



REPUBLIC OF KENYA



KENYA LAW

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**In re Estate of Werabukaya Tisa (Deceased) (Succession Cause
375A of 1987) [2023] KEHC 27169 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 375A OF 1987**

PJO OTIENO, J

DECEMBER 21, 2023

IN THE MATTER OF THE ESTATE OF WERABUKAYA TISA (DECEASED)

BETWEEN

IBRAHIM WERABUKAYA PETITIONER

AND

BERITA MUSEVE APPLICANT

RULING

1. Werabukaya Tisa (“Deceased”) died on the 12th day of August 1968 and the Petitioner in his capacity as his son petitioned this court for grant of letters of administration intestate for the estate of the deceased which he disclosed to comprise of a property known as South Kabras/Lukume/157 measuring approximately 16 HA according to the surveyor’s report dated 13th June, 2022.
2. The deceased was survived by seven sons from three households to whom the estate was shared into equal shares of 2.29 HA as per the rectified certificate of confirmation of grant dated 4th July, 2022.
3. Vide an undated Notice of Motion brought pursuant to section 76 of the Laws of Kenya and Rule 44 of the Probate & Administration Rules, the applicant, Berita Museve, seeks orders that the honorable court sets aside the district surveyor’s report and orders for fresh distribution on the grounds that she is the wife of the late William Museve who was the son the deceased and who died in the year 1981, but who has not been provided for in the scheme of distribution. Even though not elegantly drawn, the application aims at upsetting the certificate of confirmation of grant as rectified.
4. Rose Khasiro Okutoyi in an affidavit of proposal sworn on April 24, 2023 avers that she is a daughter of the deceased from the second house and is thus entitled to a share of the deceased estate. She claims that the deceased had 3 wives and that he had sub divided his estate among the three houses prior to his demise. She claims a share of what was allocated to the second house. She further proposes that all the children of the deceased both sons and daughters all get a share of the deceased.



5. When the matter was listed for hearing, the court gave to the parties a chance to address it when Rose, Mackay and Berita made their proposals. The three were in an agreement that the deceased shared out his land among three houses and planted demarcations. The little divergence was whether the demarcation was by trees or sisal. That divergence is of little significance for it does not negate on the expressed wishes of the deceased on who gets what portion of the land.
6. It is not in doubt that the deceased was polygamous. It is also not in contest who the children of the deceased were.
7. It is however of note that the estate was distributed amongst sons to the exclusion of daughters clearly contrary to the principle of equality in inheritance as well as the constitutional bar on non-discrimination based on sex, marital status among other factors.
8. *In the Matter of the Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (Deceased)* [2017] eKLR the court while frowning the then entrenched discrimination against daughters in inheritance had this to say: -

“From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when *Rono Vs. Rono* [2008] 1 KLR 803 delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement *the Constitution*- which states categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and *the Constitution*. More specifically I am content to cite the proclamation by the Court of Appeal in the case of *Stephen Gitonga M'murithi Vs. Faith Ngiramurithi* [2015] eKLR that: -

“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...”

9. When the trite law is applied to the facts of the case, it becomes axiomatic that the distribution cannot be left to stand. It must be revoked.
10. The allegation that the deceased distributed his estate among his three wives by placing boundaries was considered and dismissed by this court in a judgment delivered on 29th May, 2020 in which the court found that the boundaries were erected by the sons of the deceased. it is, thus, a matter the court cannot revisit a second time.
11. To ensure that substantive justice is administered in this matter and in the distribution of the estate of the deceased, the court directs that the Rectified Certificate of Confirmation of Grant issued on 4th July, 2022, is revoked. Let the petitioner file and serve a fresh application for confirmation of grant and in it, detail all the children of each of the three wives of the deceased. Where any of the children is



deceased, let there be clear indication of the survivors of each. Let the summons give precise proposal on fair distribution.

12. The parties are free to discuss and agree on the mode of distribution before filling the application in order that protests are avoided and time saved. On the same spirit, where any of the children does not wish to have a claim in the estate of the deceased, such child shall file an affidavit renouncing their rights to inheritance.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF DECEMBER, 2023

PATRICK J O OTIENO

JUDGE

