



REPUBLIC OF KENYA



**In re Estate of Mong'are Obanyi (Deceased) (Succession Cause  
1 of 2022) [2024] KEHC 4630 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4630 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
SUCCESSION CAUSE 1 OF 2022**

**WA OKWANY, J**

**APRIL 11, 2024**

**IN THE MATTER OF THE ESTATE OF MONG'ARE OBANYI (DECEASED)**

**BETWEEN**

**ELIZABETH KERUBI MONG'ARE ..... 1<sup>ST</sup> APPLICANT**

**JOSHUA O MONG'ARE OCHARO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOSEPH RAINI MONG'ARE ..... 1<sup>ST</sup> INTERESTED PARTY**

**RICHARD MOCHACHE MONG'ARE ..... 2<sup>ND</sup> INTERESTED PARTY**

**JONES MBOGA O MONGARE ..... 3<sup>RD</sup> INTERESTED PARTY**

**AND**

**JONES MBOGA O ..... INTERESTED PARTY**

**RULING**

1. The deceased herein, Mong'are Obanyi, died intestate on 5<sup>th</sup> December 1996. His Estate comprised LR No. KISII West Mugirango/Siamani/769. He was survived by his wife and 11 children as follows: -
  1. Elizabeth Kerubo Mong'are – Widow/1<sup>st</sup> Petitioner
  2. Joshua O. Mong'are Ocharo – Son/2<sup>nd</sup> Petitioner
  3. Japheth Mayaka Mong'are – Son
  4. Moses Nyamora Mong'are – Son
  5. Lawrence Osoro Mong'are – Son
  6. Jackson Okero Mong'are- Son



7. Joseph Raini Mong'are- Son/Interested Party/Objector
  8. Richard Mochere Mong'are- Son/ Interested Party/Objector
  9. Jones Mboga Omwamba Mong'are- Son/Interested Party/Objector
  10. George Ocharo Mong'are –Son
  11. Wilkister Moraa Mageto – Daughter (deceased)
  12. Florence Nyaboke Sorobi – Daughter
2. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners herein, who are deceased's widow and son respectively, obtained grant of letters of administration intestate in respect to his estate. The 2<sup>nd</sup> Petitioner thereafter filed an application for confirmation of the grant. His proposal on the mode of distribution was however opposed by the 1<sup>st</sup> Petitioner through an affidavit of protest.
  3. This court heard the protest through viva voce evidence but the 1<sup>st</sup> Petitioner thereafter withdrew her protest and swore an affidavit in which she conceded to the mode of distribution proposed by the 2<sup>nd</sup> Petitioner. The 2<sup>nd</sup> Petitioner however died on 19<sup>th</sup> June 2023.
  4. Following the death of the 2<sup>nd</sup> Petitioner, the 2<sup>nd</sup> Interested Party, Richard Mocheche Mong'are, filed an Affidavit of Protest on behalf of the other Interested Parties wherein he insisted that 1<sup>st</sup> Petitioner's earlier proposal for the equal distribution of the estate be adopted by this court. He also denied the allegation that the deceased had, prior to his death, distributed his property in the manner alluded to by the Petitioners. He averred that the Interested Parties were minors as at 1981 when the deceased allegedly shared out his land to the sons thus excluding them from the distribution matrix.
  5. The 2<sup>nd</sup> Interested Party maintained that the deceased's property should be distributed equally to all the beneficiaries. He urged the court to appoint him as the 1<sup>st</sup> Petitioner's co-administrator in place of the deceased 2<sup>nd</sup> Petitioner.
  6. The protest was heard by way of written submissions which I have considered.

### **Submissions**

7. The 1<sup>st</sup> Petitioner's case was that by putting his children in possession of their respective portions of land prior to his death, the deceased created a constructive trust. He argued that the deceased's intentions were clear as each son had developed his respective parcel of land and that some had even erected perimeter walls thereon. He referred to the decision in *Llyods Bank Plc vs. Rosset* (1991) 1 AC 107, 132 where Lord Bridge explained what constitutes a constructive trust and *Soulos vs. Korkontsilos* (1997) 2 SCR 217 where the Supreme Court of Canada explained the parameters of a constructive trust.
8. The 1<sup>st</sup> Petitioner argued that redistributing the estate so as to give each beneficiary an equal share would defeat the wishes that the deceased expressed since 1981. It was submitted that the mere fact that the deceased died before transferring the alienated land to his beneficiaries did not mean that the beneficiaries lost proprietary interest in their respective portions of land. Reliance was placed on the decision in *Thorner vs. Major and Others* (2009) UKL 18 (2009) 1 WLR 776, where the doctrine of proprietary interest was discussed. The 1<sup>st</sup> Petitioner also referred to the decision in *Inwards & Others vs. Baker* (1965) 1 All ER where the defendant, who had been induced by his father to build a bungalow on his father's land and expended money with the expectation that he would be allowed to remain there, was found to be entitled to remain in occupation of the bungalow against the trustees.



9. It was further submitted that that the deceased's intention ought to be construed as synonymous to a will. The 1<sup>st</sup> Petitioner urged the court to adopt the mode of distribution proposed by the 2<sup>nd</sup> Petitioner.
10. The Protestors/Objectors, on the other hand, urged the Court to distribute the estate equally. they moved the Court to invoke the provisions of Section 7 (2) of the Law of Succession Act and appoint the Objector as an Administrator in the event that the 1<sup>st</sup> Petitioner is not willing to facilitate the distribution of the estate.

### **Analysis and Determination**

11. I have carefully considered the application for confirmation of grant, the protest, the oral evidence presented by the parties and their respective submissions. I find that the following issues fall for this court's determination: -
  - i. Whether the beneficiaries had a constructive trust over the parcels of land that they occupy.
  - ii. The mode of distribution to be adopted by the court.

### **Constructive Trust**

12. The Black's Law Dictionary, 9<sup>th</sup> Edition defines a trust as follows:-

“The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”
13. At pg. 1649, a constructive trust is defined as:-

“An equitable remedy that a court imposes against one who has obtained property by wrong doing.”
14. Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 48 at paragraph 690 also expounds on what a constructive trusts entails as follows:-

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive. Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is



not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.

Exceptionally, the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement. The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.”

15. The doctrine of a constructive trust was also explained in the case of *Twalib Hatayan & another vs Said Saggar Ahmed Al-Heidy & 5 others* [2015] eKLR as follows:-

“Dealing with the first issue, according to the Black’s Law Dictionary, 9<sup>th</sup> Edition; a trust is defined as:-

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the *Trustee Act*, “...the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property... Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see *Halsbury’s Laws of England* vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see *Black’s Law Dictionary*) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust.”

16. With the above definitions and case law in mind, the question which this court has to deal with is whether, from the evidence on record, the deceased’s alleged intentions or actions can be said to have amounted to the creation of a constructive trust in favour of his beneficiaries. My finding is that the evidence on record only indicated that the deceased showed his older sons the general area where they were to live or put up their houses 1981 but did not take any active steps towards subdividing the land or transferring the title to them. My further finding is that even assuming, for argument’s sake, that a constructive trust was created, such a trust could only have existed as between the deceased and the affected sons and not the other beneficiaries who played no role in the allocation of the land.
17. The Objectors’ case was that they were minors at the time the deceased showed their older brothers the portions of land where they constructed their houses. My finding is that the mere fact that the deceased showed his sons where to construct their houses did not connote that he had distributed his estate/property or that he (the deceased) made a will. In any event, such a will would not be enforceable in law as it would have excluded the beneficiaries who were then minors.



18. For the above reasons, I find that the deceased did not hold a constructive trust in favour of the beneficiaries to his estate as he was the sole registered owner of the suit property and not a trustee for his sons. I find guidance in the decision by the Canadian Supreme Court in *Murdoch vs. Murdoch* [1975] 1 SCR 423 where it was held that:-

“As is pointed out by Scott, *Law of Trusts*, 3<sup>rd</sup> Ed., 1967, vol. 5, at p. 3215,

“a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it ... The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property”;

and, again, at p. 3413, quoting Judge Cardozo

“a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”

19. When confronted with a similar scenario where the deceased allowed his sons to utilize certain assets of his estate prior to his death, the High Court at Kakamega held as follows in *Re Estate of Chesimbili Sindani (Deceased)* [2021] eKLR: -

“...therefore, the entire estate of the deceased comprises of free property available for distribution by the court in these confirmation proceedings. I am persuaded that the deceased had only licensed the sons to utilize certain assets, and as a result they had put up structures on those assets, any distribution of the assets ought to take into account those assets, and ensure that the particular sons are allocated shares in the parcels of land where they have put up structures.”

20. Similarly, in *Dan Ouya Kodwar vs. Samuel Otieno Odwar & another* [2016] eKLR the Court stated as follows:-

“I agree that despite there being the presence of evidence of trees and sisal plants demarcating the land into three portions, that was done for the convenient use of the land which is a common practice in polygamous families but the land remained in the sole control of the deceased.

Whereas such demarcations are usually very useful in the distribution of land where the beneficiaries readily agree, that may not be the position when the beneficiaries are not in agreement. I therefore find that the land forms the estate of the deceased and that the same was not sub-divided by the deceased in his lifetime and that no portion was owned exclusively by any of the three wives of the deceased. In the circumstances the land shall be distributed in accordance with the Act.” (Emphasis mine)

21. Taking a cue from the above cited cases and having found that no constructive trust was created or will made when the deceased showed his sons where to construct their houses, I find that the entire property of the deceased’s remains available for distribution in accordance with the dictates of the [\*Law of Succession Act\*](#).



## Mode of Distribution

22. The 1<sup>st</sup> Petitioner testified that the deceased's wish was to grant each son an equal share of his land. She however testified that her daughters were not entitled to get any share of the estate as that would go against their customary law which does not permit married daughters to get a share of their father's land.
23. As I have already stated in this ruling, the 1<sup>st</sup> Petitioner reneged on her earlier position on equal distribution of the estate to her sons and adopted the mode of distribution proposed by the 2<sup>nd</sup> Petitioner which was as follows: -
1. Joshua O. Mong'are Ocharo – 0.864 Ha (Portion A)
  2. Japheth Mayaka Mong'are – 0.917 Ha. (Portion I)
  3. Moses Nyamora Mong'are – 0.717 Ha. (Portion G)
  4. Lawrence Osono Mong'are – 0.917 Ha. (Portion H)
  5. Jackson Okero Mong'are- 0.717 Ha. (Portion F)
  6. Joseph Raini Mong'are- 0.717 Ha. (Portion E)
  7. Richard Mochere Mong'are- 0.717 Ha. (Portion D)
  8. Jones Mboga Omwamba Mong'are- 0.717 Ha (Portion C)
  9. George Ocharo Mong'are – 0.717 Ha. (Portion B)
24. It is trite that except in instances where parties agree on the mode of distribution or where the daughters of a deceased person agree to forgo their interest on the estate of their deceased father, the court is required to ensure that there is fairness in the distribution of the Estate of the deceased. The Petitioners alluded to the fact that the deceased's daughters were not entitled to inherit their father's Estate because they were all married.
25. My finding is that by coming before this Court for distribution of the deceased's estate, the parties ought to be aware that the Court will be led by the law governing succession matters. In this regard, the court cannot propagate principles or customs that are discriminatory in nature, particularly in light of the clear provisions of *the Constitution* of Kenya 2010 and International Legal Instruments that promote fairness and equality. It behoves this Court to adhere to the set Constitutional principles on non-discrimination.
26. This court also recalls that it had, in the initial stages of these proceedings, referred the parties to mediation in the hope that they would come to an amicable compromise on the distribution of the deceased's estate. It is however regrettable that mediation did not yield any positive results thus resulting in the viva voce hearing of the parties' proposals on distribution. At the said hearing, evidence was presented to show that some of the beneficiaries have made substantial developments on the various parcels of land that they currently occupy. My considered view is that the most desirable outcome, on distribution, would have been for the parties themselves, as members of the same family, to determine their respective shares of the estate.
27. Having chosen to return to court for a determination on the mode of distribution, parties should be reminded that this court has no other formula for distributing the deceased's estate except as provided under *the Constitution* and Section 35 of the *Law of Succession Act*.



28. Article 27(3) of *the Constitution* provides as follow:-

“Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”

29. In W.M. Musyoka’s Law of Succession at page 118 the author aptly states as follows: -

“Non-discrimination of daughters’ reference to children does not distinguish between sons and daughters, neither is there distinction between married and unmarried daughters.”

30. Similarly, in the Matter of the Estate of M’Ngarithi M’Miriti alias Paul M’Ngarithi M’Miriti (Deceased) [2017] KLR the court stated as follows:-

“Discrimination of daughters in inheritance

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 state categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and *the Constitution*. More specifically, I am content to cite the proclamation by the Court of Appeal in the case of Stephen Gitonga M’murithi Vs. Faith Ngiramurithi [2015] eKLR that:

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”

Therefore, a son will not have priority over a daughter of the deceased simply because he is male; all- male and female siblings- are equal before the law and are entitled to equal protection of the law. (See article 27 of *the Constitution*). Accordingly, the 3<sup>rd</sup> Administrator and her children who are claiming the inheritance of late Festus K. M’Ngaruthi, the son of the deceased are only entitled to the share of their late father. They are not, in the circumstances of this case entitled to more share than the distinct share of each of the two daughters of the deceased simply because the late Festus M’Ngaruthi was the son. The three children of the deceased are entitled to share the net intestate estate of the deceased equally.”

31. The above precedents and texts indicate that the Court can only distribute the Estate of the deceased equally amongst all the beneficiaries. Section 35 of the *Law of Succession Act* is succinct on the mode of distribution in this regard as follows: -

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.



32. As I have already stated in this ruling, the estate of the deceased comprised of land parcel L.R. No. KISII West Mugirango/Siamani/769 measuring 7.2. Ha. The deceased was survived by his widow, the 1<sup>st</sup> Petitioner herein, 8 sons, 1 daughter and 2 deceased children (son and daughter). Having regard to the provisions of Section 35 of the Act, and in the absence of an agreement on the mode of distribution, I find that the duty of this court is to distribute the deceased's estate by giving each beneficiary an equal share thereof as follows: -

- a. The deceased's Widow Elizabeth Kerubo Mong'are will receive the deceased's personal and household effects absolutely and a life interest in the whole of the residue of the net intestate estate in accordance with the provisions of Section 35 (1) of the Law of Succession Act.
- b. The deceased's Estate measuring 7.2Ha will be distributed as follows:-

Joshua O. Mong'are Ocharo (deceased)	Son	0.655Ha.
Japheth Mayaka Mong'are	Son	0.655Ha
Moses Nyamora Mong'are	Son	0.655Ha
Lawrence Osoro Mong'are	Son	0.655Ha
Jackson Okero Mong'are	Son	0.655Ha
Joseph Raini Mong'are	Son	0.655Ha
Richard Mochere Mong'are	Son	0.655Ha
Jones Mboga Omwamba Mong'are	Son	0.655Ha
George Ocharo Mong'are	Son	0.655Ha
Wilkister Mora Mageto (deceased)	Daughter	0.655Ha
Florence Nyaboke Sorobi	Daughter	0.655Ha

33. In addition to the above finding on the mode of distribution of the estate, I also appoint the 2<sup>nd</sup> Interested Party, Richard Mochache Mong'are, as a co-administrator in accordance with Section 71(2) of the Act for purposes of distributing the estate alongside the deceased's widow Elizabeth Kerubo Mong'are who is now advanced in age.

34. As this was a family dispute, each party shall bear his/her own costs.

35. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA THIS 11<sup>TH</sup> DAY OF APRIL 2024.**

**W. A. OKWANY**



**JUDGE**

