



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

SUCCESSION CAUSE NO. 11 OF 2020

IN THE MATTER OF THE ESTATE OF ERMAN BUNDOTICH ARAP CHEPTOO (DECEASED)

SUSAN BUNDOTICH.....1ST PETITIONER/1ST RESPONDENT

AGNES BUNDOTICH.....2ND PETITIONER/2ND RESPONDENT

-VERSUS-

ELIZABETH K. BIRIR.....1ST OBJECTOR

JUDY J. TALLAM.....2ND OBJECTOR

HEZRON K. BUNDOTICH.....3RD OBJECTOR

LAWI K. TALLAM.....4TH OBJECTOR

RODAH J. BUNDOTICH.....5TH OBJECTOR

PATRICK BUNDOTICH.....6TH OBJECTOR

BEATRICE TALLAM BUNDOTICH.....7TH OBJECTOR

JUDGMENT

1. The only issue for the determination of this Court in this matter is the mode of distribution of the estate of the deceased Erman Bundotich Arap Cheptoo. Elizabeth Birir, Judy Tallam, Hezron Bundotich, Lawi Tallam, Rodah Bundotich, Patrick Bundotich and Beatrice Tallam Bundotich being the respective 1st to 7th objectors have through an affidavit sworn by the 6th Objector protested against the application for confirmation of grant of letters of administration by the 1st Petitioner, Susan Bundotich, and the 2nd Petitioner, Agnes Bundotich.
2. The petitioners jointly swore an affidavit on 24th June, 2021 in response to the protest. Subsequently, the objectors filed a further affidavit sworn by the 6th Objector on 22nd October, 2021.
3. In brief, the objectors' case is that they were not contacted or consulted or involved by the petitioners prior to the filing of this Succession Cause No. 11 of 2020. The objectors aver that all the parties in this cause are the grandchildren of the deceased Erman Bundotich Cheptoo (hereinafter simply referred to as Erman). Their father Ezekiel Bundotich Tallam (hereinafter simply referred to as Ezekiel) is also deceased and had inherited Ezram's land parcel Lembus/Kabunyony/Moringwo/41 without carrying out a formal succession process. The parcel of land therefore remains registered in the name of Erman.
4. The objectors further depose that their father subdivided the land among his children during his lifetime as follows:
 - a. 5.1 acres to Hezron Kipkoech Bundotich;
 - b. 6.87 acres (with graveyard) to Lawi Kipchumba Kangogo;
 - c. 5.12 acres to Patrick Bundotich;
 - d. 6 acres not allocated to anyone.

5. The objectors further aver that on 22nd March, 2021, the family of the Ezekiel held a meeting and agreed that the estate of their deceased father be subdivided according to his wishes with the unallocated 6 acres being distributed equally among his seven daughters. According to the objectors, the petitioners were present in the said meeting but later changed their minds. The objectors also contend that they had equally shared the money in Ezekiel's Boresha Sacco Account. They therefore ask this Court to distribute the estate in accordance with their proposal as this will tally with their father's wishes.
6. On their part, the petitioners aver that this matter originated and proceeded before Eldama Ravine Principal Magistrate's Court and was only transferred to this Court after the valuation of the estate showed that it exceeded the pecuniary jurisdiction of the Magistrate's Court. The petitioners depose that they have had several deliberations on how to distribute the estate of Erman without success. It is the petitioners' case that during their father's lifetime, their brothers contracted a firm of surveyors known as Jaliko Surveyors and subdivided the land amongst themselves without his consent. They depose that the objectors' witnesses are not related to them.
7. The petitioners concede that they indeed attended a family meeting on 22nd March, 2021, but declined to sign the minutes as the suggested mode of distribution is unfair and discriminatory. They deny the objectors' claim that the money in their father's Boresha Sacco Account had been distributed equally among all the beneficiaries.
8. In their further affidavit, the objectors aver that it is their father who engaged Jaliko Surveyors to subdivide the parcel of land according to his wishes.
9. This matter proceeded by way of oral evidence.
10. The objectors called five witnesses. The 6th Objector Patrick Bundotich testified as the Objectors' Witness No. 1 (OW1) and adopted the contents of his affidavits sworn on 10th May, 2021 and 22nd October, 2021 as the evidence of the objectors. On cross-examination, he testified that the 2nd Petitioner forged documents and obtained the death certificate of their father even as he remained with the burial permit. He stated that the 2nd Petitioner later initiated succession proceedings without their knowledge.
11. OW1 told the Court that their father distributed his property while still alive in the manner captured in the minutes of the meeting held on 22nd March, 2021, which minutes the petitioners declined to sign. He also testified that no one had forced their father to initiate the subdivision of the land and that the survey was done in 2014 while their father was still alive. On re-examination, he testified that all their seven sisters are married and live in their matrimonial homes except Damaris who lives at their father's home.
12. OW2 Philip Ngetich testified that in January 2014 while working as a private surveyor with Jaliko Surveyors, he was instructed by Ezekiel to demarcate his parcel of land number L.R. No. Lembus/Kabunyony/Moringwo/41 and subdivide it into four pieces. One piece was seven acres and another piece measured six acres whereas two pieces measured five acres each. According to the witness, the seven acres was for Lawi and Hezron and Patrick were to each get five acres. The remaining six acres would remain in Ezekiel's name. OW2 further testified that Ezekiel told him that he was giving seven acres to Lawi because his parcel had the family graveyard within it. The witness produced a sketch of the subdivision as evidence.
13. On cross-examination OW2 told the Court that he subdivided the land even though the same was not registered in the name of Ezekiel but that of Erman.
14. OW3 Neddy Kangongo, OW4 Elisha Biwott, OW5 Albert Kipkurui Chemitei and OW6 Noah Kipkosgei Rongoei all testified that in January 2014 they were called by Ezekiel to be witnesses as he sub-divided his land among his sons. They told the Court that Ezekiel told them that he was giving a bigger portion to Lawi because that parcel had graveyards within it while the other two sons would get equal shares. They further testified that Ezekiel told them that the unallocated six acres would belong to his grandchildren.
15. The 2nd Petitioner, Agnes Bundotich, testified for the petitioners/respondents as Respondents' Witness No. 1 (RW1) and told the Court that on 31st January, 2014 she was not at her father's home and was not aware of any land demarcation. Her testimony was that on the night of 31st January, 2014, her father called her and informed her that her brothers Lawi and Patrick had brought a surveyor to subdivide the land and that he had been pushed to the lower side of the land. She stated that her father lamented that he had been forced to give out his land while he was still alive and requested her to give him money to assist him in relocating the houses. She testified that she was not aware that the objectors' witnesses were present during the subdivision of the land.
16. RW1 further testified that initially the 4th and 7th objectors were the only administrators of the estate of Ezekiel. Her evidence was that she protested to the Magistrate's Court after the 4th and 7th objectors indicated that they were not in a hurry to distribute the land and she was enjoined as an administratrix in the letters of administration issued on 18th March, 2019. Later on, the 4th and 7th objectors became non-cooperative hence stalling the process. She also stated that they have held meetings but they have not been able to reach a consensus on the mode of distribution of the estate of Erman. It was her evidence that their father did not distribute his land and the same should be distributed equally among all his nine children.
17. On cross-examination, RW1 testified that they are seven daughters and three sons in the family of Ezekiel and that it is only her and RW2 Damaris Chepchirchir who did not agree with the distribution proposed by the objectors. Her evidence was that she did not know why Susan who is her co-petitioner did not attend Court. She also stated that Eldama Ravine PMC Succession Cause No. 44 of 2017 was instituted by the 4th and 7th objectors while Succession Cause No. 82 of 2018 before the same Court was instituted by 4th and 7th objectors and herself. She also stated that the current succession cause is a continuation of Eldama Ravine PMC Succession Cause No. 82 of 2018 as Succession Cause No. 44 of 2017 was abandoned. RW2 testified that her father informed her prior to his death that her brothers had shared out the parcel of land without his consent.

18. On re-examination, RW1 testified that the land was shared while she was away and that she did not see any witnesses nor is she aware of any mode of distribution as alleged by the objectors. She stated that she would not have gone against the wishes of her father had he voluntarily distributed the land.

19. RW2 Damaris Chepchirchir adopted her filed statement dated 26th October, 2021. She testified that she was at home when the alleged distribution was done. She stated that the alleged distribution is unfair and discriminatory. She also stated that she had not attended the meeting where the land was distributed. Further, that after the survey was done, her father informed her that her brothers had forced him to subdivide the land. She stated that her father informed her that he had been moved to the lower part of the land and he would move his two houses there. It was her prayer that the family land be shared equally.

20. On cross-examination, RW2 testified that although she lived with her father, she was not involved in the distribution process. She told the Court that their father said he would give her brothers five acres each because they were stressing him. She also stated that on the date of the subdivision she left home at 9.00am and did not see any of the objectors' witnesses.

21. Through submissions dated 24th November, 2021, the objectors identified the only issue for the determination of this Court as to whether the wishes of the deceased should be respected. It was their submission that Ezekiel expressed his wishes and executed them prior to his death. The objectors relied on Section 42 of the Law of Succession Act to argue that lifetime gifts or gifts *inter vivos* made by will or settled during the lifetime of the deceased should be taken into account when determining the share of the net intestate estate.

22. The objectors relied on the case of **Re Estate of Gedion Manthi Nzioka (deceased) [2015] eKLR** where the Court stated that a gift made *inter vivos* can only be effective if it is granted by a deed or an instrument in writing, or by delivery or by a declaration of trust in writing. They also relied on the case of **Re Estate of Phylis Muthoni M'Inoti (deceased) [2019] eKLR** to submit that in instances where one claims that a gift *inter vivos* was made to them but no title was passed, the conduct of the donor would give the intended recipient the right to enforce the gift. It was the objectors' submission that by inviting the Jaliko Surveyors to distribute the land and even volunteering to move to the lower portion of the land, the late Ezekiel expressed his wishes. This Court was urged to implement the wishes of the deceased by approving the mode of distribution proposed by the objectors.

23. In their submissions dated 14th December, 2021 the petitioners asserted that the determining factor is whether the deceased died intestate. It is the petitioners' contention that this succession is in regard to the estate of Erman who died intestate and that Ezekiel had no power to deal in the property as the same had not passed to him.

24. The petitioners also submitted that even if Ezekiel was authorized to deal in the property, the objectors' witnesses gave conflicting accounts of what transpired on 31st January, 2014 when Ezekiel is said to have distributed his land. It is the petitioners' prayer that the estate of the deceased be divided equally to all the beneficiaries. They relied on the cases of **Elizabeth Wairimu & 2 others v Wilfred Njogu Mbutia & 2 others [2014] eKLR** and **Re Estate of Wahome Njoki Wakagoto [2013] eKLR** to submit that as grandchildren of Erman they are entitled to equal shares of their father's share of the estate of Erman. The petitioners consequently urged this Court to distribute the estate equally amongst the beneficiaries.

25. From the evidence and submissions placed before this Court it emerges that the issues for the determination of this Court are whether Ezekiel had authority to deal in the property of the estate of the late Erman and the mode of distribution of the estate of a deceased person who dies intestate.

26. The case advanced by the objectors is that their father expressed his wishes on how he wanted the land to be subdivided amongst his sons. In their view, the six acres that he retained as his is what should be subdivided amongst his seven daughters. The petitioners on the other hand argue that the estate belonged to their grandfather and their father had no authority to deal in their grandfather's estate without first succeeding him.

27. Both the petitioners and the objectors agree that their grandfather had one son who was their father and that he was the only heir to the estate of their deceased grandfather. Their point of departure is whether their father had authority to deal in their grandfather's estate.

28. It is clear from the pleadings filed before this Court that this succession cause has been brought in respect of the estate of the grandfather of the parties and not their father. Section 45(1) of the Law of Succession Act, Cap. 160 provides as follows:

Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

29. In **Morris Mwitii Mburugu v Denis Kimanthi M'Mburugu [2016] eKLR**, the Court while interpreting the cited provision held that:

"From the foregoing, it is clear, and I so hold, that where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of sections 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of the innocent beneficiaries who may have been affected by the act but were not involved in the same."

30. Similarly, in **Jane Kagige Geoffrey & another v Wallace Ireri Njeru & 2 others [2016] eKLR**, the Court held that:

"The net effect of the foregoing is clear; before a grant has been issued and confirmed, no part of the estate of the deceased may be dealt with in a manner that amounts to intermeddling. This includes those not entitled therewith taking possession of, disposition, or alienation, as well as trespassing onto the property. Such acts are subject to reversal by the court summarily."

The spirit behind sections 45 and 82 of the Act, in my view, is to preserve the property of a deceased person until the beneficiaries and their respective shares are identified, ascertained and distributed. If intermeddling is allowed, the likelihood of the innocent beneficiaries being prejudiced by having their shares affected by reduction is real whereby, there may be no settlement and or peaceful co-existence or end to disputes between of the family members. In this regard, it is for the purposes of preserving the social fabric, cohesion and peaceful co-existence of or end to disputes between family members who are beneficiaries to estates, that the law restricts, indeed prohibits any dealings with an estate until the grant is confirmed. The net effect of the aforesaid provisions of the law and decided cases is that, the estate of the deceased cannot be dealt with without the sanction of the court.”

31. I am persuaded by the cited decisions that no person, may he be a beneficiary or not, has the authority to deal with an estate of a deceased person before being allowed by the court to do so through succession proceedings. It therefore follows that in the absence of a grant, Ezekiel had no authority to purport to distribute the estate of Erman. Even where there is only one surviving beneficiary, like in this case, succession proceedings must be conducted in order to give that beneficiary the legal authority to transact in the property of the estate of the deceased person.

32. The dealings of Ezekiel in respect of the parcel of land known as Lembus/Kabunyony/Moringwo/41 were not recognized by the law and the purported distribution of the parcel of land which was still registered in the name of his deceased father Erman amounted to nothing. He could not therefore make any valid gift to any person in regard to that parcel of land. Indeed, had Ezekiel had authority to distribute the land of Erman he could have concluded the process by ensuring that title deeds were issued in respect of the subdivisions he had purportedly done.

33. The question therefore is; what formula is applicable in the distribution of the estate of Erman? In the **Matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR**, the Court expressed itself on the distribution of the property of a grandparent to grandchildren as follows:

“The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

34. In this instance, the grandchildren’s own father is deceased and they are therefore entitled to inherit directly from their grandfather. Since the only known beneficiary of the estate of Erman was Ezekiel, the entire estate of Erman fall into the hands of all the children of Ezekiel. The petitioners in their application for confirmation of the grant proposed that the estate of Erman be shared equally among all the grandchildren. They argued that the objectors’ proposed mode of distribution is unfair and discriminatory.

35. The objectors in support of their mode of distribution argue that their sisters are married and are therefore entitled to a lesser share. The objectors’ argument flies in the face of Section 38 of the Law of Succession Act which 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 shall be equally divided among the surviving children.

36. Interpreting the provision in **Stephen Gitonga M’murithi v Faith Ngira Murithi [2015] eKLR**, the Court of Appeal held that:

“Applying the above principles to both the learned trial Judges’ reasoning and distribution, it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the Law of Succession Act by discriminating against the married daughters of the deceased.”

37. The objectors have not persuaded this Court that any of the grandchildren of Erman should get a bigger share of the land than the rest. Agreeing with the objectors that the grandsons of Erman should get bigger shares than the granddaughters will amount to discriminating against the granddaughters without any justifiable reason.

38. In conclusion, the summons for confirmation of grant dated 3rd March, 2021 is allowed and the grant dated 18th March, 2019 is confirmed in the terms of the summons. For avoidance of doubt, it is determined that the estate of the deceased Erman Bundotich Arap Cheptoo shall be distributed equally among his grandchildren as proposed in Paragraph 5 of the affidavit sworn on 5th March, 2021 by Susan Bundotich and Agnes Bundotich in support of the summons for confirmation of grant.

39. This being a matter involving siblings, the parties are directed to meet their own costs of the proceedings.

DATED, SIGNED AND DELIVERED AT KABARNET THIS 23RD DAY OF MARCH, 2022.

W. KORIR,

JUDGE OF THE HIGH COURT