



REPUBLIC OF KENYA



KENYA LAW

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**In re Estate of JOK (Deceased) (Succession Cause 282 of 2010)
[2023] KEHC 18056 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18056 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 282 OF 2010**

WM MUSYOKA, J

JUNE 2, 2023

IN THE MATTER OF THE ESTATE OF JOK (DECEASED)

RULING

1. On July 29, 2022, I delivered a judgment wherein I directed the administrators to address certain things. These included grouping the surviving children according to the 2 houses of the deceased, identifying the daughter who had since died, and indicating whether she had surviving children, and whether there was only 1 or more assets situated at Mombasa.
2. DKO has complied with those directions, by his affidavit, sworn on an unknown date, but filed herein on 6th September 2022. He identified the children in the 1st house as the late FKO, MKW and TIO; while the children in the 2nd house are said to be FO, EGO, RNO, DKO, PMO, JMO, MMO, RIO, the late JOK and CAO. It is explained that JOK died a minor, with no children. It is stated that there were some assets that were not listed for distribution, said to be a plot in Changamwe, Mombasa, and land in Butso, Shikoti, whose details are not given.
3. He proposes a distribution. He says the deceased had shared out his property before he died, so that the sons in the 1st house got all the land in Bugonda and the sons in the 2nd house got all the land in Shikoti. He claims that FKO was allocated Kakamega/Bugonda/3XX and 9XX; while TIO was given Kakamega/Bugonda/1XX2 and 1XX2. It is said that EGO, DKO and RIO were to share Butso/Shikoti/1X equally. Mombasa/Block XII/1XX was reserved for the daughters, that is to say MKW, FO, RNO, PMO, JMO, MMO and CAO.
4. The deceased died intestate, for no will was produced. At the oral hearing, no evidence was led to demonstrate that the deceased had shared the property inter vivos or during his lifetime, as alleged. Sharing the property inter vivos would have meant that he obtained the consent of the relevant control board to subdivide and transfer the subject property to the person mentioned. The title documents herein are all still in the name of the deceased. That would mean that there was no inter vivos transfer of the property to the sons. The property still belongs to the estate of the deceased. See *In re Estate of Gedion Manthi Nzioka (Deceased)* [2015] eKLR (Nyamweya, J), *In re Estate of Muchai Gachuika (Deceased)* [2019] eKLR (Gikonyo, J) and *In re Estate of Godana Songoro Guyo (Deceased)* [2020]



- eKLR (Nyakundi, J). Inter vivos distribution can be inferred where some step was taken towards transferring the land to the children, like an application to the land control board to subdivide, or a transfer duly executed by the deceased but he died before he lodged it at the land registry, or something similar. None of that was demonstrated. See *In re Estate of Nyachieo Osindi (Deceased)* [2019] eKLR (Ougo, J), *In re Estate of Phylis Muthoni M'Inoti (Deceased)* (2019) eKLR (Gikonyo, J) and *Lucia Karimi Mwamba vs. Chomba Mwamba* [2020] eKLR (Gitari, J). There is, therefore, absolutely no evidence that the deceased ever did any lifetime distribution as alleged, and the assets herein are all available for distribution amongst all the surviving children of the deceased.
5. It was suggested that one side of the family lived in Maragoli and the other at Shikoti. There is some credence to that, as when this cause was initiated, it was at the instance of the 2nd house, and it sought to distribute only the Shikoti property, meaning that the Maragoli lands were left out for the 1st house. Consequently, members of the 1st house, both sons and daughters, male and female, shall share the Maragoli lands equally amongst themselves; while members of the 2nd house, sons and daughters, male and female, share out the Shikoti land equally between themselves. Of course, there is a Form 37 on record. However, the same is not executed by all the survivors, which would mean there was not total agreement on distribution, which could bind the court. See *Justus Thiora Kiugu, & 4 others vs. Joyce Nkatha Kiugu & another* [2015] eKLR (Visram, Koome & Otieno-Odek, JJA) and *In re Estate of Gichuhi Wakano alias Wilfred Wakano Gichuhi (Deceased)* [2022] eKLR (T. Matheka, J). There are 4 parcels of land in Maragoli, and 1 in Shikoti. There are 3 children from the 1st house and 9 in the 2nd house. I raise this with respect to distribution of the Mombasa property. It should go to the 2nd house, in order to achieve a fair and balanced distribution.
 6. Section 38 of the *Law of Succession Act*, cap. 160, Laws of Kenya, provides that the estate ought to be shared equally between sons and daughters. See *In re Estate of Karuri Magu (Deceased)* [2016] eKLR (Mshila, J), *In re Estate of Paul Mwaura Thuo (Deceased)* [2017] eKLR (Musyoka, J), *In re Estate of Chege Nduga Kanyi (Deceased)* [2018] eKLR (Wendoh, J) and *In re Estate of M'Ikome M'Matiri (Deceased)* [2019] eKLR (Gikonyo, J). Section 38 should be read together with article 27 of *the Constitution*, which commands equal treatment of men and women, and outlaws discrimination based on gender. See *Ludiah Chemutai Bett vs. Joseph Kiprop Tanui* [2017] eKLR (M Ngugi, J). Article 2(4) of *the Constitution* renders invalid any act which contravenes *the Constitution*. See *In re Estate of M'Itunga M'Imbutu (Deceased)* [2018] eKLR (Gikonyo, J), *In re Estate of Stanley Mugambi M'Muketha (Deceased)* [2019] eKLR (Gikonyo, J) and *Wanjiru & 4 others vs. Kimani & 3 others* (Civil Appeal 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA). Making an order on distribution of this estate, which discriminates against the daughters or treat them differently from the sons, would contravene article 27 of *the Constitution*, and the order would be invalid, by dint of article 2(4) of *the Constitution*. I am not prepared to make orders that contravene *the Constitution* or which are constitutionally invalid.
 7. Law works on the basis of certainty, and, for that reason, the court ought not distribute assets whose existence is unknown, and even where existence is known, it should not distribute assets that have not been demonstrated to belong to the deceased. There is a proposal to distribute a parcel of land at Shikoti, Butso, that the deceased bought, and whose details are not given; likewise another property at Changamwe, Mombasa, whose details are not disclosed. These assets are not available for distribution. No survivor should be allocated an asset whose existence is uncertain. Let the administrators bring those assets within the estate first, before they can propose to distribute them.
 8. The final orders on disposal of the application, dated June 7, 2021, are as follows:



- a. That Kakamega/Bugonda/3XX, 9XX, 1XX2 and 1XX1 shall be shared equally between FKO, MKW and TIO;
- b. That Butso/ Shikoti/1X and Mombasa/Block XII/1XX shall be shared out equally between FO, EGO, RNO, DKO, PMO, JMO, MMO, RIO and CAO;
- c. That a certificate of confirmation of grant shall issue accordingly;
- d. That the share allocated to any child of the deceased who is since dead, shall be distributed to persons who are beneficially entitled to it, in succession proceedings to be initiated in the name of such dead child;
- e. That the administrators shall transmit the estate to the beneficiaries, in terms of the certificate of confirmation of grant to be issued under (c) above, within 6 months of the date of this ruling, and the matter shall be mentioned after 6 months for compliance and closure of this cause;
- f. That each party shall bear their own costs; and
- g. That any party aggrieved by the orders made in this ruling is given 30 days to move the Court of Appeal appropriately.

9. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 2ND DAY OF JUNE 2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

DKO, the applicant, in person.

Ms. Andia, instructed by Andia & Company, Advocates for the respondent.

