



**In re Estate of Kiplagat Kibitok (Deceased) (Succession Cause
181 of 2015) [2024] KEHC 4900 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 181 OF 2015
RN NYAKUNDI, J
APRIL 25, 2024**

BETWEEN

DANIEL KIPRUTO LAGAT PETITIONER

AND

JOHANA KIPTOO LAGAT RESPONDENT

RULING

1. The matter relates to the estate of Kiplagat Kibitok who died intestate on 31.01.2011. The grant of letters of administration with respect to the estate of Kiplagat Kibitok were made to Danel Kipruto, being the son of the deceased on 22nd July, 2016.
2. The Objector subsequently on 15th November, 2016 filed summons for revocation of the said grant and advanced various grounds among them being; The Petitioner has abused the grant by disposing off part of the estate before the confirmation of the grant and even after; the proceedings were defective in that the grant was obtained by misrepresentation and omission of material facts.
3. The petitioner filed a consent to confirmation of grant and mode of distribution on 23rd October, 2023. The petitioner's proposed mode of distribution is as follows:
 - a. Mary Jesang Langat to get 1.5 acres
 - b. Susan Jepkemboi Kiplagat to get 1.5 acres
 - c. Daniel Kipruto Lagat to get 20.5 acres
 - d. Johana Kiptoo Lagat to get 7.5 acres
 - e. James Kipsang Lagat to get 7.5 acres.
 - f. Richard Kibiwott Lagat to get 7.5 acres



4. The objector filed an affidavit in protest to the proposed mode of distribution on grounds that the petitioner proposes to get a larger share of 20.5 acres of the estate property without any justification whatsoever. According to the objector, before his death, the deceased summoned members of the family to a meeting on 20th October, 2011 where he expressed his wishes on how the parcel of land known as Meibeki/meibeki Block 4(Kaploo)3 should be distributed.
5. The objector put it that the deceased proposed that the property known as Meibeki/meibeki Block 4(Kaploo)/3 measuring approximately 45.6 be distributed to his children as follows:
 - a. Richard Kibiwott Lagat – 9 acres
 - b. Johana Kiptoo Lagat – 9 acres
 - c. James Kiplagat – 9 acres
 - d. Daniel Kipruto Lagat – 8 acres
 - e. The remaining 10 acres were to remain under the deceased.
6. The objector contends that the petitioner’s claim that he bought land from Kabomoi farm which was registered in the name of the deceased is a lie. He used his position to try and allocate himself 14 acres of the deceased land during adjudication but the deceased refused and decided to have the whole land registered in his name. The deceased had decided to allocate each of his sons 10 acres at the time but when the members list was read and the name of the petitioner had 14 acres the deceased refused and changed his mind t have the entire property registered in his name.
7. He urged the court to adopt the mode of distribution as agreed within the family. The said mode is as follows:
 - a. Richard Kibiwott Lagat – 4.05 Ha (10 acres)
 - b. Johana Kiptoo Lagat – 4.05 Ha (10 acres)
 - c. James Kiplagat – 4.05 Ha (10 acres)
 - d. Daniel Kipruto Lagat – 4.05 Ha (10 acres)
 - e. Mary Jesang Kilagat & Susan Jepkemboi Kiplagat – 2.43 Ha (6 acres)
8. The petitioner filed submissions on 14th December, 2022 in support of his proposed mode of distribution.

Petitioner’s submissions

9. The Petitioner submitted that it is not in issue as to the beneficiaries of the estate. Similarly, it is not in issue that the estate of the deceased is comprised of a single asset being Moibeki/Moibeki Block4(Kaploo)/3 measuring 18.48ha or 46 acres. The petitioner put forth the brief facts according to him as follows:
10. In the early 1980s, the members of the public were invited to buy L.R. No 5322/1 famously Kaploo Farm at Moiben. A committee was therefore formed to receive money from the prospective buyers wherein the petitioner herein was elected as a treasurer. The petitioner stated that he was a member of the said farm as demonstrated by the member register dated 20th June 1986 wherein the petitioner appears as member no. 4 whereas the deceased was member no. 3. The deceased paid Kshs. 6,051/= whereas the petitioner independently paid Kshs. 2,760/= for the acquisition of the said parcel of land



as demonstrated by the list of contributions and money paid each member wherein the said list the shares of the deceased and applicant appear as item 8,811/=.

11. That the share of the deceased and the applicant jointly measured 46 acres from which 13 acres is the share of the petitioner and 33 acres for the deceased. Balloting of the said firm was done in 1987 wherein the petitioner's share of 13 acres was amalgamated with the deceased as his father to constitute and form Moibeki/Moibeki Block4(Kaploo)/3 measuring 46 acres. He stated that in the circumstances, the registration of the deceased in so far as the said 13 acres is in trust for the petitioner.
12. The petitioner stated that he has in fact established his residence within the 13 acres and planted trees. He therefore contended that the 13 acres do not constitute the estate of the deceased and is not available for distribution equally among all the beneficiaries. In support of his side of the story, the petitioner cited numerous authorities, which I have considered in coming up with a determination.

Analysis & determination

13. I have considered the proposed modes of distribution of the estate by both parties and the law applicable. The main issue for determination I find is as to which of the two modes of distribution should be adopted.
14. The law that guides this court in such matters is section 40 of the [Law of Succession Act](#) which primarily 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 interest within each house shall then be in accordance with the rules set out in sections 35 to 38”
15. The court in [Re Estate of John Musambayi Katumanga – deceased](#) [2014] eKLR held as follows:

“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.”
16. I have keenly looked at the proposed mode of distribution by the Objector and the same seems to be fair and equitable as it has catered for all the beneficiaries of the deceased. The petitioner's mode of distribution on the other hand has not shared the estate in a fair manner. The main reason advanced is that part of the estate i.e. 13 acres was held in trust and as such it ought not be shared equally among the beneficiaries.

Was the said 13 acres held in trust? (highlighting the law on trusts)
17. It is worth pointing out that article 27 of the [Constitution](#) 2010 provides that every person is equal in the eyes of the law and before the law; and the Article goes further to state that there should be no discrimination on any ground including gender which encompasses marital status; the [Constitution](#) does not allow discriminatory rules and customs in matters of personal law, including inheritance.



18. There ought to be no classification into categories of male, female, married or unmarried; there ought to be no discrimination against the male or female children of a deceased person; nor discrimination between the married daughters and unmarried daughters of a deceased person. I therefore take the position that the estate should be share equally among the beneficiaries.
19. The broad and open minded formulation to Art. 27 & 28 of the Constitution places a higher responsibility upon the courts to give an effective remedy when the rights grounded on the Bill of Rights are violated. The threshold of that jurisdiction is stated as follows in *Fose v Minister of Safety and Security* [1997] ZACC 6 1997 (3) SA 786, 1997 (7) BCLR (CC) “ In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in count where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish hat an infringement of an entrenched rights has occurred. It is effectively vindicated. The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if need be to achieve this goal.

The specific question to be answered in this probate cause is whether inheritance rights as purposefully provided for in the law of Succession Act can be based on grounds of sex, gender, birth etc as expressly stated in Art. 27(4) of the Constitution. There is a leaning in a typical patriarchal African society to justify positioning males or sons of any family unity as having entitlement to any gifts, immovable and movable assets of the deceased, without due regard to the siblings of female gender or even surviving spouse for that matter. It is important therefore, the provisions and the rules of the enabling statute on succession disputes be used by the courts as tools to facilitate access to courts on inheritance rights rather than hindering guaranteed rights both in our constitution and sections 35,36,37,&38 of the Succession Act. It should be borne in mind that the primary function and mandate of hierarchy of courts is to ensure the attainment of justice. In any event, the court under Art. 50(1) and 159 (2) (a) of the Constitution affirms as follows: Justice shall be done to all irrespective of status. It is also important to conceive how an outcome of a succession cause in which the inheritance rights modeled in favour of the male heir would fit into the structure of our constitution and in particular the commitment to Art. 27 on equality and freedom from discrimination and to provide and effective remedy when those rights are violated or infringed. That to me would be an absurdity which directly occasions prejudice and injustice outside the letter and the spirit of the Constitution and applicable law of Succession Act. The critical responses to the court’s gender equality jurisprudence and other constitutional and legislative measures designed to protect the vulnerable or disadvantaged category of persons should always remain within the scales of nondiscrimination. I have come to understand overtime in my practice as a judge that the equality doctrine in our jurisdiction in inferenced by the historical, social, political and legal conditions of the society we live in. For centuries and overtime issues of inheritance in our cultural and customary diversity created an equality that is characterized and defined using the gender card. That a female child born in the same blood line is subordinate the male child. To make the matters worse there is a presumption all girls on attaining majority and satisfying the minimum criterion marriage has no business to be visible within her parental heritage. The aspirational value of any African family which is influenced by culture is to see that largely that girls who have come of age and have completed any learning expectations either in senior school, middle level technical college or attainment of university qualifications, are next stop is based on the ideal of marriage. As a result the inequality approach becomes systematic and rooted in the structures and institutions which reinforce culture. There is therefore, a commitment more strongly within the context and content of our constitutional architecture. It is my considered view the purpose of equality and non discrimination in Art. 27 was to remedy and to overcome this disadvantaged and exclusion clause to deny guaranteed birth rights to the female category of persons. The many disputes in Succession



matters in our courts are identified as being at the heart of unfair discrimination on the core grounds in Art. 27(4) of our constitution. Even in developing our dimensional equality jurisprudence, the meaning of dignity in relation to equality rights continues to be entrenched in our multiethnic tribes. The series of equality jurisprudence is yet to sink across the different communities to give effect to Art. 27 of the Constitution. Therefore the values of substantive equality on distribution of the estate fits comfortably with the provisions of our Supreme Law of the Land. That differentiation on inheritance rights is impermissible. It is not a mere differentiation it is at the heart of National values and principles of governance in Art. 10 of the Constitution. Any provision or conduct which differentiates between people and categories of people for reason of gender, sex, marital status, culture, birth is legitimately considered a violation of Art. 27(4) of the Constitution.

20. As noted above the right to equality is premised on the idea that every person possess equal human dignity. Unfair discrimination against persons on the ground of personal attributes, gender, sex, denies recognition of the very attribute that is common and equal to all namely human dignity. In my view unfair discrimination principally means treating persons differently in a way which impairs their fundamental dignity as human beings who are in errantly equal in dignity. In the case of Egan v Canada (1995) 29 CRR it was stated as follows: “ This court has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society, equality, as that concept is enshrined as a fundamental human right...means nothing if it does not represent a commitment to recognizing each person’s equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.

21. In an attempt to equally distribute the deceased’s estate among the beneficiaries, many at times a party may not agree with the court’s mode of distribution. In the case of Anne Nyambura Ndungu v Beatrice Wangari Ndungu & 2 others [2021] eKLR the court of appeal stated as follows:

‘Having reconsidered the record and the circumstances surrounding this matter, we wish to point out first and foremost, that succession matters, though deceptively straightforward in some cases, are not the easiest to determine. This is so particularly where a person dies intestate leaving behind many properties and many beneficiaries, and sometimes different houses as is the case here. It will always be difficult to distribute the properties “equally” and with scientific precision because different properties will have different sizes and different economic values. Section 40 of the Law of Succession Act is not a magic pill which can be applied to resolve all issues pertaining to distribution of a deceased person’s estate. In a as much as section 40 LSA talks of “Equal Shares” the distribution must also be equitable. Where the parties themselves are unable to agree on the mode of distribution, it is left to the court to do the distribution based purely on the documents presented to the court.

It is highly unlikely that the court would arrive at a mode of distribution that will be acceptable to all the beneficiaries. In this case, we are persuaded by the fact that following the death of the deceased, the principal parties sat, discussed the way forward

and arrived at some kind of agreement which they reduced into writing, appended their signatures and filed in court. We appreciate the fact that the third respondent appears to have withdrawn her consent and subsequently denounced the agreement, hence the trial court’s reluctance to endorse or adopt the same. We have keenly pondered on this issue and come to the conclusion that there is no guarantee that any other mode of distribution dictated by this court will be better, or more equitable than that presented in that document.’

22. Accordingly, as the parties were unable to agree on the distribution, I direct that the estate of the deceased being Meibeki/meibeki Block 4(Kaploo)3 be distributed equally among the beneficiaries



pursuant to Section 38, 40, 41, & 42 of the [Law of Succession Act](#). As a consequence, the certificate of confirmed grant be generated through our E-platform for adoption and endorsement of this court within seven days from today's date.

23. It is so ordered.

DATED AND SIGNED AND DELIVERED AT ELDORET ON THIS 25TH APRIL 2024

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R. NYAKUNDI

JUDGE

