



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Kiprotich Tui Gong (Deceased) (Succession Cause  
53 of 1996) [2022] KEHC 14157 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14157 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 53 OF 1996  
RN NYAKUNDI, J  
OCTOBER 19, 2022**

**RULING**

1. The petitioner filed the affidavit on the mode of distribution as directed by the court. The deceased left behind the following beneficiaries;
  - I. Jelet Kiprotich Tulgong –widow
  - II. Peter Kipkorir Rotich -son
  - III. Thomas Kipkemboi Rotich -son
  - IV. Daniel Kipwambok Rotich -son
  - V. Michael Kiprono Rotich -son
  - VI. Julius Cheruiyot Rotich -son
  - VII. Emily Chepleting -daughter
  - VIII. Sally Cherobon (Deceased) - daughter
  - IX. John Kiprugut Rotich -son
  - X. Hillary Kiplagat Rotich –son
2. Among the beneficiaries, the petitioner deponed that one Sally Cherobon died on March 9, 2017 leaving behind three children; Peris Chepchumba, Diana Jepkoge and Lilian Chepchirchir.
3. The deceased left behind the property known as Nandi/Kiminda/887 measuring ten (10) acres. Given that the grant issued in the grant issued in Kapsabet SPMC Succession Cause No 26 of 1995 was annulled on March 23, 2015 the estate of Kiprotich Tuigong (deceased) is therefore not distributed.
4. As per the affidavit on the mode of distribution the beneficiaries wish to have the estate distributed amongst themselves equally by each beneficiary receiving one acre. Apart from the objector herein, all the other beneficiaries of the estate of Kiprotich Tuigong (Deceased) have consented to the said proposed mode of distribution.



5. The only issue for determination herein is whether the proposed mode of distribution is in accordance with the law. Where a deceased person dies intestate the *Law Of Succession Act* gives provisions in sections 35, 38 and 40.

Section 35 states as follows;

- (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
- (a) the personal and household effects of the deceased absolutely; and
  - (b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

- (2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.
- (3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.
- (4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—
- (a) the nature and amount of the deceased's property;
  - (b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;
  - (c) the existing and future means and needs of the applicant and the surviving spouse;
  - (d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
  - (e) the conduct of the applicant in relation to the deceased and to the surviving spouse;
  - (f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
  - (g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

Section 38 of the *Law of Succession Act* states;

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.

Section 40 of the *Law of Succession Act* states;



- (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.
6. The court *In re estate of John Musambayi Katumanga deceased [2014] eKLR* held as follows:
- “The spirit of part V, especially sections 35, 38 and 40, is equal distribution, of the intestate 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 the provisions. The provisions are in mandatory 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.”
7. The objector has not filed any response to this mode of distribution or an alternative proposal. Further, he stands to benefit and get an equal share from the estate and therefore I find that he will not be prejudiced. It is in the best interests of the beneficiaries that the distribution be allowed as proposed herein under.



PROPERTY	NAMES OF BENEFICIARIES	SHARE
Nandi/Kiminda/887 Measuring 10 Acres	1. Jelel Kiprotich Tulgong-widow	One (1) Acre
	2. Peter Kipkorir Rotich-son	One (1) Acre
	3. Thomas Kipkemboi Rotich-son	One (1) Acre
	4. Daniel Kipwambok Rotich-son	One (1) Acre
	5. Michael Kiprono Rotich-son	One (1) Acre
	6. Julius Cheruiyot Rotich-son	A third (1/3) of an acre
	7. Emily Chepleting-daughter	A third (1/3) of an acre
	8. Peris Chepchumba-granddaughter	One (1) Acre
	9. Diana Jepkoge-granddaughter	One (1) Acre
	10. Lilian Chepchirchir-granddaughter	
	11. John Kiprugut Rotich-son	
	12. Hillary Kiplagat Rotich-son	

8. In light of these findings the certificate of confirmation of grant issued to the administrators to administer intestate estate of Kiprotich Tuigong do issue forthwith. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 19TH DAY OF OCTOBER, 2022.**

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**R NYAKUNDI**

**JUDGE**

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