



REPUBLIC OF KENYA



**In re Estate of Festo Mutenyu (Deceased) (Succession Cause 626'A' of 2011)
[2023] KEHC 24636 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24636 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 626'A' OF 2011
SC CHIRCHIR, J
OCTOBER 26, 2023**

BETWEEN

JOHN OMMANI LUCHIVIA 1ST PETITIONER

EMILY LISANZA MWERU 2ND PETITIONER

AND

SUSANA MUKASIA SHIKUKU PROTESTOR

JUDGMENT

1. This cause relates to the Estate of the late Festo Mutenyu Oluchebi (deceased) who died on 27th November 1997. Upon his demise his dependants namely John Ommani Luchivia and Emily Lisanza Mwera, the deceased's son and daughter respectively, were appointed Administrators to the estate and they applied for confirmation of grant which was issued to them by this court on 15th October 2012.
2. In his summons for confirmation of the grant dated 20th July 2015 the 1st petitioner proposed to have the larger portion of the title number Butso /Indangalasia/1256 be given to him and Butso / Indangalasia/1257 to be shared by his step-sisters.
3. The deceased left behind 8 heirs, namely;
 - a). John Luchivia- son
 - b). Emily Mwera- daughter
 - c). Sarah Khakazi Mutenyu- daughter
 - d). Susan Mukasia Shikuku-Daughter
 - e). Selina Owano Mutenyu-daughter
 - f). Rosemary Mutenyu- daughter



- g). Priscila Mutenyu-daughter
 - h). Josca mutenyu- daughter
4. The deceased left behind the following properties;
 - i. Butsotso/Indangalasia/1256 measuring approximately 2.73 Ha
 - ii. Butsotso/Indagalasia/1257 measuring approximately 1.2 Ha
 5. All the daughters of the deceased except Sarah Khakali Mutenya opposed the mode of distribution proposed by the 1st petitioner, whom they claimed had no justification to allocate himself more shares than the rest of the beneficiaries.
 6. The protests was heard by way of viva voce Evidence.
 7. PW1 Susan Mukasia Shikuku is the protesor. She testified that the deceased was her father and the petitioner is his step- brother. She listed the Deceased’s children as:
 1. Emily Ayuma
 2. Sarah Khali
 3. Susan Mukasia
 4. Selina Owano
 5. Rosemary Ayusi
 6. Priscilla Namayi
 7. John Omwami Luchivya
 8. She testified that her father had two parcels of land , parcel Numbers 1256 and 1257. She wants the properties to be divided equally
 9. On cross examination, she stated that they are 6 daughters and that the petitioner was the only son. She claimed that their father had showed them the land but the boundaries were never marked. She told the court that the petitioner had built his house on the land meant for the daughters.
 10. PW2, Rosemary Khayasi testified that her father had two wives. She knew of a woman called Rodah; that the said Rodah never lived with her father, but they brought a child, the petitioner herein. She listed the deceased 6 children but did not name the petitioner.
 11. On cross- examination, she told the court that her father left pieces of land , one on the “upper side” and another on “the lower side”. She said that her father had given instructions that the petitioner would construct his house on the upper side while the lower side would go to the girls. She stated that the petitioner now resides on the land meant for the girls.
 12. PW3 stated that the deceased was her father and that the petitioner was her brother. She listed all the seven children of the deceased, including the petitioner. She stated that the petioner’s mother was her father’s wife. She proposes equal distribution of the two Land parcels.
 13. On cross- examination, she told the court that there were marked boundaries between the two parcels. . Part of the lower portion was sold out. Her father had not shared out the land prior to his demise. She stated that the farm should be shared equally amongst the children.



14. PW4 told the court that the deceased was her father and that he had one wife who was her mother. She proceeded to name all her siblings including the 1st petitioner, whom she claimed was not her mother's child as he was born out of wedlock. She stated that her father had two pieces of land and that he had not divided the parcels. She stated that the land should be shared equally among all the children
15. PW5 adopted her witness statement as evidence. She testified that the deceased was her father and named all her siblings including the 1st petitioner. She insisted that her father had not shared out his land and that the land comprised of two Titles. She proposes equal distribution to all the children of the deceased
16. On cross-examination, she stated that Jessica passed on after the death of father, she had children who were now at Jessica's then matrimonial home. That her father had not shared out the property.
17. In re-examination, she stated that she had no objection to Jessica's children being given land; that the deceased had sold a part of the land prior to his demise and this particular piece has a separate Title.
18. PW6 was Priscilla Namayi. She testified that her father had not shared out the land and prefer equal distribution for all the children.
19. The protestor closed her case.
20. DW1 was Sarah Mutenyo. She told the court that the deceased was her father and the petitioner is her brother. She stated that her father had divided the land into two portions before he died. That after her Father's death, a meeting was held with the chief where the chief proposed hiving off a piece of the petitioner's land to go to one of the girls. She was satisfied with the distribution which her father had done. Their mothers have died.
21. On cross-examination, she told the court that her father divided the land into two portions; he showed the petitioner where to put up his house and showed the girls a different portion. She admitted that the petitioner got a bigger share of the Land.
22. DW2 was the petitioner. He told the court that he signed the affidavit of confirmation based on what the family had agreed upon. He adopted his Affidavits sworn on 20/7/2015 and a further affidavit sworn on 21/2/2020 as part of his evidence -in- chief. In the supporting Affidavit he proposes the sub-division of the property as follows:
 - a). Butotso/Indangalasia/1256 to:
 - John Ommani Luchivya-----1.965 hac
 - Sarah Khakali Mutenyu-----0.3275ha
 - Priscilla Mutenyu-----0.3275ha
 - Emily Lianza Mwera-----0.1100 ha
 - b). Butotso/Indangalasia/1257 to:
 - Emily Lianza Mwera-----0.2175 ha
 - Rosemary Mutenyu-----0.3275ha
 - Selina Owano Mutenyu----0.3275 ha
 - Susana Mukasia Shikuku—0.3275 ha



23. He told the court that before his father died, he had shown them where to build. He built his first house while his father was still alive and built the 2nd one after the demise of his father. The 2nd house was in the same parcel as the first house. The land parcel are Butotso/Indangalasia /1256 and 1257. He further told the court that he had constructed his house on parcel No.1256. That he had not had access to the Titles to the land during the life time of the deceased. He was just told to build on the upper side. His father had told him to take the upper side and if his sisters were interested, he could give them the lower side. He has not built any house parcel No. 1257. He further testified that a meeting was held and his step-mother and elders present . The elders decided that a portion of his land would be hived off and added to 1257, but his sisters disagreed. Later the chief came and added another portion to them but they were still dissatisfied.
24. They eventually ended up at the District Commissioner's (DO) office. The DO suggested that the land be divided between the two houses equally , a proposal which they all agreed to and signed for it. He asserted that he has agreed to all his sister's demands. He wants the Land divided as per what was agreed at the DO'S office.
25. On cross-examination, he stated that they signed an agreement before the DO. That his father had told him how he wanted the land sub- divided; that his step- mother was present and so were his sisters when the father expressed his wishes. He further told the court that his step- mother was buried in parcel No. 1256. When he constructed the 2nd house, it is his step- mother who showed him where to build. His sisters were present when he was being shown.
26. In re-examination he stated that his biological mother died in 1979. She was not buried on the land.
27. He prayed that the property be divided according to the decision of the DO as communicated by the DO's letter dated 19/10/2010.

Applicant's submissions

28. The protestors submitted that since there was no evidence that their father had another wife other than their late mother, the 1st petitioner cannot purport to benefit from the provisions of section 40 of the Act. He cannot therefore claim the whole of Butotso /Indangalasia/1256 for himself in exclusion to the other beneficiaries.
29. The protestors further submit that since there was no surviving spouse the distribution should be in accordance to section 38 of the law of succession and not section 40 of the Act.
30. The protestors then propose distribution as follows: the mode of distribution to be as follows;
 - Butotso /Indangalasia/1256
 - a. John Omwani Luchivya-0.56 Ha
 - b. Sarah Khakazi Mutenyu- 0.56 Ha
 - c. Priscila Mutenyu-0.56 Ha
 - d. Emily Lisanza mweru-0.56 Ha
 - e. Rosemary Mutenyu- 0.56 Ha
 - Butotso /indangalasia/1257
 - f. Selina Owano Mutenyu-0.56 Ha
 - g. Susan Mukasia Shikuku-0.56 Ha



31. It is their final submission that there was no justification as to why the 1st petitioner should get a bigger share than his sisters even though he had already built a permanent dwelling on one of the parcels. That the law should be upheld and that Article 27 should apply and, consequently all the beneficiaries be allocated equal share of the land

Petitioner's submissions

32. The Respondent submits that since the deceased died intestate the distribution of his estate was in accordance to section 40 of the *law of succession Act*.
33. He relied in the case of *Rahab Njeri Kariuki v Joyce Waruguru Kariuki & 2 others* (2016) eKLR and *Scholastica Ndululu Suva v Agnes Nthenya Suva* 2019 eKLR where the courts observed section 40 of the *law of succession Act* is at the court's discretion and the court should ensure the principle of fairness and equity and not equality among the beneficiaries.
34. He further submits that the mode of distribution made by the protestors would not be fair as he would be greatly disadvantaged and he would inherit a small portion of the estate.
35. The petitioner further argues that the protestors current proposal would see the deceased wishes unfairly defeated and that it would displace the 1st petitioner from his home and prayed that the proposal reached by the 1st petitioner before the DO be accepted since it comes closer to the wishes of the deceased.
36. He further relied on the case of *Re estate of the late Siwanyong Ngilotochi (deceased)* (2021) eKLR, where it was held that the number of children in each house is not the only factor to be considered when distributing the property.
37. He prayed that the court should not apply section 40 blindly but instead invoke and do what is fair in the circumstances. He prays that the grant be confirmed as per his proposal.

Determination

38. I have considered the evidence tendered, the parties submissions and the Authorities cited.
39. There is common ground that the contestants are all children of the Festo Mutenyu Oluchimbia. However there is no consensus on whether the petitioner's mother was married to the deceased and therefore raises the question as to whether there were two "houses" to warrant the Application of section 40 of *the Act*.
40. It is the protester's submission that, there was no evidence of petitioner's mother's marriage to the deceased, and therefore the marriage was not polygamous. It is their contention therefore that section 38 of *the Act* and not 40 should apply. On the other hand, the petitioner insist that the Deceased's marriage was polygamous and therefore section 40 should be applied, albeit "not blindly".
41. Section 38 provides as follows: - Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.
42. Section 40 states "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 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".



43. In the present case, I have not found any independent evidence showing that the Petitioner's mother was married to the deceased. The appropriate section would therefore be section 38. Further the mothers of the children have since died. Whether they were both married to the deceased therefore is immaterial for the purpose of distribution.
44. Further I hold the view that whereas section 38 and 40 deal with different scenarios, they are both geared towards achieving the same effect, namely equal distribution of the Estate amongst the survivors of the deceased.
45. In this regard, I find support in views expressed by Justice Musyoka in *Re The Estate of John Musyambai Katumanga* (2014) eKLR where he held : The spirit of part V, especially sections 35,38 and 40 , is equal distribution of the Estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in sections 35(5) and 38 is “ equally” as opposed to “ equitably”. This is the plain language of these provisions. The provisions are mandatory in terms – the property “shall... be equally divided among the surviving children”. Equal distribution is envisaged regardless of the ages, gender and financial status of the children”
46. The 1st petitioner has asserted that he is entitled to the larger portion of Butsotso /Indangalasia/1256 measuring 2.73 ha while the daughters were free to share Butsotso /Indangalasia/1257 among themselves which he stated was his deceased father's wishes.
47. However the various consultations that were held , where the petitioner kept on ceding some ground, would suggest that the Deceased's wishes had not really been ascertained. The petitioner referred to a purported agreement before the DO. The same was however not annexed to the Application. He also annexed a document purporting to be a consent by the beneficiaries this document was not signed by all the deceased's heirs.
48. Thus, even though this is an intestate succession, there was no document produced, that would help the court to give effect to the alleged wishes of the deceased.
49. Consequently, there is no reason as to why the 1st petitioner should take a larger share of the estate. 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.
50. The 1st petitioner told the court that he has constructed a permanent house in Parcel No.1256, and he is apprehensive that his sisters' insistence on equal distribution would disadvantage him. However, from the witnesses' accounts, it is apparent that there is only one live- fence between the two parcels. Once the parties move to sub- divide the land, the sub- division can be in such a way that the 1st petitioner retains the site which he has developed. His concerns therefore cannot be used to defeat the need for equal distribution of the Estate.
51. Finally there is an issue of one survivor which both parties have not addressed who has been referred to as Jesca . Jesca passed on after the death of the deceased, but she left children, who are residing with their father in her then matrimonial home. I have perused the chief's letter . It lists Jesca Mutenyu as one of the children of the deceased. There is no justification as to why her Estate left out in the proposed distribution by both the petitioner and the Protestors. Jesica/ Josca) mutenyu's Estate is equally entitled to a share of the Estate by virtue of having been the heir of the Deceased herein.
52. In view of all the foregoing, I hereby proceed to make the following orders:



- a). The Grant of letters of Administration issued on 9th November 2012 is hereby confirmed.
- b). Land parcels Nos. Butotso/ Indangalasia/ 1256 and Butotso/ Indagalasia/1257 shall be distributed between the Eight (8) children of the Deceased in Equal shares, with the 1st petitioner's portion comprising of the site that he has so far developed.
- c). The portion due to the late Jesica Mutenyo shall go to her Estate
- d). This being a family dispute, each party to meet their own costs.

DATED , SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 26TH DAY OF OCTOBER, 2023.

S. CHIRCHIR

JUDGE.

In the presence of:

E. Zalo- Court Assistant

Mr.Nyikuli for the petitioner/ Respondent

No appearance by the Protetors

