



In re Estate of Erman Bundotich Arap Cheptoo (Deceased) (Succession Cause 11 of 2020) [2023] KEHC 23956 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
SUCCESSION CAUSE 11 OF 2020
RB NGETICH, J
OCTOBER 19, 2023
IN THE MATTER OF THE ESTATE OF ERMAN
BUNDOTICH ARAP CHEPTOO (DECEASED)**

BETWEEN

SUSAN BUNDOTICH 1ST PETITIONER

AGNES BUNDOTICH 2ND PETITIONER

AND

ELIZABETH K. BIRIR 1ST OBJECTOR

JUDY J. TALLAM 2ND OBJECTOR

HEZRON BUNDOTICH 3RD OBJECTOR

LAWI K. TALLAM 4TH OBJECTOR

RODAH J. BUNDOTICH 5TH OBJECTOR

PATRICK BUNDOTICH 6TH OBJECTOR

BEATRICE TALLAM BUNDOTICH 7TH OBJECTOR

RULING

1. Before me for determination are two applications dated 17th April, 2023 and another dated 2nd May, 2023. In the application dated 17th April, 2023, the applicant who is the 6th objector Patrick Bundotich is seeking the following orders:-
 - i. This Honourable court be pleased to compel Agnes Jepkosgei Bundotich to surrender the original title deed for the parcel of Land known as Lembus Kabunyony/Moringwo/41



registered in the names of the deceased herein together with all completion documents belonging to the rest of the beneficiaries which are in her custody, to Koibatek lands office.

- ii. This Honourable court be pleased to order the administrators of this estate to file the accounts of the estate.
 - iii. This Honourable court be pleased to issue any order that is deemed just and fair to grant.
 - iv. Costs of this application be in the cause.
2. The said application is premised on the following grounds:
- a. That this Honourable court confirmed Grant of letters of Administration of the estate of the deceased on the 23rd March, 2022 and it has been more than 1 year yet the estate is yet to be distributed as expected.
 - b. That one of the administrators herein Agnes Jepkosgei Bundotich took the original title deed and completion documents belonging to the co-administrators and the rest of the beneficiaries and has since refused to submit the said documents at the Koibatek lands office for processing and issuance of the title deeds to the beneficiaries hence it has become impossible for the estate to be distributed and accounts to be filed in court within the stipulated timeframe.
3. The Application is supported by the affidavit of Patrick Bundotich sworn on the 17th April, 2023 and a further affidavit dated 29th May, 2023. In his supporting affidavit, he avers that he is one of the beneficiaries of the estate of the deceased herein and the Grant was confirmed on the 23rd March, 2023 and all the beneficiaries were taken care of.
4. The applicant proceeds to state that they sought the services of the surveyor to assist in sub-dividing the property to all the beneficiaries equally and all the beneficiaries except Agnes Jepkosgei Bundotich submitted all their documents for processing of the title deeds to the other 2 administrators.
5. That while at the Koibatek lands office submitting the aforesaid documents, Agnes Jepkosgei Bundotich got a chance to pick the title deed and other documents and disappeared till recently when she appeared to plant on the said property where she interfered with the arrangements by ploughing into the portions of other beneficiaries.
6. That unless this court intervenes and compel Agnes Jepkosgei Bundotich to surrender the original title deed together with other documents belonging to the other beneficiaries, the distribution of the estate will bear no fruits and it is only fair for the estate herein to be distributed as soon as possible and the accounts to be filed for the matter to be marked as closed.
7. In response, Agnes Bundotich filed replying affidavit dated 2nd May, 2023. She confirms that she has the original title deed in respect of parcel of land known as Lembus Kabunyony/Moringwo/41 and the intention was to protect her interests and interests of some of the beneficiaries of the estate whose entitlement in the estate pursuant to the confirmation of grant was at risk.
8. She further avers that she has not refused to submit the said title deed to Koibatek lands office stating that they never reached any accord on how the beneficiaries will be individually settled on the said land their brothers took over the process of survey and allocation of the resultant parcels to the beneficiaries.
9. That the subject parcel of land is slopy on one side facing the stream and Damaris Tallam and herself have been allocated the portions in the extreme end which are inhabitable, unproductive, gully which cannot be accessed from the main road and the criteria used to apportion/allocate the ten delineated parcels has never been explained to them.



10. That her sister Damaris Tallam who is currently occupying their parent's former house has been displaced and it was only fair for her brothers to consider the capabilities of the individual beneficiaries and particularly Damaris since settling her on a different location will mean that she starts constructing her dwelling house and that of her children afresh.
11. That their brothers working in cohorts went and cut down mature indigenous trees on the subject land and ferried them away to a saw mill owned by Lawi Tallam which was never agreed and/or sanctioned by the family members hence the conduct of his brothers amounts to intermeddling which is punishable in law.
12. She states that the proceeds of the sale of the trees should be returned and or valued and the amount paid back to the estate and be distributed equally among the beneficiaries. That the other trees remaining in the subject land are now shadowed with probable disposal by their brother.
13. That her sisters have relinquished their entitlement in the estate to their brothers and they will eventually not have any property and in the process giving their brothers the strength and latitude to oppress the two of them who are fighting for what is rightfully theirs.
14. She said she is satisfied with the mode of distribution as provided in the certificate of confirmation of grant but strongly object the discriminatory criteria used in the sharing out of the resultant parcels after subdivision.
15. The second application dated 2nd May, 2023 is filed by Agnes Bundotich and Damaris Jepchirchir Tallam seeking for the following orders:-
 - i. That this Honourable court be pleased to adopt as drawn the survey plan annexed herein as AB-2 as the agreed sub-division plan.
 - ii. That this Honourable court be pleased to order the apportionment, distribution and actual allocation of subdivision of Lembus Kabunyony/ Moringwo/41 to be done by way of secret balloting.
 - iii. That an order do issue compelling the 4th Respondent herein to file accounts of all the proceeds of the sale of trees that were cut down on the 11th January, 2023.
 - iv. That this Honourable court be pleased to make such other and/or further orders/directions as may be just and expedient in the circumstances.
 - v. That costs of this application be provided for.
16. The application dated 2nd May, 2023 is founded on the grounds that there has been no consensus amongst the beneficiaries of the estate herein on how the resultant parcels will be apportioned and/or allocated to the individual beneficiaries and that the beneficiaries have never reached an accord on how they will be individually settled on the 10 delineated parcels hived after the sub-division; that the Applicants herein have been coerced to agree to an allocation criteria which is in all respects unfair and discriminatory.
17. That the subject land is slopy on one side and the applicants herein have been supposedly allocated the portions in the extreme end which are inhabitable, unproductive, hilly and gully which cannot be easily cultivated and/or accessed from the main road and from the current sub-division plan, the persons getting the road frontage gets a more valuable land compared to the rest since the same is fertile and suitable for any sort of developments and economically higher in value.



18. She added that the male beneficiaries have kept the good and flat side touching the main road for themselves and have further cut down trees on the subject land and ferried them away which act was never agreed on and/or sanctioned by the entire family members.
19. She avers that their proposed allocation by way of secret balloting is free from any bias and/or favoritism and efficacious under the circumstances.
20. The application is supported by an affidavit sworn by Agnes Bundotich who has reiterated the grounds in support of the application.
21. She further avers that the criteria used to allocate the ten delineated parcels, hived after the subdivision to the beneficiaries has never been explained to the beneficiaries and the 2nd applicant (Damaris) is currently occupying their parent's former house has been displaced and taken to the gully side at the extreme end of the land without minding her financial capability and it would have been fair for their brothers to consider the capabilities of the individual beneficiaries and particularly the 2nd applicant herein since settling her on a different location will mean that she starts constructing her dwelling house and that of her children afresh.
22. She urges this court to intervene and give directions on the criteria of allocating the ten parcels of land to the respective beneficiaries and proposes secret balloting to identify specific areas for allocation.
23. No response to the application dated 2nd May, 2023 was filed. The court directed that the two Applications be canvassed by way of written submissions.
24. The 6th Objector Patrick Bundotich filed written submissions dated 5th June, 2023 in respect of his application dated 17th April, 2023 and argues that the issues raised in his application and affidavit are very clear and straight to the point. He stated that his sister Agnes Bundotich has conceded in paragraph 4 of the replying affidavit that she took the title deed and the same is in her custody hence holding the entire estate hostage simply because she is not contented with the position allocated to her and argue that whoever comes to equity must come with clean hands and being one of the administrator Agnes Bundotich's intention is to frustrate the beneficiaries of the estate.
25. He further states that her sister Agnes Bundotich accepted the portion of land allocated to her and went ahead to cultivate but is now claiming the land is inhabitable, unproductive, gully. He states that the allocated portion is productive as evidenced at paragraph 11 of his further affidavit and annexures PB-4 and 5 therein.
26. He further submits that it will be impossible to subdivide the entire land for all the beneficiaries to have a frontage touching the main road and inherit the homestead area.
27. Agnes Bundotich and Damaris Jepchirchir Tallam filed written submission dated 23rd June, 2023 and submits that the issues raised by the applicant in his further affidavit to the application dated 17th April, 2023 are baseless and do not form part of the contention in this cause as they are mere allegations meant to attack the character of the Respondent and does not in any way assist this Honourable court in adjudicating the issues at hand on administration of the estate of the deceased.
28. They further submit that in response to the application dated 17th April, 2023, she confirmed that she has the original title deed in respect to all that parcel of land known as Lembus Kabunyony/ Moringwo/41 in her custody and she has never refused to submit the same to Koibatek Lands office but has kept the title deed to protect her interests and that of some of the beneficiaries of the estate, particularly the female beneficiaries, whose entitlement in the estate, pursuant to the confirmation of grant was at risk.



29. They restate averments in their affidavit and further that in view of failure by Respondents in the application dated 2nd May, 2023 to file response, the application stands unopposed. She concluded that the prayer to surrender title deed is aimed at denying her the rights to protect her interests and that of her sisters who have always been discriminated on by their brothers on the basis of gender contrary to Article 27 of *the Constitution* of Kenya which calls for equality and freedom from discrimination.; that the Applicant had coerced her and her sisters to agree to allocation criterion which according to her was in all respects unfair and discriminatory; that application dated 2nd May, particularized how the proposed mode of allocation of the estate to individual beneficiaries could unfairly give advantage to the male beneficiaries as against their sisters. She prayed for fair distribution.
30. They submit that section 27 of the *Law of Succession Act* gives powers to the court to make any discretionary order and impose such condition as it deems fit. They urge this court to allow their application dated 2nd May, 2023 and adopt as drawn, the survey plan annexed to the application as AB-2 in the applicant's supporting affidavit as the agreed sub-division plan and to order the apportionment, distribution and actual allocation of subdivisions of the estate property to be done by way of secret balloting as it was *in Re Estate of Thiaka Benjamin(deceased)* 2020 eKLR where the court held that granting the prayer for balloting, in view of the circumstances will place all the beneficiaries at par, and the process will be transparent.

Determination

31. I have considered the applications dated 17th April, 2023 and 2nd May,2023, response thereto and the written submissions by parties. There is no dispute on distribution of the estate of the deceased as per Grant confirmed on 23rd day of March, 2022. What is in dispute is positioning of the portion of each beneficiary. There is also no dispute that Agnes Bundotich is holding title deed to deceased's parcel LR. No. Lembus Kabunyony/moringwo/41 which is subject for distribution among beneficiaries herein. The reason she has given for holding the title deed is dissatisfaction with the position she has been allocated together with her sisters. I consider the following as issues for determination: -
- i. Which criteria should be used to identify position of share of each beneficiary.
 - ii. Whether the court should adopt the survey plan exhibited as AB-2 as drawn be adopted as the agreed sub-division plan.
 - iii. Whether the administrators should be compelled to file accounts of the estate.

(i) Which criteria should be used to identify position of share of each beneficiary

32. I have considered averments in affidavits filed in support of applications dated 17th April,2023 and 2nd May, 2023 together with submissions filed. From the application dated 17th April, 2023 survey work had been completed and transfer forms on some properties had been duly prepared but Agness Bundotich who is one of the administrators declined to release original title deed for process of distribution to be completed; and the main prayer in the application is an order to compel Agness Bundotich to surrender the original title deed for that parcel namely Lembus Kabunyony/Moringwo/41 together with all completion documents belonging to the rest of the beneficiaries which are in her custody.
33. As observed above, Agnes Bundotich does not deny holding the title deeds but allege unfairness in positioning land allocated to her and her sisters. The issue of distribution has already been resolved.



34. The two administrators state that they have already concluded the sub-division of the land and are ready to transfer the properties in the names of the beneficiaries save for Agness Bundotich and Damaris Tallam who are not agreeable to their allocation.
35. By Judgment delivered on 23rd March, 2023, the court confirmed Grant dated 3rd March, 2021 and ordered that the estate property be distributed equally among the deceased's grandchildren. A certificate of confirmation of grant was subsequently issued on 26th April, 2023 to that effect
36. From the averment of administrator Patrick Bundotich in his application dated 2nd May, 2023, survey was undertaken and the estate property divided into 10 equal portions. He states that subdivision was done in the presence of all the other beneficiaries save for Agnes Bundotich who refused to attend. He said all beneficiaries confirmed they were satisfied with subdivision save for Agnes Bundotich and Damaris Tallam. He said Agnes Bundotich is in occupation of her portion and she is utilizing it by cultivating.
37. Under Part V Specifically Sections 35, 38 and 40, of the *Law of succession Act* property of the deceased should be distributed equally amongst the beneficiaries of the deceased. The question that arises is whether the distribution should be equal or equitable. Sections 35(5) and 38 in fact use 'equally' as opposed to 'equitably' as a formula for distribution among children. There is no doubt that mathematical equality in land without considering position can result in value variation which may result in an absurdity where few take areas with higher value or land is divided into strips incapable of any meaningful land use. For me therefore, distribution even when made equally must also be reasonable and the resultant parcels must be usable land.
38. In the case of *John Maina Gakuo & Another v Veronica Wanjiku Gakuo* (2020) eKLR the court stated as follows: -
- “ Thus, the notion of equality of shares amongst the houses or the children, is not the decisive factor in the distribution of a net intestate estate in a polygamous family set-up; rather, it is equity, fairness and, ultimately the discretion of the court that count; exercise of that discretion in any particular way will, of course, take into account those factors that have been expressly specified in section 40(1) as necessary and, no doubt, the peculiar circumstances of each particular case. It does not, therefore, always follow that the house with the largest number of children will, as a matter of course, be entitled to the lion's share of the estate”.
39. There is no doubt that it may be impossible to distribute the estate property with a scientific or mathematical precision. What the court should strive to achieve is a fair and equitable distribution of the estate property. The court has to consider, for example, whether it is fair, just and equitable to ensure minimum interruption or inconvenience institutions where beneficiaries have already settled on the ground.
40. It is not disputed that land touching tarmac road is of higher value as opposed to that on the hilly side. It would be fair for all beneficiaries to get a share of the land by the tarmac road and also that on the hillside. I am of the view that beneficiaries be allocated equal portions touching the tarmac and equal portions on hilly party and due consideration to be given to ensure that with permanent constructions remain with the developer.
41. Agness Bundotich and her sister prayed for the proceeds of the sale of the trees to be returned and or valued and the amount paid back to the estate and to be distributed equally among the beneficiaries and the other trees remaining in the subject land are now shadowed with probable disposal by their brother.



42. 6th objector confirmed that trees were cut from the land and sold. In my view, the Administrator should account for the proceeds from trees harvested from the deceased's land and the same be shared equally between beneficiaries.
43. Final Orders: -
- a. Lembus Kabunyony/Moringwo/41 to be shared equally between the deceased's 10 beneficiaries.
 - b. Administrators to account for proceeds of sale of trees harvested from deceased's land LR Lembus Kabunyony/Moringwo/41 and the same be shared equally between the 10 beneficiaries.
 - c. Each beneficiary to get equal portion of land touching the tarmac and another equal portion on the hilly part of the land. The distribution to be done with minimal interference on permanent developments if any exist on the ground.
 - d. Agnes Bundotich to surrender title deed for Lembus Kabunyony/Moringwo/41 to land registrar to facilitate distribution of the estate and the Deputy Registrar of this court shall sign all the relevant documents to effect the transfer of the properties to the beneficiaries.
 - e. Each party to bear own costs of the applications.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 19TH DAY OF OCTOBER 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Karanja- Court Assistant.

Ms Kechem for Administrator/Agnes Bundotich.

Objector – Patrick Bundotich present.

