



In re Estate of Stephen Saitieu Kaloi (Deceased) (Succession Cause 144 of 1998) [2025] KEHC 7795 (KLR) (30 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 144 OF 1998**

EN MAINA, J

MAY 30, 2025

IN THE MATTER OF THE ESTATE OF STEPHEN SAITIEU KALOI (DECEASED)

BETWEEN

JEREMIAH KALOI SAITIEU 1ST PROTESTOR

REBECCA NDINDA STEPHEN 2ND PROTESTOR

AND

ANGELA SYOKWAA JACOB ADMINISTRATOR

RULING

1. The deceased to whose estate these proceedings relate is Stephen Saitetu Koyiet who died on 8th November 1997 domiciled in Kitengela. Letters of administration were initially issued to Rebecca Ndinda Stephen and Jeremiah Kaloi Saitieu the protestors herein, before that grant was revoked and Angela Syokwaa Jacob was added as an administrator. However, the three of them could not agree on the mode of distribution and so the 3rd Administrator filed this summons for confirmation to which the 1st and the 2nd Administrators are protestors. Before this court is a Summons for Confirmation of grant dated 23rd May 2024.
2. The summons is supported by the affidavit of Angela Syokwaa Jacob the 3rd Administrator and widow of the deceased, wherein she deposes inter alia, that they could not agree on the mode of distribution with the 1st and 2nd Administrators and hence she was left with no option but to file this Summons; that the estate whose value is estimated to be 104.02 hectares comprises the following -LR NO 19150/223 measuring 0.0226 ha, LR NO 14757/5 measuring 17.37 LR NO 14757 measuring 69.9 Ha, LR NO 191150/3 measuring 0.02273 Ha and LR NO 14757/4 measuring 16.51 Ha.
3. She deposed that the deceased had three wives namely;



- a. Mary Mwihaki whose children are Peninah Saniayo, Jeremiah Kaloi Saitieu, William Katei Saitieu, Andrew Lesalon and Sylvia Wanjiku.
 - b. Angela Syokwaa Jacob who is mother to Jacob Kaloi Saitieu, Bernadette Nkunche Saitieu, Jennifer Wairimu Saitieu (deceased and survived by two daughters), Christine Peruruan Saitieu, Florence Selema Saitieu and Lilian Sotian Saitieu.
 - c. Rebecca Ndinda who is a mother to Nelly Neeso Kaloi, Nancy Wairimu and Annah Kalunda Saitieu.
4. She prayed that the assets be divided equally amongst all the seventeen (17) beneficiaries of the estate and any assets earlier inherited by the Rebecca Ndinda, Stephen Saitieu and their children or sibling be disclosed and made available for re- distribution in view of the orders made by the court on 28th March 2023.
5. The Protestors Jeremiah Kaloi Saitieu and Rabecca Ndinda Saitieu filed an Affidavit of Protest sworn jointly by themselves on 2nd November 2024 in which they contended that LR No 14757/4 and L/ R 14751/5 are subdivisions of LR No 14757 which measured 173.01 acres and not 257.499 acres as alleged. The Objectors deposed that the resultant parcels of land were dealt with by the deceased as follows-
- a. LR No 14757/1 measuring 10 acres sold on 12th June 1991.
 - b. LR No 14757/2 measuring 10 acres sold.
 - c. LR No 14757/3 measuring 10 acres was disposed by the deceased.
 - d. LR No 14757/4 measuring 40 acres was charged to ICD.
 - e. LR No 14757/5 measuring 40 acres was charged by the deceased to Kenya Commercial Bank.
 - f. Land Reference 14757/6 transferred to Simel Same Livingstone.
6. The Protestors contend that during his lifetime the deceased gifted LR No. 19150/223 and LR No 19150/3 to Rebecca Ndinda and LR No. 19150/17 to Angela Syokwaa Jacob and as such they do not form part of the estate and are not available for distribution.
7. Their proposed mode of distribution is as follows-
- a. Mary Mwihika Saitieu 4acres.
 - b. Angela Syokwaa Jacob 4acres.
 - c. Rebecca Ndinda 4 acres.
 - d. Jeremiah Kaloi Saitieu 3 acres.
 - e. William Katei Saitieu 1 acre.
 - f. James Kaloi Saitueu 1acre.
 - g. 2 acres to be sold to cater for legal expenses and any other expenses for transfer of the land to the beneficiaries.
8. by way of a reply to the Protestors, the 1st Administrator and the 1st to 6th Respondents filed a further affidavit sworn on 4th December 2024, in which they reiterated the contents of the supporting affidavit. The 1st Administrator stated that Mary Mwihika Saitieu, Rebecca Ndinda and Jeremiah Kaloi Saitieu



had already obtained portions of land which were transferred to their names which they sold to third parties as a result of the confirmation of grant earlier issued but which they have not disclosed to this court. She averred that their proposed distribution is discriminatory and illegal as the Protestors presume that James Saitieu has superior birth rights to his other siblings. Further, that only six out of the seventeen beneficiaries have been proposed to inherit a share of the estate. She also deposed that the parcels numbers, size of the parcels and how it has been utilized over time were not disclosed.

9. In further rejoinder, the Protestors filed an affidavit dated 10th February 2025 where they stated that their proposal is that the estate be distributed equally between the houses and then amongst the children and wife in the house and that Jeniffer Wairimu Saitieu who is purported to have sworn the replying affidavit died more than two years ago thus the said affidavit is fatally defective and whatever was deposed therein is false.

Submissions

10. The Summons was canvassed by way of written submissions. Learned Counsel for the 1st Administrator in submissions dated 3rd March 2025 reiterated the contents of the supporting affidavit and further submitted that the Respondent's allegation that LR No 14757/1, LR 14757/2, LR no 14757/3 and LR No 14757/6 were sold by the deceased and transferred to the purchasers was not supported by any documents; that the Respondent's allegation that LR no.14757/4 and LR no. 14757/4 were charged to financial institutions is not backed by any documents nor was there proof that one David Holley redeemed them. Counsel submitted that the net estate available for distribution was LR NO 19150/223, LR No 19150/3 and LR NO 14757/5. Counsel submitted that the estate should be shared equally among the 17 beneficiaries but should this court find it disagreeable, then LR NO 19150/223 and LR NO 19150/3 be sold to cater for survey and title processing for all beneficiaries. As regards LR 14757/5, It was submitted that it should be distributed equally and each party should bear their own legal fees, costs of survey and transfer. That there is, as yet, no proof of what those legal fees and cost of survey will be.
11. The submissions of Learned Counsel for the 1st and 2nd Protestors are dated 5th March 2025. Counsel urged this court to distribute the remainder of the estate among the three families instead of each individual beneficiary. Counsel contended that the Protestors had administered the estate within the law and had a duty to protect and preserve the estate.

Determination

12. This court has considered the Summons for Confirmation of Grant, the pleadings/affidavits, the rival submissions, the court record and the law.
13. whereas the 1st and 2nd Administrators had initially excluded the 3rd Administrator and her children it is not disputed that they too are beneficiaries of the estate. What is in disputed is what assets make up the estate and the mode of distribution of those estates and hence those are the two issues for determination by this court.
14. On what assets makeup the estate, this court shall be guided by the petition filed by the Protestors way back on 12th August 1998 when they were the sole administrators of the estate. In the said petition more specifically on 6th June 2000 they listed the properties to be: IR 52843 (LR 14757 (4), IR 64240 (LR 19150/3), IR 48450 (LR 14757) whose subdivision resulted in LR No.14757/1, LR No.14757/3, LR No.14757/4, LR NO.14757/5, LR No.14757/6 and LR 14757/2. The record for this parcel as filed by the Protestors indicates that LR 14757/2 measuring 4.186 was transferred by the deceased to one Selly Chelimo Mohammed on 15th August 1994 while LRNO 14757/6 measuring 24.28 Ha was



transferred to Simel Sane Livingstone by the deceased on 12th June 1991. LR 14757/5 was charged to KCB Bank on 18th February 1992. The other property that had been listed by the Protestors were IR 64598 (LR No.19150(223)). It is trite that parties to a litigation are bound by their pleadings. Nowhere in the petition did the Protestors make mention of any other assets as the allege now and even now they make no reference to other assets. The documents of ownership more so in regard to IR 48450(LR NO 14757) indicates that the asset was subdivided and two portions sold as stated above. There is no evidence whatsoever of the deceased having disposed of any other land in his lifetime or that the portions he had charged were redeemed on his behalf by a third party. The principle of law that he who asserts must prove holds even in these proceedings. The Protestors did not prove their assertion that two other portions were disposed by the deceased. Therefore, it is my finding that save for the 4.186 transferred to Selly Chelimo Mohammed out of LR48450 being LR 14757/2 and LR.14757/6 measuring 24.28 ha sold to Simel Sane Livingstone by the deceased, all the other properties listed above comprise the estate of the deceased and hence available for distribution to his estate. That includes LR 14757/5 which was charged to KCB for a sum of ksh 500,000 on 18th February 1992. The portion of land left of LR 48450 after the sale to Selly Chelimo and to Livingstone is now 41.434 Ha or thereabouts out of the initial 69.9 hactares.

15. On the mode of distribution, the deceased having been polygamous, this court is guided by Section 40 of the *Law of Succession Act* which provides as follows;

“(1) 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.

(2) 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.”

16. Section 3 of the Act defines a house as a family unit comprising a wife, whether alive or dead at the date of the death of the husband and the children of that wife.

17. In the case of Re Estate of John Musambayi Katumanga – Deceased [2014] eKLR the court rendered itself thus;

“Under Section 40 of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the *Law of Succession Act*, the children would divide the estate equally amongst themselves. Section 40 was not designed for the circumstances of the instant estate, but it would appear more appealing for the purpose of distribution of the said estate than Section 35.

27. 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.

28. Equal distribution does not always work justice, especially in polygamous situations, where the youngest child of the deceased may be one (1) year old, while the eldest may be over fifty (50) years of age. The infant no doubt would have far greater needs than the fifty year old, who would generally have received education and has probably been settled in life by the deceased. There cannot be justice in equal distribution in such case. The fortunes of one child may be better those that of the other – one could end up in a lowly job, say a driver or office messenger or nurse or nursery school teacher, with the other becoming a commercial pilot or the Chief Executive Officer of a blue-chip company. There would be no fairness in equal distribution in such a case. The law as currently framed does not do justice in such circumstance. Ideally, equal distribution should be the principle, with some discretion left to the court to consider the circumstances of each case.”

18. Similarly, in the case of *Rono v Rono* Civil Appeal No 66 of 2002, where Waki J.A (as he then was) stated inter alia that: -

“More importantly, 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 children of that wife.”

19. based on the number of the children in each house and the widow in that house, the first house has six units, the second house six units and the third house 4 units. The mode of distribution proposed by the 3rd Administrator is that each widow and child in the respective houses be considered as a separate unit. It is her contention that the net intestate estate of the deceased comprises 257.499 acres and that the estate should be distributed equally between all the beneficiaries. The 1st and 2nd Administrators/Protestors on the other hand have proposed that the estate be shared equally between the three houses and thereafter the share of each beneficiary in each house be determined under Section 35 of the *Law of Succession Act*. As I have stated only 41.434 acres out of IR 48450(LR NO 14757) is available for distribution as there are two portions of that parcel that were sold by the deceased. No evidence was adduced by either side of the assets allegedly gifted by the deceased to his wives in his lifetime. As I have already stated there is also no evidence that the deceased had sold other portions of land as alleged by Counsel for the Protestors. The land charged to KCB Bank is in my considered view redeemable and is hence available for distribution to the beneficiaries.

20. Having carefully considered the proposals made by the 3rd Administrator and by the 1st and 2nd Administrators/Protestors and noting as held in the case of *Re estate of John Musambangi Katumanga* – deceased [2014] eKLR that the ideal would be equal distribution of the estate among the children of the deceased, but noting the circumstances and acreage of the assets in this case I find and hold that the estate shall be distributed as follows:-



- a. IR 64598 (LR No.19150/223) which measures 0.0026 Ha (approximately 0.59 acres) to be shared equally between the three houses and thereafter in equal shares between the widow and children in that house.
- b. IR 4850 (LR 14757) which gave rise to parcels LR Nos.14757/1, 2,3,4,5 & 6 which was 69.9 hectares but out of which two portions with a cumulative size of 28.466 ha were sold by the deceased shall be distributed as follows-
 - i. LR 14757/2 measuring 4.186 hectares is not available for distribution as same had been sold to Sellip Chelimo Mohammed by the deceased on 15th August 1994.
 - ii. LR.14757/6 measuring 24.28 Ha is not available for distribution as the same had been sold to one Simel Sane Livingstone on 12th June 1991.
 - iii. The remaining 41.434 or thereabouts hectares to be distributed between all the seventeen beneficiaries (widows and children equally. It is instructive that LR 14757/5 which was charged to KCB on 18th February 1992 forms part of what was left of IR 48450 upon sale of the two parcels listed as (i) and (ii) above measures only 17.37 hectares but not the acreage stated by the 3rd Administrator and is part of the 41.434 or thereabouts referred to above and is to be treated as such but not in addition to. The same applies to LR No.14757/4 as it is part of what remained after taking into account what was sold by the deceased in his lifetime but is not separate from the initial 66.9 hectares.
 - iv. IR64240 (LR No.19150/3 measuring 0.22 Ha or 0.562 acres to be shared equally between the three houses and thereafter equally between the widow and children in that house or in any other manner the beneficiaries in the houses deem fit.
 - v. For the avoidance of doubt further to b(i), (ii) and (iii) above LR.14757/1, LR 14757/3, LR 14757/4 are to be shared equally between the seventeen beneficiaries and that includes the 3rd Administrator and the Protestors.
 - vi. Should any beneficiary have sold a share of the estate then it is that beneficiary that shall see, to the transfer of the share sold, to his creditors from his own share.
 - vii. The cost of the administration of the estate should ideally be paid from the estate but should the beneficiaries disagree on whether they could dispose of some of the assets in order to meet the costs, then each house/beneficiary shall be left to bear their own costs.
 - viii. A certificate of confirmed grant to issue.
 - ix. As for the costs of these proceedings this being a family matter the order that commends itself to me is that each party shall bear their own costs.

Orders accordingly.

RULING SIGNED, DATED AND DELIVERD VIRTUALLY ON THIS 30TH DAY OF MAY 2025.

E.N. MAINA

JUDGE

In the presence of:

Mr Were Advocate HB for Mr Musungu for 3rd Adminstrator.



Mr Mutinda for the 2nd Administrator.

Geoffrey – Court Assistant.

