

voce evidence and the lower court rendered its judgment on 3rd April 2024, dismissing the protest and ordered that the grant be confirmed as follows:

Property NJIA/KIEGOI/209

- a) Henry Kariira Bariu – 1.60 Acres
- b) John Gitonga Bariu – 1.60 Acres
- c) Moris Kimathi Laibuni – 1.60 Acres
- d) Dorcas Kawiara Ntongai and Erick Mwenda Ntongai- 1.60 Acres
- e) Charity Kaimuri Laibuni – 1.60 Acres to hold in trust for herself and children.

4. Aggrieved by the said judgment the appellant filed a memorandum of appeal dated 17th April 2024.

The Appeal

5. The appellant set out the following grounds:
- a)** *The learned Senior Resident Magistrate misdirected himself by applying unsound legal principles in arriving at his judgment and failing to heed to the appellants evidence on record and thereby unfairly deciding in favour of the respondent.*
 - b)** *The learned Senior Resident Magistrate erred in law and fact in ignoring the courts own decision on 7th July 2021 of visiting plot No Njia/Kiengo/209 before the hearing of the succession case.*

- c) The learned Senior Resident Magistrate erred in law and fact in ignoring some properties forming part of the estate of Ithagatha Ithagatha them being 2 plots in Kangeta.*
- d) The learned Senior Resident Magistrate applied open bias and unsound legal reasoning in allowing the plaintiffs suit without any substantive justification based on the evidence adduced.*
- e) The learned Senior Resident Magistrate completely misdirected himself into failing to consider all the facts placed before court by the appellant as well as the written submissions by the appellant in support of his claim and in arriving at a decision and judgment that is obviously biased, erroneous and amounting to a miscarriage of justice.*

Appellant's Submissions

6. It was submitted that some of the deceased's property was left out during the distribution. Citing Rule 73 of the Probation and Administration Rules, it was submitted that the court has powers to include the said property and make orders regarding the same as would meet the end of justice.

7. The appellant further submitted that the deceased had two (2) wives. That he was the only child of the 2nd wife. That the orders of the court were in effect a punishment to him for being an only child. That the estate had been shared on the ground long before the death of the deceased and the trial court was wrong to share the estate among the children of the deceased as one. Thus, the appellant argues, the court ought to have maintained

that arrangement and shared the land between the houses as he had proposed.

Respondent's Submissions

8. The respondent submitted that the trial court was right to involve section 40 of the Law of Succession Act and ordering the distribution of the estate among all the children equally.
9. That it would be unfair to give the applicant alone 3 acres and leave his four (4) step brothers and sisters to share the remaining five acres.
10. Cited in supporting of its submissions was the decision in **Re Estate of Nelson Kimotho Mbiti (deceased) High Court Succession No. 169 of 2000.**

Analysis and Determination

11. Being a first appeal, this court's duty is to evaluate the evidence/arguments made before the trial court and arrive at its own independent conclusion ***[see Selle v Associated Motor Boat Co. Limited (1968) EA 123]***.
12. The issues for determination in this appeal are as follows:
 - a) Whether any property of the deceased was omitted from the distribution of the estate;***
 - b) Whether the trial court erred in making the orders for distribution of the estate.***

13. On the first issue, it is clear that the parties never brought to the attention of the court the existence of any other property. Such an existence is a question of fact, to be established by the production of proof of the requisite documentation such as a certificate of official search. I have gone through the lower court records. The only property disclosed at the filing of the petition was Njia/Kiegoi/209 and was accompanied by a certificate of official search.
14. Although the appellant raised an issue of land parcel No. Kangeta/Kangeta/3371 having been given to the respondent no cogent evidence was adduced to support this allegation. It is thus not proven that this particular parcel of land belonged to the deceased.
15. As regards plots Kangeta/Kangeta/728, similarly, no evidence was adduced to prove that it had belonged to the deceased.
16. As regards plot No. Kangeta 4A, there is a letter dated 20th May 2019, which shows that the same belonged to Joseph Bariu. It was not made clear if that name was also an alias of the deceased since the death certificate does not bear that name. The onus was on the parties to have alerted the court of an alias name of the deceased. Since that did not happen, then the trial court was correct to exclude the said property.

17. In my view therefore, there was no sufficient evidence to prove that the three stated properties, in addition to Njia/Kiegoi/209, belonged to the deceased.
18. I will now move to the next issue, that of the distribution of land parcel No. Njia/Kiegoi/209.
19. I have perused the material placed before the trial court and specifically the certificates of official search dated 21st March 2019 and undated one, filed in court on 29th March 2021. Both certificates clearly indicate that parcel No. Njia/Kiegoi/209 had an existing charge registered to Kenya Commercial Bank on 6th February 1978.
20. It is thus clear that at the time of filing the petition and at the hearing of the summons for confirmation of the grant and the protest, the said charge was in existence.
21. There is no evidence that the administrators took steps to have the property discharged by Kenya Commercial Bank Limited, either by settling any debt due to it or otherwise. The consent of the chargee was not sought.
22. In such circumstances, the said property No. Njia/Kiegoi/209 was not free and available for distribution.
23. When administrators are appointed, then by operation of the law, they step into the shoes of the deceased. However, they

cannot proceed to distribute an estate which is already encumbered without the consent of the creditor/chargee. That charge remains a liability to the estate on the property in question and the administrators ought to have first settled it before they could purport to distribute it to the beneficiaries.

24. The duties of an administrators to an estate are set down by the law. Section 83 of the Law of Succession Act provides as follows:

Duties of personal representatives

Personal representatives shall have the following duties

—

(a) to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts;

(e) within six months from the date of the grant, to produce to the court a full and

accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f)subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g)within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.

(h)to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all

dealings therewith up to the date of the account;

(i)to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

25. These duties of an administrator were reiterated in **Re Estate of Julius Minamo (deceased) (2019) eKLR** where it was held that:

‘The personal representative of a deceased person holds a unique position in law. The property of the dead person is vested in them by virtue of section 79 of the Law of Succession Act. The effect of section 79, read together with section 82 of the Act, is that the same puts the personal representative on the same footing with an owner of the property, in the sense that he exercises the powers that the legal owner of the property would have exercised were they alive, and suffered the same burden of duties and obligations over the property as the legal owner would have been

under were they to be alive. Yet, the property, although vested in them by law, would not be theirs. Although the personal representative has legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof, that is those named in the will, in cases of testate succession, and those identified at confirmation of grant, in cases of intestacy. They would also be holding it for the benefit of creditors and any other persons who might have a valid claim against the estate.'

26. It is clear that whereas the joint administrators were aware of the charge, they took no steps to ascertain and if necessary, settle the debt due to the chargee.
27. From the foregoing, I find that the property known as Njia/Kiegoi/209 was not available for distribution.
28. It is therefore appropriate to proceed to set aside the judgment of the lower court and all consequential orders arising therefrom, which I hereby do.
29. The following orders shall thus issue: -
 - a) The judgment of the lower court and all subsequent orders are set aside.**

- b) The file is remitted back to the lower court with the following directions:**
- i. The administrators are to comply with the law in regards to the settlement of any dues owing to the Kenya Commercial Bank Limited prior to distribution of the estate.**
 - ii. Alternatively, if the debt has been fully paid, the administrators are to obtain a discharge of this property, to free it up for distribution to the beneficiaries.**
- c) No distribution is to be done until (a) (i) and (ii) above are complied with.**
- d) Once a discharge is obtained, the administrators or any of them may proceed to file fresh summons of confirmation of the grant.**
- e) In the event only one administrator files the summons for confirmation, the court to give directions on the filing of any protest that may arise.**
- f) The parties are at liberty to include any other property that belonged to the estate in the fresh summons for confirmation of the grant.**
- g) Each party is to bear its own costs of this appeal.**

Dated, signed and delivered at Meru this 15th day of January 2026.

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H. M. NYAGA
JUDGE