrator was not fit to be an Administrator, as he has caused disharmony in the lager family.
 13. The 2nd protestor, Edwin Bulemi Luvega filled an affidavit of protest in which he avers that the deceased left behind land parcel Idakho/Iguhu/1164 measuring 5.0 hac.He claimed that prior to his death, the deceased had distributed some land parcels as follows:
 - a. Chrispinus Wendo PalaPala kakamega/Iguhu/1166 – 1.4 ha
 - b. David Shivachi PalaPala- Kakamega /Iguhu/1169-1.7 ha
 - c. Godfrey Mutsoli PalaPala- Kakamega/Iguhu/1168- 1.3 ha
 14. He further states that out of the four sons of the deceased , only Ronald Joseph PalaPala who is deceased was not given any parcel of land. He further states that Ronald Joseph Luvega PalaPala had purchased his own parcel of land, being Kakamega/Iguhu/1163 and moved out of the family land.



15. He states that when their grandfather, the deceased, died in 1978, his grandmother called him and asked him to construct a home on a portion of 1 ½ Acres out of the land Kakamega/ Iguh/1164 and that his late brother Hillary Lumumba also lived in the same portion.
16. He proposes that their late father's share, Ronald Joseph Luvega PalaPala measuring 1.8 ha should be given to them and that the remaining shares be distributed as follows;
 - a. David Shivachi----- 0.3 HA
 - b. Ronald Luvega (deceased) rep Edwin Bulemi---0.3 HA
 - c. Godfrey Mutsoli-----0.3 HA
 - d. Henrieta Tsisika (Deceased) Represented by Tobias Bulemi ---0.3 HA
 - e. Chrispinus Wendo (Dcd) Represented by Sarah Witambila-- 0.3 Ha
 - f. Anjeline Mbakaya (DCD) represented by Kevin Nuu---- 0.3 HA
 - g. Sofia PalaPala----- 0.3 HA
 - h. Hellen Masimbwa----- 0.3 HA
 - i. Juliana Mutambi-----0.3 HA
 - j. Ruth Lipomo----- 0.3 HA

The Evidence

17. PW1 was the Administrator of the Estate. He testified that when filing for the confirmation, all the beneficiaries signed save Eugene Palapala, the first protestor.
18. He claimed that he has distributed the Land Parcel 1164 equally among the 9 beneficiaries with each getting a share of one(1), while his late brother's children, the late Robert Luvega was given the largest share.
19. According to the witness in 1967, the deceased gave his son Luvega, 2 acres of land but the son refused. Then in 1978, the deceased took the said portion and gave it to Luvega's eldest son, one Hillary Lumumba Luvenga; that he has allocated a total of 3 acres to Luvega's family.
20. He faulted the 2nd protestor's proposal dated 24/1/22 claiming that it did not show any mode of distribution or the beneficiaries of their late brother's children.
21. On the mode of distribution proposed by the 2nd protestor, he asserted that it was also incorrect since the proposed land parcel 1166 belonged to one Chrispinus Palapala; land parcel 1169 belonged to him; and finally land parcel 1168 belonged to Godfrey Musoli. He insisted that they acquired the said parcels through their own efforts and hence did not form part of the deceased's Estate.
22. During cross examination, he testified that Ronald was his elder brother, now deceased, and the 2nd protestor was Ronald's son. He claimed that his late brother had acquired 3 parcels of land on his own although he did not know the parcel numbers.
23. Further on cross-examination, he testified that he had proposed an equal mode of distribution for the land parcel 1164.
24. He denied that his father gave him land parcel 1169 insisting that he got it in 1971 and that the land is 1.7 hac; that land parcel 1168 measuring 1.3 hectares belonged to Eugene Palapala and Land Parcel



- 1166 belonged to Chrispinus Wendo, measuring 1.4 hectares and 3.4 acres respectively. He denied that his parcel borders parcel No. 1164. He further told the court that his late brother Luvega has parcel No. 1163.
25. Further on, in cross-examination he stated that parcel No. 1169 was given to him by his grandmother in 1956. He was 11 years old then and his father was still alive.
 26. He stated that Eugene, Ronald and Chrispinus were his brothers. He stated that land parcel 1163 was not his father's, but Ronald (Luvega) bought it from his uncle though his father assisted him by giving out a bull.
 27. He further testified that parcel No. 1169 is larger than 1168 by 0.9 acres and larger than 1160 by 0.8 acres. He told the court that he does not know how Eugene and Chrispinus acquired their land parcels.
 28. He further testified that they agreed to give Luvega's family 3 acres, being inclusive of the 2 acres that the deceased had given to Luvenga's son, Lumubasi. He denied the suggestion that he was allocating Luvega's family 3 acres because he did not get any inheritance during his father's life time. He insisted that he did so in good faith. He denied the suggestion that all the parcels, that is, 1169, 1168, 1166 and 1164, belonged to the deceased.
 29. On further cross-examination by Mr. Nandwa, he stated that there were 3 houses on 1164, which were: for the wife of Luvega, Edwin Bulemi, his late mother, and the widow to Chrispinus Wendo. Chrispinus was his last born brother and was buried on the land. He stated that Edwin Bulemi and Lumumba were Ronald's son and had their houses on the same parcel. Each of them occupy 1 acre of parcel No. 1164.
 30. He stated that they did not give the Luvega's family 3 acres since Luvenga was not an initial beneficiary from their father.
 31. In re-examination by Mr. Osango, he insisted that parcel No. 1164 was the only one available for distribution and that none of the beneficiaries had been left out of the distribution. He told the court that in allowing Luvega's sons to have the 2 acres, he was simply honouring the deceased's wishes.
 32. DW1 was Eugene Godfrey Pala. He adopted his written statement dated 4.1.2023 as his evidence in chief.
 33. During cross-examination, he told the court that the deceased had 4 sons and 6 daughters. He admitted that he has made the proposal for distribution in respect of the sons only. He named the sisters as Harriet Simiyu (deceased), Angeline, Sophia Mwabishi, Hellen Masimbwa, and Teresa Khakai. He suggested that the sisters can get the remaining portions of land once the sons have gotten their entitlements.
 34. He stated that by not making allocation for his sisters, he was simply following his father's wishes. He claimed that the deceased had other properties that he had given the sons before he died. He stated that the petitioner was given parcel No. 1169, and it measures about 4.2 acres, that he was given 1168 measuring about 1.2 acres and Chrispinus was given 1166. He proposed that each of the sons should get an aggregate of 4 acres and the remaining can go to his sisters.
 35. DW2 was Edwin Bulemi, the 2nd protestor. He adopted his affidavit of protest dated 17/5/2022 as his evidence in chief.
 36. He told the court that he was in agreement with the proposal by the 1st protestor. He stated that the deceased was his grandfather and that his father was Ronald Joseph Luvega. He is asking for 1.8 acres on behalf of his father



37. He claimed that Godfrey was given 1168 which measured 1.3 hac, the petitioner got parcel No.1169 acres measuring 1.7 hac while Chrispinus got parcel No.1166 measuring 1.4 hac of the 1166. He produced certified copies of the register in respect of the 3 parcels.
38. During cross examination by Mr. Osango, he claimed that his father Ronald Joseph had other pieces of land , being land parcel No. 1163 , 2066 being Kakamega/enyulu/1163,kakamega / Engulu 2066 and Isuhha/ shitochi/1939 . He said the said parcels were acquired through his father's own efforts. He admitted that the certified copies of the register show that the owners were the first registered owners and further that there is no evidence that that the parcels were initially owned his grandfather. He insisted that the land should be distributed according to custom and the balance should be given to the daughters of the deceased.
39. During cross examination by Mr. Indimuli, he stated that the the deceased had given land to his 3 sons except his father , Joseph Donald Luvega . He wants his father's share that would be equivalent to what his uncles got.
40. During re-examination, he claimed that the mode of distribution of the land parcel 1164 was informed by the fact that he had also gotten a portion from his grandfather.

Administrator's Submissions

41. It is the Administrator's submission that majority of the beneficiaries are in agreement with the mode of distribution proposed by the Administrator as evidenced by the consent signed on 2.11.2021 and their verbal confirmation when they appeared in court on January 27, 2022. and that the only land available for distribution was land parcel Idakho/Iguhu/1164 measuring 12.35 Acres
42. He pointed out that the two protestors had not offered any mode of distribution, and further that the he has not excluded any beneficiary in the mode of distribution.
43. He has relied on section 38 of the *law of succession Act* and the case of *In Re estate of Johnson Omae Aburi (deceased)* (2022) eKLR to buttress his submissions
44. On the other land parcels namely kakamega/ Iguhu/1166, 1169 and 1168 it is his submission that there is no evidence that the properties were not for the deceased but for Chrispinus wendo, David Shivachi and Godfrey Mutsoli respectively, He further submits that the documentary proof he has submitted to court , was conclusive evidence of ownership of land . In this regard he has relied on the case of *Mary Njeri Wachira vs Eliud Waweru Njenga* (2018) eKLR, and sections 24 and 26 of the *Land Registration Act*.
45. It is the Administrator's final submission that any land parcel not registered in the name of the deceased is not available for distribution.

2nd Protestor's submissions

46. The 2nd protestor restates that he was the grandson to the deceased and that his late father Ronald Joseph Luvega Palapala was the second -born son of the deceased.
47. He poses the question as to whether the three sons that is Chrispinus wendo Palapala, David Shivachi Palapala and Godfrey Mutsoli Palapala a who had benefited from their father during his lifetime were entitled to a share of the land Parcel Kakamega/ Iguhu/1164.
48. He submits that the fact that the Administrator has allocated 3 acres to the children of Ronald Joseph Lubega , (his father) lends credence to the fact that his father had not been given any land by the



deceased. He therefore wants the whole of parcel No Kakamega/Iguhu/1169 to devolve to him. In the alternative, he proposes that the court should ensure that he gets at least 1.7 acres just like the petitioner did get, and the rest can be distributed amongst the children of the deceased. In this regard he has relied on section 42 of the *Law of Succession Act*.

49. He finally urges the court to take into account parcel Nos. kakamega / Iguhu/ 1166, 1169 and 1168 in the distribution.

Determination

50. I have considered the evidence tendered and parties submissions. The following issues arise for determination:

- a). What comprises the estate of the deceased?
- b). what is the appropriate mode of distribution?

What comprise the estate of the deceased?

51. Section -3- of the *Law of Succession Act* defines estate as follows: - “Estate” “means the free property of a deceased person”.

52. There is no dispute that land parcel kakamega /Iguhu/1164 measuring 5.0 hectares belonged to the deceased. A search certificate dated 11.12.2007 confirms that the same is registered in the name of Balabala Shivachi, the deceased herein

53. What is in contention are parcel Nos: kakamega/ Iguhu/1166 measuring 1.4 ha registered in the name of Chrispinus Wendo Palapala; Kakamega/ Iguhu/1169 measuring 1.7 Ha registered in the name of David Shivachi Palapala and Kakamega /Iguhu/1168 measuring 1.3 Ha registered in the name of Godfrey Mutsoli Palapala. Certified copies of the registers were produced indicating that the three were the registered owners of the said properties.

54. The protestor’s case is that these three parcels were given to the three sons by the deceased, during his lifetime and therefore they had already benefited from Estate and that the court should take this into consideration pursuant to section 42 of the *Law of Succession Act*.

55. Section 42 of the *Act* provides as follows: : where as intestate has : “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.”

56. Nyamweya J. in *Re Estate of the Late Gedion Mantbi Nzioka (Deceased)* [2015] eKLR held :

“In law, gifts are of two types, there are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the *Law of Succession Act* provides as follows with respect to gifts made in contemplation of death: for gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered



transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.” (Emphasis added)

57. In the present case , the certified copies of the registered of the three land parcels in contention , show that they were first registration . The registration was done in 1976, apparently during the adjudication process. The protestors did not produce any document at all, that the parcels were given to the three sons by their father. Even if such a document don't meet the standard set by Nyamweya J in *Re Estate of Gideon Mantbi* (*supra*), a document evidencing the gift does exists should have been availed .
58. Further in High Court Succession Cause No. 15 of 2015 *In the Estate of the Late Gichunge M'itwerandu alias Githungu M'Nthiiri* Hon Justice Mabeya held that
- “A person can deal with his property as he wills during his life time. Whoever feels aggrieved on how his/her parent had dealt with his property should at the earliest opportunity question such a person during his/her lifetime. He/she cannot wait until such person dies to raise issues of discrimination or unfairness. Such issues can only validly be raised in cases of a will since wills are kept secret until the testator passes on. However, request that are given as gifts inter vivos openly so given and in my view whoever is dissatisfied is at liberty to question the same before the demise of the giftor.”
59. I have noted that the registration of the parcels were done around the same time , but it would be speculative to conclude that they were therefore gifts , presumably given at the same time.
60. Section 107 of the *Evidence Act* Cap 80 places the burden of proof on the party who wants the court to rely on the existence of any set of facts to make a finding in his favour, to prove those facts. Simply put: who alleges must prove.
61. The protestors have argued that, the fact that the Administrator has allocated 3 acres to the family of Ronald Luvega, from parcel No. 1164 as opposed to the 1 acre given to others, lends credence to the protestors assertion that the 2nd protestor's father had not been given any parcel of land.
62. However the evidence of the Administrator was that 2 acres was given given to one Hillary, one of the sons of Ronald. The 2nd protestor on the other hand stated that , his grandmother invited him to go and put up his house . It also came out from the evidence of the Administrator that the protestor and his brother are not the only ones living in parcel No. 1164. Chrispinus also used to live there and that is where he was buried. It can not therefore be true that parcel No. 1164 was left solely to the family of Ronald the 2nd protestor's father.
63. In effect the protestor has failed to prove that land parcels Nos 1166, 1168 and 1169 was part of the deceased's estate .
64. The only land parcel therefore available for distribution is therefore Kakamega / Iguhu/ 1169.

What is the appropriate mode of distribution

65. The Administrator has listed the children of the deceased in paragraph 5 of his Affidavit as :
1. Sophia Mwabishi papala
 2. Hellen Isichi Masibwa
 3. Juliana Chumba Mutambi
 4. Teresa Khakai alias Rith lipomo kakai



5. Valentine Dave Palapala
 6. Eugene Godfrey palaChrispin wendo papala (deceased , but survived by dependants)
 7. Ronald Joseph Luvega (Deceased but survived by dependants
 8. Henrietta Muhonja papala(Deceased but survived by dependants)
 9. Angelina papala Mbakaya (Deceased but survived by Dependants)
 10. Juliana Chumba Mutambi
66. On distribution, he proposes that each gets 1 acre save for the family of Ronald Joseph Luvega , who should get 3 acres , inclusive of the 2 acres that they already occupy. Save for the protestors , the rest of the children consented to this mode of distribution .
 67. According to the search certificate dated 11.2. 2007, parcel No. kakamega / Iguhu is 5.0 hectares (about 12. acres). Thus save for the family of Ronald, the rest of the children will get 1 acre . The 2nd protestor has insisted he wants his family’s four acres before any distribution is done . I have already found that he has failed to prove that the others had gotten any gift intervivos.
 68. Further, even if am wrong in my conclusion that no gift intervivos has been proved, am of the considered view that 3 is adequate provisions when considered against the other children who have agreed to take up 1 acre.
 69. In *Joseph Wairuga Migwi vs Mikielina Ngina Munga* (2016) eKLR the court held that express wishes of the deceased cannot be ignored. Although it is not easy to achieve equality, the court should adopt the concept of equity and fairness as was held in *Mary Rono vs Jane Rono & William Rono* (2005) eKLR where the court observed that the Act does not envisage a situation where each beneficiary has to get an equal portion because it would be unjust for some of the children.
 70. In any event, the protestors are ignoring the fact that the daughters of the deceased are equally entitled to a share of the estate. I their own words “ whatever else remains can go to the daughters” . Any exclusion of the deceased’s daughters runs contrary to section 38 of the *law of succession* which envisages equal distribution, and violates Article 27 of the *constitution* which forbids discrimination on the basis of gender, interalia. The children of the deceased are equal, irrespective of their gender and/or marital status
 71. The proposed distribution by the Administrator has tried to take care of all the beneficiaries. The 3 acres given to Donald’s family has been sufficiently explained and this court accepts it. The distribution is in consonance with the law and equity and I accept it as the most appropriate and equitable in the circumstances.
 72. In conclusion , I hereby make the following orders:
 - a). The protests by the 1st and 2nd protestors are hereby dismissed.
 - b). The Grant of letters of Administration issued on 29th July 2021 is hereby confirmed.
 - c). Land parcel No. Kakamega/ Iguhu / 1164 shall be distributed as follows:
 - (i) The Estate of Ronald Joseph Luvega- 3 acres
 - (ii) The remaining 9 acres shall be divided equally between :
 - a). Sophia Mwabishi papala



- b). Hellen Isichi Masimwa
- c). Juliana Chumba Mutambi
- d). Teresa Khaikai alais Ruth Lipomo Khaikai
- e). Valentine Dave palapala
- f). Eugene Godfrey Pala
- g). The Esate of Chrispin wendo palapala
- h). The Esate of Henrietta Muhonja palapala
- i). The Esate of Angelina palapala Mbakaya

d). The certificate of confirmation of grant to issue forthwith

DATED , SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS, THIS 30TH DAY OF MAY 2024.

S.CHIRHIR

JUDGE.

In the presence of :

Godwin- court Assistant.

