



**In re Estate of Moses Werunga Masibo (Deceased) (Succession Cause
12 of 2018) [2024] KEHC 7627 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 7627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 12 OF 2018
REA OUGO, J
JANUARY 31, 2024**

BETWEEN

CHRISTINE NJERU 1ST PETITIONER

EMMA CHEROTICH 2ND PETITIONER

AND

JOSEPHINE MOMANYI OBJECTOR

RULING

1. The 2nd petitioner, Emma Cherotich ('Emma'), vide an application dated 4/10/2023 seeks the following reliefs:
 - a. Spent
 - b. This Court do confirm the grant issued herein on 17th November 2021 subject to the Mode of Distribution of the estate proposed by the applicants herein.
 - c. Any contentious issues be disposed of by way of a hybrid of viva voce evidence and witness statements on matters of entitlement, share, distribution and administration, to be filed and served by and amongst the parties hereon, within 7 days or such other time, as this court may direct.
 - d. Costs do abide the directions of court.
2. The application is based on the grounds on the face of the affidavit and the supporting affidavit of Emma. She deposed that she has two minor children in the early stages of primary education and needs increased financial support for their basic needs, education, medical attention, housing food and other needs. She advanced that Christine Njeru's daughter, Venus Imani Werungu, is a student at the University undertaking a degree in Architecture and has gone through financial agony. Her proposal for the distribution of the deceased's assets were as follows:



Item	Particulars Of Property	Beneficiary
1.	Land Parcel East Bukusu/ North Sang'alo/373 0.04 Hectares	Emma Cherotich as Trustee for Amara Masicha & Prince Masibo in equal share
2.	Land Parcel Kisumu/ Manyatta B/3030 measuring 0.03 Hectares	Emma Cherotich as Trustee for Amara Masicha & Prince Masibo in equal share
3.	Land Parcel Ndivisi/ Khalumili/1366 measuring 1 acre	Emma Cherotich as Trustee for Amara Masicha & Prince Masibo in equal share
4.	One plot at Kiminini in Trans Nzoia County fully developed	Emma Cherotich as Trustee for Amara Masicha & Prince Masibo in equal share
5.	One plot near St. Monica in Kisumu municipality	Emma Cherotich as Trustee for Amara Masicha & Prince Masibo in equal share
6.	One plot in Kibos in Kisumu Municipality	Christie Njeru as Trustee for Venus Imani Werunga
7.	One plot in Webuye Town	Emma Cherotich as Trustee for Amara Masicha & Prince Masibo in equal share
8.	Land Parcel Kisumu/ Manyatta B/3029 measuring 0.03 Hectares	Emma Cherotich as Trustee for Amara Masicha & Prince Masibo in equal share
9.	Mv Lorry Tipper KAC 725G grounded	Emma Cherotich
10.	Mv Saloon Nissan March KAZ 390M grounded	Emma Cherotich
11.	Mv Salon Car Toyota Aventis KBY grounded	Emma Cherotich
12.	The net residue of cash at Diamond Trust Bank Kisumu Branch	Emma Cherotich as Trustee for Amara Masicha & Prince Masibo in equal share



13.	The net residue of cash at the Co-operative Bank, Eldoret Branch	Emma Cherotich as Trustee for Amara Masicha & Prince Masibo in equal share
14.	Motor Grader (grounded)	Emma Cherotich
15.	1 HP Laptop	Emma Cherotich
16.	One Canon Camera	Emma Cherotich
17.	1 iPhone & Blackberry mobile cell phone	Emma Cherotich
18.	Business contracts that had been done in Kisumu and Siaya County Government	One-third to Christine Njeru as Trustee for Imani Werunga and two-thirds to Emma Cherotich as Trustee for Amara Masicha & Prince Masibo entitled in equal share
19.	Lap Trust Pension Funds County Pension Funds	One-third to Christine Njeru as Trustee for Imani Werunga and two-thirds to Emma Cherotich as Trustee for Amara Masicha & Prince Masibo entitled in equal share
20.	Co-operative Sacco Savings	One-third to Christine Njeru as Trustee for Imani Werunga and two-thirds to Emma Cherotich as Trustee for Amara Masicha & Prince Masibo entitled in equal share
21.	One undeveloped plot opposite Kisumu/Manyatta B/3029 & 3030	Christie Njeru as Trustee for Venus Imani Werunga

3. The proposed mode of distribution was opposed by Josephine Momanyi ('Josephine') who filed an affidavit of protest dated 14/11/2022. She averred that the deceased had a liability of Kshs 528,475/- being the outstanding medical bill at Aga Khan Hospital in Nairobi which remains unpaid. But secured by her title deeds. She proposed that part of the money held by Laptrust be deducted and remitted to the hospital to settle the bill. Josephine's proposal on the distribution of the estate was as follows:



Item	Particular Of Property	Beneficiary
1.	Land Parcel East Bukusu/ North Sangalo/373	Emma Cherotich as Trustee to Amara & Prince Masibo in equal share
2.	Land Registration No. Kisumu/Manyatta“B”/3029 Kisumu/Manyatta“B”/3030	Josephine Momanyi - 40% Emma Cherotich in trust for Amara and Prince Masibo – 30% Christine Njeru in trust for Venus Imani Werunga – 30%
3.	Plot near Monica within Kisumu Municipality	To be equally shared by all the beneficiaries
4.	Land Registration Ndivisi/ Khalumuli/1366	Emma Cherotich, as Trustee to Amara Masicha and Prince Masibo and Venus Imani Werunga in equal shares
5.	One plot at Kiminini in Trans Nzoia County	Emma Cherotich, as Trustee to Amara Masicha and Prince Masibo Christine Njeru in trust for Venus Imani Werunga Josephine Momanyi ALL in equal shares
6.	Monies held at Laptrust Fund	To be shared in the ratio of Josephine Momanyi - 20% Emma Cherotich in trust for Amara and Prince Masibo – 40% Christine Njeru in trust for Venus Imani Werunga – 40%
7.	Lorry Tipper KAC 725G	Emma Cherotich, as Trustee to Amara Masicha and Prince Masibo Christine Njeru in trust for Venus Imani Werunga



		Josephine Momanyi to be sold and proceeds shared in equal shares
8.	Motor vehicle registration number KAZ 390M	Emma Cherotich, as Trustee to Amara Masicha and Prince Masibo Christine Njeru in trust for Venus Imani Werunga Josephine Momanyi to be sold and proceeds shared in equal shares

4. The objector explained that the land parcel known as Kisumu/Manyatta“B” 3029 and Kisumu/Manyatta“B” 3029 are developed and there is a building of uncompleted 9 units that sit on both parcels. She avers that she substantially contributed towards the building and development of the apartment units constructed on the two parcels of land. She further advanced that the plot in St. Monica is her property and should not be subject to these proceedings.
5. The protest elicited a response from the petitioners and a supplementary affidavit dated 15/6/2022 was filed. It was further averred that the parcel Kisumu/Manyatta“B” 3029 is registered in the name of Moses Werunga and Emma Cherotich Tuindo and that they were both responsible for the development of the property. Emma availed the floor plan designs and structural designs for the two properties. She further produced into evidence the rates demand notices which she continues to pay for the two properties. The 1st petitioner explained that she occupies the residential house that sits on parcel 3029 despite the house not being completely developed. She further deposed that land parcel no. Kiminini/Marubda 21/Kiminini 364 is registered in the name of Emma Cherotich Tuindo.

The Evidence

6. Emma Cherotich (Pw1) adopted her affidavit in support of the application, the supplementary affidavit filed on 20/1/2020 and the affidavits dated 15/2/2019 as her evidence in chief. She testified that she resides at Manyatta B in Plot No. 3029 & 3030 which she bought with the deceased. She testified that there was no basis for Josephine to demand the property in Manyatta. Josephine was the deceased’s business partner. The deceased’s number, 0721726998, to which received money from Josephine. She testified that there was a transaction dated. 6/9/2016 for a sum of 500,000/-, 9/1/2018 for a sum of 70,000/-, 27/12/2017 for a sum of 70,000/-, 1st Nov 2017 for a sum of 70,000/-, 24/7/2018 for a sum of 20,000/-, 24/4/2018 for a sum of 70,000/-, 24/4/2018 for a sum of 70,000/- and 23/2/2018 a sum of 60,000/-. On cross-examination, she testified that the rates on the Manyatta properties are addressed to Kisumu Mana Ltd. She testified that no title for plot 3030 was availed to show that it belonged to her and the deceased. She acknowledged that before the deceased’s death, they had separated and she was living in the apartment that they built together. When she was referred to Josephine’s statement of account, she testified that she was not aware that the monies were used to develop the properties. She had equally given the deceased money for the development of the property. The apartments they built have 9 units and only 2 are fully developed out of the 9 as the project stalled for a while. She testified that the hospital bill of Kshs 500,000/- is a liability of the estate. She told the court that their matrimonial property was acquired by the deceased and herself.



7. Josephine Momanyi (Pw1) testified that she filed an affidavit of protest and adopted her affidavit of protest as her evidence in court together with the annexure in support. On cross-examination, she testified that her children's father James Nyakundi passed away. She testified that her children should not be part of the deceased's estate. Pw1 produced a statement to show she contributed towards the constructions. She wrote a cheque to Bhole Kondele Ltd for the purchase of building materials but did not produce a receipt for the items bought. She also gave the deceased Kshs 500,000 (see entry of 29.1.2018) which was in the form of a cash transfer from her company J.Nisa Ltd. She proposed that she is entitled to 40% of the Manyatta property having contributed towards building the property.

Submissions By The Parties

8. The petitioners submit that the following are the issues to be determined by the court:
- a. What share of the estate should be distributed to the deceased's beneficiaries?
 - b. Whether a spouse's contribution to the acquisition and development of immovable property is a factor that influences and affects the share she received when compared to her co-wives.
 - c. Costs
9. It was submitted that Emma contributed to the acquisition of plots 3029 and 3030 and has provided the court with documentation proving the same. Therefore, the court should wholly give the same to Emma because the objector's interest in the deceased was that of a contractor leveraging opportunities hence the regular and constant remittance by her to the deceased in the sums of Kshs. 70,000/- and the fact there was no evidence of her contribution to the development of the two properties. She also relied on the case of *Scholastica Ndululu Sava v Agnes Nthenya Suva*, [Court of Appeal at Nairobi, Civil Appeal No 49 of 2007], where the court stated 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.
10. The objector in her submissions argues that the court should determine the share to which each beneficiary of the deceased is entitled. Josephine submits that she substantially contributed towards the development of plots 3029 and 3030. There is overwhelming evidence that she sent money from her bank account to the deceased to develop his property. She further submits that there was no evidence that plots 3029 and 3030 were registered in the joint names of the deceased and Emma.

Analysis And Determination

11. The issue before the court is solely on distributing the deceased's estate to the beneficiaries. The issue of the deceased beneficiaries is not an issue as the deceased had 3 children and 3 wives. The deceased was polygamous and he died intestate, therefore the applicable law is section 40 of the [Law of Succession Act](#) which provides as follows:
- “40(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.”
12. The petitioners who filed for the confirmation of the grant were required, firstly, to identify and describe the free property that was owned by the deceased which is available for distribution. This



involves presenting evidence to establish that the deceased was the rightful owner of the property. In re Estate of Atibu Oronje Asioma (Deceased) (Succession Cause 312 of 2008) [2022] KEHC 11046 (KLR) (22 July 2022) (Ruling) the court observed that:

“With respect to property, there is only one critical consideration, whether he owned any property. Modern property is subject to registration, and whether a person owns a piece of property is evidenced by documents of registration or ownership. What is in dispute here is land, what would evidence ownership of the subject property would be evidence of registration of the same in the name of the deceased.”

13. In this case, some of the deceased’s property was not well described and neither did the parties provide a certificate of search or title to establish that the same was owned by the deceased. After carefully considering the evidence on record, the only properties that were properly identified as the deceased through title or certificate of search were:
 1. Kisumu/Manyatta‘B’/3029
 2. Kisumu/Manyatta‘B’/3030
 3. EbukusuN. Sangalo/373
14. Parcel no. 3029 was in the joint names of the deceased and Emma. Emma testified that she contributed towards the acquisition and development of plots 3029 and 3030. According to the sale agreement in respect to plot 3029, the same was purchased at the price of Kshs 775,000/-. She availed the structural plans made in 2014 for the proposed development of a residential development which Emma claims to occupy even though the same was not completed. She also produced as evidence the floor plan designs for the development of parcels 3029 and 3030 which had a building with 5 floors. However, the certificate of official search for parcel 3030 reveals that the deceased is the sole owner of plot no. 3030.
15. Josephine on the other hand claims to have contributed to the development of parcels 3029 and 3030. She availed bank statements showing that on 14/6/2017 through her company J.N Investment Ltd, she paid Kshs 250,000/- to Bhole Kondele for materials to be used in the development of the property. She sent the deceased money on his mobile phone on 8 different occasions between 2017-2018 totalling Kshs 550,000/-. According to her bank statement on 9/09/2016, she sent the deceased Kshs 500,000/-. The objector has urged the court to consider her contributions to the distribution of parcels 3029 and 3030.
16. It is my finding that the deceased co-owned parcel 3029 with his wife Emma. It was also clear that there were developments made on both parcels 3029 and 3030. Therefore, the only portion available for distribution is part of parcel 3029 and the whole of 3030. Emma testified that she lives on the incomplete residential house on the land and that 9 units have also been constructed thereon. Emma further testified that the residential house was built as her matrimonial home and in my view, she is entitled to the same. The apartments built have 9 units in total. According to the floor plan designs, they sit on both parcels 3029 and 3030. Therefore, considering the joint ownership of parcel 3029 and the fact that Emma’s house has 2 children, I find that her house is entitled to a bigger share of the development. I have also considered and I am persuaded that Josephine made financial contributions by directly sending money to the deceased for the development of the property but did not have any children with the deceased and her house is considered as a single unit. The house of Christine Njeru will have two units as she had a child with the deceased. Having considered section 40 of the Law of the Succession Act as well as the respective contributions, I find that the house of Emma shall therefore have the residential home that sits on the property being her matrimonial home and 6 units of the apartment given that she co-owned parcel no. 3029 with the deceased and made a substantial



contribution towards the acquisition of the land. The house of Christine Njeru will have two units, one for Christine Njeru and the other for Venus Imani Werunga. Josephine is entitled to one unit out of the nine units constructed.

17. The next is land parcel no. Kiminini/Matunda Block21/Kiminini364 measuring 0.17Ha was registered in the name of Emma and therefore does not form part of the estate.
18. Land parcel no. Ebukusu N. Sangalo/373 measuring 0.4 Ha shall be shared equally between the three houses.
19. It was not in dispute that there are pending hospital bills of Kshs 528,475/- at Aga Khan Hospital and the same shall be settled by the deceased's pension. There was no dispute that the deceased's personal effects, 1 HP laptop, 1 Canon camera, iPhone and Blackberry phone devolved to the house of Emma. The proceeds from the sale of KAC 725G, KAZ 390M and Toyota Aventis KBY all of which are grounded shall be sold and the proceeds shared equally between the houses. The petitioners have not provided specific information regarding the deceased's bank accounts. Consequently, no orders on funds in the accounts will be issued until the court receives a comprehensive description of the deceased's bank accounts.
20. The deceased's properties shall therefore be distributed as follows:



Description Of Property	Beneficiaries	
1.	Development on Kisumu/Manyatta'B'/3029 and Kisumu/Manyatta'B'/3029 comprising of a residential house and an apartment with 9 units	Residential house and 6 units of the apartment devolve to Emma Cherotich Tuindo to hold in trust the property for Amara Masicha & Prince Masibo in equal share 1 unit of the apartment to Christine Njeru 1 unit Apartment to Venus Imani Werunga 1 unit of the apartment to Josephine Momanyi
2.	Ebukusu N. Sangalo/373	To be shared equally between the three houses.
3.	Lap Trust Funds, County Pension Funds	Kshs 528,475/- to be applied towards settling the hospital bill in Aga Khan Hospital. The balance shall be shared as follows: a. The house of Christine Njeru is entitled to 30% b. The house Emma Cherotich Tuindo is entitled to 50% c. The house of Josephine Momanyi is entitled to 20%.
4.	The motor vehicle KAC 725G, KAZ 390M and Toyota Aventis KBY	Shall be sold and proceeds shared equally between the three houses.
5	Land Parcel No. EbukusuN. Sangalo/373 measuring 0.04	Shall be shared equally between the 3 houses
6	The deceased personal effects being 1 HP laptop, 1 Canon camera, an iPhone and a Blackberry phone	Emma Cherotich

21. This being a family matter there shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JANUARY 2024.

R.E. OUGO



JUDGE

In the presence of:

Mr Wasilwa For the Petitioners Christine and Emma

Miss Nyakongo h/b Mr. Odongo – For the Objector

Wilkister C/A

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