



In re Estate of of the Late Elisha Chemwetich Kandagor (Deceased) (Succession Cause 155 of 2017) [2023] KEHC 23691 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23691 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 155 OF 2017
HM NYAGA, J
OCTOBER 18, 2023
IN THE MATTER OF THE ESTATE OF THE LATE
ELISHA CHEMWETICH KANDAGOR (DECEASED)**

RULING

1. This Succession Cause relates to estate of Elisha Chemwetich Kandagor who died on 29th August, 2011.
2. On 23rd March, 2017, Rosa Kabon Cheptoo and Christopher Kiplagat Ngetich filed a petition for letters of Administration intestate and set out the following as the survivors of the deceased: -

1st House

1. Emily Talai Chepmwetich – Widow
2. Rose Chelagat Koskei (for the estate of Wilfred Ng’etich)- Daughter in Law
3. Christopher Kiplangat Nge’tich- Son (Adult)
4. Esleen Jepkeiyo Ngetich- Daughter in Law
5. Patrick Kemboi Chebo(for the estate of Magdaline Ngetich-deceased)- grandson
6. Monicah Jeruto Ngetich- Daughter Adult
7. Marylyn Jerono Ngetich- Daughter Adult
8. David T. Ngetich- Son Adult
9. Joyce Jebet Ngetich- Daughter Adult
10. Jerotich Ngetich – Daughter Adult
11. Cecilia Ngetich – Daughter Adult
12. Flora Jepchirchir Ngetich- Daughter Adult



2nd House

1. Rosa Kabon Cheptoo- Widow
 2. Kiptui Ngetich- Son Adult
 3. Seguton Paul Ngetich- Son Adult
 4. Brigid Jebet Ngetich- Daughter Adult
 5. Kennedy Cheptoo Rotich- Son Adult
 6. David Kipyakwai Ngetich- Son Adult
3. According to the Petition for letters of administration, the deceased's estate comprised the following assets, with no liabilities:
- i. Baringo/Sabatia/103/39- 8.6 HA
 - ii. L.R NO. 9413/15 (Kabarak Farm) 20.8 HA
 - iii. Nakuru Municipality Block 29/843(Ronda)
- The total estimated value of the assets was Kshs. 10,000,000/=
4. The grant of letters of Administration intestate was issued to Rosa Kabon Cheptoo and Christopher Kiplagat Ngetich on 16th October, 2017.
 5. When the advocates for the respective parties appeared before court on 24th May, 2023 they informed court that Land Parcel No. Nakuru Municipality Block 29/843(Ronda) is no longer available for distribution as it was sold during the lifetime of the deceased and it is subject of ELC No. 14 of 2012.
 6. They also informed court that there is another property Baringo/Kapchemwoso/648 measuring 5 acres which forms part of the estate and which had been omitted from the schedule of the property belonging to the deceased.
 7. In view of the above, I directed the petitioners to file a fresh application for confirmation of grant and to exclude Land Parcel No. Nakuru Municipality Block 29/843(Ronda)from the assets of the estate and include land parcel no. Baringo/Kapchemwoso/648 among the assets of the deceased's estate.
 8. Subsequently, the 2nd petitioner, Kiptui Ngetich filed an amended summons for confirmation of grant dated 29th May,2023 seeking for orders THAT:-
 - a. The grant of letters of Administration made to Christopher Kiplagat Ng'etich and Rosa Kabon Cheptoo on 16th October 2017 be cancelled and a fresh grant be issued in the names of Chrostopher Kiplagat Ng'etich & Kiptui Ngetich
 - b. The Grant of letters of Administration made to Christopher Kiplagat Ng'etich and Rosa Kabon Cheptoo be confirmed in terms of the proposal submitted by the parties to be considered and determined by this Honourable Court.
 - c. Property title number Baringo/kapchemoswo/648 measuring approximately 5 acres be included among the assets in the estate for distribution in equal share of 2.5 acres to each house.
 - d. Property title number Nakuru Municipality Block 29/843 (ronda) be removed from the list of the assets in the estate on account of the court dispute regarding its ownership.



- e. Costs to be in cause.
9. The Amended Summons is supported by an Affidavit of Kiptui Ngetich dated 29th May, 2023. He depones that on 3rd February, 2018 the co-administrator Rosa Kabon Cheptoo died and in view of her demise, the parties agreed that he be substituted with him and the grant be cancelled and one be issued to Christopher Kiplangat Ng'etich and to him as joint administrators.
 10. He asserts that the deceased's intention was for each house to remain on the matrimonial property he established during his lifetime and that when the deceased married his mother Rosa Kabon Cheptoo around 1969 she was a civil servant working in the ministry of Agriculture in Kabarnet.
 11. He states that upon marriage, his mother was taken by his father to Baringo/Kapchemoswo/648 to establish a matrimonial home where the 1st wife, Emily Talai Chepmwetich also resided and that around 1970 or thereabout, the deceased purchased property title number Baringo/Sabatia/103/39 measuring 21 acres and relocated his 1st wife.
 12. That in 1971, the deceased relocated his mother to join the 1st wife in Sabatia farm and in 1972 the 1st wife ejected his mother from there and she moved back to Kapchemoswo/648. Subsequently, his parents purchased Kabarak farm and his mother relocated from Kapchemoswo/648 and settled on the Kabarak Farm from the late 1970s until her demise in 2018.
 13. He contends that his parents were of old school of thought and Kabarak Farm was registered solely in his father's name although the acquisition of the same was a joint effort in which his mother was a major contributor.
 14. He avers that members of the 1st house peacefully resided in Sabatia while the 2nd house resided at Kabarak and that when the deceased passed away in 2011 he was buried in Sabatia although he had expressed his wish to be buried in Kapchemoswo.
 15. He further deposes that upon death of the deceased, Christopher Ng'etich and David T. Ng'etich started demanding a share of his mother's matrimonial home and in 2015 they brought goons armed with bows, arrows, spears and pangas and invaded his mother's home and subdivided the land into 2 portions and locked their mother out of the land which she had developed for years for her subsistence.
 16. He depones further that after his father's death, the members of the 1st house subdivided the Sabatia land among themselves and thus the same is not available for distribution.
 17. He states that the conduct of the members of the 1st house is unjust and it would be in the interest of justice and fairness that each family gets the land on which their respective mothers had established their matrimonial homes.
 18. Christopher Kiplangat Ngetich filed an affidavit of protest on 8th June, 2023 asserting that neither he, his advocate nor his siblings were consulted when counsel for the 2nd petitioner filed the amended summons for confirmation.
 19. He asserts that the 1st house do not agree with the mode of distribution of the estate as proposed by the 2nd petitioner as the same leaves each of them enjoying greater parcels of land, thereby inadvertently punishing them since their mother was blessed with more children.
 20. He contends that the summons for confirmation of grant is also inadequate and scanty as the same is devoid of the requisite consent FORM P & A 38 ordinarily filed concomitantly with the summons for confirmation of grant and this honourable court has now been left with an uphill task of deciphering



whether their proposal for division of the deceased's property was acquiesced by all the beneficiaries or the same was just the wishes of the 2nd petitioner (Kiptui Ngetich).

21. He proposed that assets of the deceased estate i.e. Baringo/Kapchemoswo/648, measuring 5 acres; Kabarak Farm L.R No 9423/15 I.R 57223 measuring 52 Acres; & Baringo/Sabatia/103/39 measuring 20 acres be shared amongst Emily Talai Chemwetich Kandagor; Estate of Wilfred Kipkemoi Ng'etich; Christopher Kiplagat Ng'etich; Esleen Jepkeiyo Ng'etich; Estate of Magdaline Ng'etich; Monica Jeruto Ngetich; Maryline Jerono Ngetich; David T. Ng'etich; Joyce Jebet Ng'etich; Jerotich Ng'etich; Flora Jepchirchir Ng'etich; Kiptui Ng'etich; Seguton Paul Ng'etich; Brigid Jebet Ng'etich; Kennedy Cheptoo Rotich; & David Kipyakwai Ng'etich.
22. He states that the above proposal has taken into articulation their mother as one of the units of the beneficiaries of the 1st house which is line with Section 35 as read with Section 40 of the Succession Act.
23. He avers that their proposal is the most equitable and fairest way in ensuring that all the beneficiaries benefit from the deceased's estate as the same has taken into account the number of children in each house as units.
24. He prays that this Honourable Court proceeds to strike out the amended summons for confirmation of grant and allow his proposal in regards to the distribution of the Estate of the deceased.
25. Joyce Jebet Ng'etich ,the beneficiary of the 1st house swore an affidavit dated 31st May,2023 proposing the assets of the deceased's estate to be distributed as follows:-

Kabarak Farm L.R NO. 9423/15 I.R 57223 measuring 52 acres

- i. 4 acres along Nakuru-Marigat Road be hived off to make 16 quarter acre commercial plot and each beneficiary to get a share of a commercial plot.
- ii. 1 acre to be given to the surviving widow, Emily Talai Chepmwetich Kandagor.
- iii. The homestead of the 2nd widow, be preserved and the homestead to be made up of 1 acre.
- iv. The balance of 46 acres be shared as follows:Each son of the deceased to get 3.5 acres while 3.5 acres to be shared amongst Rose Chelagat Koskei (for the estate of Wilfred Kipkemoi Ngetich(deceased); Christopher Kiplagat Ngetich; David T. Ngetich; Kiptui Ngetich; Seguton Paul Ngetich;Kennedy Cheptoo Rotich and David Kipyakwai Ngetich and each daughter of the deceased to get 2.5 acres the said daughters are; Esleen Jepkeiyo Ngetich;Patrick Kemboi Cheboi (for the estate of Magdalene Ngetich-deceased); Monicah Jeruto Ngetich; Marylin Jerono Ngetich;Joyce Jebet Ngetich;Jerotich Ngetich;Flora Jepchirchir Ngetich; and Brigid Jebet Ngetich.

v. 1.5 acres be provided for as a road reserve.

Baringo/sabatia/103/39 measuring 20 acres

- i. Homestead of the 1st Widow to be given 2 acres
- ii. 18 acres to be shared as follows;
 - a. 7 sons of the deceased to get 1.8 acres each.
 - b. Each of the 8 surviving daughters of the deceased to get 0.5 acres each
 - c. 1.4 acres be provided for as a road reserve.

Baringo/kapchemoswo/648 Measuring 5 acres



- Each house to get 2.5 acres to be held in trust by the administrators of the respective houses.
26. She avers that Cecilia Ngetich (Deceased) was not survived by any child.
 27. She believes that the above proposal is fair and equitable and prayed that this court adopts it.
 28. The Summons was canvassed by way of written submissions.

1st Petitioner's Submissions

29. The 1st Petitioner submitted that the only free properties of the deceased available for distribution are Baringo/Sabatia/103/39 measuring 21.24 Acres; L.R No. 9431/15(Kabarak Farm) measuring 51.4748 Acres; & Baringo/KApchemuswo/648 measuring 4.9153 Acres.
30. He proposed that Baringo/Sabatia/103/39 measuring 21.24 Acres; L.R NO. 9431/15(Kabarak Farm) measuring 51.4748 Acres be distributed in equal shares among all the children adding the widows of the deceased as units.
31. Regarding property Baringo/Kapchemuswo/648, he submitted that it is too uneconomical and tiny to be shared among 16 individuals. He urged this court to exercise its discretion and order that the same be sold at the best market value and the proceeds therefrom be used to offset the Estates known and verified creditors including all the legal fees for this matter.
32. In support of his submissions, the 1st petitioner relied on Section 40 of the [Law of Succession Act](#) and the cases of; Mary Rono vs Jane Rono & another [2005] eKLR where the court held that

“...Section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.” A “house” in a polygamous setting is defined in section 3 of the Act as a “family unit comprising a wife ... and the children of that wife”. There is no discrimination of such children on account of their sex...”

In Re Estate of John Musambayi Katumanga (Deceased) [2014] eKLR- where the court stated that the provisions of Section 35, 38 and 40 are in mandatory terms which envisage equal distribution of the property among the surviving children irregardless of their ages, gender and financial status of the children. In re Estate of Ainea Masinde Walubengo (Deceased) [2017] eKLR – where the court guided by Section 40 of the [Law of Succession Act](#) stated that distribution of the estate of the deceased should be according to each house taking into account the number of children in each unit including the surviving widow. In re estate of Kimitei Cherop (deceased) (2021) e KLR where the court held that;

“It is manifest therefore that, guided by the provision of Section 40 (1) of the [law of succession Act](#), the estate herein ought to be distributed equally amongst children of the deceased and the surviving widow, thus making 10 units... that being the case, it is the 15.5 Hectares that must be shared equally amongst the 10 units aforementioned”

2nd Petitioner's Submissions

33. The 2nd petitioner submitted that during the lifetime of the deceased, his two wives resided in two separate matrimonial houses that are about 40 kilometres apart. That the 1st widow and her children always resided and still resides in property title number Baringo/Sabatia/103/39 where the deceased was buried while the 2nd widow resided with her children in Property L.R NO. 9413/15 Kabarak Farm during her life time for over 40 years.



34. The 2nd petitioner contended that in 2015 the objector and David T. Ngetich forcefully and violently invaded property L.R NO. 9413/15 (Kabarak Farm) and divided it into two and thereafter took possession and occupation of 26 acres which they have occupied since then. He averred that the dispute among the two houses was litigated in Nakuru Citation Cause No. 869/2014, Nakuru Citation Cause No. 6/2015 and Nairobi Succession Cause No. 2773/2015 and on 9th December, 2016 the court in citation number 869/2014 ordered that the two houses each avail a representative who would apply for grant of letters of administration.
35. The 2nd petitioner proposed two modes of distribution.
36. In the first option, he proposed that;The 1st house to have Baringo/Sabatia/103/39 in its entirety while the second house entirely gets L.R NO. 9413/15 (Kabarak Farm). The reason for this is that the deceased had settled his two houses in the above respective properties and the members of the two houses do not enjoy a cordial relationship.In the alternative he proposed that the members of the 2nd house to get 21.24 acres (8.6 hectares) in Kabarak Farm which is a size equivalent of the size in Baringo/Sabatia/103/39 and thereafter they subdivide it among themselves.The court to order that 30.2338 acres be set aside in the locality of the homestead of the 2nd deceased widow particularly where she is buried to be taken as her matrimonial home and burial ground for her and her descendants.The court to order that the 16 acres fronting Nakuru Kampi ya Moto Road be subdivided and each child of the deceased to be allocated 1 acre for potential business development.The court to order that the remaining 10 acres of Kabarak Farm be sold at the current market value and the proceeds thereof be distributed equally among the 16 children of the deceased.Property title number Baringo/Kapchemoswo/648 be distributed equally between the 2 houses each getting 2.5 acres
37. In the 2nd option, the 2nd petitioner proposed that;The 1st house to get Baringo/Sabatia/103/39 in whole, the 2nd house to get 21.241 acres in Kabarak farm and the remaining 30.2338 acres in Kabarak Farm be sold and the proceeds be distributed equally among all the beneficiaries.Property title number Baringo/Kapchemoswo/648 be subdivided equally between the 2 houses each getting 2.5 acresMembers of the 2nd House do have priority to choose which part of Kabarak Farm they desire the 21.241 to be set aside.The court to order Christopher Kiplagat Ngetich and David T. Ngetich to demolish and remove all structure they erected in Kabarak Farm and vacate the property within a specified time frame.The administrators be at liberty to source for a purchaser(s) of the 30.2338 acres but all beneficiaries to be informed of the purchase price offered.Legal charges for Advocates to be paid from the proceeds of the sale of the 30.2338 acres.
38. The 2nd petitioner argued that although one of the key principles of Succession Law is to promote equal distribution of the assets of the estate of the deceased who died intestate, there will occasionally be circumstances peculiar to a case. The 2nd Petitioner relied on the case of *In re Estate of Godana Songoro Guyo (Deceased)*[2020] eKLR for the proposition that there are extra ordinary circumstances making equal sharing of the assets amongst the children and the spouse repugnant to justice.

Daughters of the 1st House Submissions

39. The beneficiaries herein submitted that the provisions of Section 40(1) of the *Law of Succession Act* provides for guidelines for distribution of the estate of a polygamous intestate. In support of his submissions, they cited the cases of *Lucy Nyaruai Gachoki vs Loise Wambui Gachoki* [2017] eKLR; *In re Estate of Michael George Tendwa Said (Deceased)* [2020] eKLR; *Scholastic Ndululu Sura versus Agnes Nthenya Sura* [2019] eKLR; *In re Estate of Eliud Wanyama Saratuki (Deceased)* [2019] eKLR which acknowledged this position.



40. They urged this court to distribute the estate according to their affidavit of Joyce Jebet Ngetich dated 31st May, 2023.
41. Regarding the proposal by the 1st Petitioner, the beneficiaries submitted that the same may not be in the best interest of the family whereas the proposal by the 2nd petitioner is not tenable as there is no evidence that Kabarak Farm is a matrimonial property and was also purchased by the 2nd widow.

Analysis & Determination

42. The issue for determination by this court is which mode of distribution should be adopted by this court in distributing the deceased's estate.
43. It is no doubt the deceased was polygamous and had two wives. Section 40(1) of the [Law of Succession Act](#) provides for the mode of distribution to be adopted by the court in the event that the deceased was polygamous. The said section provides that;

“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.”

44. The Court of Appeal in *Scolastica Ndululu Suva vs Agnes Nthenya Suva* [2019] eKLR expressed itself at paras 15-21 as hereunder:

“In *Mary Rono vs Jane Rono & another* (supra), Waki JA in the leading judgment, accepted the proposition that the Court had the discretion in ensuring a fair distribution of the deceased's estate but that the discretion must be exercised judicially on sound legal and factual basis....It is therefore evident, that, although section 40 of the [Law of Succession Act](#) provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”

45. In *Douglas Njuguna Muigai vs John Bosco Maina Kariuki & Another* [2014] eKLR the court cautioned on the blind application of section 40 of the [Law of Succession Act](#). The court observed as follows:

“(17) It is therefore evident, that, although section 40 of the [Law of Succession Act](#) provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”

46. The Court in *Re Estate of John Musambayi Katumanga – Deceased* [2014] eKLR held as follows:

“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is ‘equally’ as opposed to ‘equitably’. This is the plain language of the provisions. The provisions are in mandatory



terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

47. Re Estate of Chesimbili Sindani (Deceased) [2021] eKLR, where the Court noted the following:

“The estate shall be distributed amongst all the children, regardless of their gender and marital status. There is no consent or consensus amongst the children on distribution, and, in the circumstances, I shall follow the position stated by the Court of Appeal in *Justus Thiora Kiugu, & 4 Others vs. Joyce Nkatha Kiugu & Another* [2015] eKLR (Visram, Koome and Otieno-Odek JJA), that where the parties filed consents on distribution, the court would have no reason not to endorse the distribution proposed, so long as the same had the concurrence of all the persons beneficially entitled, even if the proposed distribution departed from what the law provided on distribution. However, where there is no consensus, the court strictly applies the law.”

48. With the above principles in mind, I will now proceed determine the above issues.

49. It is in no doubt that the deceased estate comprises of three assets namely; Baringo/Sabatia/103/39; L.R No. 9431/15(Kabarak Farm); & Baringo/Kapchemuswo/648.

50. I will first deal with 1st property namely Baringo/Sabatia/103/39. The first petitioner has asked this court to equally divide this property to the deceased’s beneficiaries while the 2nd petitioner has advanced two options, the first one being that this property should devolved entirely to the beneficiaries of the first house for reasons that that is where the 1st widow lived and currently lives with all her children. The daughters of the 1st house on their part proposed that 2 acres of the property to be given to the only surviving widow, 1.8 acres to each son of the deceased, 0.5 acres to each daughter and 1.4 acres be provided for as a road reserve.

51. The contention by the 2nd petitioner that this property has since been subdivided amongst the beneficiaries of the 1st house is not supported by any evidence. It is however undisputed that the deceased was buried in this parcel of land and all the children of the 1st house lived on this parcel prior the deceased’s death.

52. The assertion by the 2nd petitioner that the 1st widow ejected her mother from the above property in the year 1972 amounts to mere hearsay, as these words did not come from the widow herself. What is clear is that the children of the second house were not living on this property(Sabatia) prior the deceased’s death.

53. Regarding the Kabarak Farm, I find the 1st proposal by the 2nd petitioner to have the property devolve entirely to the 2nd house untenable because the land herein is bigger in size than the land parcel BARINGO/SABATIA/103/39.

54. Evidently, the land in Kabarak Farm appears to be the main bone of contention, given its location and size, hence its value. Unfortunately, the parties did not find it fit to have the estate valued. If that had been done I would have had an easier time in distributing the estate.

55. In the circumstances, I direct that the Kabarak Farm and Sabatia properties be valued by a licensed valuer(s). The parties can agree on a joint valuer in the next 90 days and in the event they cannot agree then each house is to proceed to engage their own. In the event of a joint valuation the beneficiaries from the 2 houses shall share the costs equally.



56. With respect to land parcel Baringo/Kapchemoswo/648 measuring 5 acres, this appears to be the deceased's ancestral home. I find the proposal to have the land sold to be inappropriate. Ancestral land has sentimental value to the African family. It gives the family an identity of some kind. Selling it to strangers may not only erase that identity but also raise conflict with other members of the deceased's family. I think that the best way is to have the said property preserved for both houses.
57. Therefore for the above land at Kapchomwuso, I will divide the same in a ratio that caters for all the beneficiaries, including the widows, equally. I have been informed that Cecilia Ngetich from the 1st house is deceased and that she did not have children. If that is the case, then her share shall be distributed amongst the other beneficiaries. That leaves the 2 houses with a ratio of 10:5 (or 2:1) as between the 1st house and the 2nd house respectively, excluding Cecilia. The said property will be divided into that ratio. A licensed surveyor will be enlisted to divide the said land equitably. Once subdivided, each house shall agree on how to deal with their respective portions. The costs of subdivision shall be met by the members of the two houses in the same ratio.
58. Having considered all the issues raised in this cause, I make the following final orders: -
- a. The Grant of Letters of Administration issued to the Christopher Kiplagat Ng'etich and Rosa Kabon Cheptoo on 16th October, 2017 be and is hereby revoked.
 - b. Fresh grant be and is hereby issued to Christopher Kiplagat Nge'tich and Kiptui Ngetich.
 - c. Baringo/Kapchemoswo/648 being part of the estate be and is hereby included in the list of assets of the deceased's estate. The said parcel of land to be subdivided as set out above.
 - d. Nakuru Municipality Block 29/843 (Ronda) being not part of the estate be and is hereby excluded from this cause.
 - e. That Baringo/Sabatia/103/39 and LR No. 9431 (Kabarak Farm) to be valued as set above, pending further directions of the court.
 - f. Each party shall bear its own costs noting that the claim herein is a succession cause involving family members.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 18TH DAY OF OCTOBER, 2023.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

K. Mbugua for 1st Petitioner and holding Brief for 2nd Petitioner

Mr. Langat for beneficiaries of 1st house

