



**In re Estate of Kipngetwo Arap Kenduiwo alias Kipngetwo Kenduiwo (Deceased)
(Succession Cause 292 of 2004) [2023] KEHC 1526 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 292 OF 2004
AN ONGERI, J
FEBRUARY 23, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE KIPNGETWO
ARAP KENDUIWO ALIAS KIPNGETWO KENDUIWO (DECEASED)**

BETWEEN

DAVID KIMUTAI BETT PETITIONER

AND

GRACE CHEROTICH KENDUIWO OBJECTOR

JUDGMENT

1. The Objector herein Grace Kenduiwo filed a protest against the summons for confirmation of grant dated 02/0/2015. She said the deceased herein Kipngeno Arap Kenduiwo who died on 22/8/1996 had two wives as follows;Obot KipkiruiGrace Kenduiwo
2. The objector was the second wife and the 1st wife Tabutany Kipkirui who is deceased had three children two sons and a daughter.
3. The objector said the reason for the protest was that the deceased had subdivided his property namely Kericho/kongotik/1172 comprising 40 acres and she was given 23.5 acres and the first house was given 15 acres.
4. The Objector said she was given a bigger share due to the number of children in her house. She said Alexander Kosgei bought 2 acres.
5. In her written witness statement, the objector stated that she objected to the mode of distribution filed by the 1st Petitioner because her late husband's wishes were that the distribution he made prior to his demise ought to remain, and that the land measures 40.5 acres, the deceased had sold 2 acres to a third party and subsequently the land was divided as follows; First House 15.0 acres and Second House 23.5



- acres. The Objector further stated that the deceased had considered the number of children of each household.
6. The Objector called Kiptangus Kenduiwo as her witness. The witness adopted his witness statement dated 02/11/2015 as his evidence in Chief.
 7. The witness stated that sometime before his late brother fell ill he divided his land into two portions, according to the two households, he erected a boundary fence and stated that each household was to occupy the portion given to it.
 8. The witness said the first house had 4 children while the second house had 10 children. He said the deceased subdivided his land before his demise.
 9. DW3 also said after the deceased died a meeting was held with the Chief and the Chief maintained the position that the deceased had divided his land. The buyer was given 2 acres which the deceased had sold to him.
 10. The Petitioner David Kimutai Bett said the deceased died in 1996. He said his father owned land parcel No. Kericho/Kongotik/1172.
 11. The Petitioner said the property should be shared equally.
 12. The Petitioner called one witness Daniel Tuiya who is a retired Chief of Kemu Location.
 13. The Chief said he held a meeting on 25/8/2004 where it was agreed that the land be shared into two equal shares after removing the 2 acres for the purchaser.
 14. The Chief produced the minutes as an exhibit in this case.
 15. The 1st Petitioner conceded that it was not in dispute that the deceased herein had two wives and two households with the respective beneficiaries.
 16. The 1st Petitioner conceded that the deceased during his lifetime had disposed off part of his estate.
 17. The 1st Petitioner contended that the deceased had died testamentary and had sub-divided the land into two equal portions for each household and further that DW 2 had produced minutes from family meetings which was a unanimous confirmation of the deceased's wishes.
 18. The 1st Petitioner was therefore praying that the court confirm the certificate of confirmation of grant which was in line with the deceased's wishes.
 19. The 2nd Petitioner filed submissions in support of her affidavit of protest against confirmation of grant as proposed by the 1st Petitioner, whilst taking cognizance of the 2 acres sold by the deceased to Alexander Kosgei, contended that the deceased had demarcated the shares of the two households and further that the distribution by the deceased had factored in the number of children in each house and that this was an equitable, fair and just mode distribution of the estate in tandem with provisions of section 40 of the Law of Succession Act.
 20. I have considered the evidence adduced in this case. I find that it is not in dispute that the deceased died on 22/8/1996 according to the death certificate attached to the petition.
 21. It is also not in dispute that the deceased left one parcel of land namely Kericho/Kongotik/1172 measuring 16.4 Ha(40 ½ acres).
 22. The deceased had two wives. The 1st wife who is deceased had 4 children while the second wife had 10 children.



23. The issues for determination in this protest are as follows;
- i. Whether the deceased shared the estate prior to his death.
 - ii. How the estate should be shared.
24. On the issue as to whether the deceased shared the estate prior to his death, I find the deceased did not transfer the property to the beneficiaries.
25. There is no evidence that the deceased made any gift inter vivos to any of his children, in *Re Estate of the Late Gedion Mantbi Nzioka (Deceased)* [2015] eKLR, Nyamweya J. stated as follows on the validity of incomplete gifts: “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.”
26. I also find that there is no evidence that the deceased left a valid written will or oral will.
27. I therefore find that the deceased died intestate and his estate is subject to intestate succession.
28. *In Re Estate of Chesimbili Sindani (Deceased)* [2021] eKLR, the court stated that; “...There was no gift inter vivos to any of the children of the deceased, and, therefore, the entire estate of the deceased comprises of free property available for distribution by the court in these confirmation proceedings. I am persuaded that the deceased had only licensed the sons to utilize certain assets, and as a result they had put up structures on those assets, any distribution of the assets ought to take into account those assets, and ensure that the particular sons are allocated shares in the parcels of land where they have put up structures.”
29. On the issue as to how the estate should be shared, Section 40 of the Law of succession Act is applicable in this case. The said Section states 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”
30. Section 40 of the law of succession have been expounded in the following cases, in *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.”



31. *In the Matter of the Estate of Nelson Kimotho Mbiti(deceased)* HCSC NO.169 of 2000, Koome J. (as she then was), directed that the estate of a polygamist be divided in accordance with the provisions of Section 40 of the Act. The estate was divided into units according to the number of children in each house with the widows being added as additional units. The same reasoning was also applied by Judge Ali Roni (as she then was) in the *Estate of Ainea Masinde Walubengo(deceased)* (2017) eKLR who stated that “I am of the view that Section 40 of the Law of Succession Act will apply to the circumstances of this Case. Meaning that the Court will distribute the estate of the deceased according to each house taking into account the number of children in each unit including the surviving widow.”
32. I find that the estate should be shared equally in accordance with Section 40 of the Succession Act.
33. Any surviving spouse to be added as an additional unit.
34. I direct that the Estate be shared in accordance with Section 40 of the Law of Succession Act.

RULING DELIVERED, SIGNED AND DATED THIS 23RD DAY OF FEBRUARY 2023

A. ONGERI

JUDGE

