

KENYA / JUDGMENT

In re Estate of Chemung'ani (Deceased) [2026] KEMC 551 (KLR)

[2026] KEMC 551 (KLR)

COURT

Magistrate's Court

BEFORE

TO Omono

CASE / FILE NUMBER

Succession Cause E258 of 2024

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REPUBLIC OF KENYA**IN THE CHIEF MAGISTRATE'S COURT AT BUNGOMA****SUCCESSION CAUSE NO. E258 OF 2024****IN THE MATTER OF THE ESTATE OF ALFRED MUCHELE CHEMUNG'ANI (DECEASED)****PETRONILLA NASIEBANDA.....PETITIONER****VERSUS****FRED WAKORA MUCHELE.....PROTESTER****JUDGMENT**

1. The deceased died on 04th July 2026. He was survived by the Petitioner and six children, including the Protester. Consequently, the deceased's family filed this succession cause leading to the issuance of a Grant of Letters of Administration intestate to the Petitioner on 15t January 2026.
2. The Petitioner filed the Summons for Confirmation dated 13th January 2026 setting out the distribution of the deceased's land parcel number W. Bukusu/E. Siboti/57 ("suit property") to the deceased's dependents, including the protester who was awarded 0.32 ha to be excised from the suit property, as set out in the consent to the mode of sharing dated 13th January 2026 herein.
3. It is against this backdrop that the Protester filed a Witness Statement dated 08th June 2026 alleging that the deceased distributed the suit property before his death by giving him 4 acres of land to him from the suit property, which he ought to have been given, not the 0.32 ha of land proposed by the Petitioner.

4. It is imperative to note that the Protester filed a Witness Statement in support of his Protest. The Protester ought to have filed a Protest to the confirmation of the Grant (see Rule 40 (6) of the Probate and Administration Rules).
5. This court takes the view that the procedural infraction committed by the Protester is a proper case for this court to seek refuge from Article 159 (2) (d) of the Constitution, which obligates this court to administer justice without undue regard to procedural technicalities.
6. The position taken by this court is informed by the fact that, despite the procedural infraction by the Protester, his witness statement adequately set out the dispute between him and the Petitioner. The Petitioner, on the other hand, adequately responded to the concerns raised in the Protester's witness statement. This shows that the procedural infraction by the Protester herein did not prejudice the Petitioner in any way whatsoever.
7. Flowing from the above, this court treated the Protester's witness statement dated on record as a Protest to the Confirmation of a Grant within the meaning of Rule 40 (6) of the Probate and Administration Rules.
8. The Protest was canvassed by way of viva voce evidence. The evidence adduced by the Protester and the Petitioner is summarized below.

Protester's Case

1. **PW1 Fred Wakora Muchele** adopted his witness statement dated 08th June 2026 as his evidence in chief. He testified that the deceased distributed the suit property before his death by giving him 4 acres from the said land. He added that the deceased sold 21/2 acres of the suit property and 1 acre of the suit property to Fwamba Simiti and Fwamba Opicho respectively before his death.
2. **PW2 Robert Namasake Ooko** testified that the deceased was his eldest brother. He stated that when he was 12 years old, he heard commotion in the deceased's home only to learn that the protester was demanding for a share of his land from the deceased. He added that he was aware that the deceased gave the Protester 4 acres of land from the suit property.
3. In cross-examination, he could not tell if the deceased and the protester sold part of the protester's portion of land in the suit property to other buyers before the deceased's death.

Petitioner's Case

1. **PW1 Petronilla Muchele** is the deceased's surviving wife. She recalled that sometime in 1976, the Protester demanded a share of his land from the deceased, but the deceased refused to meet those demands since the Protester was still a student at Netima Secondary School.

2. She added that the Protester's demands for land persisted when the deceased gave the Protester a parcel of land stretching from the suit property to land parcel number W. Bukusu/E. Siboti/2651.
3. She further stated that Robert Namasake Ooko (PW2) could not have witnessed the deceased giving the Protester 4 acres of land from the suit property since he was barely 10 years old when the deceased distributed land to his dependents.
4. **PW2 Hedwick Juma Biketi** is the deceased's area chief. He disputed PW2's testimony on the issue at hand on the ground that PW2 was a minor in 1976 when he reportedly witnessed the deceased giving the Protester 4 acres of land from the suit property. He also stated that PW2 could not have witnessed the deceased's distribution of the suit property in 1998 given that he had relocated from the deceased's village in 1995.
5. He added in cross-examination that the Protester's portion of land measuring 4 acres stretched from the suit property to land parcel number W. Bukusu/E. Siboti/2651.
6. He further stated that the deceased and the Protester jointly sold 21/2 acres of land and 1/2 an acre of land to Wycliffe Mukwa (PW5) and Silas Gitongo respectively before the deceased's death.
7. **PW3 Benedict Kooko Chemung'ani** is the deceased's brother. He testified that he was aware that the deceased gave the Protester land stretching from the suit property and land parcel number W. Bukusu/E. Siboti/2651.
8. In cross-examination, he confirmed witnessing the sale of 2 acres of land to William Simiyu Mukwa (PW5) and Silas Gitongo.
9. **PW4 Joshat Wamalwa Chemung'ani** recalled that in 1976, while serving as the deceased's village elder, he joined the deceased's brothers to settle a dispute between the deceased and the Protester who was demanding a share of his land.
10. He stated that the deceased gave the Protester a share of his land which stretched from the suit property to land parcel number W. Bukusu/E. Siboti/2651 registered in Chemung'ani Kooko's name.
11. **PW5 Wycliffe Simiyu Mukwa** testified that between 1998 – 2005, he bought 2 acres of land from the Protester and the deceased to be excised from the suit property. He produced sale of land agreements to corroborate his testimony on how he bought part of the Protester's portion of the suit property.
12. **PW6 Silas Gitongo Nyongesa** corroborated PW5's testimony regarding how the Protester sold a portion of his land on the suit property to PW5. He produced a sale of land agreement dated 11th October 1999 in support of his testimony.

ANALYSIS AND DETERMINATION

1. This court has given due regard to the pleadings and the evidence placed before it by the parties herein.
2. This court takes the view that the only issue for determination is whether the Protester's Protest is merited.
3. The Protester took the position that he was entitled to 4 acres of land from the suit property. He relied on his own oral testimony and the testimony of PW2 in support of his case.
4. The Petitioner, on the other hand, adduced evidence which disputed the Protester's case that he ought to be given 4 acres of land from the suit property. She reiterated that the portion of land that the deceased gave the Protester stretched from the suit property to land parcel number W. Bukusu/E. Siboti/2651.
5. PW5 and PW6 also adduced evidence by way of sale of land agreements showing that the Protester sold to them part of his share of the suit property. The Protester did not controvert the contents of the sale of land agreements adduced by PW5 and PW6.
6. Given the uncontroverted evidence led by PW5 and PW6, it follows that the Protester cannot seek 4 acres of land given to him by the deceased before the deceased's death, yet he sold part of that land to PW5 and PW6. The Protester cannot have his cake and have it.
7. Further, the law in this jurisdiction is that he who alleges must prove. The Protester, in the face of the Petitioner's claim that the Protester was only entitled to 0.32 ha of the suit property, had an obligation to place before this court a land surveyor's report showing his current acreage of land on the suit property.
8. The land surveyor's report would have also settled the question of whether the 4 acres of land claimed by the Protester stretched from the suit property to land parcel number W. Bukusu/E. Siboti/2651.
9. In the absence of a land surveyor's report to support the Protester's Protest, the evidence on record is largely the Protester's word against the Petitioner's word. Such contradictory evidence cannot be used to support the Protester's Protest.
10. In the penultimate, this court finds and holds that the Protester has failed to prove his Protest on a balance of probabilities.

DETERMINATION

1. The foregoing inclines this court to make the following orders:
2. *The Protester's Protest contained in the Protester's Witness Statement dated 08th June 2025 is dismissed*

3. *The Grant of Letters of Administration Intestate herein issued to Petronilla Nasiebanda Muchele on 15th January 2026 is confirmed per the consent to the mode of sharing dated 13th January 2026*
4. *This being a family dispute, each party to bear their own costs*
5. Judgment accordingly.

Judgment read, signed and delivered in open Court at Bungoma this 18th day of August 2026

T.O. OMONO

SENIOR RESIDENT MAGISTRATE

In the presence of:

Ms. Nekesa h/b for Mr. Wasilwa for the Protester

Petitioner

C/A: Rioba

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