



REPUBLIC OF KENYA



**In re Estate of of the Late Isaac Bisienei (Probate & Administration
30 of 2004) [2024] KEHC 3537 (KLR) (22 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION 30 OF 2004
JRA WANANDA, J
MARCH 22, 2024**

BETWEEN

JAPHETH MAIYO 1ST PETITIONER

EDWARD BUSIENEI 2ND PETITIONER

AND

ANNE JELAGAT BUSIENEI 1ST RESPONDENT

JANE JEMUTAI BUSIENEI 2ND RESPONDENT

DORCAS JEPKAZI BUSIENEI 3RD RESPONDENT

GRACE JEPCHUMBA BUSIENEI 4TH RESPONDENT

JOYCE JERUTO BUSIENEI 5TH RESPONDENT

RULING

1. The deceased, Isaac Bisienei, died intestate on 21/10/2001 at the age of 68 years. On 26/01/2004, the Petitioners, as sons of the deceased, petitioned for Grant of Letters of Administration Intestate in respect to the estate. In the Petition, it was stated that the deceased had left behind 10 survivors. 3 parcels of land were then listed as comprising the estate.
2. Subsequently, various persons emerged and filed successive Applications seeking to be included as survivors. Several interlocutory Applications were also filed seeking preservatory orders of various nature and also rights to plough or cultivate portions of parcel of land comprising the estate. For these reasons, 20 years since being filed, this Cause is yet to be concluded and during the intervening period, a number of family members have since died.
3. Before the Court now is the Petitioners' Summons seeking Confirmation of the Grant of Letters of Administration with respect to the estate The Petitioners seek orders as follows:



- i. Grant of Letters of Administration Intestate made to the Applicant by the Honourable Court on 22/3/2004 be now confirmed.
 - ii. The estate of the late Isaac Busienei be distributed as per the schedule provided for in the affidavit of Edward Busienei herein filed.
 - iii. Costs of the application be provided for.
4. The Summons is filed through Messrs Songok & Co. Advocates and is expressed to be brought under Section 71(3) and (4) of the *Law of Succession Act* and Rule 40 of the *Probate and Administration Rules*. It is then premised on the grounds appearing on the face thereon and is supported by the Affidavit sworn by the 2nd Petitioner, Edward Busienei.
5. In the Affidavit, the 2nd Petitioner deponed that the identification of all persons beneficially entitled to the estate of the deceased has been ascertained as follows:



Beneficiary	Description of Property	Shares	
1.	Jane Cheronon Maiyo	LR No. 6614/5 Tractor, Planter and Plough Kachibora shop	60 Acres
2	Edward Busienei	LR No. 6614/5 Nandi/ Chemuswa/51/386 Lorry KUT 166 Mosoriot Shop No. 24	13 Acres 47 Acres
3.	Christine J. Tuwei	LR No. 6614/5 Nandi/ Itigo/272/145 Chemuswo Shop No.37	7.5 Acres 52.5 Acres
4.	John Mutai	LR No. 6614/5 Nandi/ Itigo/272/145 1 Tractor & Planter Mosoriot Shop No. 24	7.5 Acres 52.5 Acres
5.	Everlyne Jeptoo Agui	LR No. 6614/5 Mazda KZU 314 & Trailer Kachibora Shop	60 Acres
6.	Ruth Chepchirchir	LR No. 6614/5	10 Acres
7.	Dorcas Jepkazi	LR No. 6614/5	10 Acres
8.	Grace Jepchumba	LR No. 6614/5	10 Acres
9.	Joyce Jeruto	LR No. 6614/5	10 Acres
10.	James Busienei	LR No. 6614/5	60 Acres



		Kachibora Shop	
11.	Wesley Maiyo	LR No. 6614/5	60 Acres
12.	Stanley Maiyo	LR No. 6614/5 Tactor KXQ 187	60 Acres
13.	Christine Busienei	LR No. 6614/5	22 Acres
14.	Jacob K. Tuwei	Nandi/ Chemuswa/50	50 Acres
LR No. 6614/5	10 Acres		
15.	Elisha Busienei	Nandi/ Chemuswa/50	50 Acres
16.	Barnaba Busienei	Nandi/ Chemuswa/50	50 Acres
17.	Esther Maindi	LR No. 6614/5	20 Acres
18.	Grace Chepkoech Chepsiro	LR No. 6614/5	10 Acres
19.	Joseph T. Lelei	LR No. 6614/5	5 Acres
20.	Josphat Koskei	LR No. 6614/5	5 Acres
21.	Anne Koskei	LR No. 6614/5	31/2 Acres
22.	Johan Rugut	LR No. 6614/5	13 Acres
23.	Hellen Chepngetich	LR No. 6614/5	10 Acres
24.	Esther Busienei	LR No. 6614/5	10 Acres
25.	Anne Lelei	LR No. 6614/5	10 Acres

6. The 2nd Petitioner therefore prayed that the Grant be confirmed in the said terms.
7. It will be noted that from the 10 survivors initially listed in the Petition, the listed survivors are now 25 in number.
8. To the Summons is attached the Consent Form dated 23/05/2023 signed by 12 persons supporting the Summons. 11 spaces are however left unsigned by the persons contemplated.



Affidavit by Joyce Jeruto Busienei

9. The mode of distribution proposed in the Summons was opposed by the 5th Respondent, Joyce Jeruto Busienei, who swore the Affidavit filed on 22/6/2023 through Messrs Rotich Nyongio & Co. Advocates. In the Affidavit, she deponed that she was authorized by the 4 other Respondents, Ann Jelagat Busienei, estate of Jane Jemutai Busienei, Dorcas Jepakazi Busienei and Grace Jephumba, to swear the Affidavit on their behalf.
10. She deponed further that the 5 Respondents are the daughters of the deceased, and that the deceased left 12 children/beneficiaries, that in the 1st house the survivors were Charles Kipsang Tuwei (deceased-but represented by Christine Tuwei, the widow), Ann Chelagat Busienei, Japheth Kiprof Maiyo (now deceased and now represented by Jane Jerono Maiyo, the widow), Edward Cheruiyot Busienei, Nicholas Busienei (now deceased-but represented by Everline Jeptoo Agui, the widow), Dorcas Jepakazi Busienei, John Kipkoech Mutai, Jane Jemutai Busienei (now deceased), Grace Jephumba Busenei and herself, Joyce Jeruto Busenei.
11. She deponed further that in the 2nd house, the survivors were two, Stanley Busenei and Wesley Busenei.
12. The 5th Respondents further deponed that at the time of his death, the deceased had sold portions of the parcel of land known as L.R. No. 6614/5 (Kitale) to various persons, namely, Esther Maindi (20 acres), Jonah Rugut (13 acres), Josephat Koskei (10 acres), An Koskei (3.2 acres) and Josephat T. Lelei (5 acres).
13. Additionally, the 5th Respondent deponed that the deceased had also gifted their step-grandmother, Bot Kiplelei, 50 acres of the said L.R. No. 6614/5 (Kitale) and 154 acres of the parcel of land described as Nandi Chemuswa, for her own benefit and her children – Christina Jesoimo Busienei, Hellen Chepngetich, Barnaba Busienei, James Busienei, Esther Busienei, Elisha Busienei and Jacob Busienei.
14. The 5th Respondent added that the deceased had also gifted her sister, Jane Jemeli Chepsiror, 10 acres from the said L.R. No. 6614/5 (Kitale).
15. She deponed further that as a result of the said sales and gifts made by the deceased prior to his death, the remaining estate, specifically land, should be shared equally amongst the 12 children, irrespective of their gender. She therefore proposed that the estate be distributed as follows:



1 st House		
Charles Kipsang' Tuwei (deceased-represented by Christine Jepkoech Tuwei, wife)	LR No. 6614/5 Nandi/Itigo/272/154 Nandi/Chemuswa/ Shop. No. 24	51 Acres
Japheth Kiprof Maiyo (deceased-represented by Jane Jerono Maiyo, wife)	LR No. 6614/5 ½ of Kachibora Shop	51 Acres
Edward Cheruiyot Busenei	LR No. 6614/5 Nandi/ Chemuswa/51/386 ½ of Mosoriot Shop No. 24 Lorry KUT 166	51 Acres
Nicholas Kibet Busenei (deceased-represented by Everlyne Jeptoo Agui, wife)	LR No. 6614/5 Mazda KZU/314 & Trailer ½ of Kachibora shop	51 Acres
John Mutai	LR NO. 6614/5 Nandi/Itigo/272/154 1 Tractor & Planter ½ of Mosoriot Shop. 24	51 Acres
Anne Jelagat Busienei	LR No. 6614/5	51 Acres
Estate of Jane Jemutai Busienei	LR No. 6614/5	51 Acres
Dorcas Jepkazi Busienei	LR No. 6614/5	51 Acres
Grace Jepchumba Busienei	LR No. 6614/5	51 Acres
Joyce Jeruto Busienei	LR No. 6614/5	51 Acres
2 nd House		



Wesley Kipchirchir Maiyo	LR No. 6614/5 Tractor KXQ	51 Acres
Stanley Maiyo	LR No. 6614/5	51 Acres
Gifts		
Jane Jemeli Chepsiror (sister to Isaac Busienei) (now deceased) represented by Grace Chepsiror	LR No. 6614/5	10 Acres
Bot Kiplelei step- mother to Isaac Busienei-represented by: a. Christina Jesoimo Busienei (Bot Kiplelei) b. Hellen Chepngetich c. Barnaba Busienei d. James Busienei e. Esther Busienei f. Elisha Busienei g. Jacob Busienei	LR No. 6614/5 Nandi/Chemuswa	50 Acres 154 Acres
Sales prior to the death of the deceased		
a. Esther Maindi b. Jonah Rugut c. Josephat Koskei d. Ann Koskei e. Joseph T. Lelei	LR No. 6614/5	20 Acres 13 Acres 10 Acres 3.2 Acres 5.0 Acres

Affidavit by James Busienei

16. One James Busienei swore the Affidavit filed on 15/11/2023 through Messrs Nyekwei & Co. Advocates. He described himself as one of the heirs to the estate and deponed that he agreed with the proposed mode of distribution proposed by the 2nd Petitioner in the instant Summons for Confirmation.
17. He deponed further that he disagreed with the with the averments made by her sister, Joyce Jeruto Busienei, to the extent that whereas their deceased father allowed them to settle anywhere within the 3 houses, Joyce Jeruto Busienei is proposing to segregate the heirs by suggesting that each child be



apportioned land within the parcel that their biological mother lives, that the proposal by Jane Busienei is unfair because the land parcel hosting the 3 widows are not equal in acreage, that the children born out of each widow are not the same in number, that Jane Busienei lists only 11 of the deceased's children when they are a total of 18, that their deceased father took him to Kitale Land Parcel No. 6614/5 in 1981 and upon attaining the age of majority, apportioned him about 60 acres on which he has built his home and has utilized for over 30 years and that Jane Busienei is proposing that he abandons his home and the developments he has made for 3 decades and relocate to land parcel Nandi/Chemuswo/50 in Nandi County where he has no interest.

18. He further deponed that when their deceased father died, the family elders convened a meeting in which it was agreed that their sisters be apportioned 10 acres while the brothers be apportioned 60 acres, and that they have lived under this arrangement for over 20 years without any problem.

Affidavit by Elisha Busienei

19. One Elisha Busenei also swore the Affidavit filed on 15/11/2023 through Messrs Nyekwei & Co. Advocates. He deponed that he is one of the sons of the deceased and stated that he substantially agrees with the mode of distribution proposed made by the 2nd Petitioner in the Summons. He however submitted that he opposed the portion proposing that he and his brother, Barnaba Busienei, be apportioned 50 acres each when the rest of his brothers have been apportioned 60 acres. He therefore proposed that all the deceased's sons be apportioned equal share. He submitted further that he associated himself fully with the observations made by his brother, James Busienei, against the proposal by Joyce Busienei.

Hearing of the Summons

20. It was then agreed and directed that the Application be canvassed by way of written Submissions. Pursuant thereto, the Petitioners filed their Submissions on 16/1/2024 while the Respondents (daughters) filed their Submissions on 27/2/2024. James Busienei and Elisha Busienei had filed their joint Submissions earlier on 15/11/2023.

Petitioner's Submissions

21. Petitioner's Counsel submitted that the law on the distribution of the estate of a deceased person who dies intestate and polygamous is found in Section 40 of the *Law of Succession Act*, that the Section has always been the to varying interpretation by different judicial officers. He cited the case of *Judith Naiyai Ramaita V James Koote Ramaita*, Kajiado Succession Cause No. 71 of 2015, and submitted that Section 40 has always been a touchy issue subject to contradictory interpretations, which controversy stems from whether the distribution of the net estate of an intestate polygamous deceased should be distributed equally or equitably.

Respondents' Submissions

22. Petitioner's Counsel submitted that the law on the distribution of the estate of a deceased person who dies intestate and polygamous is found in Section 40 of the *Law of Succession Act*, that the Section has always been the to varying interpretation by different judicial officers. He cited the case of *Judith Naiyai Ramaita V James Koote Ramaita*, Kajiado Succession Cause No. 71 of 2015, and submitted that Section 40 has always been a touchy issue subject to contradictory interpretations, which controversy stems from whether the distribution of the net estate of an intestate polygamous deceased should be distributed equally or equitably.



Submissions by James Busienei and Elisha Busienei

23. Petitioner's Counsel submitted that the law on the distribution of the estate of a deceased person who dies intestate and polygamous is found in Section 40 of the Law of Succession Act, that the Section has always been the to varying interpretation by different judicial officers. He cited the case of *Judith Naiyai Ramaita V James Kooote Ramaita*, Kajiado Succession Cause No. 71 of 2015, and submitted that Section 40 has always been a touchy issue subject to contradictory interpretations, which controversy stems from whether the distribution of the net estate of an intestate polygamous deceased should be distributed equally or equitably.

Determination

24. I have carefully considered the Summons vis a vis the Response thereto and also the Submissions presented. Clearly, there is substantial differences in opinion as regards the mode of distribution of the estate amongst the family members/beneficiaries. The Respondents, being daughters of the deceased, are strongly opposed to the mode of distribution submitted by the Petitioners. Whereas the Petitioners propose that the Respondents-daughters be allocated 10 acres each, the Respondents, save for alleged gifts and the sales made by the deceased prior to his death, want the estate to be equally distributed amongst all the beneficiaries irrespective of their gender.
25. I have keenly looked at the several modes of distribution proposed and note that not only do they differ in terms of the acreage proposed but also note that they slightly differ in respect to the list and/or identification of beneficiaries. There are people listed in one proposal but who do not feature in the other, and vice versa. The Petitioners also do not seem to have included all the persons named by the Respondents as having allegedly been the recipients of gifts and/or sales of some of the estate parcels of land during the deceased's lifetime
26. There are also serious constitutional issues for determination touching on whether the proposed mode of distribution submitted by the Petitioners discriminates against the Respondents on the ground of their gender.
27. It is also evident that James Busienei, being one of the sons of the deceased, substantially agrees with the mode of distribution proposed by the Petitioners save that he argues that while he lives on parcel No. 6614/5 Kitale, the Respondents propose that he be allocated land in Nandi/Chemoswo yet he has lived and utilized parcel No. 6614/5 Kitale for over 30 years. On his part, Elisha Busienei, also being one of the sons of the deceased, while generally agreeing with the Petitioners' proposed mode of distribution, also seems to have qualms with the fact that the rest of his brothers are being allocated 60 acres whereas he and his other brother, Barnaba Busienei, are proposed to be given 50 acres. He wants each of the sons of the deceased to be apportioned an equal share.
28. I also note that James Busienei insinuates to there being 3 houses (widows), rather than 2 houses (widows) as alluded to by the Petitioners and the Respondents. He also deponed that Jane Busienei has listed only 11 of the deceased's children when they are 18 in total.
29. In view of the foregoing observations and contradictory factual submissions made by the respective parties, my assessment is that I cannot conclusively or accurately tell who are the correct beneficiaries herein and what number they are. My view is that the Court can only determine the same if the parties were to tender viva voce evidence. The contradictory facts presented cannot be determined from the record as it stands, it would require the calling of witnesses and cross-examination.



Final Orders

30. In light of all the foregoing, I make the following orders:

- i. The determination of the Summons for Confirmation of Grant dated 23/5/2023 and filed in Court on 24/5/2023 is hereby deferred.
- ii. I direct that a date(s) be fixed when the parties shall be allowed the opportunity to tender viva voce evidence in respect to the mode of distribution of the estate and be cross-examined thereon.
- iii. Costs shall be in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF MARCH 2024

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WANANDA J.R. ANURO

JUDGE

