



REPUBLIC OF KENYA



**In re Estate of Kipkoech Arap Bosio (Succession Cause 20 of 2021)
[2023] KEHC 469 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 469 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
SUCCESSION CAUSE 20 OF 2021
RN NYAKUNDI, J
JANUARY 27, 2023**

BETWEEN

RICHARD KIPKEMBOI KOECH PETITIONER

AND

JOHN KOECH OBJECTOR

JUDGMENT

1. The matter relates to the estate of Kipkoech Arap Bosio, who died intestate on 7th November, 1993. The grant of letters of administration with respect to the estate of Kipkoech Arap Bosio were made to Richard Kipkemboi Koech and John Koech on the 2nd day of March, 2020.
2. The petitioner on February 27, 2020 filed summons for the confirmation of grant, which summons were opposed by the objector who filed rival summons for the confirmation dated February 28, 2020. The only bone of contention between the parties is on the mode of distribution of the estate of the deceased.
3. The matter was disposed off by way of *viva voce* evidence.

Objector's Case

4. PW1 John Koech, testified that he is a son to the deceased. he told the Court that the deceased had two parcels of land; Nandi/Chepterit 244 and Nandi/Chepterit/259. He further testified that he conducted two searches on the said parcels of land on 13/8/2019 and 19/8/2019 respectively.
5. PW1 further testified that the deceased had two wives and that the 1st wife lived on parcel of land known Nandi/Chepterit/244 whereas the 2nd wife lived on parcel of land known as Nandi/Chepterit/259.
6. In addition, he told the Court that the 1st House has six (6) children whereas the 2nd House has four (4) children. That by the time the deceased was dying, he sub-divided the land amongst the two house and



was living with 2nd House. He further told the Court that parcel of land known as Nandi/Chepterit 244 measures 10 acres but did not know the acreage of parcel of land number Nandi/Chepterit/259.

7. On cross- examination, PW1 he told the court that the only land he is aware of is parcel of land number Nandi/Chepterit/244. He reiterated that parcels of land number Nandi/Chepterit/ 244 and 259 belonged to his late father. He conceded that his mother got married to the deceased in 1960 and used to live on parcel of land known as 259. He also told the court that he did not have any a problem with Petitioner planting tea on parcel of land number Nandi/Chepterit/244 because he knew eventually, he would take the land.
8. He also told the court that in the year 2007, he was an alcoholic and did not concentrate on land matters. He also confirmed to court that he had visited the Chief's office with view of having the two parcels sub-divided. He told the court that the petitioner herein had omitted the name of one of wife the deceased whereas he had two. He also confirmed that he agreed that the petitioner files this instant cause but did not agree with the mode of distribution of the estate.
9. On re-examination, he told the court that the deceased died in the year 1993 whereas his 2nd wife died in 1997. He told the court the Petitioner and his mother begun planting tea in the year 1993 after the demise of their father. He confirmed that both parcel of land numbers Nandi/Chepterit/244 and 259 are in the names of the deceased. Further that the deceased had moved the 2nd wife to parcel of land number Nandi/Chepterit/259.

Petitioner's Case

10. DW1 Richard K. Koech, testified that he is a son to the deceased. That the deceased was married to wives and had two parcels of land being Nandi/Chepterit/244 and 259. That the total acreage of the suit land is 16.2 acres.
11. He told the court that the only bone of contention is on the mode of distribution. He proposed that each family should be give 8.1 acres. He also told the court that there are 9 beneficiaries and that all the family members stay on both parcels.
12. On cross-examination, he told the court that the deceased died on 7/11/1993. He told the Court that his mother and him were living on parcel of land number Nandi/Chepterit/244. He told the court that in 1987 nothing took place and that in 1998 he built his house on parcel number Nandi/Chepterit/259. He also confirmed that his mother was buried on parcel number Nandi/Chepterit/259.
13. He told the court that he got married in 1997 and that at the time he had a hut on parcel number, Nandi/Chepterit/244. That the 1st house has 6 dependants and the second house has 5 dependants. He confirmed that the deceased left no will. That there are 9 living dependants from both houses. He told the court that the estate should be distributed per household and amongst the beneficiaries in those houses.

Petitioner's Submissions

14. In his submissions dated October 13, 2022 and filed in Court on the same date, the petitioner submitted that the only bone of contention between the parties is on the mode of distribution of the estate of the deceased.
15. The petitioner wants the estate of the deceased to be distributed equally amongst all the beneficiaries of the beneficiaries of the deceased. The petitioner is opposed to the proposal by the objector that the deceased had sub-divided his properties among the two houses. The petitioner maintained that



both parcels are still registered in the deceased's name and as such should be devolved in accordance with section 40 of the *Law of Succession Act*. In support of his submissions the petitioner relied on the following cases; *Rono V Rono* and *Stephen Gitonga M'murithi V Faith Ngira Murithi*.

Objector's Submissions

16. In his submissions dated November 9, 2022 and filed in Court on November 10, 2022, the objector argued that the deceased was married to two wives had settled them on their respective parcels of land. The objector contended that the 1st house in which he belongs was settled on parcel of land known as Nandi/Chepterit/244 whereas the petitioner and his siblings were settled on parcel of land known as Nandi/Chepterit/259.
17. The objector further submitted that the 1st house comprises of six (6) beneficiaries whereas the 2nd House has four (4) beneficiaries.
18. The objector urged the court to distribute the estate of the deceased as follow; parcel of land number Nandi/Chepterit/244 to be given to the 1st House whereas parcel of land number Nandi/Chepterit/259 to be given to the 2nd House and the beneficiaries in the respective houses can then agree on the mode of distribution in each house among themselves.

Determination

19. I have, considered the law applicable in this matter and the proposal on the mode of distribution of the estate that has been placed before me. There are only two issues for determination in this matter: -
 - a. Whether the deceased established his wishes on how his two parcels of land were to be subdivided.
 - b. Which is the most appropriate mode of distribution.
20. The deceased herein died intestate and was a polygamous man survived by two wives are now both deceased and had ten children. From the record, the assets forming part of the estate of the deceased are parcel of land number Nandi/Chepterit/259 measuring approximately 10.38 acres and parcel of land number Nandi/Chepterit/244 measuring approximately 5.9 acres.
21. From the evidence tendered before this court it evident that both the suit properties herein are still registered in the name of the deceased. It also evident that the deceased died in testate having left no will on how his properties should be devolved.
22. There is no doubt he was a polygamous man having married two wives.
23. The petitioner herein wants the estate to be distributed equally amongst all the beneficiaries of the deceased whereas the objector's position is that prior to his death the death, the deceased had settled the two families on their respective portions of land and thus wants this court to uphold the same.
24. From the evidence tendered by both parties it not in dispute that at some point in time both families lived on both parcels of land without clearly establishing which parcel belonged to which family. PW1 during cross-examination told the court that when deceased married his mother they used to live on parcel of land number Nandi/Chepterit/244 before being moved to parcel of land number Nandi/Chepterit/259. He also admitted that the Petitioner herein plants tea on parcel number Nandi/Chepterit/244 and conceded that he had once approached the area Chief with view of sub-dividing the two parcels of land.



25. The petitioner on the stand during cross-examination told the Court that in 1993 he used to live on parcel of land number Nandi/Chepterit/244. He further told the court that his mother was buried on parcel number Nandi/Chepterit/ 259.
26. From the totality of the evidence tendered by the respective parties on record, it is clear to my mind that the deceased herein did not make any wishes as how his two parcels were to be sub-divided between the two houses. One thing that also came out strongly during the hearing of this matter is that both houses seem to have a major interest on parcel number Nandi/Chepterit/244.
27. Having found so, it is evident from the record that the parties herein do not agree on the mode of distribution that should be adopted by the Court in devolving the deceased's estate to the respective beneficiaries.
28. 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”
29. 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.”
30. Further, In the Matter of the Estate of Nelson Kimotho Mbiti (Deceased) HCSC No.169 of 2000, Koome J, directed that the estate of a polygamist be divided in accordance with the provisions of section 40 of the Act. The estate was divided into units according to the number of children in each house with the widows being added as additional units. The same reasoning was also applied by Judge Ali Roni in the Estate of Ainea Masinde Walubengo (Deceased) (2017) eKLR stating that “I am of the view that section 40 of the Law of Succession Act will apply to the circumstances of this Case. Meaning that the Court will distribute the estate of the deceased according to each house taking into account the number of children in each unit including the surviving widow.”
31. At this juncture it 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.



32. 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.

33. The first house of the deceased is constituted as follows;

1. Rosa Chemaiyo Bosio – Widow (Deceased)
2. Constantina Cheplembus Rotich- Daughter
3. John Koech – Son
4. Samuel Kipkering Koech – Son (Deceased)
5. Flomena Chemesunde- Daughter
6. Julius Murei- Son (Deceased)
7. Rose Jeserem Kogo

It is worth pointing out in the first house save for the deceased's wife being deceased, two of his children are also deceased. The Objector in his submission pointed out that Samuel Kipkering Koech (Deceased) left behind a widow and children whereas Julius Murei (Deceased) left no dependants.

34. The second house of the deceased is constituted as follows;

1. Clementina Jepkurgat – Widow (Deceased)
2. David Kibet- Son
3. Richard Kipkemboi Koech – Son
4. Mary Jerotich- Daughter
5. Anjelina Jepsongok - Daughter

35. For purposes of this Succession proceedings, the 1st house is made up of 5 units and the 2nd house is made up of (4) units. The total number of units forming part of the deceased's estate is therefore (9). The (9) units are all entitled to inherit equally from the deceased's estate.

36. Accordingly, as the parties were unable to agree on the distribution, I direct that the estate of the deceased be distributed as follows: -

- a. That Nandi/Chepterit/244 – 10.38 Acres be distributed to the 1st House and 2nd House and be shared equally to the beneficiaries.
- b. That Nandi/Chepterit/259 – 5.9 ACRES be distributed to the 1st House and 2nd House and be shared equally to the beneficiaries.
- c. Each party shall bear its own costs noting that the claim herein is a succession cause involving members of one family.

It is ordered so.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF JANUARY, 2023.

R. NYAKUNDI



JUDGE

