



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

In re Estate of Lesinko Sokorote Kirayio (Deceased) (Succession Cause 34 of 2019) [2023] KEHC 27301 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEHC 27301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
SUCCESSION CAUSE 34 OF 2019
SN MUTUKU, J
NOVEMBER 28, 2023**

RULING

1. This Ruling relates to Summons for Confirmation of Grant dated 24th July, 2019. The Summons was taken out by Naimutie Sokorte alias Naimutie Sialala. Naimutie is one of the widows of the deceased and a co-administrator of the estate of the deceased alongside Nyokabi Lesinko Lesegorete, the other widow. The Grant sought to be confirmed was issued by this court (Mwita, J) on 26th June 2019.
2. The Applicant has listed the following as the beneficiaries of the estate of the deceased as captured in paragraph 2 of the Affidavit in support of the Summons sworn by the Applicant on 24th July 2019:
 - a. Naimutie Sokorte Alias Naimutie Sialala ...1st Wife
 - b. Jane Wambui Kuria
 - c. Esther Kirunua Naeni
 - d. Kini Ene Lolndapash
 - e. Naisenya Enole Ntayia
 - f. Joyces Nairuko Ene Nkoitiko
 - g. Noonkuta Ene Kenka
 - h. Shadrack Naeku Njike
 - i. Naipanoi Ene Kenka
 - j. Isaac Saisa Sukuruti alias Isack Saisa Sukuruti
 - k. Tubula Sokorte
 - l. Paul Teeka (deceased)
 - m. Komeyian Sokorte(deceased)



- n. Nyokabi Lesinko Lesegorete.....2nd wife
 - o. Patricia Nanyu
 - p. Patrick Seur
 - q. Joyce Mbama
 - r. Virginia Seleina(deceased)
 - s. Nancy Sirau
3. In the Supporting Affidavit, the Applicant has proposed mode of distribution of the estate as follows:
- a. $\frac{3}{4}$ acre from Title No. Ngong/Ngong/4124 to be registered in the name of Isaac Saisa Sukurti alias Isack Saisa Sukuruti absolutely.
 - b. $\frac{3}{4}$ acre from Title No. Ngong/Ngong/4124 to be registered in the name of Tubula Sokorte absolutely.
 - c. 2 $\frac{1}{2}$ acres from Title No. Ngong/Ngong/4124 to be registered in the name of Naimutie Sokorte Alias Naimutie Sialala absolutely.
 - d. 4 acres from Title No. Ngong/Ngong/4124 to be registered in the name of Nyokabi Lesinko Lesegorete to hold on behalf of her household.

Replying Affidavit

4. The Application is opposed through a Replying Affidavit sworn by Rhoda Nyokabi Lesinko Leserogerere on 24th July, 2019. It is her case, as deposed in that Replying Affidavit that she is an administrator of the estate of the deceased and was married to the deceased; that the Applicant herein left the deceased in 1973 and settled in Narok where her family occupies 5 acres of Land owned by the deceased; that she was the one taking care of the deceased including catering for the expenses until his demise; that the Applicant only resurfaced after the deceased's death and that it is not fair for the Applicant to get a share in Title No Ngong/Ngong/4124 since she was adequately provided with the 5 acres land in Narok.
5. The Applicant, through a Supplementary Affidavit dated 22nd October, 2019, stated that the allegations by the Respondent in her Replying Affidavit are aimed at disinheriting her and her children; that it was a fact that the deceased was polygamous; that the contents of paragraph 5 of the Respondent's Replying Affidavit that Respondent was left to take care of the deceased after Applicant moved to Narok are baseless; that there is no proof that the deceased owned 5-acre land in Narok and that the Applicant was a loving wife to the deceased and took care of him and her children.
6. The Applicant further states that Respondent is misleading the court as the burial expenses of the deceased were catered for through fundraising and that the Applicant and her children are dependants of the estate of the deceased and are entitled to a share of the deceased's estate.
7. This court directed that this matter be canvassed through oral evidence in open court.

Applicant's evidence

8. It is the testimony of the Applicant that she was the deceased's first wife with 10 surviving children and the Respondent was the deceased's second wife with 4 surviving children; that the deceased had



only one piece of land being Ngong/Ngong/ 4124 which she proposed to be subdivided into 2 equal portions and each widow to get half of the property.

9. The Applicant denied that the deceased had another land in Narok and argued that she could not allow the Respondent to have the bigger share of the property. She stated that the said property borders the road on one side and therefore it should be subdivided in a way that each portion touches the main road.
10. The Respondent did not testify in court. She did not attend court for the hearing despite being aware of the hearing date. She moved the court, through her counsel to re-open the case to cross-examine the Applicant but this was declined by the court.

Interested Party

11. The firm of M/s F. A. Badia & Co. Advocates, through Chamber Summons dated 27th July 2019 against the Administrators, sought the following orders:
 - i. That, this Honourable Court be and is hereby pleased to enjoin the former Advocates/Applicants F.A Badia & Company Advocates as Creditors to the Estate of the Deceased Lesinko Sokorte Kirayio in furtherance of Legal Services offered to the 1st Administrator/Respondent and the beneficiaries directly under her between 03/07/2015 and 14/02/2019.
 - ii. That, this Honourable Court be and is hereby pleased to recognize, acknowledge and enforce the Acknowledgement of Instructions dated 13th July 2015 from F. A Badia & Company Advocates as endorsed between Nyokabi Lesinko Leserogerere & Badia. A. Fiona of F. A Badia & Company Advocates.
 - iii. That, the Honourable Court be and is hereby pleased to recognize, acknowledge and enforce the Acknowledgement of Instructions dated 13th July 2015 from F. A Badia & Company Advocates as endorsed between Joyce Paina Lesokorte & Badia. A. Fiona of F. A Badia & Company Advocates.
 - iv. That, the Honourable Court be and is hereby pleased to recognize, acknowledge and enforce the Acknowledgement of Payment of Instructions; Succession Cause No. 39 of 2008 in the Senior Principal Magistrates Court at Kajiado dated 20th July 2015 from F.A Badia & Company Advocates as endorsed between Nyokabi Lesinko Leserogerere, Joyce Paima Lesokorte, Moses Koikai Tianda and Badia A. Fiona of F. A Badia & Company Advocates; and that the particular intended portion of the estate of the deceased be hived off from the portion to be assigned to the 1st Administrator/Respondent and the beneficiaries directly under her.
 - v. That, the Honourable Court be and is hereby pleased to issue any other and further orders as it deems appropriate in the wider interest of justice.
 - vi. That, the costs of this Application shall be borne from the Estate of the Deceased Lesinko Sokorte Kirayio more specifically the portion to be assigned to the 1st Administrator/Respondent and the beneficiaries directly under her.
12. In a ruling delivered on 8th November 2021, this court allowed this application.



Submissions

13. Parties were directed to file written submissions after the conclusion of the hearing. Both the Applicant and the Respondent have filed submission through their respective counsel. The Interested Party did not file submissions, her case having been concluded through a ruling delivered on 8th November 2021.
14. The Applicant's submissions are dated 28th June, 2022. She raised two issues for determination as follows:
 - a. Whether the Applicant lives in a parcel of land that forms part of the deceased's estate thereby available for distribution.
 - b. Whether the deceased estate should be distributed equally to the two houses.
15. She submitted, in respect to the 1st issue, that the allegations by the Respondent that she lives in Narok are neither true nor proved; that she lives in Narok on land belonging to her son in law; that no evidence has been tendered to prove that the said land belonged to the deceased.
16. While relying on section 109 of the *Evidence Act*, which provides that "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that proof of that fact shall lie in a particular person, the Applicant submitted that there is no evidence tendered before the court that the deceased owned any other property other than LR Ngong/ngong/4124 which measures 3.32 hectares.
17. The applicant cited *Evans Nyakwana -vs- Cleophas Bwana Ongaro (2015) eKLR*, where the court held that:

"As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (i) of the *Evidence Act* Chapter 80 of the Law of Kenya). Furthermore, the evidential burden.... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence."
18. She further submitted that the issue of the land in Narok was determined by this court (Hon Justice Reuben Nyakundi) and that the Respondent is attempting to have this court determine issues already determined, which amounts to abuse of court process and that the land in Narok does not therefore form part of the deceased estate.
19. On the second issue, it is submitted that the deceased died intestate and therefore the applicable law is section 34 of the *Law of Succession Act*; that it is not in dispute that the deceased was polygamous and therefore section 40 of the said Act applies and that the deceased was survived by two widows and number of children and therefore distribution of the estate of the deceased equal between the two houses. The Applicant cited *Gerald Macharia Njogu -v- Samuel Macharia Murimi (2016) eKLR*, where the court stated that:

"The advantage of oral evidence is that the witness is available for cross-examination, and thus the strength of evidence may be tested. That is why reliable viva voce evidence is sometimes given more weight."



20. She submitted that the evidence of the Respondent, having failed to tender her evidence, leaves the Applicant's testimony uncontroverted and cited Kenya Akiba Micro Financing Limited-vs- Ezekiel Chebii & 14 others[2012] eKLR that:

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”
21. She submitted that the property should be divided equally between the two houses; that this court has discretion over the distribution of the estate, as set out in the case of Rono-vs- Rono (2005) 1 KLR 538 where it was stated that the court retains the discretion over the distribution of the estate, subject to the usual rider of fairness and reasonable distribution of the estate.
22. The Respondent filed her submissions dated 21st December 2022. She has raised one main issue for determination, the issue on the distribution of the property Ngong/Ngong/4124. She submitted that the court had not conducted a scene visit on the property and therefore it did not understand her concerns; that she has occupied the land bordering the main road where her home is situated and where her two children are buried; that the same portion is the one being sought after by the Applicant; that she has an emotional attachment to her home and the resting place of her loved ones and urged that this honourable court considers her plea.
23. She has, further, submitted that she is apprehensive that should the court grant the Applicants prayers, the Applicant would sell off her share of the land and relocate back to Narok where she has lived for 40 years. She expressed her fears that the graves of her loved ones may land on the wrong hands and get desecrated. She stated that should the court hear her plea she is willing to provide an access road to the piece of land on the lower end of the subject property.
24. The Interested Party did not file submissions.

Analysis and Determination

25. I have had time to read and consider Summons for Confirmation of Grant and the grounds in support of the same; all the issues raised in this matter, the affidavits, the oral evidence of the Applicant and submissions by the parties. I find no dispute that the deceased was married to the Applicant and the Respondent and that the deceased died intestate. Both the Applicant and Respondent are the administrators of the estate of the deceased. What is disputed in this Cause is the property forming the estate of the deceased and the mode of distribution.
26. The Respondent claimed that the Applicant lives in Narok in a property belonging to the deceased and therefore she should not claim the property Title No. Ngong/Ngong/4124. The Respondent did not provide evidence to support her claim. This issue was also dealt with by this court (Nyakundi, J) in a ruling dated 20th November, 2017 where the judge stated as follows:

“The sweeping statements in the form of affidavits by the applicant to the effect that the deceased owned property in Narok where he settled the respondent before his demise remains and shall remain an allegation until probative evidence in the form of a search and title in the name of the deceased is availed before this court.”
27. Without evidence to show that the deceased left behind a property in Narok and details of that land, it is clear to this court that the only property identified as belonging to the deceased and available for distribution to the beneficiaries is Ngong/Ngong/4124. I therefore make a finding that the estate of



the deceased in respect of this Cause comprises Ngong/Ngong/4124. This is the property available to the beneficiaries to share amongst themselves.

28. It is the wish of the Applicant to have that property divided into two equal portions between the two houses. I find that this issue was also dealt with by Justice Nyakundi in the ruling dated 20th November 2017 where he stated that:

“It must follow therefore that the deceased estate be distributed equally between the two houses of each wife by each being entitled to an equal share of the property L.R Ngong/Ngong/4124 irrespective of the number of children.”

29. It is the wish of the Applicant that each of the two equal portions should touch the main road, but the Respondent has argued that the plot touching the main road is where she has built her home and where her 2 children have been buried. The Respondent has referred to annexure ‘CMS1’, a report by a valuer and sketch and survey plans annexed in the Notice of Motion Dated 10th December 2018. I have noted that the report does not any permanent structural development on the land. The Respondent has not furnished any further evidence to show any developments on the land.

30. The deceased in this Cause died intestate on 10th October 1996 as shown in the Death Certificate SN 328346 dated 22nd October 2008. Under Section 2 of the *Law of Succession Act* Cap. 160 Laws of Kenya, whose commencement date is 1st July, 1981 provides that:

2. (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

31. In polygamous marriages, the applicable section of the *Law of Succession Act* in respect to the distribution of the estate is section 40. It provides that:

- (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.

32. The issue of the distribution of the estate and how much share each household should hold seems to be fully resolved in that there are the pronouncements of Justice Nyakundi, which I have cited above and there is the wish of both parties. The only issue the Respondent seem to have is that she has developed the section bordering the road and that her children’s graves are on that part of the property.

33. Although the law under section 40 spells out the mode of distribution in polygamous household, I have considered that the parties in this matter have agreed on the manner of distribution. It is my considered view, therefore, that the distribution of this estate should be in accordance with the wishes of the parties, that is, in equal shares between the two household. Consequently, the estate, comprised of Ngong/Ngong/4124, shall be divided equally between the two households. Thereafter, the distribution between each household shall be in accordance with sections 35 to 38 of the *Law of Succession Act*. In order to take into account the rights of each household, the two equal portions shall have access to the road. The Respondent can retain the portion that houses the two graves of her children.



34. I have considered the interest of the Interested Party in this suit. The claim of the Interested Party is not a claim against the estate of the deceased but a claim against the Respondent's share of the estate. It is my direction that the Interested Party's portion shall be hived off the portion that is distributed to the Respondent and her household. The remainder of the Respondent's portion shall thereafter be distributed to the household of the Respondent according to sections 35 to 38 of the Act.
35. I make orders accordingly.

DATED, SIGNED AND DELIVERED THIS 28TH NOVEMBER 2023.

S. N. MUTUKU

JUDGE

