



REPUBLIC OF KENYA



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**In re Estate of David Keya (Deceased) (Succession Cause 17 of 2022)
[2024] KEHC 11383 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION CAUSE 17 OF 2022
JN KAMAU, J
SEPTEMBER 24, 2024
(FORMELY KAKAMEGA SUCCESSION CAUSE NO 480 OF 2010)
IN THE MATTER OF THE ESTATE OF DAVID KEYA (DECEASED)**

BETWEEN

MARY MUSIMBI 1ST PETITIONER

LAZARUS CHABUGA KEYA 2ND PETITIONER

AND

ERICK MUYEYIA KEYA 1ST OBJECTOR

RACHAEL MMBOGA KEYA 2ND OBJECTOR

NOAH MUKANGULA KEYA 3RD OBJECTOR

RULING

Introduction

1. In their Chamber Summons Application dated 3rd November 2016, and filed on 4th November 2016, the Petitioners herein prayed that the order that was issued on 10th March 2016 be varied and or set aside and the court be pleased to issue a Grant of Probate with a written will dated 17th October 1989. Both Petitioners swore Affidavits in support of the application herein.
2. They averred that the deceased died testate having left behind a written will dated 17th October 1989. They stated that on 10th March 2016, the court had issued an order for issuance of a joint interim grant and that there was an error apparent on the face of that order which needed variation.



3. On their part, the 2nd and 3rd Objectors herein opposed the said application vide Replying Affidavit that was sworn by the 1st Objector herein on their behalf on 18th November 2016. The same was filed on 18th November 2016.
4. In delivering his Judgment in the matter herein, on 17th September 2021, Musyoka J held as follows:-

“The final orders, on the applications dated 13th February 2014 and 3rd November 2016, which are the foundation for the judgment herein, are as follows:

 - a. That I declare that the wills purportedly made by the deceased on 18th August 1984 and 17th October 1989 are invalid for want of proper execution and attestation;
 - b. That I declare that the survivors of the deceased are Azibeta Kusui Keya and Mary Marimba Keya, as surviving spouses, and Eric Muyeyia, Fred Mumera, William Wesley, Noah Mukangala, Rachael Mmboga and Phanice as children from the 1st house; Lazarus Chabuga, Grace Vinaywa and Mary Olesia as children from the 2nd house; and Anna Vugutsa, Wycliffe and Margaret Mideva as children from the 3rd house;
 - c. That I declare that there cannot be a fair and equitable distribution of the estate before the charges on South Maragoli/Lugovo/1061 are discharged, and I, therefore, find that distribution of the estate herein is premature, and the confirmation application is accordingly postponed;
 - d. That I direct the administrators, jointly and severally, to work on redeeming South Maragoli/Lugovo/1061 and discharging the charges, before having the matter relisted for determination of the application on distribution;
 - e. That I also direct the administrators to obtain and place on record documentation relating to the 2 plots that they claim the deceased owned at Bukuga and Mabanga markets;
 - f. That the matter shall be mentioned on a date to be obtained at the registry for compliance and further directions;
 - g. That each party shall bear their own costs; and
 - h. That any party aggrieved by the orders that I have made herein has leave of twenty-eight (28) days to move the Court of Appeal appropriately.”
5. This court became seized of this matter on 27th March 2023. On the said date, the parties informed it that the only issue that was pending was distribution of the deceased estate.
6. The 2nd Petitioner swore a Further Affidavit on his behalf and on behalf of the 1st Petitioner herein on 13th January 2024. The same was filed on 25th March 2024. They also relied on their Mode of Distribution that was dated 14th November 2016 and filed on 15th November 2016.
7. On 25th April 2024, the 1st Objector also swore a Further Affidavit on his own behalf and on behalf of the 2nd and 3rd Objectors herein. The same was filed on 29th April 2024. They also relied on their Affidavit of Protest that was dated 3rd April 2013.



8. The Ruling herein is therefore based on the said affidavit evidence and the 1st and 2nd Petitioners' Mode of Distribution.

Legal Analysis

9. In their said Further Affidavit, the Petitioners averred that as at the time of delivery of Judgment dated 17th September 2021, two (2) of the dependants, namely, Lydia Kadenyi Keya and Teresa Imali Keya of the 2nd House had been omitted and that Grace Vinaywa who was a daughter-in-law in the 1st House was mistakenly placed in the 2nd House. They further stated that L.R. No South Maragoli Luvogo/1061 was sold unlawfully to one Mr Benard Kirabondo Jumba on 24th June 2023. They urged the court to confirm the Grant as per their Mode of Distribution dated 14th November 2016.
10. On their part, in their Further Affidavit, the Objectors averred that a portion of L.R. No South Maragoli Luvogo/1061 was sold by Hana Mmera Minayo who was the wife to the late Fred Mmera Keya to cater for the hospital bill and his burial. They asserted that it was only after the distribution of the estate that the said Hana Mmera Minayo could deal with the purchaser. They added that such sale was not enforceable and did not affect the deceased's estate. They therefore urged this court to distribute the estate as per their proposal and the evidence that was adduced in court.
11. During trial, the 1st Objector testified that the deceased had three (3) wives namely, Emmy, Aliveta and Mary, the 1st Petitioner herein. He said that his mother, who was the first wife, lived with the deceased at L.R. No South Maragoli Luvogo/1061 and at other times at Kakamega/Chekalini/557 where the Aliveta and the 1st Petitioner herein had been settled. He explained that his mother was sickly and therefore went to live at Kakamega/Chekalini/557 because the weather there was more palatable (sic). He averred that 1st Petitioner herein was previously married to one Esere Agesa with whom she had children. He denied that she had any children with the deceased.
12. He further said that Kakamega/Chekalini/557 was acquired in 1965, by which time he and his siblings were students and that during school holidays, they would go and spend time with the deceased. He proposed that Kakamega/Chekalini/557 be shared equally among the children of the deceased and the two (2) surviving widows, so that each could get 2.63 acres. He stated that the deceased sold Plot No 4 Bukuga to Livingstone Imbamba and that the same ought to be given to him. He proposed that L.R. No South Maragoli/Lugovo/1061 be given to the children of Emmy, the first wife, who included himself.
13. He also said the deceased had a plot at Mabanga, whose number he could not recall. He proposed that the same be given to his mother Emmy. In respect of the will of 18th August 1984, he said that the same was not signed by attesting witnesses. He said that the Maragoli land was small and if they took the same, distribution of Kakamega/Chekalini/557 to the 1st Petitioner would be disproportionate.
14. During cross-examination, he contended that the deceased settled the 1st Petitioner at L.R. No Kakamega/Chekalini/557. He explained that his mother was in Maragoli while Azibeta was on Kakamega/Chekalini/557. He stated that the deceased was buried at L.R. No Kakamega/Chekalini/557 where he stayed with the 1st Petitioner. He stated that his mother was buried at Maragoli because that was the original home. He reiterated that the Bukuga plot had been sold. He conceded that both the deceased and the 1st Petitioner cleared the loan in respect of L.R. No Kakamega/Chekalini/557.
15. As regards the Mabanga plot, he said that he did not know where it was and also that he did not have any documents relating to it. He was emphatic that the three (3) children of Azibeta should not get a



- share of L.R. No South Maragoli/Lugovo/1061 due to its small size and the fact that the deceased gave it to them to use. He admitted that the 2nd and 3rd wives resided in L.R. No Kakamega/Chekalini/557.
16. The 2nd Petitioner said that he was not interested in L.R. No South Maragoli/Lugovo/1061 because it was for the 1st house. He asserted that the deceased had no plot at Mabanga Market. During cross-examination, he stated that it was the deceased who sold the Bukuga plot.
17. He conceded that not all the children of the deceased had been listed in the Petition for Letters of Administration Intestate. He also admitted that none of the sisters in all three (3) houses, the children from the 1st house and L.R. No South Maragoli/Lugovo/1061 were mentioned in the said Petition of Letters of Administration Intestate.
18. Notably, the Petitioners' Mode of Distribution was as follows:-
- “Title Number Kakamega/Chekalini/557 be shared as follows in conformity with the will of the deceased.
- a.
- i) Mary Musimbi Keya 3.125 acres
 - ii) Ann Vuguza Keya 3.125 acres
 - iii) Wycliffe Omunga keya 3.125 acres
 - iv) Margret Mideva Keya 3.125 acres
- b.
- i) Lazarus Chabuge Keya 2.5 acres
 - ii) Asibeta Kusui Keya 2.5 acres
 - iii) Mary K. Olesia Keya 2.5 acres
 - iv) Lydia Kadenyi Keya 2.5 acres
 - v) Teresa Imali Keya 2.5 acres
- c) L.R. No South Maragoli/ Logovo/1061 To be shared by the deceased's family at Maragoli that includes the 3rdPetitioner (sic).”
19. On the other hand, the Objectors proposed as follows:-
- a. L.R. No Kakamega/Chekalini/557 To be shared out equally between Eric Muyeyia Keya, Fred Mumera Keya, William Wesley Keya, Noah Mukangula Keya, Rachael Mmboga Keya, Phanice Keya, Peninah Keya, Lazarus Chabuga Keya, Grace Vinaywa Keya, Mary Marimba, Azibeta Keya and Mary Olesia.
 - b. L.R. No South Maragoli/Lugovo/1061 To be devolved upon Eric Muyeyia Keya, Fred Mumera Keya, William Wesley Keya, Noah Mukangula Keya, Rachael Mmboga Keya, Phanice Keya, Peninah Keya and Grace Vinaywa Keya
20. They were categorical that Anna Vugutsa, Wycliffe Keya and Margaret Mideva ought not get anything from the deceased's estate as they were not the deceased's children or dependants. They asserted that they should therefore inherit the assets of their father.



21. Both parties agreed that although the Charge of L.R. No South Maragoli/Lugovo/1061 was discharged, the said property had been sold to one Mr Benard Kirabondo Jumba on 24th June 2023. The Sale Agreement dated 24th June 2023 was adduced as evidence.
22. The purported sale of L.R. No South Maragoli/Lugovo/1061 was illegal, null and void ab initio and amount to intermeddling with the deceased's estate contrary to Section 45 of the Law of Succession Cap 160 (Laws of Kenya). None of the beneficiaries had capacity to sell the said property in the absence of a confirmed Grant of Letters of Administration by virtue of Section 82(b)(ii) of the Law of Succession Act which provides that:-

“No immoveable property shall be sold before confirmation of the grant”.
23. As the parties herein agreed that the plot at Bukuga was sold by the deceased and the plot at Mabanga was never identified and/or documentation relating to it adduced as evidence, only L.R. Kakamega/Chekalini/557 and L.R. No South Maragoli/Lugovo/1061 were therefore available for distribution herein.
24. Having critically analysed both Modes of Distribution herein, this court found out that indeed the Petitioners' Mode of Distribution left out other children of the deceased, more so, those of the 1st House. Additionally, it was evident that the proposed mode of distribution was based on the purported Wills that were declared to have been invalid by Musyoka J. The distribution could not therefore be based on the said Wills.
25. On the other hand, bearing in mind the oral evidence adduced by the 1st Objector and the 2nd Petitioner, their proposed Modes of Distribution appeared to have been reasonable. However, both sides had both left out the children of the 3rd House.
26. In the absence of a mutually agreed and acceptable mode of distribution of the estate of the deceased, Section 40 of the Law of Succession became applicable herein as it provides for guidelines for distribution of the estate of a polygamous intestate. Any proposed mode of distribution therefore ought to be compatible with and in accordance with the said provision thereby leaving no room for distribution based on the whim of the holder of the grant or his/her sentimental feelings.
27. The said Section 40 of the Law of Succession Act states as follows:-
 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 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;
 2. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38”.
28. In the case Mary Rono v Jane Rono & Another [2005] eKLR, the Court of Appeal stated that if Parliament had intended that there had to be equality between the houses, there would have been no need to provide in Section 40 of the Law of Succession Act that the number of children in each house be taken into account.
29. The court was of the view that the provisions negated any proposal that the division must be equal between the houses, for to say so, would ignore the fact that in most instances, the number of children in each house was never equal.



30. This court noted that the 1st House had six (6) children while the 2nd and 3rd Houses had three (3) children each. It therefore found it fit to proceed with the distribution pursuant to Section 40 of the *Law of Succession Act*.
31. This court noted that the 2nd Petitioner was not interested in L.R. No South Maragoli/Lugovo/1061 on the ground that the same belonged to the 1st house which consisted the Objectors herein. Similarly, the Objectors were not laying any claim to L.R. No Kakamega/Chekalini/557.
32. A perusal of the Certificate of Search of L.R. No Kakamega/Chekalini/557 showed that the same measured 10.5 ha while the Certificate of Search in respect of L.R. No South Maragoli/Lugovo/1061 showed that the same measured 1.8 ha. It was evident that the two (2) parcels of land were not of the same size.

Disposition

33. For the foregoing reasons, the upshot is that the deceased's estate shall be distributed as follows;
 - a. The purported sale of L.R. No South Maragoli/Lugovo/1061 be and is hereby set aside and/or vacated and declared null and void ab initio. In the event the title had moved to a third party, the same be and is hereby revoked and cancelled forthwith and the Registrar of Lands to ensure that the same reverts to the name of the deceased, David Keya, forthwith for sub-division. The purchaser will be at liberty to pursue his or her claim from the beneficiary(ies) who illegally sold him or her the said parcel of land.
 - b. It is hereby directed that Mary Marimba, Azibeta Keya, Lazarus Chabuga Keya, Grace Vinaywa Keya, Mary Olesia, Anna Vugutsa, Wycliffe and Margaret Mideva will share seven (7) ha of L.R. No Kakamega/Chekalini/557 equally each getting a portion of 0.875 ha.
 - c. It is further hereby directed that Eric Muyeyia Keya, Fred Mumera Keya, William Wesley Keya, Noah Mukangula Keya, Rachael Mmboga Keya and Phanice Keya will share three nought five (3.5) ha of L.R. No Kakamega/Chekalini/557 equally each getting a portion of 0.58 ha.
 - d. It is also hereby directed that Eric Muyeyia Keya, Fred Mumera Keya, William Wesley Keya, Noah Mukangula Keya, Rachael Mmboga Keya and Phanice Keya will share L.R. No South Maragoli/Lugovo/1061 equally each getting a portion of 0.3 ha.
 - e. The sub-division shall take into account of each beneficiary's developments on the portion of land that each beneficiary is currently occupying and road access that is to pass through L.R. No Kakamega/Chekalini/557 and L.R. No South Maragoli/Lugovo/1061.
 - f. For the avoidance of doubt, if provision for road access is made, the sub-division shall first take into account the measurements of the said road access whereafter the equal distribution of L.R. Kakamega/ Chekalini/ 557 and L.R. No South Maragoli/Lugovo/1061 amongst the beneficiaries as set out in Paragraph 33 (b), (c) and (d) hereinabove shall then apply.
 - g. It is further hereby directed that where a beneficiary has currently exceeded his or her portion, he or she will not be evicted from that he or she is currently occupying but shall compensate the beneficiary on whose land that beneficiary will have encroached on such terms as they may agree upon.
 - h. As this matter involved family members, it is hereby directed that each party will bear its own costs.



34. It is hereby directed that the Certificate of Confirmed Grant of Letters of Administration will issue forthwith as has been distributed herein.

35. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF SEPTEMBER 2024

J. KAMAU

JUDGE

