



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 271 OF 2004**

**IN THE MATTER OF THE ESTATE OF THE LATE BOAZ AMUNABI ASALA (DECEASED)**

**RULING**

1. The application to be determined is dated 20<sup>th</sup> May 2020. It is premised on section 76(a) (b) (c) of the Law of Succession Act, Cap 160, Laws of Kenya, and section 73 of the Probate and Administration Rules. It is brought at the instance of Eva Wafula Khasaya, on behalf of Dafrosa Iminza, Edith Eteya and Beverlyne Buyanzi, on grounds that they were daughters of the deceased, and that during confirmation of the grant they were not given to their entitlement to a share in the estate. I shall hereafter refer to the daughters as the applicants.
2. The deceased herein died on 29<sup>th</sup> August 1988. The letter from the Chief of Emusitwi Sub-Location, dated 11<sup>th</sup> June 2004, lists the following as the deceased sons and daughters of the deceased - Jared Amunabi, Livingston Asala, Epha Khasasya, Sellah Vijedi, Dafrosa Iminza, Samson Anyonyi, Edith Eteya, Emmanuel Amulwani, Abitone Mahindu and Beverlyne Buyanzi. Livingstone Asala and Serah Injendi sought representation of the estate, in their capacities as son and daughter, respectively, of the deceased. They expressed the deceased to have had died possessed of the-E/Bunyore/Ebusamia/813, 1885 and 2112. Letters of administration intestate were made to the petitioners on 20<sup>th</sup> September 2004, and a grant duly issued on 30<sup>th</sup> September 2004, and confirmed on the 20<sup>th</sup> July 2010. The estate was distributed as follows- E/Bunyore/Ebusamia/2112 was to be shared equally between Jared Amunabi, Livingstone Asala, Samson Anyonyi, Manuel Amulwani Amunabi; E/Bunyore/Ebusamia/1885 devolved upon Aviton Isendi Amunabi; and E/Bunyore/Ebusamia/1813 was to be shared equally between Risper Isedi Emiteche and Josiah Asitwa Okumu. It was the said orders on distribution that prompted the filing of the instant application.
3. It is the applicants' case that the distribution ordered by the court was not fair as it did not include the daughters of the deceased, that is to say Eva Wafula Khasaya, Dafrosa Iminza, Edith Eteya and Beverlyne Buyanzi. It is averred that the deceased had intended that his daughters also share in the estate, and that the distribution ordered by the court did not give them that entitlement. They refer to a sketch that shows how the land was to be distributed. They complain that the distribution on record only favoured the sons. It is prayed that the confirmed grant be annulled, and that the estate be shared equally amongst all the beneficiaries.
4. The administrators on their part do not oppose the application. In their affidavit, they confirm that the applicants were indeed entitled to a share in estate of the deceased. They concede that the deceased had left a sketch drawing on distribution of the estate to respective children, with a section for the daughters to share equally, and that they wish to adopt the same sketch to distribute the estate of the deceased.
5. Directions were given on 4<sup>th</sup> June 2020, to the effect that the application be heard by way of written submissions.
6. Parties did not file submissions, and chose, on 25<sup>th</sup> June 2020, to rely on the affidavits on record.
7. This court has, on several occasions, in diverse decisions, emphasized that the Law of Succession Act, is gender neutral. It makes no distinction between sons and daughters. The reference in the Act to children would mean both sons and daughters. There is not a single provision in the Law of Succession Act which gives sons a superior claim or right in the estates of their parents over the daughters.
8. Article 27(4) of the Constitution prohibits any form of discrimination on account race, sex, marital status, social origin, colour, age, etc. In *In the Matter of Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (Deceased)* [2017] eKLR, the court stated, with regard to that, that:

*“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.”

9. In *Grace Chebet Sisimwo & 4 Others vs. Everlyne Cherukut Sisimwo & Another* [2019] eKLR, the Court of Appeal said:

“Nevertheless, it is now well settled that there can be no discrimination against the daughters of a deceased, and it matters not that they are married. This has been the case since the enactment of the Law of Succession Act and has been the subject of numerous pronouncements, both in this Court and in the lower courts. For instance in *Grace Wachuka vs. Jackson Njuguna Gathungu & another* [2014] eKLR this Court held that all the children of a deceased person are treated equally as beneficiaries, and that unless a married daughter voluntarily renounces her rights, she would be entitled to an equal share of her deceased parent’s estate.

20. In *Mwongera Mugambi Runturi & another vs. Josephine Kaarika & 2 others* [2015] eKLR this Court emphasizing that the Law of Succession Act does not countenance any discrimination against female children of a deceased person stated as follows:

“With the greatest respect, such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny not least because it is plainly discriminatory of itself and in its effect. It is anachronistic and misplaced notwithstanding that it was (once) the norm for a vast majority of Kenya’s communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstances of his or her birth. Each has a share without shame or fear in the parents’ inheritance and may boldly approach to claim it. What *Rono vs. Rono* (2005) 1 EA 363 decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya 2010.”

21. In the earlier decision of *Mary Rono vs. Jane Rono & Another* [2005] eKLR this Court had set aside the distribution of the estate in which the deceased’s daughters had been excluded. The Court ordered that the estate be shared out equally between the sons and daughters of the deceased and stated:

“The Constitution which takes hierarchical primacy in the mode of exercise of jurisdiction, outlaws any law that is discriminatory in itself or in effect ... More importantly, Section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the ‘houses’ according to the number of children in each house...There is no discrimination of such children on account of their sex.”

10. From the above it is clear that a distribution of the estate of a deceased person that does not provide for the daughters of the deceased, as provided for by the law, is discriminatory, and it would be in the best interests of justice that the same be set aside.

11. The administrators herein stated in their affidavit that they do not oppose the application and state that there is a sketch drawing on distribution of the parcel to respective children with a section for the daughters to share equally, and that they wish to adopt the same sketch to distribute the estate of the deceased.

12. Taking everything into account, I hereby make the following orders:

- (a) **That the orders made on 20<sup>th</sup> July 2010 are hereby vacated and the certificate of confirmation of grant issued, based on those orders, is hereby cancelled;**
- (b) **That the administrators shall file a fresh application for confirmation of their grant, in which they shall strive to comply with all the requirements set out in section 71 of the Law of Succession Act and Rule 40 of the Probate and Administration Rules, list all the children of the deceased, inclusive of the daughters of the deceased, and file Form 37, executed by such survivors of the deceased, as they be in agreement with the proposals in the confirmation application to be filed;**
- (c) **That any of the persons who are beneficially interested in the estate who shall be unhappy with the proposed distribution shall be at liberty to file an affidavit of protest;**
- (d) **That the confirmation application shall be filed within forty-five (45) days; and**
- (e) **That the matter be mentioned after forty-five (45) days from the date of this ruling for compliance and directions.**

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS.....24<sup>TH</sup> .....DAY OF .....JULY.....  
2020

W MUSYOKA

JUDGE