



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Kanda Keture (Deceased) (Probate & Administration  
148 of 2008) [2024] KEHC 7563 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7563 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
PROBATE & ADMINISTRATION 148 OF 2008  
RN NYAKUNDI, J  
JUNE 24, 2024**

**BETWEEN**

**DAVID KIPLAGAT KANDA ..... PETITIONER**

**AND**

**TULA KANDA ..... 1<sup>ST</sup> OBJECTOR**

**JONATHAN KANDA ..... 2<sup>ND</sup> OBJECTOR**

**RULING**

1. Before me for determination is an application dated 20<sup>th</sup> June, 2024 seeking orders as follows:
  - a. Spent
  - b. That this honourable court be pleased to arrest or stay its ruling/judgment in the matter pending the hearing and determination of the mode of distribution.
  - c. That the costs of this application be provided for.
2. The application is based on grounds that the 1<sup>st</sup> Petitioner has discovered new facts to which he needs to file a supplementary affidavit. The Petitioner stated that it is for the interest of justice that the judgment/ruling be stayed or arrested to determine the mode of distribution.
3. The applicant filed an affidavit in support of the proposed mode of distribution. The applicant proposed an equal distribution among the beneficiaries as per the schedule hereunder:



NAME	DESCRIPTION OF PROPERTY	SHARE
L.R. No. Lelan/ Kaptalamwa/26 MEASURING 57 ACRES	To be shared equally among the three houses	
HOUSE A	L.R. NO. Lelan/ Kaptalamwa/26 measuring 57 Acres	19 Acres
David Kiplagat Kristina Kipchumba Salina Kisang (dcd) Ruth Cherop Kipsang (daughter) Andrew Kanda (dcd) Salina Suter Ruto (daughter)		
HOUSE B	L.R. NO. Lelan/ Kaptalamwa/26 measuring 57 Acres	19 Acres
Anna Kanda William Kanda (dcd) Hillary Kanda (son) Flora Kanda Michael Kanda		
HOUSE C	L.R. NO. Lelan/ Kaptalamwa/26 measuring 57 Acres	19 Acres
Tula Kanda – Widow (surviving) Betty Kanda Zablon Kanda (dcd) Mary Korir (wife) Elizabeth Kanda Elijah Kanda Abraham Kanda	19 Acres	



4. On 19<sup>th</sup> March, 2024 when the parties appeared in court, both counsels had a consensus to have the grant issued to David Kiplagat Kanda on 11<sup>th</sup> May, 2009 reviewed to incorporate administrators from three houses. It is for that reason that this court on 20<sup>th</sup> March, 2024 issued a grant to David Kiplagat Kanda, Jonathan Kanda and Michael Kanda. The import of that is that the application dated 8<sup>th</sup> November, 2023 seeking revocation of the impugned grant is therefore spent.
5. Subsequently, the Objectors filed affidavits on 3<sup>rd</sup> of June 2024 expressing concern on how the Petitioner has intermeddled with the estate of the deceased. The 1<sup>st</sup> Objector deponed as follows:
- a. That the petitioner being the 1<sup>st</sup> son of the 1<sup>st</sup> house and who is also one of the administrators has been fraudulent in his conduct as an administrator of the estate of the deceased.
  - b. That not all the properties of the deceased have been disclosed for distribution by the Petitioner.
  - c. That all the properties belonging to the deceased are as follows;
    - i. Parcel number Chepsiro/Kiptoi BLK2/Kapsimotwo/184 (measuring 5.261 Ha).
    - ii. Land parcel number Lelan/Kaptalamwa/249 (measuring 40.47 Ha)
    - iii. Land parcel number Lelan/Kaptalamwa/26 (measuring 22.4 Ha)
  - d. That the only property that is presently available for distribution is parcel number Lelan/Kaptalamwa/26.
  - e. That land parcel number Chepsiro/Kiptoi BLK2/Kapsimotwo/184 which was deliberately left out by the Petitioner was allocated to the deceased who was a beneficiary in Succession cause No. 401 of 1998 at the high court in Nairobi while it was still consolidated scheme named LR No. 10005.
  - f. That the said parcel of land Kapsimotwo farm LR No. 10005 was issued to a number of beneficiaries as a whole and was later subdivided into portions that gave rise to Chepsiro/Kiptoi BLK2/Kapsimo/184 which was specifically allocated to the deceased Kanda Keture a copy of the area list having been filed as annexure TK-7 in the further affidavit dated the 16<sup>th</sup> of November, 2023.
  - g. That land parcel number Chepsiro/Kiptoi BLK 2/Kapsimotwo/184 has been intermeddled with by the Petitioner in this case by way of transferring ownership to himself and charging the same for a loan at the Agricultural Finance Corporation.
  - h. That the said intermeddling was reported at Kapcherop police station and Geta Police Station on the 29<sup>th</sup> of June, 2023.
  - i. That parcel number Lelan/Kaplamoto/249 is also unavailable for distribution as it is subject to an ongoing land court case HCC ELC number 250 of 2014 at Eldoret Law Courts where the petitioner is the defendant.
  - j. That the Petitioner also failed to disclosed all the rightful beneficiaries of the estate of the deceased who are as follows:

1<sup>st</sup> House



David Kanda (son)Christina Kipchumba (daughter)Ruth Kanda (granddaughter of the deceased)

2<sup>nd</sup> House

Anna Kanda (daughter)Kibet Kemboi Kanda (Grandson of the deceased)Flora Kanda (daughter)Michael Kanda (son)

3<sup>rd</sup> House

Tula Kanda (widow of the deceased)

Betty Kanda (daughter)

Mary Korir (widow and daughter in-law of the deceased)

Elizabeth Kanda (daughter)

Jonathan Kanda (son)

Elijah Kanda (son)

Abraham Kanda (son)

Evans Kanda (son)

- k. That none of the above-mentioned beneficiaries executed the said affidavits as we were not aware of this succession cause until we did a search and realized that one parcel of land in the deceased's estate had been transferred by the Petitioner to himself and consequently charged it for a loan which triggered us to do a search for any succession cause filed in court that bequeathed the petitioner the said property.
- l. That upon conducting due diligence, we found out that there is a pending petition in court slated for confirmation of grant on 10<sup>th</sup> November, 2023 which is the current suit.
- m. That the representation made unto this honourable court by the Petitioner were therefore false, unconscionable and a deliberate misrepresentation of facts with a view to mislead the court to issue orders in favour of the Petitioner herein.
- n. That unless Land Parcel number Chepsiro/Kiptoi BLK2/Kapsimotwo/184 is discharged from the loan liability, ownership determined and the ongoing suit on Lelan/Kaptalamwa/249 is finalized, the estate of the deceased cannot proceed for distribution.
- o. That once the above is finalized and all the property is available for distribution, it is our prayer that the mode of distribution of the all the estate of the deceased be distributed equally amongst all the beneficiaries as individual units.
- p. That should the court grant and confirm the summons for confirmation of grant dated 31<sup>st</sup> of July, 2023, most of the rightful beneficiaries stand to lose their entitlement in the estate hence leading to an injustice.
  1. The 2<sup>nd</sup> Objector equally swore an affidavit with averments which were more less the same with those of the 1<sup>st</sup> Objector.

#### **Analysis and determination.**

7. I have carefully read through the application dated 20<sup>th</sup> June, 2024 and the initial affidavits filed by the objectors, which were pending determination. I am conscious of the fact that the Petitioner wishes to have the said determination arrested, with a view to disclose new material facts. The Objectors



essentially seek to have all the properties belonging to the deceased person disclosed and that the petitioner should be restrained from intermeddling with the estate. The properties that have been identified as belonging to the deceased person at present are as follows:

Parcel number Chepsiro/Kiptoi BLK2/Kapsimotwo/184 (measuring 5.261) Ha).

Land parcel number Lelan/Kaptalamwa/249 (measuring 40.47 Ha)

Land parcel number Lelan/Kaptalamwa/26 (measuring 22.4 Ha)

8. The objectors contended that the only property that is available for distribution is Land parcel number Lelan/Kaptalamwa/26 (measuring 22.4 Ha). That fact is not disputed. The objectors deponed that Land parcel number Lelan/Kaptalamwa/249 (measuring 40.47 Ha) is a subject matter in an ongoing land suit at the Eldoret High Court, case number HCC ELC 250 of 2014 where the Petitioner is the defendant thus making it unavailable for distribution at the moment. As for Parcel number Chepsiro/Kiptoi BLK2/Kapsimotwo/184 (measuring 5.261) Ha), the Objectors averred that the Petitioner has intermeddled with it by transferring its ownership to himself and securing a loan at the Agricultural Finance Corporation using the parcel as collateral thus making it unavailable for distribution.
9. The applicable law in this case is Section 40 of the [Law of Succession Act](#) in cases of this nature. The said Act makes provisions for distribution of the deceased's estate to the houses according to the number of children in each house and includes a wife as a unit if still alive. There is no discrimination of such children on account of sex. Section 40 primarily provides as follows:
  - “(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 interest within each house shall then be in accordance with the rules set out in sections 35 to 38”
10. In the case of Rono –v-Rono Civil Appeal NO. 66 of 2002, where Waki J.A stated *inter alia* that; -

“More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.” A “house” in a polygamous setting is defined in section 3 of the Act as a “family unit comprising a wife and children of that wife.”
11. Additionally, in the Matter of Re Estate of Benson Ndirangu Mathenge (deceased) Nakuru HCSC NO. 231 of 1998 (Ondeyo J), the deceased was survived by his two widows and their children. The first widow had four children, while the second widow had six children. The court stated that the first house was comprised of five units while second had seven units. The two houses of the deceased combined and looked at in terms of units made up twelve units. The court distributed the estate to the children and the widows treating each as a unit. The land available for distribution was forty acres, which was divided by the court into twelve units. Out of the twelve units, five were given to the first widow and her four children, while the remaining seven units went to the second widow and her six children.



12. Stephen Gitonga M’urithi –v- Faith Ngira Murithi the court made the following observations:

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried.

Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each house hold of a polygamous deceased. Applying the above principles..... it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the Law of Succession Act by discriminating against the married daughters of the deceased...”

13. Our jurisprudence is now settled on the issue of inheritance that the imperatives of Art 27 of the Constitution is one of the yardsticks in interpreting Section 38 and 40 of the Law of Succession Act. Besides the above authorities, the court in *Eliseus Mbura M’ Thara v Harriet Ciambaka & another* also addresses the issue in the following language:

“The Law of Succession Act does not discriminate between gender in matters of succession or inheritance. Under the Law of Succession Act and indeed under the Constitution a child is a child and every person has equal rights under the law irrespective of gender. The law of Succession Act does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as th other children (sons) of a deceased person.”

14. The court has taken note of the schedule of distribution filed by the Petitioner, which distributes the available parcel of land equally among the beneficiaries. The principles of the law in my judgment are in consonant with the model filed by the Petitioner. Land parcel number Lelan/Kaptalamwa/249 (measuring 40.47 Ha) to this end shall await the outcome in Eldoret High Court, case number HCC ELC 250 of 2014, whereas for Parcel number Chepsiro/Kiptoi BLK2/Kapsimotwo/184 (measuring 5.261) Ha), the petitioner shall give the status of the property as to whether it is an estate property or it is a property gifted to the administrator.

15. From the foregoing analysis, the grant issued on 20<sup>th</sup> March, 2024 is as a result partially confirmed in respect to Land parcel number Lelan/Kaptalamwa/26 (measuring 22.4 Ha).

16. In this case, whilst this is a partial confirmation the court has not disregarded the application for filing of a supplementary affidavit on new disclosures on matters arising out of the administration of this estate. As a consequence therefore, leave be and is hereby granted for the filling of that supplementary affidavit and that affidavit shall be served upon other beneficiaries named in this Petition and the court may in its discretion make attendant orders to that features in that affidavit. For purposes of clarity, the court is careful not to make piecemeal determination given the prima facie facts of this succession cause that there are other appropriate assets which are yet to be conclusively dealt with as mentioned elsewhere in this ruling requiring the necessity of further interrogation for the ends of justice to be met. The interventions by this court as highlighted, will be better holistically adjudicated on a priority basis on account of the ELC matter being determined, the interim probate account on the contentious asset stated to have been transmitted to David Kiplagat Kanda as alleged by the other beneficiaries without their concurrence. That is a justiciable issue

17. The Petitioner is hereby directed to file an interim probate account for Parcel number Chepsiro/Kiptoi BLK2/Kapsimotwo/184 (measuring 5.261) Ha), given that it is contested by the Objectors and for the court to appreciate the contentious issues. Any application seeking inclusion or exclusion of the



properties to this estate ought to be decided when all these other pending issues set out in this ruling have been heard and determined on merit.

18. In terms of this issues a status conference be held on the 21<sup>st</sup> of October, 2024. In the meantime, a certificate of confirmation of grant shall be issued forthwith on the itemised asset.

19. Costs be in the cause.

**DATED SINGED AND DELIVERED VIA E-MAIL AND SIGNED AT ELDORET ON THIS 24<sup>TH</sup>  
DAY OF JUNE 2024**

**R. NYAKUNDI**

**JUDGE**

