



**In re Estate of Chomba Wahome Gichuki alias Erastus Chomba Wahome (Deceased)
(Succession Cause 236 of 2017) [2024] KEHC 2086 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2086 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 236 OF 2017
HM NYAGA, J
FEBRUARY 28, 2024**

**IN THE MATTER OF THE ESTATE OF CHOMBA WAHOME
GICHUKI ALIAS ERASTUS CHOMBA WAHOME (DECEASED)**

RULING

1. The Succession cause herein relates to the estate of Chomba Wahome Gichiki alias Chomba Wahome who died intestate on 23rd April 2015.
2. From the record, the deceased was a polygamous man who had three wives. The 1st wife, Esther Wangari, predeceased him while the 2nd wife, Grace Wangari Shumba, is the 2nd Administrator herein. The third wife was one Mary Wangari Chomba who is said to have died in the year 2022. The deceased had six children with each one of them.
3. Following the demise of the deceased, Grace Wangari Shumba, Joseph Wahome Chomba and Wang'ombe Chomba, petitioned for letters of administration intestate on 4th August, 2017 in their capacity as the widow and sons respectively and the same was issued to them on 16th May, 2018.
4. Subsequently, the 1st Administrator, Grace Wangari Shumba filed summons for confirmation of grant dated 15th March, 2019. The summons was supported by her affidavit of even date wherein she listed all the survivors of the deceased estate and her proposed mode of distribution. However, after valuation of the estate was done she swore a further affidavit dated 18th February, 2022 wherein she stated that it supersedes the aforesaid affidavit.
5. She deposed that the following are the beneficiaries of the deceased estate:

1st House

Joseph Wahome

Teresiah Wambui Black

Mary Mumbi Memia

Susan Mweru Itemo



Paul Kariuki Chomba

Elizabeth Njeri Chomba

2nd House

Grace Wangari Shumba- Widow

Anne Wambui Chomba

Ann Njeri Muturi- Daughter in Law

Macharia Chomba

Catherine Chomba

Peter Gichohi Chomba

Jane Kagure Chomba

3rd House

Mary Wangari Chomba- Widow

James Wahome Chomba

Wang'ombe Chomba

Veronica Wambui Kamau

Hellen Wangechi Chomba

Simon Gichohi Chomba

Jecinta Kagure Chomba

6. She averred that from the valuation report the following properties no longer forms part of the estate:-Elburgon/elburgon Block7/403 (Ndimio)Elburgon/elburgon Block7/451 (Ndimio)Elburgon/elburgon Block7/452 (Ndimio)Elburgon/elburgon Block7/453 (Ndimio)Elburgon/elburgon Block7/456 (Ndimio)Elburgon/elburgon Block7/463 (Ndimio)Bahati/kabatini Block1/634
7. She contended that Title Numbers Elburgon/Elburgon Block 7/401 and Elburgon/Elburgon Block 7/402 were not at any time the property of the deceased but they were owned by her and Mary Wangari Chomba respectively.
8. She stated that the deceased had two homes on Elburgon/Elburgon Block 7/456 (Ndimio) and Nakuru Municipality Block 4/179 (Samoei Estate)
9. That the 1st and 3rd wives lived with the deceased in the home on Nakuru Municipality Block 4/179 (Samoei Estate) and helped him run the family business while she lived in her home on Elburgon/Elburgon Block 7/456 where she took care of all the children of the deceased, and that the home on this parcel has an old colonial house which is no longer part of the deceased's estate.
10. She averred that upon the death of the deceased, the 3rd widow, Mary Wangari Chomba moved from the matrimonial home on Title Number Nakuru Municipality Block 4/179(Samoei) and occupied a rental unit on the 1st floor on Title Number Nakuru Municipality Block 2/226(Freehold) and soon thereafter, the 2nd administrator herein Joseph Wahome a son from the 1st house moved his house which was within the same compound into the matrimonial home of the deceased.



11. She averred that she does not have a home considering that parcel no. Ndimbo Elburgon/Elburgon Block 7/456 (Ndimbo) that she occupied with the deceased all her married life is no longer part of the estate of the deceased.
12. It was her deposition that title number Nakuru Municipality Block 4/179 (Samoei Estate) which measures 0.0871 Ha (0.2152 Acres) and is developed with two residential houses and some rental units can be conveniently divided into 2 portions measuring approximately 0.435 Ha with each portion having one residential house and some rental units.
13. She contended that she is sickly and needs to move to a place with warm weather, and thus proposed that one portion of the above parcel goes to the 1st house while the 2nd portion goes to the second house so that she can have a house in place with warm weather and easy access to good medical facilities.
14. She deponed that she should get the portion with the matrimonial home and Mr. Joseph Wahome should go back to his former house which would be in the second portion.
15. She stated that Title Number Nakuru Municipality Block 2/226 is the main asset of the estate of the deceased valued at Ksh.31, 650,000/= and the said asset should be shared amongst the 3 houses. That the 2nd house should get the ground and 1st floors i.e. Block 1 as per the valuation report, and the rental houses in other blocks 2, 3, 4 and 5 in the valuation report while the 2nd house should get the 2nd floor of the main block (Block 1) and the 3rd floor of the main block (Block 1) as per the valuation report.
16. With regard to title number Nyandarua/Sabugo/498, she averred that the valuation report indicates that it is registered under the settlement fund trustees but it had been allocated to the deceased who fully paid for it and was issued with a certificate of outright purchase, and that all that remains in respect of the property is to have it transferred to the estate of the deceased and thereafter shared amongst the 3 houses in equal shares.
17. She proposed that title number Elburgon/Elburgon Block 3/17 (Matuiku Farm) should go to Ann Njeri Wahome and Wangome Chomba in equal shares.
18. She contended that all the 5 parcels of land at Kapsita have a caveat by the government of Kenya and that one of them was owned by the deceased and 5 other co-owners. She proposed that three of them should be shared among the three houses equally while one should be shared among all the sons of the deceased equally.
19. With respect to Nakuru/Kapsita/878, she proposed that it should be shared amongst the 3 houses equally.
20. She contended that though Land parcel No. Nakuru/Kapsita 1218 is registered in the name of the deceased he held it in trust for other co-owners who have been in occupation and the whole family of the deceased is aware of the position. She thus proposed that 0.246 Ha to be shared equally between Catherine Wanjiku Chomba & Elizabeth Njeri Choma while Elijah Macharia, Kinuthia Muya and David Karanja get 0.246 Ha each.
21. She averred that Nakuru Kapsita 904 should be shared amongst the sons of the deceased in equal shares i.e. Joseph Wahome, Wangome Chomba, James Wahome Chomba, Peter Gichohi Chomba, Macharia Chomba, Paul Kariuki Chomba, Anne Njeri Muturi and Simon Gichohi Chomba while Nakuru Kapsita/2112, Nakuru Kapsita/912 and Nakuru Kapsita/913 should be shared amongst the 3 houses equally as it is bigger and measures at approximately 1.0 Ha, 2.5 acres and has a value of Ksh. 2,500,000/=



22. The 2nd administrator in his affidavit for proposed mode of distribution dated 19th July, 2019 proposed that Nakuru Municipality Block 2/226 (Freehold Estate) be distributed as suggested by the 1st Administrator Nakuru Municipality Block 4/179 should be given to the 1st house since that was the matrimonial home of their mother during her lifetime. Bahati/Kabatini Block 1/634 be distributed between Joseph Wahome and Paul Kariuki Chomba in equal shares. Plot Number 480 Sabugo Settlement Scheme be distributed in equal shares to Joseph Wahome for his benefit and in trust for Teresia Wambui Black, Mary Wambui Black, Mary Mumbi Memia, Susan Mweru Itemo, Paul Kariuki Chomba and Elizabeth Njeri Chomba, Grace Wangari Shumba for her benefit and in trust for Anne Wambui Chomba, Ann Njeri Wahome, Macharia Chomba, Catherine Wanjiku Chomba, Peter Gichohi Chomba and Jane Kagure Chomba, Mary Wangari Chomba for her benefit and in trust for James Wahome Chomba, Veronica Wambui Kamau, Hellen Wangechi Chomba, Simon Gichohi Chomba and Jecinta Kagure Chomba. Elburgon Kapsita 878 be shared equally amongst the three houses Nakuru /Kapsita 904, 912, 913, 1218 & 1218 be shared equally amongst the three houses.
23. Regarding parcels of Land known as Elburgon/elburgon Block 7/456, 7/453, 7/451, 7/452 and 7/463, he averred that all have a dispute pending in the Court of Appeal and in the event that the appeal is concluded in favour of the estate, the parcels of land should be shared equally amongst all the three houses.
24. He prayed for an order that the 2nd and 3rd houses do give a complete and accurate account of the total amount that they withdrew at Ebenezer Sacco failure to which the said sum be recovered as a debt from the two houses and an order to direct Mary Wangari Chomba to give an account of the rent that she has collected from 2015 to date failure to which the same be made a debt deductible from her share.
25. The members of the third family through a letter filed on 18th March 2022 disagreed with mode of distribution by the 1st Administrator regarding the property known as Plot 2/226 Free Hold only. According to them this parcel belongs to their late mother Mary Wangari as per the written will of the deceased. They stated that they are satisfied with only this property and they cannot inherit what was not meant for them.
26. The matter proceeded by way of *viva voce* evidence. During hearing, only the 1st administrator was present, the 2nd and 3rd administrators though aware of the hearing date chose not to attend court and their case were deemed as closed.
27. The 1st administrator in her testimony urged the court to adopt her mode of distribution as indicated in her affidavit filed on 18th February, 2022.
28. Thereafter, I directed parties to file submissions. Only the 1st and 3rd administrators filed their submissions.

1st Administrator's submissions

29. The 1st administrator submitted that the law relating to distribution of the estate of a deceased polygamist is set out at section 40 of the *Law of Succession Act*. However, the courts have held that the above section is a general provision for the distribution of the estate of polygamous deceased's persons and therefore courts have a discretion to take into account factual situations to avoid absurd results and to ensure equitable and fair distribution of the estate. In support of this proposition reliance was placed on the cases of *Mary Rono vs Jane Rono & another* [2005] eKLR & *Scholastic Ndululu Sura vs Agnes Nthenya Sura* [2019] eKLR



30. The 1st administrator submitted that considering the 1st and 3rd spouses of the deceased are not alive Section 38 applies. She posited that each house' share should be distributed among the 6 beneficiaries equally.
31. In regards to the 2nd house, she argued that Section 35 of the *Law of Succession Act* applies. She submitted that the widow has a life interest over the share given to this house but with the power of appointment of all or any part of the capital of the net intestate estate. However, to avoid any conflicts, she submitted that the court should exercise its discretion and give the matrimonial home to the 1st administrator solely and then order the remaining share given to this house be distributed amongst all the 7 beneficiaries equally.
32. The 1st administrator urged this court to distribute the estate as proposed in her affidavit but in regards to land parcel no. Nakuru/Kapsita 904 she stated that it can be shared equally amongst the three houses as proposed by the 2nd administrator.
33. Regarding the rental income deposited in court, the administrator stated that all the children of the deceased are adults and fending for themselves. She thus urged this court to release the entire amount to her as she is sickly and she cannot work to earn a living.

The 3rd administrator's Submissions

34. The third administrator urged the court to distribute the estate in accordance with the will dated 5th March, 2000.

Analysis & Determination

35. I have considered the depositions in support of and in opposition to the Summons for confirmation of Grant, the evidence of the 1st Administrator and submissions on record. As a result, I find the main issue for determination is which mode of distribution is fair to the parties?
36. The duty of this court is to ascertain the beneficiaries of the deceased, determine what constitutes the Estate of the Deceased and how the Estate should be distributed.
37. The high court in *re Estate Of Solomon Mwangi Waweru (Deceased)* (2018) eKLR stated as follows;

“The duty of the Probate Court is to oversee the transmission of the estate of the deceased to his beneficiaries. Its jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime and its purpose is to ascertain the assets, liabilities, if any, the beneficiaries and the mode of distribution of the estate.”
38. *In re Estate Of Henry Kithia Mwitari (Deceased)* (2021) eKLR, also stated as follows;

“The duty of the Probate (Family) Court is to oversee the transition of the estate of a Deceased person to the genuine beneficiaries – to ascertain the assets and liabilities of the estate, identify the beneficiaries and set out the mode of distribution of the Estate.”
39. Further, the High Court *in re Estate of Atibu Oronje Asioma (Deceased)* (Succession Cause 312 of 2008) [2022] KEHC 11046 (KLR) (22 July 2022) (Ruling) stated that: -

“The probate court only distributed assets that were undisputedly owned by the deceased. Assets that were unencumbered or the subject of ownership disputes were not undisputedly owned by the deceased, and were not available for distribution by the court until the



encumbrances were removed or the ownership disputes resolved. Property available for distribution was defined in section 3 of Law of Succession Act as the free propriety of the deceased.”

40. In the instant case, beneficiaries of the deceased are not contested. They are as listed by the 1st Administrator in paragraph 5 of her further affidavit save to state that Mary Wangari Chomba, the third wife, is now deceased. The only point of disagreement is the manner the deceased’s estate should be distributed.
41. What constitutes free property of the deceased has been defined by Section 3 of The Law of Succession Act as follows:-

“In relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”
42. The Indian case of *Balgangadhar Tilak vs. Ganesh Srikrishna*, 26 Ilr Bombay 792 shed more light on the provision of Section 3 of the Act. The court held that: -

“The grant of probate only perfects the representative title of the executor to the property which belonged to the testator and over which he had disposing power...”
43. Definition under Said Section 3 reveals two perspectives. The first one is the property of the deceased which was encumbered during his lifetime and in respect of which his interest has been terminated by his death is not free property and does not form part of his estate. Second one, is if the deceased during his lifetime sold, transferred or gifted any of his property, that property does not form part of his estate and is not available for distribution.
44. It has also not been controverted that the following properties no longer form part of the deceased’s estate; Elburgon/elburgon Block7/403 (Ndimio) Elburgon/elburgon Block7/451 (Ndimio) Elburgon/elburgon Block7/452 (Ndimio) Elburgon/elburgon Block7/453 (Ndimio) Elburgon/elburgon Block7/456 (Ndimio) Elburgon/elburgon Block7/463 (Ndimio) Bahati/kabatini Block1/634
45. The 2nd and 3rd administrators also did not dispute that Elburgon/elburgon Block 7/401 and 402 belong to the 1st Administrator and one Mary Wangari Chomba as per the annexed title deeds marked as Ex 1.
46. Regarding Title Number Nyandarua/Sabogo/498 the same is indisputably still registered under the Settlement Fund Trustees and is yet to be transferred to the estate of the deceased. This property will be available for distribution upon such transfer is effected.
47. The 1st Administrator also stated that all the 5 parcels of land at Kapsita have a caveat placed by the Government of Kenya. This position is corroborated by the valuation report dated 10th August, 2021. This land is therefore encumbered and not available for distribution.
48. Similarly, title No. Nakuru/Municipality Block 4/179 is encumbered. According to the said valuation report there is restriction dated 4th August 2015 on no dealings without the consent of Mwangi Mukira & Co. Advocate acting on behalf of Anne Wambui and Catherine Wanjiku who are claiming ownership and there is registered charges dated 21st October 1983 & 29th September, 1999 to Standard Chartered Bank Limited of Ksh. 120,000/= and 80,000/= respectively.



49. In light of the above, it is the court's finding that Elburgon/elburgon Block7/403 (Ndimo), Elburgon/Elburgon Block7/451(Ndimo) Elburgon/elburgonBlock7/452 (Ndimo) Elburgon/elburgonBlock7/453 (Ndimo) Elburgon/elburgon Block7/456 (Ndimo) Elburgon/elburgon Block7/463 (Ndimo) Elburgon/elburgon Block7/401 and 402 do not belong to the deceased.
50. The same applies to the property known as Nyandarua/Sabogo/498 which is still under the name of the Settlement Fund Trustees. This can be available once the transfer process to the name of the deceased is completed.
51. The properties known as Nakuru /Kapsita 904,912,913,1218 & 1218 & Nakuru/Municipality Block 4/179 are encumbered and until the encumbrances are removed, they are not free property of the deceased estate and therefore not available for distribution.
52. The property known as Kabati /Kabati Block 1/1634 has a pending case so it is also not available as free for distribution.
53. The property known as Nakuru Municipality Block 2/226 has a charge to Standard Chartered bank. It is also not available for distribution.
54. Therefore the only property that is free of encumbrances at the moment and available for distribution is;
 - i. Elburgon/Elburgon Block 3/17 (Matuiko). It is a parcel of land measuring 0.064 acres with a temporary house on it.
55. The first question to be answered is whether there was a will left by the deceased as alleged.
56. Section 51(2)(e) of the Law of Succession Act, provides that a petitioner for grant of letters of his administration must disclose in his petition whether or not the deceased left a valid will. Where it is alleged that the deceased left a valid will then section 51(3) prescribes clearly what ought to be done. The said Section 51(3) states as follows: -

“(3) Where it is alleged in an application that the deceased left a valid will –

 - (a) if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either
 - (i) an authenticated copy thereof shall be so annexed;
or
 - (ii) the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;
 - (b) if it was oral, the names and addresses of all alleged witnesses shall be stated in the application.”
57. The 3rd Administrator, who alleges that there was a will left by the deceased was given a chance to have it presented before court. He should have applied to revoke the grant of letters intestate on account of discovery of the alleged will. The court would then have determined the said issue. It was not proper to just file it. The court has to be moved accordingly. Since the 3rd administrator did not file the requisite



application in compliance with the court's directions, I find that his contention therefore do not hold any water.

58. Therefore in the absence of the said application the correct position is that the deceased is presumed to have died intestate and the distribution of his estate is no doubt subject to intestacy provisions of the Law of Succession Act. In particular section 40 thereof states 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.

(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.”

59. From the evidence adduced herein and the valuation report filed herein it is discernible that the majority of the estate is in a way encumbered. Thus, it would be premature to distribute the only free property at the moment, as it forms a very minute portion of the estate. I am of the opinion that the same can await the rest of the estate to be ready for distribution.

60. It is the duty of the 3 administrators to proceed to act on the said encumbrances. They should proceed to the respective banks to confirm the status of the loan accounts and seek a way to have the charges discharged. Under section 86 of the Act, debts of every description enforceable at law and owed by or out of an estate shall be paid before any legacy. Therefore the distribution has to await the clearance of the said debts.

61. Before that is done the only orders that the court can issue is in regards to the rental income from the property on Nakuru Municipality Block 2/226. In fact, this appeared to be the most contentious issue. The rent therefrom is collected by the appointed agent. The money so far collected may be needed to offset the loans to the banks. Therefore, the orders to collect the rent will subsist until further directions of the court.

62. I therefore find that the matter is not ripe for confirmation, even a partial one, until the administrators have complied with the directives above.

63. The administrators will be given time to comply and revert back.

64. The Parties will bear their respective costs. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU 28TH DAY OF FEBRUARY, 2024.

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H. M. NYAGA

JUDGE

In the presence of:-

C/A Oleperon

Mutonyi for 1st Administrator

Mama Willy for 2nd Administrator



Wangombe Chomba- present

