



In re Estate of John Simiyu Musawa (Deceased) (Succession Cause 393 of 2011) [2025] KEHC 185 (KLR) (17 January 2025) (Ruling)

Neutral citation: [2025] KEHC 185 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
SUCCESSION CAUSE 393 OF 2011**

**DK KEMEL, J
JANUARY 17, 2025**

IN THE MATTER OF THE ESTATE OF JOHN SIMIYU MUSAWA-DECEASED

BETWEEN

ERNEST MUSAWA SIMIYU PETITIONER

AND

FREDRICK NYONGESA SIMIYU 1ST OBJECTOR

JULIUS WANYONYI WANDAMBUSI 2ND OBJECTOR

BASILISA SIMIYU MUSAWA 3RD OBJECTOR

AND

MURIKA SIMIYU MUSAWA PROTESTOR

RULING

1. The Petitioner herein filed summons for confirmation of grant dated 3/5/2021 and made a raft of proposals on the distribution of the estate. The three objectors herein filed affidavits in opposition with each stating their rival stand points. For instance, the 1st Objector maintains that the petitioner has not involved the rest of the family members and further brought in purchasers onto the family land while the 2nd Objector claims that he is a purchaser whose land has been interfered with by the purchasers while the 3rd Objector is a former wife of the petitioner whose children have not been catered for in the distribution. The protestor herein is a step brother of the petitioner who is opposed to the distribution and has proposed that the estate be shared equally between the four sons and one purchaser only.
2. Parties agreed to canvass the summons for confirmation of grant and protests by way of viva voce evidence.



3. The protestor Murika Simiyu Musawa adopted his averments vide his affidavit of protest and maintained that the estate should be shared equally and that each son should take 5 ½ acres while a purchaser (creditor) be given 5 acres. He finally stated that the rest of the purchasers who bought from the beneficiaries should claim from them after the confirmation of grant. On cross -examination by counsel for the petitioner, he averred inter alia; that the deceased had two wives and that his mother died in 1964 when he was too young; that he attended the Bukusu “lufu” ceremony following the death of the deceased herein; that the deceased had put boundaries on the land; that he sold a portion of 1 ¾ acres to the 2nd Objector; that he had settled on the said 1 ¾ acres before selling it; that he had lived on his portion for a long period before disposing it; that all his brothers sold part of their portions to purchasers.

On re-examination, he stated inter alia; that there is no agreement showing that the deceased distributed the land; that the land should be shared equally.

4. The protestor closed his case at that juncture.
5. The 1st Objector renounced his objection against the petitioner since he had already crossed ranks and opted to be one of his witnesses. The second objector was confirmed to have passed on and that his family did not seek to substitute him.
6. The 3rd Objector Basilisa Nangila Musawa stated that she did not file an affidavit or witness statement. However, she stated that she is opposed to the proposed mode of distribution of the estate fronted by the petitioner. She closed her case at that juncture.
7. The Petitioner Ernest Musawa Simiyu, testified that he relies on his affidavit in support of summons for confirmation of grant dated 3/5/2021 and the witness statement dated 7/6/2021 as his evidence in chief.

On cross examination by counsel from the protestor, he stated inter alia; that the protestor is a step brother; that there are no family minutes over the distribution of the estate; that the deceased had sub divided the land but there are no minutes or documents over the same; that the deceased had sold land to Wepukhulu Siundu; that the deceased had given everyone one acre before he died; that there is only one buyer on the land and who bought from the deceased; that the protestor did not sign consent to distribution; that the deceased had informed them that the protestor was his son.

On cross examination by the 3rd Objector, he stated that the land has been sold to 20 people and thus it is not four sons of the deceased. On re-examination, he stated inter alia; that it was his mother who introduced the protestor to the family; that he got a large portion because he is the eldest son in the family; that the protestor was not present when the deceased sub divided the land; that the deceased had set aside land for the protestor; that he is opposed to the proposed mode of distribution by the protestor as the land has been given to many people and as such there is no extra land; that the protestor has sold his portion to buyers.

8. Pet.PW2 Fredrick Nyongesa Simiyu testified that he was the 1st Objector herein but has since withdrawn his objection and teamed up with the petitioner’s mode of distribution.

On cross examination by the protestor’s counsel, he stated inter alia; that the deceased sub divided the land before he died but there was no minutes to support it; that the clan members who witnessed the sub division have all died.

On cross examination by the 3rd objector, he stated that he does not know if her husband had given her land.



On re-examination, he stated that the mode of distribution is as per the deceased's sub division and that he has no objection to the proposed distribution.

9. Pet. PW3 Alice Nakhumicha Simiyu adopted her statement dated 29/5/2021 as her evidence in chief and stated that the family has shared the land and that her main concern is on access roads.

On cross examination by the counsel for the protestor, she stated inter alia; that she is the wife of the late Joseph Wekesa Simiyu; that she found the protestor at the home when she got married; that the deceased had four sons and two daughters; that she cannot interfere with the distribution by the family; that the protestor sold his portion and moved elsewhere; that she is only interested in her share of the land.

On cross examination by the 3rd objector, she stated that she found purchasers on the land and that titles have not been issued.

On re-examination, she stated that she found the purchasers already on the land when she got married; that the protestor sold the whole of his portion to one Julius.

10. That marked the close of the Petitioner's case.
11. Parties were directed to file and exchange submissions. However, it is only the protestor who complied.
12. I have given due consideration to the entire evidence of the Protestor, 3rd Objector, Petitioner and the submissions filed. It is not in dispute that the protestor herein is a son of the deceased herein who had been born out of wedlock. It is also not in dispute that each of the sons of the deceased occupied one acre of land comprised on East Bukusu/South Kanduyi/171 prior to the demise of the deceased as this was confirmed by the Petitioner on cross examination. It is also not in dispute that the Petitioner did not obtain the consent of the protestor over the distribution of the estate. It is also not in dispute that the deceased sold portions of the land to some purchasers prior to his demise. It is also not in dispute that the beneficiaries have sold some portions to purchasers. It is not in dispute that the deceased died intestate. It is also not in dispute that the 1st Objector has already withdrawn his objection to the petitioner's mode of distribution. It is also not in dispute that the 2nd Objector is now deceased and that no substitution has been made by his family. I find the following issues necessary for determination namely:

- i. Whether the deceased sub divided his property before his death.
- ii. Whether the 3rd Objector's objection has merit.
- iii. Whether the protestor's objection has merit.
- iv. Whether the Petitioner's proposed mode of distribution is fair.
- v. Who is to pay costs of the suit.

13. As regards the first issue, the Petitioner's evidence on cross examination by the learned counsel for the protestor admitted that the deceased had given each son one acre of land before he died and that there are no family minutes or documents regarding the sub division by the deceased prior to his death. The Petitioner's schedule of distribution has indicated that the only property of the deceased is East Bukusu/South Kanduyi/171 measuring 27 acres. If indeed, this is the size as compared to the one acre each the deceased gave to his sons, then it is clear that the deceased had not substantially distributed his property since a huge chunk of the land remained undistributed. Further, in the absence of family minutes or evidence of witnesses, the only conclusion one arrives at is that the deceased did not distribute his property to his dependants prior to his death.



14. As regards the second issue, it is noted that the 3rd Objector is a former wife of the Petitioner herein with whom they had separated. Apparently, it seems she has rushed to court to protect her interests and those of her children. However, she has not filed any affidavit of protest or even recorded a statement in that regard. I find that even if she had filed any such pleadings, the same would not have any force of law since the said objector's interest should come under the share due to the Petitioner herein. Hence, I find her purported objection is rather premature. She should wait for the grant to be confirmed after which she can then pursue the petitioner for her share, if any. Consequently, I find that the 3rd Objector has been unwittingly roped into the dispute rather early in the day. I find that her objection has no merit and is hereby dismissed.
15. As regards the third issue, it has transpired from the evidence of the Petitioner and his witnesses that the Protestor is a son of the deceased who had been born out of wedlock. That being the position, he is entitled to be allocated a share of the estate of the deceased. The Petitioner and his witnesses have opposed the proposed mode of distribution by the Protestor and have maintained that the Protestor herein had sold his two acres and left the area and that he is now rocking the boat with a view to getting more land. I find this claim to be further from the truth since it has transpired that the deceased had not distributed his property before his demise and that he had only given each son one acre each thereby leaving the bulk of the land to be distributed. Again, the Protestor's consent to the filing of this cause and the proposed mode of distribution was not obtained by the Petitioner so as to back his claim that the Protestor had already been given his share by the deceased prior to his death. It is also noted that the Petitioner did not obtain the consent of the other dependants such as his brothers and sisters on the mode of distribution which forbids discrimination on grounds of tribe, race, gender etc. The Petitioner herein failed to present a consent by all the beneficiaries both male and female and that if the female children had renounce claims to the estate, then he should have filed affidavits in that regard. This was not done. It transpired that the deceased had two wives and that the mother of the Protestor separated from the deceased quite early after the birth of the Protestor and that the mother of the Petitioner had three sons and two daughters and that the total number of children of the deceased are six in number comprised of four sons and two daughters. All the six are dependents pursuant to the provisions of Section 29 of the *Law of Succession Act* that describes a dependent as a wife or wives or former wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death. As the deceased had two wives, then the distribution of his estate shall be in accordance with Section 40 (1) of the *Law of Succession Act* which provides as follows:

“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.

The proposal by the Protestor that the estate be distributed equally between the six children of the deceased has merit but not quite. The protestor's proposal has left out the two female children who are reported to be married. The said two beneficiaries have neither signed a consent nor affidavits renouncing claims to the estate. Hence, the estate should be distributed equally between the six children of the deceased. There is also a Creditor to the estate by the name of Makhanu Wepukhulu Siundu who had bought 5.25 acres. Hence, the parcel of land namely East Bukusu/South Kanduyi/171 measuring 27 acres should be shared equally between the six beneficiaries after the creditor's share of 5.25 acres has been factored. To that extent, the Protestors protest has merit. As to what will happen with the myriad purchasers, it is noted that they bought land from the beneficiaries before the grant is confirmed and therefore they are all intermeddlers in the estate of the deceased and that their



conduct is against the clear provisions of Section 45 and 82 of the Law of Succession Act that forbid intermeddling with estates of deceased persons. The said purchasers must therefore wait for the grant to be confirmed and then they can pursue the respective beneficiaries who had sold land to them.

16. As regards the forth issue, it is noted that the Petitioner herein has left out the female children of the deceased and that the proposed schedule of distribution is not fair as there is no equality in the sharing. As noted on paragraph 15 above, the estate should be shared equally between the six beneficiaries after the creditor's share has been factored. Consequently, the Petitioner's mode of distribution is not acceptable. The same is rejected.
17. In view of the foregoing observations, the following orders are hereby issued.
 - a. The objection by the 3rd Objector lacks merit and is dismissed.
 - b. The Petitioner's mode of distribution lacks merit and is rejected.
 - c. The Protestor's protest partly succeeds.
 - d. The grant made on 27/1/2012 is hereby confirmed and that the estate of the deceased comprising of parcel Number East Bukusu/South Kanduyi/171 shall be shared as follows:
 1. Makhanu Wepukhulu Siundu
(Creditor)5.25 acres.
 2. The balance of the acreage be shared equally between Ernest Musawa Simiyu, Fredrick Nyongesa Simiyu, Alice Nakhumicha Wekesa, Murika Simiyu Musawa, Bridgid Namalwa Simiyu and Lilian Nasipwondi Simiyu.
 - e. The purchasers who bought land from the beneficiaries before the grant is confirmed shall claim from the respective beneficiaries upon the confirmation of the grant.
 - f. As the matter involves members of one family, I order each party to bear their own costs.

DATED AND DELIVERED AT SIAYA THIS 17TH DAY OF JANUARY 2025.

D. KEMEI

JUDGE

In the presence of:

Masiga for Wekesafor Petitioner

N/A Kituyi.....for Protestor

N/A for Alovi.....3rd Objector

Mboya.....Court Assistant

