



**In re Estate of Bera Kimata Naburuk alias Pera Naburuku (Deceased) (Probate & Administration E017 of 2021) [2024] KEHC 10401 (KLR) (23 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10401 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
PROBATE & ADMINISTRATION E017 OF 2021**

**DK KEMEL, J**

**AUGUST 23, 2024**

**IN THE MATTER OF THE ESTATE OF BERA KIMATA  
NABURUK ALIAS PERA NABURUKU (DECEASED)**

**BETWEEN**

**JOSEPH MAKASI BERA ..... PETITIONER**

**AND**

**MIRIAM TEMKO BERA ..... OBJECTOR**

**RULING**

1. *Vide* an affidavit of Protest sworn on 29<sup>th</sup> May 2023 and filed on even date, the Objector herein sought orders against confirmation of grant of letters of administration issued to the Petitioner herein on 21<sup>st</sup> April 2022. She avers that she is the daughter of the deceased herein and that the deceased had two families with the 1<sup>st</sup> house having 11 children, 5 now deceased, and the 2<sup>nd</sup> house has 9 children. According to her, the deceased's children of the 1<sup>st</sup> house left behind families that need to be provided for and that her father left behind one asset, land parcel LR. North Malakisi/ South Wamono/222 measuring 132 Acres or thereabouts. She avers that the Petitioner commenced the succession process herein without involving all the beneficiaries and that the proposed mode of distribution is unacceptable as it recommends the registration of the deceased asset in the name of Petitioner only in trust. She avers that the beneficiaries of the deceased are two in number and the lack of the involvement and consent of all the beneficiaries by the Petitioner is an error. She urges this Court to dismiss the Petitioner's application for Confirmation of the Grant and that the grant issued to him on 21<sup>st</sup> April 2022, be revoked.
2. In response to the affidavit of Protest, the Petitioner herein swore a replying affidavit on 16<sup>th</sup> August 2023 and filed in Court on 23<sup>rd</sup> August 2023, wherein he avers that the deceased had three families and not two. According to him, he commenced the succession process of the estate of the deceased with the consent of all the beneficiaries as several meetings had been held and minutes generated. He avers



that the Objector herein was in attendance. He avers that the deceased herein, his father, prior to his demise sub-divide his land into six equal portions each measuring 8.9 Ha from total of 53.5 Ha and that his five sons were duly catered for in this sub-division.

3. Vide Court directions issued on 17<sup>th</sup> October 2023, the Protest was to be canvassed by way of written submissions. Both parties complied.
4. The rival submissions have been given due consideration by this Court in the light of the filed rival pleadings, there being no dispute that the deceased died intestate while married to three wives, the distribution of his estate was placed in the hands of the Petitioner as the Administrator of the estate who was thus tasked with ensuring that the proposed mode of distribution would be beneficially done and agreed upon by all the three houses of the deceased. Failure to come up with a mutually agreed and acceptable mode of distribution of the estate meant that the Petitioner would be required to adhere to the applicable statutory guidelines in that regard i.e Section 40 of the Law of Succession Act.
5. According to the filed form P&A 5, the deceased was survived by 12 children and that the asset of the deceased is listed as N/Malakisi/S.Wamono/222, but the introductory letter from the chief indicated 15 children including the deceased ones. The availed form 38, which is the consent to the making of the grant, only indicates that only three people availed their consent out of the deceased person's beneficiaries.
6. A mutually agreed and acceptable mode of distribution would have removed the distribution of that estate from the guidelines provided under Section 40 of the Succession Act and have the grant confirmed by the Court for the benefit of all the three houses of the deceased only if the succession process was duly confined to the set guidelines.
7. It is evident that the exclusion of the three deceased beneficiaries from the succession process means that their rightful shares will be left to their respective estates and beneficiaries. Also, the record confirms that no such consent was availed to indicate that an agreement was reached in regard to the mode of distribution. Both modes of distribution appear to have been made without proper and/or adequate input from the other beneficiaries. Indeed, the respondents conceded that not all the beneficiaries agreed with their proposed mode of distribution.
8. Consequently, the said grant of letters of administration issued on 26<sup>th</sup> May 2022 is revoked. Subsequently, the summons for confirmation of grant is hereby disallowed and struck out with orders that the parties may take out fresh grant and summons for confirmation of grant after reaching a mutually agreed and acceptable mode of distribution for the benefit of all the three houses of the deceased and selection of the respective representative from the said three houses to be the Administrators of the estate of the deceased herein. For the avoidance of doubt, the proper beneficiaries of the estate are the three wives of the deceased and his children with any one of them (including the deceased ones).
9. In default of any agreement on the administration and mode of distribution of the estate by all the beneficiaries, the matter be referred to the public trustee for necessary administration and distribution of the estate in accordance with Section 40 of the Law of Succession Act and in any event, within a period of six (6) months from this date hereof.
10. Section 40 of the Act, provides for guidelines for distribution of the estate of a polygamous intestate in the following terms: -

“(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 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 intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38”.

11. The provision is the applicable law in the present circumstances where there is no agreement on distribution of the estate. Any proposed mode of distribution ought to be compatible with and in accordance with the provision thereby leaving no room for distribution based on the whim of the holders of the grant or their sentimental feelings.
12. In the case of *Esther Wanjiku Burugu Vs Margaret Wairimu Burugu Civil Appeal No. 319 of 2002*, the Court of Appeal sitting in Nakuru observed that the provision does not state that the division of the estate must be equal and that it specifically states that although the distribution of the estate of a polygamous person is in the first instant to be among the houses, it nonetheless specified that that would be done according to the number of children in each house.
13. The Court was of the view that the provisions negates any proposal that the division must be equal between the houses, for to say so, would ignore the fact that in most instances, the number of children in each house is never equal.
14. In the Case of *Mary Rono Vs Jane Rono & Another* (2005) eKLR, the Court of Appeal stated that if parliament had intended that there must be equality between the houses, there would have been no need to provide in Section 40 of the Succession Act that the number of children in each house be taken into account. The case of *Elizabeth Chepkoech Salat Vs Josephine Chesang Salat Civil Appeal NO.211 of 2012* at Nairobi, reiterated and fortified the fact that Section 40 of the *Succession Act* does not provide for equality between houses or that each child must receive the same or equal portion. The court held that: -

“Section 40 of the *Act* does not give discretion to a court to deviate from the general principles therein annunciated.

Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court had no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to make adjustment to the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust”.

15. As directed herein above, the parties herein together with all the other beneficiaries and their respective Counsels must spare no effort in arriving at a consent on the matter within the next six (6) months and take out fresh grant and summons for confirmation of grant. Their failure in that regard, will mean that the administration and distribution of the estate among the three houses, of the deceased shall be undertaken by the public trustee on this Court’s order.
16. The upshot of the foregoing, is that the affidavit of Protest application dated May 29, 2023 is merited. I allow the application. No order as to costs.

It is so ordered.



**DATED AND DELIVERED AT BUNGOMA THIS 23<sup>RD</sup> DAY OF AUGUST 2024.**

**D. KEMEI**

**JUDGE**

In the presence of:

Sichangi for Petitioner

Songor for Korir for Objector

Kizito Court Assistant

