



**In re Estate of Kungu Kiriga Ngoti (Deceased) (Succession Cause 86 of 2017)
[2025] KEHC 592 (KLR) (Family) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 592 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
FAMILY
SUCCESSION CAUSE 86 OF 2017
CM KARIUKI, J
JANUARY 30, 2025**

IN THE MATTER OF THE ESTATE OF KUNGU KIRIGA NGOTI (DECEASED)

BETWEEN

DANIEL MWANGI KUNGU (SENIOR) PETITIONER

AND

MARGARET NJOKI KUNGU PROTESTOR

JUDGMENT

1. By summons to confirm grant dated 31/05/2024, the Petitioner seeking confirmations of grant and approval of the proposed distribution of Estate of Kungu Kiriga Ngoti (deceased). Same is supported by affidavit sworn by Daniel Mwangi Kungu – 1st Petitioner sworn on 31/05/2024 with annexed copy of consent signed by according to him 10 out 20 beneficiaries of the deceased Estate namely 17 of the 1st house and 3 of the 2nd house. The 2nd house also lodged its own Application to confirm the grant dated 21/05/2024 supported by affidavit of Daniel Mwangi Kungu – 2nd Petitioner; sworn on 02/05/2024 on behalf of his mother’s (2nd house) beneficiaries.
2. It is worth noting that Petitioner 1 & 2 are different though share same name but represent house 7 and 2 respectively. This being un-intestate matter parties proposed their own procedure of distribution vide their affidavits for house 1 –
 - a. That they are praying this Honorable court to confirm the said grant in such terms that the deceased estate be registered as follows: - (Paragraph 10 of the 1st Petitioner’s Affidavit)



Description Of Property	Share
Nyandarua Mawingu/salient/242	Maria Wairimu Kungu 2.5 Acres Margaret Njoki Kungu 2.5 Acres Joseph Njoroge Kungu 1.13 Acres Daniel Mwangi Kungu (senior) 2.5 Acres Paul Kimani Kungu 1.13 Acres David Gaitho Kungu 1.13 Acres Peter Wainaina Kungu 1.13 Acres John Kiriga Kungu 1.03 Acres Samson Kamau Kungu 1.13 Acres Stephen Kuria Kungu 1.13 Acres Wangeci Kungu 1.13 Acres David Mwangi Kungu 1.13 Acres Wangari Kungu 1.13 Acres Daniel Mwangi Kungu (junior) 1.13 Acres Simon Mwaniki 1.13 Acres

3. For Petitioner 2, he proposes the suit property to be subdivided equally between the two houses.
4. The parties testified in support of there position on distribution and thereafter filed submissions to canvass their argument;

Petitioner 1’s Submissions Dated 09/09/2024: -

5. That the property was well distributed including the widow and children from the 1st house and the 2nd house. That their consent was signed by all the beneficiaries except the widow and 2 children from the second house. That the protestor contested the mode of distribution arguing that the first house had already been gifted a parcel of land Nyandarua Mawingu/Salient/367.
6. That the protestor argued that the parcel of land was acquired through the deceased and had left it to the widow and children of the first house. That what the protestor is contesting is null on basis that Nyandarua Mawingu/Salient/367 was acquired by the 1st widow on her own self and the deceased was not involved in acquisition of the said parcel of land. That it is not in dispute that the deceased had two housed and the second house was occupying some part of the parcel of land.
7. The evidence by the protestor is that the deceased had subdivided the subject parcel of land which is utterly lies and no family member was communicated to on the deceased intentions. It is not in dispute that when the deceased died the 2nd house was already occupying the subject parcel of land but that did not mean that they were to get half share of the subject property. For equality and justice, it is only fair that the parcel of land in the name of the deceased be shared equally or as per the summons of confirmation.



8. That they do not wish to submit further and leave to court to help them in resolving this matter and administer justice to both families and put an end to this matter.
9. Petitioner 2/protestor Paragraph 5 – 13 Of The Submissions Dated 04/09/2024 submitted that, it is not in dispute that the deceased was survived by two households. Sections 40 of the [Law of Succession Act](#) provides as follows: -

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.

The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Sections 35 to 38.
10. The protestors' evidence is that the deceased had subdivided the subject parcel of land into two equal portions and settled the two families in their respective portions and the 2nd House has remained in possession of the property she was allocated by her late husband. They contended that the intention of the deceased was well known by the family members.
11. This evidence is collaborated by the witnesses who testified before the court. The 1st Administrator confirmed that at the time, the property was in occupation of the 2nd family and two sons of the 1st house i.e. him and his brother (who were currently residing on the property) while the other beneficiaries were cultivating. He further confirmed that each house was occupying half of the subject parcel of land and utilizing it.
12. He further confirmed that when the two houses started living in the half portion of the subject land as they are not, their father was alive, and to his death, that has been the occupation by the two families to date. The 1st wife confirmed that when she left for the other portion of land, she left her husband and the 2nd family, and even up to his death, the deceased was living on the said parcel of land. She confirmed that the people who are currently living on the land have developed their respective portions which they occupy.
13. At no point in time did the deceased alter the occupation to an equal share of the subject land by his two families. It is clear that he had comfortably settled his families as per his wishes and it is on that basis that even after his death, the two houses have continued to live in their respective portions as they did during the lifetime of the deceased.
14. As confirmed, there are developments made by those living on the half that belongs to the 1st house and the half that belongs to the 2nd house. Thus, submitted that the applicability of the provisions of Section 40 of the [Law of Succession Act](#) would not be fair and just.
15. In the Estate of Ramaita Solitei (Deceased) [2019] e KLR, the court will discuss the effect of Section 40 of the [Law of Succession Act](#) made the following observations. As evidenced by the precedents referred to above, distribution under Section 40 has always been a touch issue subject to contradictory interpretations. For the most part, the controversy stems from whether in such a situation, the estate of a deceased ought to be distributed equally or equitably.



16. Further in *Rahab Njeri Kariuki v Joyce Waruguru Kariuki & 2 Others* [2016] e KLR, the court while interpreting the inference of Section 40 of the *Law of Succession Act* observed as follows: -

“The Learned Judges essentially espoused the principal of fairness and equity in distribution of a deceased’s estate between or amongst persons beneficiary entitled to such an estate in a polygamous family set-up. While the number of children in a particular house is an important factor in the determination of the share to be allocated to each house, it is not the only factor; neither is it the controlling factor. The share each house gets is not contingent upon the number of children in any particular house; there are other considerations which will guide the court’s discretion in the distribution of the estate; for instance, the age of the children and their station in life are factors that the court will necessarily take into account.”

17. There is no evidence that either of the family raised any issues as to the way the deceased had subdivided the subject parcel of land. The petitioner cannot claim not to have been aware that the father had subdivided the land yet he admits that their house occupies half of the subject parcel of land and they, did so even before the demise of the deceased. In fact, the deceased expressed his desire to be buried on the portion belonging to the 2nd house and that was where he was buried.

Issues, Analysis And Determination:

18. After going through the material before me, I find the issues are whether the estate of the deceased shall be distributed into equal portions to all beneficiaries who survived him? And costs.
19. It is not disputed the deceased was survived by two widows and 20 children; That is two houses with children numbering first house 16 and the second house 2. The first house proposed distribution is unequal in distribution according to the application for the confirmation of grant. No explanation is proffered as to why it should not be in line with the professions of section 40 of the LSA Cap 160 LOK. However, in the submissions, there is mention by pw1 and 2 that the division be in accordance of section 40 above.
20. The protestors on the other hand propose the land to be shared equally between the two houses as per the wishes of the deceased who left petitioner and his brother occupying and using half of suit land and the first house in possession of the of the other half.
21. The Dw2 and the witnessed testified to that effect. The Dw1 testified that the first house has another parcel of land in the widow of first house name said to be 5 acres and owned by deceased but gifted to first wife. That piece of evidence was denied by Dw1 and 2 was denied.
22. In a civil case, the "burden of proof" refers to the responsibility of a party (usually the plaintiff) to present enough evidence to prove their claim, while the "standard of proof" is the level of evidence required to meet that burden, which is typically "preponderance of the evidence" meaning that the evidence must show it is more likely than not that the claim is true, exceeding a 50% certainty threshold. In civil cases in Kenya, the "burden of proof" lies with the plaintiff, and the "standard of proof" required is "on a balance of probabilities," meaning they must prove their case is more likely to be true than not, which is a lower standard than the "beyond a reasonable doubt" standard used in criminal cases.
23. The standard of proof relates to the evidential threshold required for a claim to be considered as having been proved. The issue of the burden of proof has two facets. There are the legal burden of proof and the evidential burden of proof. Sections 107(1), (2) and 109 of the *Evidence Act*, Cap. 80 of the Laws of Kenya deals with the burden of proof. They state as under: -



24. Sections 107(1) and (2): Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person and
25. Section 109: Proof of particular fact. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
26. The protestors have not proved that deceased was owner of parcel no Nyandarua Mawingu/Salient/367 registered in the first widow's name. In any event if there is evidence, the protester can file claim for share of same as it would be a trust property of the estate.
27. The protestor also advanced contest that the court in any case can disregard user of section 40 of LSA cap 160 LOK and rely on the case of Rahab Njeri Kariuki v Joyce Waruguru Kariuki & 2 Others [2016] e KLR where court held there are other considerations which will guide the court's discretion in the distribution of the estate; for instance, the age of the children and their station in life are factors that the court will necessarily take into account."
28. However, no evidence to supports elements such as the example given in that case are adduced to support such exemptions.
29. Therefore, court finds that in absence of a will or exceptional circumstances the court has to go by the provisions of the provisions of section 40 of LSA. Thus, the court orders;
30. That Nyandarua Mawingu/Salient/242 shall be divided to the 20 beneficiaries of the estate of the deceased each getting 1 acre.
31. The remaining acre, to be divided into equal two portions with half going to the graveyard of the deceased to be held in trust by Margaret Njoki Kungu and the other half be sold to meet costs for the sub-divisional and transfer of shares of the beneficiaries.
32. No orders as to costs.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION THIS
30TH DAY OF JANUARY, 2025.**

**HON. CHARLES M. KARIUKI
JUDGE**

In The Presence Of:

C/A: Abel

Kamenyu for Chege for Objector

Petitioner/Administrator: N/A

