



REPUBLIC OF KENYA



**In re Estate of David Kiprono Tuei (Deceased) (Probate & Administration
E002 of 2021) [2024] KEHC 7357 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
PROBATE & ADMINISTRATION E002 OF 2021**

JR KARANJA, J

JUNE 13, 2024

IN THE MATTER OF THE ESTATE OF DAVID KIPRONO TUEI (DECEASED)

RULING

1. The petition for letters of Administration intestate respective of the estate of the late David Kiprono Tuei (deceased) was presented in court on 2nd April 2021, BY Jeptepkeny Jepkosgei (Petitioner) in her capacity as the daughter of the deceased. Other survivors of the deceased as listed in the Petition included Ruth Jepkwambok (deceased), Tecla Jemeli (widow), Jepkurui Jerop (daughter), Kibiwot Chepkosiom Ronoh (son), Jepkogei Terotich Tuei (daughter), Kibet Kimurei Kimnani (son) and Jelimo Jebet Tuei (daughter).

2. Land Parcel No Nandi/Lolkeringet/361 and No Nandi/Lolkeringet/360 were identified as the estate property along with the deceased's beneficial interest in two unregistered parcels of land at Kabiemit and Sугоi.

The Gazette Notice No E2 of 2021 dated 10th July 2021, published to all and sundry the Petitioner's application for grant of letters of administration.

Thereafter, on the 10th February 2022 the subject grant of letters of administration Intestate was issued to the Petitioner and on the 18th August 2022, she applied for confirmation of the grant with a proposal on the mode of distribution of the estate, in particular, land parcel No Nandi/Lolkeringet/360 and 361.

3. However, the surviving widow of the deceased, Tecla Jemeli filed an affidavit dated 10th June 2023 protesting the Petitioner's proposal on the mode of distribution of the estate property. The protester/ objector was the second wife of the deceased and a stepmother to the Petitioner whose mother (now deceased) was the first wife of the deceased. Other than the affidavit dated 10th June 2023, the objector also filed a supplementary affidavit in protest to confirmation dated 22nd April 2024.

The protest was canvassed by written submissions filed herein by Kipkosgei Choge & Co. Advocates, on behalf of the Protestor and Manani, Lilian, Mwetich and Co. Advocates, on behalf of the Petitioner.



4. Upon due consideration of the protest as against the rival submissions it was apparent to this court that the subject grant was regularly obtained by the Petitioner as the daughter of the deceased even though the protestor was the surviving widow of the deceased and above the Petitioner in the order of preference to apply for a grant (see, Section 66 of the *Law of Succession Act*).
5. The bone of contention is not of the validity of the grant in relation to the Petitioner being appointed the administrator of her late father's estate but rather, her proposed manner of distribution of the estate property among the rightful beneficiaries. It would appear that the proposal was arrived at unilaterally without the input of the rest of the beneficiaries including the protestor as the surviving widow of the deceased. This is easily demonstrated by the fact that the consent to the mode of distribution of the estate annexed to the impugned summons for confirmation of the grant was only signed by the Petitioner. The remainder of the beneficiaries did not sign the document thereby signifying their disagreement with the proposed mode of distribution and/or their not being informed or made aware by the Petitioner of the application for confirmation of grant.
6. Indeed, in the protest, it is contended that the Petitioner did not obtain the necessary consent from the other beneficiaries and that her proposed mode of distribution of the estate is improper, illegal, unfair and unjust.
7. The law on distribution of the estate respecting an intestate succession is set out in Section 35 to Section 41 of the *Law of Succession Act*.

The Petitioner as the holder of the subject grant would on confirmation of the grant be empowered to distribute the estate property among the rightful beneficiaries including herself. However, the distribution is to be undertaken and guided by the legal principles emerging from the aforementioned provisions of the Succession Act.

8. In this case, it is evident that the deceased was an intestate polygamist who had two wives during his lifetime. His deceased first wife, Ruth Jepkwambok Tuei or Tuwei, was the mother of the Petitioner. The protestor/Objector was the second wife of the deceased. Whereas, the Petitioner belonged to the first house of the deceased, the objector belonged and was the head of the second house.
9. The evidence herein indicates that the Petitioner was the only child and surviving beneficiary of the deceased from his first house, while the objector and her children with the deceased were the surviving beneficiaries of the deceased's second house. All these beneficiaries are entitled to protection of their interest in the estate property by the administrator (Petitioner) and they have a right to ensure that the estate is properly administered and distributed.
10. Therefore, the Petitioner was required with the consent of the other beneficiaries to come up with a proposed mode of distribution which would be proper, fair and in accordance with the set legal principles. In that regard and in view of the circumstances of this case, the proposed mode of distribution ought to be in accordance with the provisions of Section 40(1) of the Succession Act and reflect the principles therein.

The provision provides as follows:

“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”.



11. Under Section 3 of the Succession Act, a “house” means a family unit comprising a wife, whether alive, or dead at the date of the death of the husband, and the children of the wife. Therefore, Section 40 of the Succession Act, decrees that in a polygamous set up, the estate shall be distributed among the houses of the deceased 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.
12. The proposal made herein by the Petitioner reflected in paragraph five (5) of the affidavit in support of the summons for the confirmation of grant does not at all accord with the provisions of Section 40 of the Succession Act in as much as it is skewed very much against the second house of the deceased and grossly disregards the interest thereof in the estate property.
13. In her submissions, the Petitioner attempts to justify the proposed mode of distribution on the basis of matrimonial property rights. However, matrimonial property rights and the law applicable to such rights would not be relevant in the present context surrounding the distribution of the estate of the deceased. Even if the Petitioner did not heed the provisions of Section 40 of the Succession Act, her proposed mode of distribution should at least have been equitable and proportionate because the provision does not set a principle of law that the estate of the deceased polygamist must be distributed equally among his houses or beneficiaries.
14. Besides, a court has wide discretions to distribute the estate fairly. Section 40 of the Succession Act does not take away that discretion (see *Rono v Rono* [2005]1KLR 538).

The Objector, in her affidavit of protest proposes that the estate property described as land parcel No Nandi/Lolkeringet/361 be distributed equally to all beneficiaries and houses of the deceased and that land parcel No, Nandi/Lolkeringet/360 be distributed likewise as it was sold by the deceased to third parties or party who are currently in possession and/or occupation of the same.

15. This proposal is however, untenable due to its incompatibility with Section 40 of the *Law of Succession Act*, its inequity and its apparent omission of parcel No Nandi/Lolkeringet.360 as being part of the deceased’s property available for distribution, yet there is no evidence provided herein to show that the parcel was sold by the deceased to third parties during his lifetime. In any event, if indeed any third party or parties have a beneficial interest in the parcel the remedy would not lie in a succession court but an Environment and Land court as against the estate of the deceased.
16. It is settled that Section 40 of the *Succession Act* does not state that the division or distribution of the estate among the beneficiaries must be equal. This is clearly deciphered from the wordings of the provision which negates any proposal that the distribution must be equal between the houses of the deceased for to say so would ignore the fact that in most instances, such as in this case, the number of children in each house is almost never equal.
17. While considering Section 40 of the Act, the court in *Catherine N. Mbauni v Gregory M. Mbauni* [2009] eKLR, shared the intestate estate according to a ratio reflecting the number of units in the houses.

In *Elizabeth C. Salat v Josephine C. Salat* NBI (Civil Appeal No 211 of 2012, the court of Appeal observed that:

“Section 40 of the Act does not give discretion to a court to deviate from the general principles therein enunciated where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions more specifically, the court has no power to substitute the statutory principles for its own notion of what is equitable or just decision. However, a court has limited residual discretion within the



statutory provisions to make adjustments to share of each house or of a beneficiary where, for instance, the deceased during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in list”

18. So, if the parties herein do not agree on the mode of distribution and the court is required to divide the estate property among the beneficiaries, then the court would be bound by the provision of Section 40 of the Succession Act with modifications or adjustments if necessary.

It is instructive to note that Section 71 of the *Law of Succession Act* as read with Section 83(g) of the Act indicates that the confirmation of the grant and the completion of the administration of the estate is intended to take a short time. The application for confirmation of grant is required to be made after expiration of six months from the date of the grant and the administration of the estate is required to be completed within six months from the date of confirmation of the grant.

19. Failure or neglect to complete the administration of the estate expeditiously would therefore amount to a breach of the Succession Act.

The parties herein should work towards an expeditious completion of administration of the state of the deceased. Given that the first house of the deceased comprising of a single unit in the person of the Petitioner is evidently overwhelmed by the second house comprising of six units inclusive of the objector and her five children, the application of Section 40 of the Succession Act to the letter would invariably be shewed against the first house. It would therefore be necessary for the provision to be applied with necessary adjustments if the parties do not arrive at a consensus on the distribution of the estate.

20. In order to facilitate expeditious completion of the administration of the estate and prevent unnecessary disputes on distribution of the estate and in exercise of the powers of the court under Rule 73 of the Probate and Administration Rules, this court hereby revokes the grant issued to the Petitioner on 10th February 2022, and orders that a fresh grant be issued forthwith in the joint names of the Petitioner, Jeptepkeny Jepkosgei and the Objector/Protestor, Tecla Jemeli, as co-administrators.

21. It is further directed that the two administrators shall within six (6) months from this date hereof or any shorter period take out the necessary summons for confirmation of grant so as to have the fresh grant confirmed and the estate duly distributed to all the rightful beneficiaries and/or dependants.

22. Otherwise, the present protest is allowed and sustained only to the extent that the Petitioner’s summons for confirmation dated 18th August 2022 be and is hereby dismissed with each party bearing own costs. Matter be mentioned at a later stage for ascertainment of the status.

DATED AND DELIVERED THIS 13TH DAY OF JUNE 2024

J. R. KARANJAH,

JUDGE

