



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Jacob Kiliru Asava (Deceased) (Succession Cause
429 of 2010) [2023] KEHC 3946 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 429 OF 2010
REA OUGO, J
APRIL 25, 2023**

BETWEEN

JUDITH MUSIMBI KILIRU PETITIONER

AND

CHRISTINE VIHENDA KILIRU 1ST OBJECTOR

CHRISPO KISANYA KILIRU 2ND OBJECTOR

RULING

1. Jacob Kiliru Asava died on the 19.3.2010. Judith Kaliro Musimbi filed a Petition for letters of administration intestate on the 30.11.2010. The deceased died intestate and left the following surviving him:
 - a. Judith Kiliru Musimbi – widow – 2nd Wife
 - b. Christine Vihenda Kiliru – widow – 3rd wife.
 - c. Esnas Kiliru – daughter
 - d. Chrispo Kisanya Kiliru – Son
 - e. Duncan Asava – Kiliru – Son
 - f. Mercy Kiliru – Daughter – daughter
 - g. Michael Kiliru – son.
 - h. Loice Kiliru – Daughter
 - i. Edith Kiliru – Daughter
 - j. Anthony Kiliru – Son.



2. He left behind the following assets:
 - i. Land Parcel NO. Bungoma/Kiminini/245
 - ii. Pension from Municipal of Nakuru parcel NO. 245 is about 12.1.Ha as per certificate of search attached to the Petition.
3. An application to confirm the grant was filed on the 4.11.2011 by Judith Musimbi Kiliru.
4. A grant of letters of administration Intestate was issued to Judith Musimbi (Judith), Christine Vihenda Kiliru (Christine) and Chrispo Kisanya Kiliru (Chrispo) on the 18.3.2015.
5. Judith is the first wife, Christine the 2nd wife and Chrispo a son of the deceased. On the 2.2.2021 the parties agreed to proceed by way of viva voce evidence and that the issues for determination were:
 - i. Who are the beneficiaries of the estate?
 - ii. What is each beneficiaries share.
6. The Administrators filed own proposed mode of distribution of the deceased estate. The only asset of the deceased is LR NO. Bungoma/Kiminini/245 measuring 12.2 ha as per the report of the county surveyor filed in court on the 27.11.2018.
7. Parties reached a further consent on the 4.5.2021 that the issue of Esnas Asia Kiliru being a beneficiary be canvased by way of viva voce evidence and that the issue of distribution be canvased by way of written submissions.
8. On the 7.6.2022 the court after listening to a lady called Esnas and after the lady denied knowing the deceased. The court made an order that the issues of whether Esnas is a beneficiary is settled that the issue of whether she is a beneficiary is settled that she doesn't exists she is not a beneficiary.
9. Christine testified as follows:

“I know the deceased. He was my husband. We married in 1973. He died in 2010. When I was married I heard he had married a woman but had left. He did not marry any other woman after me. We had 10 children but 5 died. The ones who are alive are:

 - i. Mercy Chebaya Asava
 - ii. Michael Amugungo Asava
 - iii. Edith Kiliru Nyagoha
 - iv. Anthony Midega Kiliru
 - v. Loice Makwane Kiliru
 - vi. Dancun Kiliru Asava (deceased but has wife Elizabeth Mushi Asava) My husband had one parcel of land at Kiminini measuring 24 HA. He had plots at Nakuru at:
 - a. Bangladesh
 - b. Stadium

He sold 1 and at Kiminini. He sold to:



- i. Patrick Aganya
- ii. Martin Sisiko
- iii. Jane Agesa
- iv. Agrey Esami.

I have made the proposal for distribution as filed. I have distributed to 6 children.

I have also given Chrispo Kisaya Asava. He is son of the deceased. I do not know his mother but I found him with deceased. I have also included Judith Musimbi. She is my co-wife. She is the elder wife of deceased. I have distributed to 4 buyers. The surveyor confirmed that acreage as 29 acres. The 2 plots in Nakuru were taken by Judith. I did not propose their distribution.

10. Judith filed 2 affidavits on the 30.4.2019 and a further affidavit on the 4.7.2019. Her proposed mode of distribution is as follows:

First House

1. Judith Musimbi Kiliru - 6.05 acres

2nd House

2. Chrispo Kisanya Kiliru - 5 acres
3. Esnas Asara - 1 acre

3rd House

4. Christine Vihenda Kiliru - 4 acres
5. Dan Asara - 2 ½ acres
6. Antony Amugongo - 2 ½ acres
7. Michael Musibega - 2 ½ acres
8. Mercy Chabaya - ½ acres
9. Edith Nyangoha - ½ acres
10. Loice Makhwana - ½ acres

Buyers

11. Patrick Aganya Agevi - 1 acre
12. Aggrey Isami Nguyamba - 1.5 acres
13. Jane Agesa Embuzi - 1 acre

She avers that the pension held in the Bank (PF) to be distributed in respect to the house of the deceased.

11. Christine mode of distribution as per affidavit filed in court on the 5.11.2019 is as follows;
 1. Ms. Judith Musimbi Kiliru - 1 acre
 2. Ms. Christine Vihenda Kiliru - 1 acre



3. Mr. Duncan Asava Kiliru - 4 acres
4. Chrispo Kisanya Asava - 5 acres
5. Mr. Michael Amugongo Asava - 4 acres
6. Ms. Loice Makwana Kiliru - 1 acre
7. Ms. Edith Nyagoha Kiliru - 1 acre
8. Antony Midega Kiliru - 4 acres

Buyers

9. Mr. Patrick Aganya Agevi - 1 acre
10. Martin Sisiko - 0.5 acres
11. Jane Agesa Embuzu - 1 acre
12. Mr. Aggrey Isami Nguyambwa - 1.5 acres
13. Road Reserve - 2 acres

Total - 29 acres

12. In a further affidavit filed in court on the 16/5/2022 Christine depones as follows that the land is 27 acres and not 29 acres. That at no time did the beneficiaries instruct Geometer Survey Ltd to carry out survey of LR No. Bungoma/Kiminini/245. That she resides and utilized LR No. Bungoma/Kiminini/245 and at no time has the petitioner or the said surveyor visited the land with a view of carrying out survey. That she has an objection to Gideon Vosereze being allocated 2 acres because he did not establish his claim.
13. Chrispo filed an affidavit on the 17.7.2019 and it reiterates the content of the affidavit of 5.8.2020. His proposal on the mode of distribution is as follows:
 - a. Judith M. Kiliru– 1acre of land for she still holds some of my father’s properties in Nakuru, the ones they got before 1973. Even the house she is staying in – County Council house was in the name of my father.
 - b. Christine V. Kiliru(1) acre which is developed including a house and some trees on it.
 - c. Chrispo Kisanya Asava – 5 acres (he was the son of 1st wife Regeni)
 - d. Danca Asava Kiliru– 4 acres (the son of Christine)
 - e. Michael Amugongo Kiliru– 4 acres (the son of Christine)
 - f. Antony Midega Kiliru– 4 acres (the son of Christine)
 - g. Esnas Kezengwa- 1 acre (Daughter of Regeni)
 - h. Mercy Chabaya- 1 acre (2nd daughter of Christine)
 - i. Loyce Makwana – 1 acre (3rd daughter of Christine)
 - j. Edith Nyagoha– 1 acre (4th daughter of Christine)
 - k. Patrick Aganya– Buyer 1 acre



- l. Aggrey Isami– Buyer 1 ½ acres
- m. Jane Agesa- Buyer 1 acre
- n. Martin Sisiko– Buyer ½ of an acre.
- o. 2 acres – access road.

(Subject To Verification.

Total Acreaged Is 29 Acres(12.1 HA)

In his affidavit filed on the 5.8.2020 he depones that Judith till holds some of his father’s properties in Nakuru the ones they got before 1973 and the house Judith is staying in a county council house was in the name of his father.

14. Parties filed written submissions. I have carefully considered the said submissions together with all their affidavits filed .
15. The issues for determination are as follows:
 - i. Who are the beneficiaries.
 - ii. What is the acreage of the asset LR Bungoma/Kiminini/245
 - iii. What mode of distribution.
16. Beneficiaries
The deceased was survived by the following beneficiaries:
 1. Judith Kiliru Musimbi – widow – 2nd Wife
 2. Christine Vihenda Kiliru – widow – 3rd wife.
 3. Chrispo Kisanya Kiliru – Son
 4. Duncan Asava – Kiliru – Son
 5. Mercy Kiliru – Daughter – daughter
 6. Michael Kiliru – son.
 7. Loice Kiliru – Daughter
 8. Edith Kiliru – Daughter
 9. Anthony Kiliru – Son.
17. The issue of Esnas Kesangwa was resolved in court when the court on the 7.16.2022 made an order that she doesn’t exist and that she is not a beneficiary.
18. The 3 administrators are in agreement that there are buyers who are entitled to part of the land parcel. The buyers are Patrick Aganya Agevi, Aggrey Isami Nguyambwa, Jane Agesa Embuzi and Martine Sisiko.
19. Christine in her submissions filed in court on the 15.12.2022 states that Duncan Asava Kiliru passed on. She filed a certificate of death in her list of documents dated 1.11.2022. What is attached is a certificate of birth and not a death certificate. Submissions cannot be used as evidence. But it is apparent from Christine and Chrispo that Duncan is deceased.



Mode of distribution

20. The deceased was polygamous and therefore the section of law that governs the distribution of his estate is Section 40 of the *Law of Succession Act* which 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 intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.
21. In considering the mode of distribution am guided by the law and also the principle on equitable distribution in cases where a deceased was polygamous. The land parcel for distribution is appropriately 12.1 Ha which translate to 30 acres. When I calculate the acreage as proposed by Judith it amounts to about 29 acres and the acreage proposed by Christine is about 27. Judith and Christine are both wives of the deceased. Judith had no children with the deceased but as a wife she is entitled to an equitable share. She has sought 6.5 , Christine and Chrispo have proposed 1 acre. In my view she is entitled to 5 acres. Chrispo has proposed 6 acres for himself, Judith has proposed 5 acres for him and Christine has proposed 5 acres. In my view Chrispo is entitled to 5 acres. Next is the household of Christine. The acreage that is remaining is 20 acres to be shared between Christine’s household and the buyers. The acreage due to the buyers is 5 to be shared as follows; Patrick Aganya Agevi 1 acre, Aggrey Isami Nguyamba 1.5 acres, Jane Agesa Embuzi 1 acre and Martin Sisiko 0.5 acres.
22. Finally, the household of Christine share is distributed as follows;
- i. Christine V. Kiliru.. 4 acres
 - ii. Dancan Asava Kiliru ...2 ½ acres
 - iii. Anthony Midega Kiliru ...2 ½ acres
 - iv. Michael Amugongo Asava ...2 ½ acres
 - v. Mercy Kiliru ½
 - vi. Edith Nyangoha Kiliru ½ acres
 - vii. Loice Makhwana Kiliru ½ acres
23. Parties to bear their own costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 25TH DAY OF APRIL 2023.

R.E.OUGO

JUDGE

In the presence of:

Judith Kiliru 1st Petitioner present

2nd Petitioner Absent

3rd Petitioner Absent

Wilkister - C/A

