



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of the Late M'Mbui Burutio (Deceased) (Succession Cause
518 of 2004) [2024] KEHC 6202 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 518 OF 2004
TW CHERERE, J
MAY 16, 2024**

IN THE MATTER OF THE ESTATE OF THE LATE M'MBUI BURUTIO (DECEASED)

BETWEEN

JOYCE MUKOKINYA M'MBWI PETITIONER

AND

HENRY BUNDI M'MBWI OBJECTOR

RULING

Introduction

1. M'Mbui Burutio (Deceased) died sometimes on 01st April, 2023. At the time of filing this cause, Joyce Mukokinya M'Mbwi (Petitioner/1st Administrator) indicated that deceased's estate comprised of L.R. Nyaki/Giaki/324.
2. The deceased family include the following:
 - 1st house
 - Zipporah Kananu M'Mbwi - widow- Deceased
 - Children
 - i. Evangeline Kairuthi
 - ii. Agnes Gaiteng'a
 - iii. Henry Bundi
 - iv. Josphine Gacece
 - v. Purity Kanario



- vi. Hellen Karimi
- vii. Primoner Karuru
- viii. Charity Kanyiri
- ix. Julius Muthamia
2nd house
Joyce Mukokinya M'Mbwi - widow
Children
 - i. Daniel Miriti
 - ii. Miriam Makena
 - iii. Winfred Kathure
 - iv. Amos Muriiki

3. The parties herein failed to agree concerning distribution of L.R. Nyaki/Giaki/324. An attempt by a court annexed mediator to assist the parties resolve the dispute similarly failed and the matter proceeded for hearing interpartes.

Petitioner/1st Administrator's case

4. By her evidence, Joyce Mukokinya M'Mbwi (Petitioner/1st Administrator) relied on her supplementary affidavit of mode of distribution filed on 03rd March, 2023 where she proposed that the estate be distributed as follows:

L.R. Nyaki/Giaki/324

- 1. 3.75 acres to Amos Muriiki M'Mbwi
 - 2. 3.75 acres to Daniel Miriti
 - 3. 5.90 acres to Julius Muthamia M'Mbwi
 - 4. 2 acres jointly to Flomina Karuru, Hellen Karimi, Evangeline Kairuthi, Agnes Gaiteng'a, Purity Kanario, Josphine Gacece, Charity Kanyiri
5. Petitioner/1st Administrator explained that the deceased allowed his share in LR. Nyaki/Njkabune/45 from his mother to be inherited by Henry Bundi M'Mbwi (Objector/2nd Administrator) and that the Objector/2nd Administrator was therefore not entitled to a share of L.R. Nyaki/Giaki/324.
6. Julius Ndegwa, brother to Objector/2nd Administrator and Cyprian Kaunda whose son was married to the Petitioner/1st Administrator stated deceased allowed his mother's inheritance in LR. Nyaki/Njkabune/45 to be registered in the name of the Objector/2nd Administrator and that Objector/2nd Administrator was therefore not entitled to inherit from L.R. Nyaki/Giaki/324.

Objector/2nd Administrator's case

7. Henry Bundi M'Mbwi (Objector/2nd Administrator) acknowledged that LR. Nyaki/Njkabune/45 was registered in his name but denied that it was an inheritance from his father.



8. Objector/2nd Administrator by his affidavit of mode of distribution filed on 28th May, 2012 proposed that the estate be distributed as follows:

L.R. Nyaki/Giaki/324

1. 1 acre to Evangeline Kairuthi
2. 2.75 acres to Henry Bundi M'Mbwi
3. 2.75 acres to Julius Muthamia M'Mbwi
4. 2.75 acres to Amos Muriki
5. 2.75 acres to Daniel Miriti
6. 1 acre to Joyce Mukokinya M'Mbwi
7. 2.40 acres equally to Miriam Makena, Winfred Kathure, Purity Kanario Josphine Gacece, Purity Kanario, Hellen Karimi, Primoner Karuru, Charity Kanyiri,

Analysis and Determination

9. I have considered the evidence on record and I have deduced issues for determination as follows:

1. Who are the beneficiaries of the deceased
2. Should the estate of the deceased be distributed as proposed by the Administrators
3. Whether LR. Nyaki/Njkabune/45 was given to Objector/2nd Administrator by the deceased
- (4) How ought the estate of the deceased be distributed

Who are the beneficiaries of the deceased

10. Both parties agree that deceased was survived by the following:

1. Joyce Mukokinya M'Mbwi - widow
2. Evangeline Kairuthi - daughter
3. Agnes Gaiteng'a - daughter
4. Henry Bundi - son
5. Josphine Gacece - daughter
6. Purity Kanario - daughter
7. Hellen Karimi - daughter
8. Primoner Karuru - daughter
9. Charity Kanyiri - daughter
- (10) Julius Muthamia - son
- (11) Daniel Miriti - son
- (12) Miriam Makena - daughter
- (13) Winfred Kathure - daughter



Whether deceased's estate ought to be distributed as proposed by the Administrators

11. From the mode of distribution proposed by the Petitioner/1st Administrator, I notice that she makes no provision for herself. What baffles me is that of the 15 plus acre land due for distribution, she omits the names of two daughters Miriam Makena and Winfred Kathure. She then goes further to propose that the remaining 7 daughters share only 2 acres as two of the sons get 3.75 acres each and another soon gets to 5.90 acres.
12. I notice that Petitioner/1st Administrator makes no provision for herself. What baffles me is that of the 15 plus acre land due for distribution, Petitioner/1st Administrator omits the names of two daughters Miriam Makena and Winfred Kathure. She then goes further to propose that the remaining 7 daughters share only 2 acres as two of the sons get 3.75 acres each and another son gets to 5.90 acres. I listened to the Petitioner/1st Administrator and I did not hear her justify the mode of distribution that is discriminatory to the daughters of the deceased.
13. Objector/2nd Administrator does not make it any better for he proposes 1 acre each to the widow and one of the daughters, 2.75 acres each to the four sons and 2.40 acres to 8 daughters of the deceased. He similarly offers no explanation for such a skewed mode of distribution.
14. There being no evidence that the daughters of the deceased had renounced their equal right to their father's estate, there cannot be any justification for discriminating the daughters and denying them their inheritance.
15. It will be pretentious for any person to say or act ignorantly of the fact that discrimination of any person on the basis of gender or status is prohibited under the Constitution of Kenya, 2010, because; other than the existence of abundantly clear provisions of Constitution, the chain of judicial decisions on discrimination on the basis of gender or status are equally clear. (See Rono v Rono & Another, 2008 1 KLR (G & F) page 803; Douglas Njuguna Muigai v John Bosco Maina Kariuki & another [2014] eKLR; Mwongera Mugambi Rinturi & another v Josphine Kaarika & 2 others [2015] eKLR; Stephen Gitonga M'murithi v Faith Ngira Murithi [2015] eKLR and Joyce Kabiti M' Turuchu v David M' Ntiritu Kiambi [2016] eKLR).
16. In a case of this nature where the deceased died intestate and was polygamous, having been survived by one widow and children, the anchor on distribution of his estate is Section 40 of the Law of Succession Act which primarily provides that;

" 40.

(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".
17. A plain reading of the foregoing section means that the estate of a deceased that was polygamous is to be shared equally between children (male and female) and widows.
18. Consequently, I find that the modes of distribution proposed by both administrators are skewed, discriminatory and unlawful and are rejected.



Whether deceased gave his share in LR. Nyaki/Njkabune/45 to Objector/2nd Administrator

19. The Petitioner/1st Administrator and her two witnesses told court that LR. Nyaki/Njkabune/45 was ancestral land belonging to deceased's mother. It was their evidence that the same would have been inherited by the deceased but he allowed it to be registered in the name of the Objector/2nd Administrator.
20. Objector/2nd Administrator acknowledges that the said land belonged to his grandmother but does not explain the circumstances under which it was transferred to his name.
21. Section 109 of the *Evidence Act*, Cap 80 places the burden of proof on him who alleges and states as follows: -

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.'

22. The foregoing section was reiterated in *Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR where it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence.....”

23. The question of burden of proof on a balance of probabilities was discussed by Kimaru, J (as he then was) in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place..
.....”

24. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the Court of Appeal held that:

“Denning J. in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

25. Having listened to the Petitioner/1st Administrator and her witnesses vis a vis the evidence by the Objector/2nd Administrator, I find on a balance of probability that LR. Nyaki/Njkabune/45 was



deceased's share from his mother's estate and was therefore a gift inter vivos by the deceased to the Objector/2nd Administrator.

How ought the estate of the deceased be distributed

26. Section 42 of the [Law of Succession](#) provides as follows:

Where—

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of [this Act](#),

that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

27. Now that L.R. Nyaki/Njkabune/45 was settled by the deceased in favour of the Objector/2nd Administrator, the gift has to be taken into consideration during distribution of the residual of the estate comprised in L.R. Nyaki/Giaki/324.

28. There is evidence in the form of green card that L.R. Nyaki/Njkabune/45 measures 0.56 Ha which is equivalent to 1.38379 acres. On the other hand, the green card for L.R. Nyaki/Giaki/324 reveals that it measures 15.40 acres.

29. It should be remembered that no beneficiary has a better right to a deceased's estate than the other. Having found that the Objector/2nd Administrator already benefitted from L.R. Nyaki/Njkabune/45, I have come to the conclusion that he is not entitled to a share of L.R. Nyaki/Giaki/324. His claim to L.R. Nyaki/Giaki/324 would place him at an advantage compared to the other beneficiaries contrary to the clear provisions of the law. In any case,

30. The Objector/2nd Administrator should count himself lucky for the reason that even if he doesn't get a share of L.R. Nyaki/Giaki/324, his 0.56 Ha share in L.R. Nyaki/Njkabune/45 will still be 0.199 acres larger compared to the respective share of the 13 beneficiaries in L.R. Nyaki/Giaki/324 which is 1.1846 acres.

31. From the foregoing analysis, it is hereby ordered as follows:

1. Henry Bundi M'Mbwi (Objector/2nd Administrator) benefitted from L.R. Nyaki/Njkabune/45 and is therefore not a beneficiary in L.R. Nyaki/Giaki/324
2. L.R. Nyaki/Giaki/324 shall be distributed in equal shares to the following:
 1. Joyce Mukokinya M'Mbwi
 2. Evangeline Kairuthi
 3. Agnes Gaiteng'a
 4. Josphine Gacece
 5. Purity Kanario
 6. Hellen Karimi
 7. Primoner Karuru



8. Charity Kanyiri
 9. Julius Muthamia
 - (10) Daniel Miriti
 - (11) Miriam Makena
 - (12) Winfred Kathure
 - (13) Amos Muriiki
- (3) This being a family matter, each party shall bear its own costs
- (4) Mention on 03rd October, 2024 to confirm transmission

DELIVERED AT MERU THIS 16th DAY OF May 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

Petitioner/1st Administrator - Present in person

For Objector/2nd Administrator - Ms. Nelima for Ms. Kiome for Charles Kariuki & Kiome Associates
Advocates

