



In re Estate of Gideon Kibet Toroitich (Deceased) (Succession Cause E068 of 2022) [2024] KEHC 2465 (KLR) (28 February 2024) (Ruling)

Neutral citation: [2024] KEHC 2465 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE E068 OF 2022
G MUTAI, J
FEBRUARY 28, 2024**

BETWEEN

DORCAS JERUTO TOROITICH PETITIONER

AND

ROY KIPLUMBEI TOROITICH PROTESTOR

RULING

1. Before me is the Affidavit of Protest sworn on 9th June 2023 by the Protestor, Roy Kiplumbei Toroitich. Vide the said affidavit, the Protestor objects to the entire estate of the deceased, vesting on Dorcas Jeruto Toroitich (hereafter “the Petitioner”), his mother, and the widow of the deceased. He seeks to have the estate property valued and the same distributed to the beneficiaries so that those who want to give their portions to the Petitioner are at liberty to do so.
2. The Protest avers that the grant of Letters of Administration Intestate was granted to his mother on 21st October, 2022, and the same was due for Confirmation at the time he filed the Protest.
3. In his Witness Statement, the Protestor averred that he was the firstborn of the 6 children of the decedent, the late Gideon Kibet Toroitich (hereafter “the deceased”) and the Petitioner. His complaint is that his mother “does not seek equal interests to all her children and especially for me.” His view is that he had been sidelined from the running of the estate business and that his siblings were acting in cahoots with the Petitioner to deny him his rightful share of the estate.
4. The Protestor deposed that he refused to sign the Consent on subdivision because he had concerns about the proposed mode of distribution. As the Petitioner had indicated that she would bequeath her share of the estate to her brother Kenneth Limo Toroitich, the Protestor was apprehensive that Kenneth would eventually end up with a lion share of the estate.
5. He denied that he was hot-tempered and verbally abusive and that he lacked financial discipline. He averred that he supervised some family farms and that he was as interested as his siblings were in the



- preservation and growth of the family's wealth and assets. He accused his siblings Cathy Jerotich, Kenneth Limo, Cynthia Jemutai, Oliver Kipchumba, and Robert Kiproop of engaging in deceit, trickery, and vagueness with “the singular intention that they take complete control of the family enterprises at my exclusion and which in turn shall visit me great loss and prejudice.”
6. He thus prayed that the estate be distributed taking into account the welfare of the Petitioner, given that she is 83 years old and requires adequate shelter, healthcare, security food, and “any other assistance to make her life comfortable.”
 7. The Petitioner filed a Reply Affidavit sworn on 15th June 2023. In it, she reiterated the contents of her Affidavit in Support of Summons for Confirmation of Grant dated 29th May 2023.
 8. Mrs. Toroitich deposed that the deceased died intestate. He was survived by herself as the sole widow and 6 children, Roy (the Protestor), Cathy Jerotich Toroitich, Kenneth Limo Toroitich, Cynthia Jemutai Toroitich, Oliver Kipchumba Toroitich, and Robert Kiproop Toroitich. In her view, she is entitled to the personal and household effects of the deceased absolutely and to a life interest in the whole of the residue of the net intestate estate. Thus, she averred that neither the Protestor nor any of his siblings is entitled to the net intestate estate of the deceased, or any part thereof, so long as she lived as the deceased’s surviving spouse and so long as she did not remarry. She stated that she had no problem with Roy carrying out the valuation of the estate, provided that he bore the costs of the said exercise.
 9. The Petitioner declined to accept the Protestor’s proposal to have the deceased’s estate distributed to the beneficiaries so that those who wished could transfer their share to her, arguing that she was entitled to the whole residue of the deceased’s net intestate estate and that all of the Protestor’s siblings had consented to the arrangement.
 10. The Chamber Summons dated 29th May 2023 sought the following orders:-
 1. That the grant of letters of administration Interstate granted to the said Dorcas Jeruto Toroitich on 21st October 2022 be confirmed;
 2. That the entire estate of the said Gideon Kibet Toroitich vests in his widow Dorcas Jeruto Toroitich; and
 3. That costs of this application be costs in the cause.
 11. In her Supporting Affidavit the Petitioner listed 49 assets of the deceased whose value she gave as being Kes.515,084,059.00. She indicated that the estate had no liabilities. She annexed consents to the confirmation of the grant signed by all the beneficiaries save for the Protestor.

Proceedings in Court

12. The Summons for Confirmation of Grant came up for hearing on 20th June, 2023. Although the beneficiaries were all present, this Court could not hear the same as the Protestor’s protest had to be determined first under Rule 41(1) of the [Probate and Administration Rules](#), which provides that:-
 - (1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.”
13. The Court was of the view that the question raised in this matter was one of law only. Consequently, the parties were directed to file Written Submissions, which were to be highlighted on 26th July 2023.



On 26th July 2023, the Protestor's advocate insisted that his client wished to have the matter canvassed by way of a viva voce hearing. The court, despite not being convinced of the need for such a hearing, nevertheless acceded to the said request and ordered that the hearing proceed on 26th September 2023.

14. Hearing proceeded on 26th September and 3rd October 2023. The Protestor testified on his own behalf. The Petitioner had 3 witnesses: Dorcas Jeruto Toroitich, Kenneth Limo Toroitich, and Robert Kiprop Toroitich.
15. In his testimony, the Protestor expressed his strong desire to have his portion of the estate availed to him. He accused his siblings of sidelining him and also of undervaluing the estate. He reckoned that the estate was worth, at a minimum, Kes.1,000,000,000.00. Although he admitted to receiving help from time to time from his mother and his brother Kenneth Limo Toroitich, he testified that he was a responsible man with his own children and grandson and that he undertook farming.
16. The Petitioner, on the other hand, testified that as the sole spouse of the deceased, she had a life interest in the net residue of his estate, and her son could not claim the estate while she was alive. She denied that the Protestor had been oppressed. It was her evidence that she supported him and gave him money from time to time.
17. Her evidence was supported by Kenneth Limo Toroitich and Robert Kiprop Toroitich. Given the narrow question that this Court is called upon to determine. I see no reason to rehash their testimony in this ruling.

The Protestor's Submissions

18. The Protestor filed skeleton submissions and also filed further submissions on 28th November 2023. In his submissions, the Protestor urged that it was not true that all the children of the deceased had consented to the Summons for confirmation of Grant. His position was that only 5 of the 6 had done so. He urged that the 5 consenting children had, in cahoots with the widow, conspired to disinherit him by manipulating the estate in the guise that it was being held by the widow.
19. The Protestor counsel, Professor Kiama Wangai, referred me to the decision of the Court in *Justus Thiora Kiungu & 4 others versus Joyce Nkatha Kungu & Another* [2015]eKLR where the Court stated that:-

“The Court of Appeal held that where the children of the deceased and his widow did not agree or consent on the mode of distribution of the deceased's estate, then the Court has no choice but to adhere to section 35 of the *Law of Succession Act* which provides that a surviving spouse shall be entitled to the personal and household effects of the deceased absolutely and a life interest in the whole residue of the net intestate estate.”

20. Counsel submitted that an estate cannot be legally distributed other than by the parties agreeing among themselves and filing a consent or by the Court following the provisions of Section 35 of the *Law Succession Act*.
21. The Protestor thus proposed that the widow be adequately provided for and the remaining estate be distributed to the beneficiaries.

The Petitioner's Submissions

22. The Petitioner's advocates filed two sets of submissions. The first, pursuant to my earlier orders, was dated 20th July 2023. After the Protestor filed Further Submissions on 28th November 2023, the Petitioner's counsel filed Supplementary Submissions dated 18th December 2023.



23. The Petitioners identified the sole issue coming up for determination in this case as being whether the Petitioner, as the surviving spouse of the deceased is entitled to a life interest in the net intestate estate of her deceased husband.
24. Relying on the definition given to the term “surviving spouse” In the matter of the *Estate of Andrew Mungai Muthemba (deceased) (Elizabeth Wanjiru Njonjo Rubia versus Brian Mwaituria)* [2019]eKLR her counsels, Anjarwalla & Khanna submitted that the Petitioner was the surviving spouse.
25. As a surviving spouse, it was urged that she was entitled to her husband's net intestate estate as long as she lived and did not remarry. The Court was referred to the case of *In re Estate of Walter Kiplangat arap Chamdany (deceased)* [2021]eKLR in support of this proposition.
26. Based on the decided cases that they had provided the Petitioner’s counsel urged that I should dismiss the protest and fix the summons for Confirmation of Grant for hearing.

Analysis and Determination

27. I have read the Petition, the Chamber Summons application vide which the Confirmation of the Grant previously issued by this Court, the Affidavit of Protest and the various affidavits and statements filed in this matter. I have also considered the submissions of the parties. In my view, there is only one issue that calls for my determination, which is whether the Protestor is entitled at law to claim his share of the estate as long as his mother lives and has not remarried.
28. Before I do so, however, I must set out the facts, which all the parties herein agree. These are, in my view:-
 1. The deceased was married to the Petitioner. The Petitioner was the deceased sole wife, their union being a monogamous one;
 2. The deceased and the Petitioner had 6 issues: Roy, Cathy, Cynthia, Kenneth, Oliver and Robert Toroitich. All are adults. They are dependents as defined under section 29 of the *Law of Succession Act*;
 3. The Petitioner has not remarried;
 4. Grant was issued to the Petitioner on 21st October 2022 and is now due for confirmation; and
 5. All the issues of the Petitioner, save for the Protestor, have agreed that the Petitioner shall have a life interest in the net intestate of the deceased.
29. The Protestor’s case, as I understand it, is that the Petitioner should get such a portion of the estate as is necessary to secure her in the remainder of her life and that the rest should be divided amongst the dependants so that they can do whatever they want with their respective portions. The Petitioner on the other hand urges that the Protestor’s interest in the estate hasn’t crystalized and that he should bid his time until it does so.
30. The life interest of a spouse in the estate of his/her departed partner is provided for in section 35 of the *Law of Succession Act*, which provides that:-
 - (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-
 - (a) the personal and household effects of the deceased absolutely; and



(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

- (2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.
 - (3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.
 - (4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to –
 - (a) the nature and amount of the deceased's property;
 - (b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;
 - (c) the existing and future means and needs of the applicant and the surviving spouse;
 - (d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
 - (e) the conduct of the applicant in relation to the deceased and to the surviving spouse;
 - (f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
 - (g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.
 - (5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”
31. Although the plain reading of section 35(1) of the *Act* is discriminatory to the extent that it treats female spouses differently from males, the discriminative aspects of the said legislation are no longer in effect. The Meru High Court in *Ripples International versus The Attorney General & others* (Constitutional Petition No. E017 of 2021) declared the said provision unconstitutional and directed that in light of the transitional and consequential provision of the *Constitution* set out under Article 262, the said section should be interpreted in a manner that gives effect to the equality of women and men with regard to the protections and benefits accruing under the said provisions.
32. Thus, in my view, even if the Petitioner had remarried, she would be entitled to a life interest in the net residue of the estate of the deceased.



33. Can the Protestor claim his share of the estate while his mother lives? My reading of section 35 of the said Act leads me to the ineluctable conclusion that he can't. He has no choice but to bid his time until his mother is deceased or is otherwise amenable to making an apportionment to him under section 35(2) of the *Act*. The decision as to whether to make an apportionment is discretionary. He would, however, have the right to seek redress in court if he is certain, upon the happening of such an event, that his request for appointment was unreasonably withheld.
34. I am guided by the decision of the Court *In re Estate of Walter Kiplangat arap Chamdany (deceased)* [2021]eKLR where Lady Justice Korir-Lagat expressed herself as follows:-
- “I agree with the Petitioner (surviving spouse) that presently, she holds a life interest in the estate of the deceased. And while this entitlement is not absolute, her children, including the Applicant are not entitled to seek to have the property devolve to them except where the Petitioner remarries or passes on. In the absence of these two events, she (the surviving spouse) continues to enjoy a life interest in the net intestate while at the same time holding it in trust for her surviving children.”
35. Musyoka J, in his *Tau Kakungi versus Margrethe Thorning Katungi & Another* [2014]eKLR stated that:-
- “The effect of section 35(1) is that children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children right to the property crystalizes upon the determination of the life interest following the death of the life interest holder or her remarriage ... However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution.”
36. It bears noting that life interest is not a matter of choice. This was pithily observed by the Court *In re Estate of Jolly Jimmy Githieya (deceased)* [2013]eKLR where it was stated that:-
- “The applicant (the surviving spouse) says that the children are not happy with the issue of life interest... life interest is not a matter of choice by the surviving spouse; it is an imposition by the law. It is, in fact, supposed to safeguard both the children and the surviving spouse. However, if everything passes to the children, there is a real possibility that the surviving spouse could be left destitute. To safeguard his or her position, he or she is given a life interest in the estate.”
37. Since the Petitioner has a life interest in the net residue of the estate, the Protest is totally bereft of merit. During his testimony, the Protestor stated that he does farming on part of his father's estate. He should take care of himself until his mother's life interest is extinguished. If, however, his life depends on getting a portion of the estate, he has the option of asking his mother for apportionment. As I have earlier indicated, if his request for apportionment is unfairly withheld, he can still pursue a remedy in court.
38. The Petitioner is not deceased. She hasn't remarried. That being the case, the protest has no merit and is dismissed.
39. This is a family matter. award of costs will aggravate the situation and poison the relationship between the parties. In the circumstances, each party will bear own costs.
40. Orders accordingly.



DATED AND SIGNED THIS 28TH DAY OF FEBRUARY 2024 AT MOMBASA.

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GREGORY MUTAI

JUDGE

In the presence of: -

Prof Kiama Wangai for the Protestor;

Mr. Sakimpa holding brief for Mr. Esmail for the Petitioner; and

Arthur - Court Assistant

