

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CASE NO 200 OF 2009
IN THE MATTER OF THE ESTATE OF THE LATE MARK WERABUKO
LUCHELI (DECEASED)

BETWEEN

REBECCA MISHELE MARK-----
PETITIONER

AND

EVALIN NASHIMIYU MARK-----
OBJECTOR

JUDGMENT

1. The matter refers to the estate of the late Mark Werabuko Lucheli, who died on 10th May 2006. He left behind two parcels of land, being S/Kabras/Chemuche/565 and 2148, and several beneficiaries listed in the chief's letter dated 29th March 2009.
2. The chief's letter listed the beneficiaries of the deceased as follows;
 - a) Mrs. Rebecca Mishele Mark, 1st widow,
 - b) Mrs. Margret Mark Lucheli, 2nd widow
 - c) Mrs. Evalini Nashimiyu Khakava, 3rd widow,
 - d) Lydia Mark-daughter
 - e) Elijah Lucheli Mark-son,
 - f) Eluid Luvonga Mark- son,
 - g) Harrison Mukoyole Mark- son
3. The deceased's 3 widows jointly applied for a grant of letters of administration, which was issued on 13th August,2009
4. On 14th April 2010, the petitioner, the 1st widow, Mrs. Mishele Mark, applied for confirmation of the grant, where she listed several purchasers, including Nathan Chimoi and David Opaka Odenyi, as beneficiaries of the estate, including his other beneficiaries.
5. The 3rd widow filled a response to the summons by the petitioner where she acknowledged that the deceased had married three wives and deponed that the petitioner had no children and that upon the death of their husband, the petitioner remarried again to Elijah Nandi who also died and that the petitioner filled a succession cause No. 524 of 2017 where she obtained letters of administration for her second husbands estate.

6. She avers that the petitioner had already inherited from her 2nd husband's estate and should not also be allowed to inherit from her 1st husband's estate as well.
7. According to her, the respondent had already subdivided the land parcel No. Kakamega/Chemuche/564 as follows;
 - i. Emily Atsinga Amubundo----- 4.3 acres
 - ii. Peter Lucheli-----2 acres
 - iii. Herself-----3 acres
 - iv. Zipporah Katambani-----7.2 acres.
8. She claimed that Emily Atsinga and Peter Lucheli were not dependents of the deceased and that Zipporah Katambani is the widow of their deceased husband's brother, Christopher Mutsami.
9. She avers that the 2nd widow, Margaret Nabututu, never benefited from the estate of their deceased husband and denied the allegations that she sold a share of the estate and averred that the respondent sold 3 acres of the property to one Timothy Mohammed and Raphael Muhia, and that Mohammed demolished her property.
10. According to Evalini Nashimiyu, the deceased had two properties, S/Kabras/Chemuche/565 and S/Kabras/Chemuche/2148, and that the last property was jointly owned between the deceased and Peter Leseneka, and denied the allegations that their father-in-law bequeathed the land parcel No. 564 as a gift inter vivo, as he had died before the death of their husband.
11. On 23rd January 2022, the 1st petitioner, who is also the 1st widow, filed an affidavit acknowledging that the deceased had three wives and that at the time of his demise, he had the following properties: S/Kabras/Chemuche/565 and S/Kabras/Chemuche/2148.
12. She claimed that the protestor, Evaline Nashimiyu, sold all of South/Kabras/Chemuche 2148 and that she had now encroachment on the parcel of land that was given to herself and the 2nd widow, Margaret Mark Lucheli.
13. On 22nd May 2023, the 1st petitioner filed a further affidavit where she claimed that the property identified as Kakamega/Chemuche/564

did not form part of the deceased estate and claimed that she never remarried to Elijah Nandi whom she claimed was just a friend and disputes the protestors allegation claiming that it was meant to malign her interest as she never bore any children.

14. She avers that the deceased, who died in 2006, was buried in the property that was allocated to her as the 1st wife in accordance with the Luhya customs. She further claimed that all the widows had sold off their allocated land and that Evaline Nashimiyu had sold the entire land allocated to her according to the surveyor's report dated 21st January 2023 to a third party through a sale agreement, which she attached between 7th September and 29th September 2014.
15. According to the petitioner, the 2nd wife, Margaret Lucheli, sold a portion of South Kabras/Chemuche/565 to a third party as per the sale agreement dated between 8th March 2018 and 26th March 2018.
16. She acknowledges selling her portion of the South /Kabras/Chemuche/565 and refers to the surveyor's report dated 21st January 2023 which was contested by the protestor and claims that several purchasers now reside on the land since 2009 without any dispute from the widows and claimed that the deceased estate comprised of 9.3 Ha was equally distributed among the three widows.
17. The petitioner filed her submissions, where she acknowledged the deceased's three wives and four children and the two properties that he owned, being S/Kabras/Chemuche/565 and S/Kabras/Chemuche/2148.
18. In her submission, she raised two issues for determination, namely whether the court ought to confirm the deceased estate as per the surveyor's report and who was entitled to the costs.
19. On the first issue on the confirmation of the grant according to the surveyor's report, she relied on section 28 of the Law of Succession Act on the circumstances the court ought to consider in making an order. She claimed that the deceased had two parcels of land, which he had already allocated to his three wives before his demise, and in each, he had built for them.

20. She claimed that she had unfortunately been evicted from her home and disinherited, despite being the first wife and the deceased having been buried in her section of the property.
21. She claimed that the deceased had settled the first and the second wife on South/Kabras/Chemuche/565 and the third wife on South/Kabras/Chemuche/2148, where he lived with the third wife.
22. According to the petitioner, she was not blessed with a child and that the deceased was buried in her portion of the land in South/Kabras/Chemuche/565 which she sold her portion to Michael Nyongesa while the second wife Margaret Mark Lucheli who resided in South Kabras/Chemuche /565 sold her portion of the land to 7 purchasers, while the third widow Evaline Nashimiyu Mark equally sold her portion of the land South Kabras/Chemuche/2148 to seven purchasers who have since erected permanent houses in the land.
23. She relied on section 40 of the law of succession, where the deceased was polygamous, and the distribution of her estate. She relied on the matter **of Re Estate Benson Ndirangu Mathenge Nakuru HCSC NO.231 of 1998** and in the matter of **Estate of Nelson Kimotho Mbiti (deceased) HCSC NO.169 OF 2000.**
24. She prayed that the court exercises its discretion and take into account the peculiar circumstances of the case, so that the occupants of the estate interests are protected.
25. The petitioner claims that she was illegally displaced from her matrimonial home by the objector despite not having children and claims that she is entitled to her share as the 1st wife and pray that the court order the objector to leave the petitioner's home in the land parcel south /Kabras/Chemuche/565 and to relocate to her parcel of land in South /Kabras/Chemuche/2148.
26. They pray that the costs be borne by each party.
27. The respondent had not filed submissions at the time of writing the judgment

Analysis and determination

28. Having analysed the parties' pleadings, affidavits, and submissions before the court, I find the following issues for determination:
- a) *Whether the Petitioner, Rebecca Mishele Mark, is entitled to inherit from the estate of the deceased, given her alleged remarriage and inheritance from her second husband's estate.*
 - b) *Whether the parcels of land, South Kabras/Chemuche/565 and South Kabras/Chemuche/2148, form part of the deceased's estate and how they should be distributed among the beneficiaries.*
 - c) *Whether the sales of portions of the estate to third parties by the widows are valid and should be recognized in the distribution of the estate.*
 - d) *Whether the court should confirm the grant as per the Petitioner's proposed distribution and the surveyor's report dated 21st January 2023.*
 - e) *Who should bear the costs of this suit.*
29. The Objector contends that the Petitioner, having allegedly remarried one Elijah Nandi and inherited from his estate in Succession Cause No. 524 of 2017, is not entitled to inherit from the deceased's estate. The Petitioner denies remarriage, asserting that Elijah Nandi was merely a friend and that the Objector's allegations are meant to malign her interest, particularly since she has no children, hence she should not inherit.
30. Section 3(5) of the Law of Succession Act provides that a widow ceases to be entitled to inherit from her deceased husband's estate if she remarries. **In Re Estate of Charles Onyango Opiyo (Deceased) [2016] eKLR (Court of Appeal)**, the court held that a widow who remarries loses her beneficial interest in her deceased husband's estate unless she can demonstrate exceptional circumstances.
31. The Objector has not provided conclusive evidence of the Petitioner's remarriage to Elijah Nandi, such as a marriage certificate.

The Petitioner's assertion that Elijah Nandi was a friend, coupled with her denial of remarriage, casts doubt on the Objector's claim.

32. **In Re Estate of Benson Ndirangu Mathenge [1998] eKLR**, the court emphasized that claims of disentitlement based on remarriage must be substantiated with cogent evidence.
33. Furthermore, the Petitioner's lack of children does not bar her from inheriting as a spouse under Section 35 or Section 40 of the Law of Succession Act. **In Mary Rono v. Jane Rono & Another [2005] eKLR**, the court of Appeal held that a widow's entitlement to her deceased husband's estate is not contingent on having children but on her status as a spouse at the time of death.
34. In the absence of conclusive evidence of remarriage, the court finds that the Petitioner remains a beneficiary of the deceased's estate as his first widow.
35. On whether the parcels of land form part of the deceased's estate, the deceased owned two parcels of land: South Kabras/Chemuche/565 and South Kabras/Chemuche/2148. The Objector contends that South Kabras/Chemuche/564 does not form part of the estate, alleging it was a gift inter vivos from the deceased's father-in-law, who predeceased the deceased. The Petitioner disputes this, asserting both parcels form part of the estate.
36. The Objector's claim regarding South Kabras/Chemuche/564 is unsupported by documentary evidence, such as a title deed or transfer documents indicating it was a gift inter vivos. **In Re Estate of Nelson Kimotho Mbiti (Deceased) [2000] eKLR**, the court held that claims excluding property from an estate must be substantiated with clear evidence. The title deeds for both parcels, as per the pleadings, were in the deceased's name at the time of his death, confirming they form part of his estate.
37. Regarding South Kabras/Chemuche/2148, the Objector alleges it was jointly owned with Peter Leseneka. However, no evidence, such as a joint title or agreement, has been adduced to support this claim. The

court finds that both parcels constitute the deceased's estate for distribution.

38. On the validity of sales to third parties, the petitioner and objector have both accused each other of selling portions of the estate to third parties. The Petitioner claims the Objector sold all of South Kabras/Chemuche/2148, while the Objector alleges the Petitioner sold portions of South Kabras/Chemuche/565 to third parties, including Timothy Mohammed and Raphael Muhia. The Petitioner acknowledges selling her portion of South Kabras/Chemuche/565 to Michael Nyongesa, and the second widow, Margaret, is said to have sold her portion to seven purchasers.
39. Under Section 55 of the Law of Succession Act, no distribution of an estate can occur before the confirmation of the grant. Any sale of estate property before confirmation is null and void unless ratified by the court. **In Macharia v. Macharia [2015] eKLR (Court of Appeal)**, it was held that transactions involving estate property without court approval are invalid.
40. The surveyor's report dated 21st January 2023 indicates that portions of both parcels have been sold to third parties, who have erected permanent structures. The Petitioner submits that these purchasers have occupied the land since 2009 without dispute. However, the Objector contests these sales, particularly those involving Emily Atsinga, Peter Lucheli, and Zipporah Katambani, alleging they are not dependents of the deceased.
41. The court notes that Zipporah Katambani, identified as the widow of the deceased's brother, is not a dependent under Section 29 of the Law of Succession Act, which defines dependents as spouses, children, or parents of the deceased. Similarly, Emily Atsinga and Peter Lucheli have not been demonstrated to be dependents. Their inclusion as beneficiaries is therefore improper.
42. However, the long-standing occupation by third-party purchasers since 2009, as evidenced by the surveyor's report, suggests acquiescence by the beneficiaries. The court of appeal **in Re Estate**

of John Musambasi [2014] eKLR upheld sales of estate property where beneficiaries had consented or acquiesced over a prolonged period. The court will exercise its discretion under Section 28 to consider the interests of the purchasers, provided they can demonstrate valid sale agreements and occupation before this judgment.

43. On whether this court should confirm the grant based on the surveyor's report, the Petitioner proposes equal distribution of the estate among the three widows, relying on Section 40 of the Law of Succession Act, which governs the estates of polygamous deceased persons. This section requires the estate to be divided among the houses according to the number of children, with consideration for the spouses.
44. In **Mary Rono v. Jane Rono & Another [2005] eKLR**, the Court of Appeal held that in polygamous households, the estate should be divided equitably, taking into account the number of children in each house and the surviving spouses'. The deceased had four children, all from the second and third wives, as the Petitioner has no children.
45. This court notes the Petitioner's claims that the deceased allocated portions of South Kabras/Chemuche/565 to the first and second widows and South Kabras/Chemuche/2148 to the third widow during his lifetime.
46. However, the sales of portions of the estate by all three widows complicate the distribution. The surveyor's report indicates that South Kabras/Chemuche/565 measures approximately 9.3 hectares, with portions already sold. The court finds that an equitable distribution should account for the widows and children.
47. 21. The Objector's claim that the Petitioner evicted her from South Kabras/Chemuche/565 is unsupported by evidence. Conversely, the Petitioner's claim of being displaced from her matrimonial home by the Objector lacks corroboration. The court will rely on the surveyor's report to determine the available land for distribution.
48. Based on the foregoing, the court makes the following orders:

- a) The Petitioner, Rebecca Mishele Mark, is entitled to inherit from the estate of the deceased as his first widow.
- b) The parcels of land South Kabras/Chemuche/565 and South Kabras/Chemuche/2148 form part of the deceased's estate.
- c) The distribution shall be done into seven equal portions in accordance with section 40 of Succession Act Cap 160 Laws of Kenya for the Deceased left 3 widows who are alive and 4 children who are also alive.
- d) The subdivision of the land shall be done in such a way that each widow share falls within the area where the husband(deceased) had put up a home for the respective wife.
- e) Since the purchasers bought the land before confirmation of the grant, and without the consent of all the beneficiaries or approval of the court each purchaser can follow the person who sold the land to him or her before the appropriate forum for appropriate reliefs.
- f) Each party to bear its own costs of the Application.
- g) Right of Appeal 30 days.
- h) File closed.

DATED SIGNED, and DELIVERED in open court at KAKAMEGA THIS 9TH day OF OCTOBER, 2025.

S.N. MBUNGI

JUDGE

In The Presence of;

CA: Angong'a

Ms Chesire for the Petitioner present online.

Mr Munyendo for the objector, absent