



**In re Estate of Kipketer Arap Rotich (Deceased) (Succession Cause
191 of 2008) [2023] KEHC 23690 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 191 OF 2008**

JK SERGON, J

OCTOBER 12, 2023

IN THE MATTER OF THE ESTATE OF KIPKETER ARAP ROTICH (DECEASED)

JUDGMENT

1. The matter is about the estate of Kipketer Arap Rotich (deceased) who passed away on 24th March, 2004 while married to five (5) wives. The deceased had several properties and shares in various companies in Kenya. At the time of the demise of the deceased herein, the families were living peacefully on their respective farms, however, since the succession matter was filed, the families of the deceased have not agreed on the best mode of distribution.
2. This succession cause was filed on 5th December, 2008 and owing to disagreements the same was gazetted on 14th December, 2018 (ten years after it was filed) and the court issued an interim grant through letters of administration intestate (P&A41) on 24th September, 2019.
3. The matter was referred for mediation by this court. The parties went through mediation proceedings and the mediator filed a report that the parties reached a partial settlement dated 31st May, 2022, in which they agreed on a list of assets of the deceased and administrators of the estate however, they did not reach a settlement on the mode of distribution of the estate and therefore requested that the matter be referred back to court for determination and further direction.
4. Since 24th September, 2019 efforts including mediation by a court annexed mediator the families have failed to reach amicable distribution of the estate hence this court issued directions that the matter be canvassed by written submissions. It is therefore in the interest of justice to have this matter resolved.
5. During the mediation proceedings all the parties were in attendance and agreed on a list of assets of the deceased as follows; Kericho/kipsonoi 5.5 24 Area (22.9) Acres, Kericho/cheborgei 61 Area (2.2) Ha, Kericho/cheborgei 64 Area (1.4) Ha, Kericho/cheborgei 72 Area (2.63) Ha, Plot No. 32 Cheborgei Market 50*100 Ft, Molo South/keringet Block 2/61 Kirobon Area 13 Acres, Molo South/keringet Block 2/95 Kirobon Area 17 Acres, Nakuru/rongai/leketyo Farm Plot No. 465 Area 2 Acres, Nakuru/rongai/leketyo Farm Plot No. 363 Area 2 Acres, Nakuru/rongai/leketyo Farm Plot No. 811 1.8 Acres .



6. However, the parties did not agree on the mode of distribution and the matter was referred back to court for further direction.
7. This court on 4th July, 2023 directed that the matter be canvassed by written submissions. The parties filed written submissions and set out their preferred mode of distribution for this court's consideration.
8. The parties filed written submissions which I have considered.
9. The 1st, 4th and 5th Houses submitted that the deceased passed away on 24th March, 2004 while married to five (5) wives, he had several properties and had settled each of his wives. They further submitted that the deceased owned shares in various companies at the time of death and that he left behind forty-nine (49) beneficiaries and dependents.
10. The beneficiaries of the 1st, 4th and 5th Houses urged this court to adopt a fair mode of distribution that takes into consideration the earlier attempt by the deceased to settle each in its own distinct parcel of land and the number of years in marriage and degree of emotional support to the deceased and contribution towards acquisition of the property. They cited the Court of Appeal case of *Scolastica Ndululu Suva v Agnes Nthenya Suva* [2019] eKLR in which the court of appeal stated that courts have 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.
11. The beneficiaries of the 1st, 4th and 5th Houses argued that the estate of the deceased had been distributed and bequeathed by the deceased as per paragraph 2 of their written submissions and that nothing was free and/or available for distribution save for the shares and unoccupied parcels of land, in which the beneficiaries have not agreed on the mode of distribution.
12. They therefore submitted that section 40 of the *Law of Succession Act* should apply in respect of the distribution of the estate of the deceased noting that he was polygamous and that the court should exercise its discretion judicially based on sound legal and factual basis and put into account the factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate. They cited the case of *Douglas Njuguna Muigai v John Bosco Maina Karuiki & Another* where the court noted the absurdity of a blind application of section 40 and stated that although section 40 of the Law of Succession provides a general provision for the distribution of the estate of a polygamous deceased person the court has the discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.
13. The beneficiaries of the 1st, 4th and 5th Houses urged the court to uphold the deceased wishes wherein the deceased in his lifetime settled each of the five houses in the various parcels, all of whom took possession and have used, developed and lived thereon to date. They cited the case of *In re Estate of Nzolove Kisuke alias Daudi Nzolove Kisuke (Deceased)* [2022] eKLR where the court declined to interfere with the deceased's clear intentions and stated that the court cannot substitute its discretion in favour of that of the deceased. They further submitted that on the free parcels of land particularly Molo/Rongai/363, 365, 366 & 367 and the shares should be distributed equally amongst the beneficiaries, and for the shares where equal distribution may not suffice, the shares should be sold and proceeds distributed equally amongst the five houses.
14. The beneficiaries of the 1st, 4th and 5th Houses argued that should the court fail to consider the fact that the deceased had settled each house in its own distinct parcel of land, owing to the lack of consensus amongst the five houses on mode of distribution, the court should strictly follow the provisions of the law and invoke section 38 of the *Law of Succession Act*. They cited the case of *Re Estate of Chesimbili Sindani (Deceased)* [2021], in which the court noted that in cases where there is no consent or consensus among beneficiaries, the court strictly applies the law, the court proceeded to



- distribute the subject estate among all (the five houses) children, regardless of their gender and marital status.
15. The 1st, 4th and 5th Houses urged the court to consider an additional seven (7) acres to the first wife of the deceased owing to her longevity in the marriage and her contribution towards purchase of these properties by the deceased.
 16. The beneficiaries of the 1st, 4th and 5th Houses then set out their preferred mode of distribution in paragraph 18.
 17. The beneficiaries of the 2nd and 3rd House submitted that a grant of letters of administration intestate of the estate of the deceased was issued on 24th September, 2019 and summons for confirmation of grant dated 10th February, 2021 were protested by two objectors namely Alice Chepkemioi Rotich And Rusi Chepngeno Rotich.
 18. The beneficiaries of the 2nd and 3rd House submitted that the petitioners in their proposed mode of distribution listed an inventory of the deceased's asset but did not include property known as Kericho/ Kipsonoi S. S/32 which was transferred to Grace Chepkirui Rotich measuring ten-point seven 10.7 Ha which formed part of the estate of the deceased.
 19. The beneficiaries of the 2nd and 3rd House opposed the mode of distribution proposed by the 1st, 4th and 5th House. They maintained that in the instant case the deceased died intestate and was a polygamous man survived by 5 widows and children and therefore the applicable law in this case was section 40 of the Law of Succession Act and cited the several cases to wit In *Estate of Nelson Kimotho Mbiti (Deceased)* HC SC No. 169 of 2000 and In *The Estate of Ainea Masinde Walubengo (deceased)* (2017) eKLR in the courts stated that the estate of a polygamist is to be divided in accordance with the provisions of section 40 of the Law of Succession Act, and the estate was divided into units according to the number of children in each house, with the widows being added as additional units.
 20. The beneficiaries of the 2nd and 3rd Houses contended that they were not agreeable to proposed mode of distribution preferred by the 1st , 4th and 5th Houses because the property known as Kericho/ Kipsonoi S.S/32 which was transferred to Grace Chepkirui Rotich measuring ten-point seven (10.7) Ha yet it formed part of the estate of the deceased. They cited the case of *Al-Amin Abdulrehman Hatimy v Mohamed Adbulrehman Mohamed & another* [2013] eKLR in which the court stated that in succession causes it is the duty of a litigant to make full and fair disclosure of material facts.
 21. The beneficiaries of the 2nd and 3rd House urged the court to take cognisance of the fact that the land parcel known as Kericho/ Kipsonoi S.S/32 measuring 10. 7 Ha which was transferred to the Grace Chepkirui Rotich of the 1st House was part of the estate of the deceased, they therefore proposed that the residual land parcels forming properties of the estate of the deceased and the shares forming part of the properties of the estate should devolve to the entitled beneficiaries equally. They cited the case of the *Re Estate of John Musambayi Katumanga (Deceased)* [2014] eKLR in this case the court stated that the spirit of Part V of section 35, 38 and 40 espouses equal distribution of the intestate state among the children of the deceased, the court placed emphasis on equally as opposed to equitably and further expounded that equal distribution is envisaged regardless of the ages, gender and financial status of the children. They therefore maintained that the court should adopt their proposed mode of distribution.
 22. I have considered the submissions herein and the proposed mode of distribution by all the parties herein and the issues warranting this court's intervention are whether land parcel Kericho/ Kipsonoi S.S/32 measuring 10.7 HA forms part of the estate of the deceased and how the deceased's property should be distributed on account of the lack of consensus between the beneficiaries of the estate.



23. On the issues as to whether Kericho/KipsonoiS.S/32 measuring 10.7 HA constitutes the estate of the deceased, I have considered the submissions by the 2nd and 3rd House on the fact that Grace Chepkirui Rotich the widow of the 1st House is the registered proprietor of Kericho/KipsonoiS.S/32 measuring 10.7 HA as per a certificate of search which was filed in this court and that the same was transferred to her in the lifetime of the deceased. The 2nd and 3rd Houses allege that the same formed part of the estate of the deceased, a fact that was never disclosed to this court during the succession proceedings. However, I find that the parties went for mediation proceedings and arrived at a partial settlement on the list of assets by the deceased herein, which partial agreement was filed in this court and this particular land parcel was not deliberated upon in the mediation proceedings and therefore I find it untenable that the 2nd and 3rd Houses are attempting to bring it up in their submissions as it being part of the estate of the deceased.
24. On the how the estate of the deceased should be distributed, based on the fact that the beneficiaries are not in agreement on the mode of distribution this court is duty bound to distribute the estate of the deceased as prescribed under section 40 Law of Succession Act given that the deceased was polygamous and died intestate, however, the court should also take into account the factual circumstances of this case. In the court of appeal case of *Scolastica Ndululu Suva v Agnes Nthenya Suva* [2019] eKLR the court observed as follows: "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."
25. I have considered both modes of distribution preferred by the various houses in their submissions. I have considered the fact that the deceased, prior to his demise had settled each of his five wives as follows;
- (i) Kericho/KipsonoiSS/24 (22.9 Acres) - 1st Wife
 - (ii) Kericho/Cheborgei/61 (5.434 Acres) - 2nd Wife
 - (iii) Kericho/Cheborgei/72 (6.495 Acres) - 3rd Wife
 - (iv) Kericho/Cheborgei/64 (3.458 Acres) - shared by 2nd and 3rd Wife
 - (v) Plot No.32 (Cheborge Market) AREA (50*100 Ft) - proceeds to be shared by the 2nd and 3rd Wife
 - (vi) Molo South/Keringet Block 2/61 Kirobon Area13 Acres - 4th Wife
 - (vii) Molo South/Keringet Block 2/95 Kirobon Area17 Acres - 5th wife
26. I have noted that the 1st, 4th and 5th Houses in the preamble of their submissions included two additional unoccupied properties to constitute the estate of the deceased to wit Nakuru/Rongai/Leketyo Farm Plot No.366 AREA 2 Acres - not occupied and (ii) Nakuru/Rongai/Leketyo Farm Plot No.367 AREA 2 Acres - not occupied however, they did not provide sufficient proof in the form of certificate of title or certificate of official search to substantiate their assertion that the said parcels were owned by the deceased and hence are part of his estate.
27. Taking cognizance of the fact that the deceased in his lifetime settled each of the five houses in distinct parcels, all of whom took possession and have used, developed and lived thereon to date. This court will therefore uphold the wishes of the deceased and maintain the same as follows;
- (i) Kericho/KipsonoiSS/24 (22.9 Acres) - 1st House



- (ii) Kericho/Cheborgei/61 (5.434 Acres) - 2nd House
- (iii) Kericho/Cheborgei/72 (6.495 Acres) - 3rd House
- (iv) Kericho/Cheborgei/64 (3.458 Acres) - shared by 2nd and 3rd House
- (v) Plot No.32 (Cheborge Market) Area(50*100 Ft) - proceeds to be shared by the 2nd and 3rd House
- (vi) Molo South/Keringet Block2/61 Kirobon Area13 Acres - 4th House
- (vii) Molo South/Keringet Block 2/95 Kirobon Area 17 Acres - 5th House

28. The unoccupied parcels stated hereunder be distributed as follows:

- (i) Nakuru/Rongai/Leketyo Farm Plot No.465 AREA 2 Acres - be divided equally among all houses each to get 0.4 acres
- (ii) Nakuru/Rongai/Leketyo Farm Plot No. 363 AREA 2 Acres - be divided equally among all houses each to get 0.4 acres

29. It is noted that the deceased had shares in various companies and that all beneficiaries in their submissions concur that the same should devolve upon the entitled beneficiaries equally. I hereby order as follows;

The shares from Kenya Commercial Bank, National Bank of Kenya, Kapkatet Tea Factory, Yaas Angwan Limited, Barclays Bank of Kenya, Bureti Tea Growers Sacco Limited, Sinendet Multipurpose Cooperative Society, Kenya Tea Development Agency, Mau Tea Multipurpose Cooperative Society, Kenya Cooperative Creameries constituting part of the deceased's estate be sold and the proceeds shared equally among the 1st, 2nd, 3rd, 4th and 5th Houses.

30. Consequently, the grant of letters of administration issued by this court on 28th June, 2022 still stands and the certificate of confirmation of grant shall be issued accordingly.

31. For the avoidance of doubt, distribution be done according to the houses. The assets due to each house be registered in the name of the Widow (Wife) or Legal Representative if the widow (wife) is deceased representing the house in trust of the members of each house.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH OCTOBER, 2023

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J.K. SERGON

JUDGE

In the presence of:

Court Assistant - Rutoh

Miss Kitur for the 2nd & 3rd Houses

E. K. Korir for 1st, 4th & 5th Houses

