



REPUBLIC OF KENYA



**In re Estate of Sabuni Marita Gilbert (Deceased) (Succession Cause  
2 of 2019) [2024] KEHC 2826 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2826 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
SUCCESSION CAUSE 2 OF 2019**

**WA OKWANY, J**

**MARCH 7, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE  
SABUNI MARITA GILBERT------(DECEASED)**

**BETWEEN**

**ESTONE NYANGORI GODFREY SABUNI ..... PETITIONER**

**AND**

**HELLEN NYABOKE SABUNI ..... OBJECTOR**

**RULING**

1. The deceased herein, Gilbert Sabuni Marita, died intestate on 3<sup>rd</sup> May 2017. His Estate comprised of Land Parcel No. MWONGORISSETTELEMENT SCHEME/66 measuring 28.4 Acres. The deceased was survived by 11 children and one widow, namely: -
  1. Hellen Nyaboke Sabuni – Widow (Objector)
  2. Grace Mora Moku – Daughter
  3. Mary Kwamboka Vindi – Daughter
  4. Dinna Nyachae Sabuni – Daughter
  5. Estone Nyangori Godfrey Sabuni – Son (Petitioner)
  6. Rose Bosibori Sabuni – Daughter (deceased)
  7. Jackline Nyakerario Sabuni – Daughter
  8. George Morara Sabuni – Son
  9. Emily Bochaberi Sabuni – Daughter



10. Dickens Omasire Sabuni – Son
11. Julia Nyasuguta Sabuni – Daughter
2. On 25<sup>th</sup> June 2019, the Petitioner herein, who is the deceased's first- born son, applied for Grant of Letters of Administration in respect to the deceased's estate. He obtained the grant on 30<sup>th</sup> April 2020. The Petitioner subsequently applied for Confirmation of Grant on 28<sup>th</sup> September 2020 and proposed a mode of distribution that was consented to by himself and two other beneficiaries, namely; his sister Dinna Nyachae and brother Dickens Omasire.
3. The Petitioner's mother, Hellen Nyaboke Sabuni, objected to the grant through an application dated 30<sup>th</sup> October 2020 wherein she contended that the grant was obtained fraudulently and through a concealment of material facts.
4. On 12<sup>th</sup> November 2020, this court (differently constituted) directed the parties to pursue an amicable settlement of the mode of distribution through mediation and appointed co-administrators to the Estate of the deceased who included the Objector herein, Grace Moraa Mokuia and Dickens Omasire Sabuni.
5. Parties were unable to agree on the mode of distribution at the Mediation and the matter was referred back to this Court. Maina J. directed parties to file and exchange their proposals on the mode of distribution for the court's consideration. Directions were further issued that distribution be canvassed by way of viva voce evidence.
6. The hearing later proceeded before Kamau J. who, in her Ruling dated 25<sup>th</sup> September 2023, found that the issue of revocation of grant had already been disposed of by Maina J. in her ruling of 15<sup>th</sup> April 2021. The learned Judge then noted that the Petitioner had, in his submissions, not addressed the court on issue of the distribution of the estate. The Petitioner was therefore directed to file his submissions on distribution for the court's consideration.
7. Parties thereafter appeared before me on 6<sup>th</sup> November 2013 when they agreed that the only issue for determination was the distribution of the estate of the deceased based on their respective proposals on the mode of distribution.
8. I have considered the oral evidence adduced by the parties at the hearing before Kamau J. I have also considered the parties' respective pleadings and the rival proposals on distribution. The main issue for my determination is the appropriate mode of distribution. In considering this issue, the court will also determine the identity of the legitimate beneficiaries of the deceased's estate.

#### **i. Beneficiaries**

9. The *Law of Succession Act* (hereinafter "the Act") provides that the legitimate beneficiaries of the Estate of a deceased person are his dependants, his survivors and his creditors. Section 29 of the *Law of Succession Act*, Cap 160 defines dependants as follows: -

29. Meaning of dependant

For the purposes of this Part, "dependant" means—

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers



and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

10. Sections 35, 36, 38 and 39 of the Act set out the survivors of a deceased person as parents, spouses, children, siblings, other relatives who are nearest to the 6<sup>th</sup> degree of consanguinity, while creditors are those people to whom the Estate of a deceased person owes some liability.
11. In the present case, the deceased was survived by one widow and 10 children. I have considered the Petitioner's Affidavit in support of Mode of Distribution and noted that he listed only 10 beneficiaries thereby excluding his deceased sister, Rose Bosibori Sabuni. In his statement dated 27<sup>th</sup> October 2021, the Petitioner further listed one Yusabia Bonareri Omwenga as a beneficiary of the Estate on the basis that he had sold to half an acre of the deceased's land for Kshs. 700,000 through an agreement dated 12<sup>th</sup> January 2017.
12. It is on the strength of this sale agreement that the Petitioner considered the said Yusabia as a beneficiary of the Estate of this father. It is noteworthy that the sale agreement was between the Petitioner and Yusabia and not the deceased and that the portion of land sold to Yusabia was to be limited to the portion of land that would eventually devolve to the Petitioner upon subdivision. Yusabia testified that she conducted the search which revealed that the title was in the name of the late Gilbert Sabuni the deceased herein.
13. The issue for this court's determination is whether the sale was legitimate and enforceable in law so as to render the said Yusabia Bonareri a bonafide purchaser for value and subsequently a beneficiary of the Estate.
14. It is trite that the Estate of a deceased person should not to be interfered with and that anyone who wishes to dispose of it must act in accordance with the requirements of Section 82 of the *Law of Succession Act*. Section 45 of the Act further sanctions intermeddling with a deceased's property. This was explained in *Morris Mwiti Mburugu v Denis Kimanthi M'Mburugu* [2016] eKLR, thus: -

“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.”

15. It noteworthy that the Petitioner sold the half acre land before the deceased died, in which case, the actions by the Petitioner do not amount to intermeddling with the deceased's estate under Section 45 of the Act. It is clear that even though the deceased may have partitioned his land to each of his sons, the fact that he had not undertaken any active steps towards actualizing the land transfer meant that the interests in his land remained vested in his Estate upon his death. I am persuaded by the decision in *Lucia Karimi Mwamba vs. Chomba Mwamba* [2020] eKLR where it was held: -

“In this case the deceased had not given the estate to the sons during his lifetime. He applied for sub division but never transferred the land to his sons. Though he pointed out where each of the sons could occupy, the land remained in his name. It was property which formed free estate of the deceased and was available for distribution.”



16. I note that even though the Petitioner's case was that the sale of the half acre was effected during his father's lifetime and that his father sanctioned the same, no evidence was presented to support this claim.
17. My finding is that the fact that the Petitioner sold off part of the land that he claims his father had subdivided to him, without any requisite documentation, rendered the sale void as he sold land that had not been formally transferred to him by his father. On another score, can Yusabia Bonareri be deemed as a bonafide purchaser for value?
18. The Court of Appeal referred to the Black's Law Dictionary 8<sup>th</sup> Edition when defining a bonafide purchaser for value was in the case of Weston Gitonga & 10 others vs. Peter Rugu Gikanga & Another [2017] eKLR as follows: -

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

19. Similarly, in Katende vs. Haridar and Company Limited [2008] 2 E. A. 173 the Court held as follows: -

“... A bona fide purchase for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchase to successfully rely on the bona fide doctrine, he must prove the following:

- a) He holds a certificate of Title;
- b) He purchased the Property in good faith;
- c) He had no knowledge of the fraud;
- d) The vendors had apparent valid title;
- e) He purchased without notice of any fraud;
- f) He was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

20. In this case, it was not disputed that the Petitioner did not have any valid title to the property so as to enable him transfer it to the purchaser in the first place. I find that while it is evident that the sale may have been conducted out of good faith, the law, as explained hereinabove, and the circumstances of the sale do not make the buyer a bonafide purchaser for value.
21. The next category of beneficiaries to consider are the children of Rose Bosibori Sabuni (deceased), who was also the deceased's daughter. The evidence presented revealed that Rose was survived by three daughters, namely; Yvonne Lusichi, Jamila Lusichi and Vallary Nyaboke Lusichi. The Petitioner testified that his younger sister, Rose, was married in Western Kenya where she was buried and that her 3 children have a father who is still alive and is taking care of them. According to the Petitioner, the children of Rose are not bona fide beneficiaries of the deceased's estate.
22. My finding is that the Law of Succession does not support the Petitioner's argument. Indeed, the Act stipulates that the children of the deceased are considered either his dependants or his survivors. In this case, the deceased was survived by 10 children, including Rose Bosibori who is deceased. The question



is therefore whether the benefits that would have accrued to the deceased daughter could be devolved to her surviving children. In other words, whether a deceased person's Estate can be distributed to his grandchildren.

23. The answer to the above question is contained in the decision in *The Matter of the Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR, where 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.”

24. Taking a cue from the above decision, I find that it was incumbent upon the Petitioner to include his deceased sister's children as beneficiaries of his father's Estate. Failure to do so can only mean that he was discriminating them which goes against the tenets of the *Law of Succession Act* and *the Constitution* which requires that all persons be treated as equal before the law.
25. In conclusion, I find that the legitimate beneficiaries of the Estate are the widow of the deceased, his 9 surviving children and his 3 grand-daughters representing his deceased daughter.

## ii. Mode of Distribution

26. It was not disputed that the only property in the Estate was L.R. No. Mwongori Settlement Scheme/66 measuring 11.5 Ha (28.4 acres). The Petitioner filed an Affidavit in support of his Summons for Confirmation of Grant dated 28<sup>th</sup> September 2020 in which he proposed distribution of property as follows: -

- a. The widow of the deceased Hellen Nyaboke Sabuni and her daughters Grace Moraa Mokuu, Mary Kwamboka, Dinna Nyachae Sabuni, Jackline Nyakerario Sabuni, Emily Bochareri Sabuni and Julia Nyasuguta Sabuni shall get a joint share of 5.9375 acres if L.R. No. Mwongori Settlement Scheme/66.
- b. The sons Estone Nyangori Godfrey Sabuni shall get 5.475 acre George Morara Sabuni 5.9375 acres and Dickens Omasire Sabuni 5.9375 acres of L.R. No. Mwongori Settlement Scheme/66.
- c. 7.0. acres of L.R. No. Mwongori Settlement Scheme/66 shall be applied towards settling liabilities of buyers.
- d. Borabu Primary School will get ½ an acre given to it as a gift.
- e. ¼ an acre will be set aside for roads and footpaths.
- f. The identification and delineation of the respective shares on the ground shall respect the locations where each beneficiary is settled on the land as was determined at the family meeting held on 19/10/2019.

27. The Objector, on the other hand, proposed distribution as follows: -

- a. 4 acres belong to Mr. Jared Nyagwachi Bichanga, 2 acres to Mr. Peter Bokoo and another ½ acre to Borabu Primary School which portions shall be excised from the deceased's Estate.
- b. The remaining 21.9 acres shall be shared equally amongst the beneficiaries of the Estate of the deceased such that each beneficiary gets approximately 2 acres each.



28. The duty of this Court is to advance the principles of justice and fairness. The applicable provision of the law with regard to a deceased who dies intestate leaving a wife and children is Section 35 which provides as hereunder: -

35. Where intestate has left one surviving spouse and child or children

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.



5. Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

29. I have considered the rival proposals on distribution and considered the Petitioner's testimony at the hearing. I note that he conceded that he sold off a portion of the land, that he alleged was earmarked for him, to a third party, Yusabia. He also testified that he was not comfortable with each member getting 2 acres and he could not contemplate taking only 2 acres for himself. On cross-examination, he stated that his deceased sister's children were not entitled to inherit the estate of their grandfather as their father was still alive.
30. My analysis of the Petitioner's evidence is that he was reluctant to have an equal distribution of the estate as such a mode of distribution would significantly reduce the portion of land that he would get. It also emerged, from the evidence and through the Petitioner's Mode of Distribution, that he apportioned larger portions of land to the 3 sons of the deceased while his mother and 7 sisters are left to share only 5.9 acres.
31. My finding is that the Petitioner's proposed mode of distribution is not only unjust but also goes against the dictates of the Law of Succession and the Constitution of Kenya which provide that all the children of the deceased, including the married daughters, are entitled to an equal share of the deceased's property. I therefore find that there is no legal basis for denying the children Rose a share of the estate. I further find that there is no legal basis for the sons to inherit larger portions of the land as compared to the daughters. I am guided by the Court of Appeal decision in Stephen Gitonga M'murithi vs. Faith Ngira Murithi [2015] eKLR, where it was 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.”

32. I will now turn to consider the Petitioner's claim that the family had a meeting on 19<sup>th</sup> October 2009 when deceased disclosed his desire to subdivide the land into four equal portions of 7 acres each as recorded in the minutes which reveal that each son was to get 7 acres while the remaining 7 acres was left for the deceased, his wife and daughters. A perusal of the minutes indicates that the sons were to take steps to engage the services of a surveyor to make permanent subdivision of the land for purposes of issuance of title deeds. I have perused the minutes for 22<sup>nd</sup> June 2008 in which it was agreed that the subdivision of the land would only take effect upon each of the sons presenting a cow to the parents and only after the first harvest, with the consent of the deceased and his wife in accordance with the Abagusii customary laws. I note that no evidence was presented to show that any of the deceased's sons acted on the conditions set to achieve the subdivision of their father's land when he was still alive as agreed in the minutes. I therefore find that the Petitioner's argument that his father had already subdivided the land to his brothers was vitiated by the fact that the sons did not register their respective portions in their names and further, by the fact that, as a family, they sold portions of the land to one Jared Nyagwachi for Kshs. 6,000,000/= to settle the deceased's medical costs.
33. The above position means that the Petitioner's proposal to distribute the estate by granting the sons a larger portion is not tenable. My finding is that the sons' failure to secure their interests during the lifetime of their father meant that the land remained vested in their father's Estate upon his demise. It



is my finding that the entire estate of the deceased remains available for distribution in accordance with Section 35 of the Act. I am persuaded by the decision in *Re the Estate of John Musambayi Katumanga Succession Cause 399 of 2007 (2014) eKLR* where Musyoka J. held thus: -

“27. 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.”

34. Flowing from the above decision and since it was not disputed that portions of the deceased’s property was sold off to third parties Mr. Jared Nyagwachi Bichanga, Mr. Peter Bokoo and Borabu Primary School, it is the determination of this Court that those portions be excluded from distribution and be excised from the Estate of the deceased that is available for distribution. It is also the finding of this Court that the interests of justice will only be advanced through equal distribution of the remaining portion of the property to all the beneficiaries of the Estate.

35. As for the Petitioner’s purchaser, Yusabia Bonareri, it is the view of this Court that her claim for an interest in the ½ acre parcel can only be determined upon the Petitioner receiving his share and subdividing to her. I find that in the event that the same subdivision to Yusabia will not be forthcoming from the Petitioner, there are avenues for redress as explained in *Re the Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR* where it was held that: -

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

36. In the end, I make the following findings and order as follows: -

- i. The legitimate beneficiaries of the Estate of the deceased are his widow, their 9 surviving children and their deceased daughter Rose Bosibori Sabuni represented by her three daughters.
- ii. The proposed mode of distribution by the Petitioner contravenes the provisions of the *Law of Succession Act* and *the Constitution* as it is discriminatory against the daughters of the deceased.
- iii. The proposed mode of distribution by the Objector ensures fairness and equality amongst all the beneficiaries and I therefore approve it.
- iv. The Estate of the deceased will therefore be distributed in accordance with the proposed mode of distribution by the Objector as follows: -

Value of the Estate: Mwangori Settlement Scheme/66 = 11.5 Ha/28.4 Acres

1. 4 Acres to Mr. Jared Nyagwachi Bichangi.



2. 2 Acres to Mr. Peter Bokoo according to the deceased's wishes.
3. ½ Acre to be distributed to Borabu Primary School.
4. The deceased's Widow Hellen Nyaboke Sabuni will receive the household effects of the deceased absolutely and a life interest in the whole of the residue of the net intestate Estate of the deceased.
5. The remaining portion being 21.9 Acres will be shared equally amongst the beneficiaries as follows: -

Grace Moraa Mooka – Daughter	2.19 Acres
Mary Kwamboka Vindi – Daughter	2.19 Acres
Dinna Nyachae Sabuni – Daughter	2.19 Acres
Estone Nyangori Godfrey Sabuni – Son	2.19 Acres
Rose Bosibori Sabuni – Daughter (Dcsd)	2.19 Acres
Jackline Nyakerario Sabuni– Daughter	2.19 Acres
George Morara Sabuni – Son	2.19 Acres
Emily Bochaberi Sabuni – Daughter	2.19 Acres
Dickens Omasire Sabuni – Son	2.19 Acres
Julia Nyasuguta Sabuni – Daughter	2.19 Acres

6. For avoidance of doubt, Yvonne Lusichi, Jamila Lusichi and Vallery Nyaboke Lusichi being the deceased's granddaughters will be considered as one unit and will be entitled to their deceased mother, Rose Bosibori Sabuni's share.

37. As this was a family dispute relating to succession of the deceased's Estate, each party shall bear its own costs.
38. Orders accordingly.



**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS  
7<sup>TH</sup> DAY OF MARCH 2024.**

**W. A. OKWANY**

**JUDGE**

