



**In re Estate of Mwalamet Arap Tutungo (Succession Cause
145 of 2019) [2022] KEHC 16875 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 145 OF 2019
RN NYAKUNDI, J
DECEMBER 23, 2022
IN THE MATTER OF THE ESTATE OF MWALAMET ARAP TUTUNGO**

BETWEEN

FLOMENA TUTUNGO 1ST PETITIONER

ANNA JEPKORIR 2ND PETITIONER

AND

CICILIAH JEPTPKENY OBJECTOR

RULING

1. The matter relates to the estate of Mwalamet Arap Tutungo who died intestate on March 12, 1982. The grant of letters of administration with respect to the estate of Mwalamet Arap Tutungo were made to Flomena Tutungo, Annah Jepkorir and Cecilia Jeptepkeny, being the wives of the deceased on July 3, 2014.
2. The 1st petitioner filed summons for confirmation of grant on December 5, 2019. The 1st petitioner however died on March 27, 2020 and was substituted by Arnother Jelagat Mmaiyo being her daughter. Upon filing summons for the confirmation of the grant, the objector Cecilia Jeptepkeny filed an affidavit of protest sworn on March 4, 2021, protesting the confirmation of the grant on the grounds that the proposed mode of distribution by Arnother Chelagat Maiyo was done without the consultation of her co-administrators and that the same is full of errors and concealment of material truth regarding the properties of the estate and the proposed ownership.
3. The objector contends that the acreage of the four parcels namely Nandi/ndubeneti 308, Nandi/ngechek/90, Nandi/ngechek/88 and Nandi/ngechek/99 as described in the said summons do not tally with those in the official searches. The objector maintains that parcel of land known as;
 1. Nandi/ndubeneti308 is indicated as measuring 30.8 acres instead of 40.7 acres.



2. Nandi/ngechek/90 is indicated as measuring 8.8 acres instead of 8.4 acres.
3. Nandi/ngechek/88 is indicated as measuring 24.2 acres instead of 23.7 acres.
4. Nandi/ngechek/99 is indicated as measuring 48.714 acres instead of 30.88 acres.
4. According to the objector, the concealment of the true acreage is only geared towards misleading the court in believing that the 2nd and the 3rd houses are benefiting more from the estate.
5. With regard to parcel of land known as Nandi/ndubeneti308, the objector contends that the mode of distribution indicates that the said parcel measures 30.8 acres instead of 40.7 acres. The objector further contends that the proposed mode of distribution does not disclose that the 2nd house is in occupation of 8 acres thereof while the 1st house is in possession of 32 acres. The objector wants the aforementioned position to be reflected in the said mode of distribution.
6. With regard to parcel of land known as Nandi/ngechek/88, the objector contends the proposed mode of distribution by the 1st petitioner indicates that the said parcel measures 24.2 acres whereas the true position is that the parcel measures 23.7 acres. The objector wants this to be rectified before the confirmation of grant. The objector also wants the whole of the said parcel to be transferred to the 2nd house.
7. With regards to parcel of land known as Nandi/ngechek/99, the objector contends that according to the proposed mode of distribution, the said parcel is to be shared equally between the 2nd and 3rd house. The objector maintains that this information is misleading as the said parcel measures 30.88 acres and 48.7 acres. The objector deposed that the 2nd and 3rd house are in agreement that the 2nd house gets 11 acres whereas the 3rd house gets 19.88 acres.
8. Lastly, with regard to Nandi/ngechek/90, the objector contends that the said parcel measures 8.8 acres instead of 8.4 acres as indicated in the proposed mode of distribution.
9. The objector urged the court not to confirm the said grant unless and until the anomalies afore-stated are rectified.
10. Another affidavit of protest was filed on March 12, 2021 by the 2nd petitioner Anna Jepkorir in which she deposed that she is the wife to the deceased representing the 2nd house. She averred that the proposed mode of distribution by the 1st Petitioner is marred with intentional irregularities. The 2nd objector urges the court not to confirm the summons for confirmation of grant until the said anomalies are corrected.
11. The 1st petitioner filed an affidavit of reply to protest sworn on April 27, 2021, denying the claims by the protestors.
12. The 1st petitioner deposed that this matter has been in court since 2015 and the same ought to be determined. The 1st petitioner proposed that the contents of her summons of confirmation of grant dated November 5, 2020 be amended to reflect the true acreage as it appears on the official search as follows;



No.	Asset	Acres	Share per house
Nandi/ ndubeneti/308	40.77	house -1 absolutely	
Nandi/ngechek/88	24.7	house -2 absolutely	
Nandi/ngechek/90	8.4	house -3 absolutely	
Nandi/ngechek/99	30.88	house- 2 & 3 absolutely	
Nandi/ngechek/111	4	house-3 absolutely	
Nandi/ngechek	11.1	house -3 absolutely	
Ndubeneti Center Plot No 1		house – 1 absolutely	
Ndubeneti Center Plot No 2		house -2 absolutrely	
Ndubeneti Center Plot No 13		house -3 absolutely	

13. The 1st petitioner maintains that the error in the tabulation of the acreage was not intentional.
14. The 1st petitioner deposed that during the lifetime of the deceased, he had settled the 1st house on Nandi/ndubeneti/308. The 1st petitioner maintains the 1st house has been in occupation and utilization of the said portion to date.
15. The 1st petitioner further deposed that parcel of land known as Nandi/ndubeneti/309 is registered in name of Kipkemei Arap Tiony (deceased) and thus ought to be removed from the distribution of the estate of the deceased herein.
16. With regard to parcel of land known as Nandi/ndubeneti/309, the 1st petitioner deposed that the same is registered in the name of Kipkoech s/o Kimwei (deceased) and thus ought to be removed from the distribution of the estate of the deceased herein.
17. With regard to parcels of land known as Nandi/ngechek Nos 88,90,111 and 121 the 1st petitioner deposed that the deceased had settled the 2nd and 3rd house during his lifetime.
18. The 1st petitioner maintains that the 2nd house has no beneficial claim in Nandi/ndubeneti/308.
19. According to the 1st petitioner, if any beneficiary is not in agreement with the proposed mode of distribution then section 40 (1) of the *Law of Succession Act* should be applied. The 1st petitioner maintains that all the children of the deceased should be treated equally in the distribution of the estate of the deceased.



20. The 1st petitioner filed a further affidavit dated April 8, 2022 in response to the affidavit protest by the objector. The 1st petitioner deposed that at the time of his death, the deceased was survived by the following persons;

1st House

Flomena Tutungo – widow (deceased)

Catherine Paulo – daughter

Teresa Jeptaraus Tuwei – daughter

Arnother Chelagat Maiyo – daughter

Mary Sambai – daughter

Josphine Jerono – daughter

Emmanuel Kipkemboi Tabut – son

Hillary Kiparbei Tabut – son

2nd House

Anna Jepkorir – widow

Matthew Tutungo Tabut – son

Moses Tutungo – son

3rd House

Ciciliah Jeptepkeny – widow

Dismas Kiptabut – son

21. The 1st petitioner further deposed that at the time of his death the deceased had the following parcels of land;

Nandi/ndubeneti/308 - 40.7 acres

Nandi/ngechek/88 - 24.2 acres

Nandi/ngechek/99 - 30.88 acres

22. The 1st petitioner maintains that the deceased had also bought the following parcels of land although the said parcels were not registered in his name;

Nandi/ndubeneti/309 – 11.9 acres

Nandi/ndubeneti/87 – 2.6 acres

Nandi/ngechek/121 – 11.1 acres

Nandi/ngechek/11 – 4 acres

Nandi/ngechek/90 – 8.4 acres

23. The 1st petitioner contends that immediately after the death of the deceased, the objector herein, went ahead and had some of the parcels of land that had been bought by the deceased transferred to her name. The subject parcels are;

Nandi/ngechek/121 – 11.1 acres



Nandi/ngechek/11 – 4 acres

Nandi/ngechek/90 – 8.4 acres

24. The 1st petitioner maintains that the rest of the family members had no objection to the said parcels being transferred to the objector's/protestor's name as they knew that the same would be factored in during the distribution of the estate. The 1st petitioner maintains the proposed of distribution had been agreed on by all the beneficiaries' way back in the year, 2015 and even produced a copy of minutes of the said meeting. The 1st petitioner contends that in the said minutes it was clear that the 1st protestor herein Cicilia Jeptepkeny representing the 3rd house had already received her share of 24.4 acres from the said estate. The 1st petitioner contends that it is not true that the 1st protestor herein bought the said parcels with her own money. The petitioner's case is that the 3rd house should not be allowed to benefit twice from the said estate.
25. The 1st petitioner maintains that the proposed mode of distribution is very fair considering the fact that the 1st house has seven units while the 2nd house and the 3rd house have three and two units respectively.

Determination

26. I have, considered the law applicable in this matter and the proposal on the mode of distribution of the estate that has been placed before me. The issue for determination by this court is whether the proposed mode distribution of the estate ought to be adopted as proposed by the 1st petitioner.
27. The deceased herein died intestate and was a polygamous man survived by three widows and ten children. From the record, the assets forming part of the estate of the deceased are as follows;
- Nandi/ndubeneti/308 - 40.7 acres
- Nandi/ngechek/88 - 23.7 acres
- Nandi/ngechek/99 - 30.88 acres
- Ndubeneti Center Plot No 1
- Ndubeneti Center Plot No 2
- Ndubeneti Center Plot No 3
28. The law that guides this court in such matters is section 40 of the [Law of Succession Act](#) which primarily provides as follows;
- (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 interest within each house shall then be in accordance with the rules set out in sections 35 to 38"
29. 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.”

30. I have keenly looked at the proposed mode of distribution by the 1st petitioner and the same seems to be fair and equitable as it has catered for all the beneficiaries of the deceased. However, the objector and the 2nd petitioner are not in agreement with the proposed mode of distribution by the 1st petitioner.
31. At this juncture it is worth pointing out that article 27 of the Constitution 2010 provides that every person is equal in the eyes of the law and before the law; and the Article goes further to state that there should be no discrimination on any ground including gender which encompasses marital status; the Constitution does not allow discriminatory rules and customs in matters of personal law, including inheritance.
32. There ought to be no classification into categories of male, female, married or unmarried; there ought to be no discrimination against the male or female children of a deceased person; nor discrimination between the married daughters and unmarried daughters of a deceased person.
33. For purposes of these succession proceedings, the 1st house is made up of 7 units, the 2nd house is made up of (3) units and the 3rd house is made up of (2) units. The total number of units forming part of the deceased's estate is therefore (12). The (12) units are all entitled to inherit equally from the deceased's estate.
34. Accordingly, as the parties were unable to agree on the distribution, I direct that the estate of the deceased be distributed as follows: -
 - a. That Nandi/ndubeneti/308 - 40.7 acres be distributed to the 1st house and be shared equally to the beneficiaries.
 - b. That Nandi/ngechek/88 - 23.7 acres be wholly shared by the 2nd house in equal shares.
 - c. That Nandi/ngechek/99 - 30.88 acres be distributed between the 2nd house and 3rd house in equal shares.
 - d. That Ndubeneti Center Plot No 1 be distributed to the 1st house and be shared equally to the beneficiaries.
 - e. That Ndubeneti Center Plot No 2 be wholly shared by the 2nd house in equal shares.
 - f. That Ndubeneti Center Plot No 3 be wholly shared by the 3rd house in equal shares.
 - g. Costs be in the cause.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 23rd DAY OF DECEMBER, 2022.

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R. NYAKUNDI
JUDGE

