



In re Tabage Arap Chesino alias Tabaige W/O Arap Chesino (Deceased) (Succession Cause 164 of 2012) [2023] KEHC 25678 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 164 OF 2012**

JK SERGON, J

NOVEMBER 23, 2023

**IN THE MATTER OF THE ESTATE OF THE LATE TABAGE ARAP
CHESINO ALIAS TABAIGE W/O ARAP CHESINO (DECEASED)**

BETWEEN

ELIZABETH CHEPKEMOI MUNDUI PETITIONER

AND

RAEL KOECH 1ST APPLICANT

AGNES MATINYIT 2ND APPLICANT

CHEPKWONY TABUTANY 3RD APPLICANT

ELIZABETH MARTHA 4TH APPLICANT

JUDGMENT

1. The deceased herein died intestate on 13th September, 1992. A Grant of Temporary Letters of Administration of the said estate was granted to the Elizabeth Chepkemoi Mundui (petitioner/respondent) as the 1st administrator, however, by consent of the parties herein, the said grant of temporary letters of administration was amended on 9th June, 2016 to incorporate the 2nd, 3rd and 4th administrators.
2. The deceased was survived by the following dependants;
 - Elizabeth Chepkemoi Mundui daughter-in-law ...78 years
 - Rael Koech..... daughter-in-law....82 years
 - Ruth Kendagor Koech daughter-in-law ...78 years
 - Agnes Matinyit daughter-in-law 60 years



Chepkwony Tabutany..... daughter-in-law 79 years

3. The deceased prior to her demise had divided her estate to the beneficiaries as follows;
Elizabeth Chepkemai Mundui5.5 acres
Rael Koech 5.5 acres
Ruth Kendagor Koech and Cheptonui Tabutany to share 5.5 acres
Agnes Matinyit5.5 acres
4. That although the deceased had divided her land before her demise as aforesaid the petitioner/respondent did not accept the same and the dispute proceeded to Ainamoi Land Dispute Tribunal whereby it was resolved that Kericho/Kapsoit/483 - 22 Acres which the deceased herein left behind was to be divided equally among the beneficiaries herein, the award from the tribunal was adopted by the Kericho Chief Magistrates Court, Civil Suit No. 18 of 2011 and the petitioner/respondent never appealed the outcome of the tribunal.
5. The gist of the instant succession cause is the distribution of the deceased's estate. The objectors filed their proposed mode of distribution and the court directed that parties file their written statements and on 19th April, 2017 the court directed that the matter proceed by viva voce evidence. The objectors/applicants herein availed four witnesses in support of their case.
6. Rael Koech (Pw.1) adopted her witness statement as her examination -in-chief, she stated that the deceased herein was her mother-in-law who died intestate on 13th September, 1992. A grant of temporary letters of administration intestate granted to Elizabeth Chepkemai Mundui by consent of the parties and subsequently amended to incorporate the 2nd, 3rd and 4th administrators. The deceased was survived by several dependants, the deceased had shown them their respective shares of her estate prior to her demise. The parties developed their respective portions save for one Ezekiel Kimetei Mundu (deceased) husband to Agnes Matinyit who left for Subukia, Elizabeth Mundia the petitioner/respondent and her children encroached on his land parcel resulting in a land dispute amongst the beneficiaries of the estate of the deceased and further that there have been several clan meetings to resolve the dispute, in the first meeting held in 1987, it was resolved that the estate of the deceased be divided equally, the petitioner/respondent did not accept the resolution. The dispute was escalated to the Ainamoi Land Dispute Tribunal and it was resolved that the estate be divided equally, this award was subsequently adopted in Kericho CMCC No. 18 of 2011 and the petitioner/respondent herein never appealed the same.
7. On cross examination, Pw. 1 confirmed that there were several meetings held to resolve the land dispute and it was resolved that the land should be sub-divided equally and minutes appended to the affidavit on the proposed mode of distribution dated 11th June, 2016, however, Elizabeth Mundui did not agree to the resolution. On re-examination, Pw. 1 stated that she did not know why Elizabeth Mundui wanted a large share of the estate. She stated that she was aware that Elizabeth Mundui's husband - Chepkoit Kimunai had a protracted land dispute with Chesino on land parcel no. Kericho/Kapsoit/483 which is in the name of Tabaige Chesino.
8. Kimutai Arap Chepkwony (Pw. 2) adopted his witness statement dated 17th March, 2017 as evidence-in-chief. He stated that the deceased herein was his neighbour, who died intestate in 1992. He maintains that he was aware that the children of the deceased have been having issues with distribution of the estate and several clan meetings had been held to resolve the land dispute including the first meeting held on 1987, he was a secretary to the said meeting where it was resolved that the estate should be sub-divided equally, Elizabeth Chepkemai did not agree with this resolution.



9. On cross-examination, Pw. 2 confirmed that he was the secretary to the 1987 meeting, which resolutions were captured in minutes, however, he did not keep a copy of the said minutes. He stated that he did not know whether Chepkemoi Kimunai was involved in acquisition of the land or whether there were various arrangements for exchange of land parcels among the beneficiaries of the estate of the deceased.
10. Charles Kibet Tuei (Pw. 3) adopted his witness statement dated 17th March 2017 as his evidence-in-chief. The deceased herein was his grandmother, the second wife to the late Mundi Arap Chesoni, she had six children, four sons and two daughters, all sons are deceased and one of the daughters is still alive. He was aware that there have been land disputes concerning distribution of the estate of the deceased and that several meetings had been held to resolve the disputes and it was resolved that the land should be shared equally among the beneficiaries of the deceased. He finally stated that his late grandmother till her demise was adamant that the land should be shared equally among all the beneficiaries.
11. On cross examination, Pw. 3 stated that Rael Koech was his mother and that he was present for several of the meetings, however, in the said meetings they were represented by their parents. He stated that there was no apparent reason why Elizabeth was asking for a larger share; his grandmother had distributed the land prior to her demise. Kimetei Matiny left his share and went to Subukia, Elizabeth took his share. He stated that there was no exchange of land between Johana Chereo and Kimunai Chepkoit and further that there was exchange of land between Rebecca Maina and his grandfather Arap Chesino, however, he did not know when the exchange took place. He confirmed that he was not aware how the land in dispute was acquired and whether Kimunai Chepkoit made a contribution to the acquisition of the land. On re-examination, Pw. 3 he confirmed that the land was acquired by his grandfather who registered it in the name of his grandmother. Kimunai Chepkoit did not acquire any land.
12. David Kipkemoi Langat (Pw. 4) adopted his witness statement dated 17th March, 2017 as his evidence-in-chief, stating that he knows that the family of Tabaige Chesino, they are his neighbours and that their farm is ancestral land.
13. On cross examination, Pw. 4 confirmed that he did not know how the land was acquired. On re-examination, he stated that he did not know how Chesimo acquired the land as there were no title deeds then and that when the adjudication process took place the late Chesino was already in possession of the said land parcel. He also stated that he was not aware of any exchange of land parcels constituting the estate of the deceased.
14. The petitioner/respondent herein availed two witnesses in support of her case.
15. Elizabeth Chepkemoi Mundui (Dw. 1) adopted her witness statement dated 18th April, 2017 as her evidence in chief. On cross examination Dw. 1 stated that she was aware that she was in court in respect of the estate of Tabaige w/o Chesino alias Tabaige Arap Chesino and that she was one of the beneficiaries of the estate of the deceased herein. She contended that she had contributed towards acquisition of Kericho/Kapsoit/483 from one Rebecca Maina before the land adjudication process; the land was previously a bush. She stated that the subsequent registration in the name of Tabaige w/o Chesino was fraudulent, the said registration was orchestrated by the chief. Tabaige was her mother-in-law. She maintained that her husband Chepkoit Kimunai bought the land parcel while he was working as a police officer. She maintained that she would like to get a bigger share of the land as it was hers, she and her husband had acquired it through concerted effort and she was therefore against getting equal shares with Rael Koech, Ruth Kendagor, Agnes Matinyit and Cheptanui Tabutany. She argued that the land was not ancestral land rather that she contributed to its acquisition and that the other beneficiaries were residing on her land.



16. Kipsum Kitur (Dw. 2) adopted his witness statement dated 5th April, 2019 as his evidence-in-chief. He stated that he knew Tabaige Arap Chesino (deceased) as the registered owner of Kericho/Kapsoit/483 and the beneficiaries of the estate of the deceased are Agnes Matinyit, Cheptanui Tabutany, Ruth Kendagor Koech Rael Koech and Elizabeth Chepkemoi. He stated that Elizabeth Chepkemoi should get a larger portion of the estate as she was the wife to Chepkoit Kimunai, who was the son to the deceased and the main contributor in attainment of the estate. He stated that sometime in 1995 Arap Chesino and his son Kimunai Chepkoit had a dispute about the demarcation of boundaries which happened years back when land ownership was not evidenced by title deeds. The dispute was presided over by village elders and it was agreed that Chepkoit Kimunai would get a larger portion of the estate because he made a substantial contribution towards its acquisition whereas his father Arap Chesino would get a smaller portion and trees were planted to demarcate the portions. He stated that when title deeds were issued Arap Chesino was registered as the sole proprietor of the estate despite the demarcation of boundaries of the property between him and the son and that there was further exchange of land between Kimunai Chepkoit and Johana Arap Chere which exchange resulted in a larger acreage for Kimunai Chepkoit.
17. On cross examination Dw. 2 confirmed that he attended the land dispute meeting in 1955 and that the land parcel constituting the estate of the deceased was ancestral land owned by the deceased who had three wives, the second wife was Tabaige, who had four sons, the first son known as Chepkoit Kimunai. He confirmed that he did not attend the proceedings in the Ainamoi Land Dispute Tribunal.
18. Peter Kipkemoi Arap Tindo (Dw.3) adopted his written statement dated 18th April, 2018 as his evidence in chief in which he stated that Elizabeth Chepkemoi Mundui was entitled to a bigger share of the estate of the deceased. He further stated that the property of his mother Rebecca Chepkoech Maina was in between the property of Kimunai Chepkoit hence accessibility was challenged so they decided to exchange properties.
19. On cross examination Dw. 3 stated that he knows all the beneficiaries herein they are all children of Tabaige the deceased. On re-examination, he reiterated that Elizabeth was entitled to a bigger portion of the estate of the deceased. He confirmed that the land was not demarcated, people were cultivating everywhere.
20. The objectors herein filed written submissions which I have considered.
21. The objectors reiterated that the dispute on distribution of the estate was escalated to Ainamoi Land Dispute Tribunal whereby it was resolved that Kericho/Kapsoit/483 - 22 Acres which the deceased herein left behind was to be divided equally among the beneficiaries herein, the award from the tribunal was adopted by the Kericho Chief Magistrates Court, Civil Suit No. 18 of 2011 and no appeal was lodged against the said award. The objectors contended that the petitioner/respondent was well versed with the matter and ought to have appealed the outcome of the tribunal which was subsequently adopted by the lower court.
22. The objectors in response to the assertion by the petitioner/respondent that she was deserving a larger portion allegedly because her husband had bought a parcel comprised in the estate herein, however the objector were adamant that the petitioner/respondent did not produce any written document to prove that there was any sale agreement that was executed by her husband in regards to the estate. The objectors cited section 3(3) of the Law of Contract which requires that a suit based on a contract of disposition of interest in land ought to be entertained only if the contract is in writing, executed by the parties and attested.



23. The objectors contended that assuming there was such as sale, the sale would be subject to the Land Control Board Act which requires that a consent should always be obtained for any transaction relating to agricultural land and therefore in 1978 the consent was supposed to have been obtained within three (3) months from the date of the sale agreement. The objectors contended that the petitioner/respondent did not prove whether the application for consent was ever made in the lifetime of the deceased and further that given that no consent to subdivide and transfer the alleged portion, therefore the sale agreement was vitiated and in any event the issue of sale of the portion of the estate of the deceased cannot be resolved through succession proceedings and can only be dealt with the Environment and Land Court.
24. The objectors maintained that their proposed mode of distribution dated 11th June, 2016 was based on justice, equity and fairness and further that the intestate estate of a polygamist is governed by section 40 of the Law of Succession Act and that the same was in tandem with the wishes of the deceased.
25. The objectors were adamant that the mode of distribution that was proposed by the petitioner/respondent was skewed and not in tune with the wishes of the deceased herein.
26. The objectors urged the court to dismiss the petitioner/respondent's proposed mode of distribution and proceed to adopt their proposed mode of distribution as it was the most fair, just and equitable way of distribution of the estate.
27. I have considered the viva voce evidence and submissions by the various parties. I find that the sole issue for this court's determination is how to distribute the deceased's estate; whether to adopt the petitioner/respondent's proposal that she was deserving of a larger share of the estate or to adopt the mode of distribution proposed by Rael Koech the 1st objector dated 11th June, 2016 in which she proposes equal distribution of the estate and avers that her proposed mode was in tandem with the wishes of the deceased.
28. I wish to point out that the petitioner/respondent does not have a proposed mode on distribution filed on record, however, I have considered the viva voce evidence by Dw. 1 the petitioner/respondent herein and moreso her assertion that she was deserving of a bigger share of the estate because she and her husband Chepkoit Kimunai (now deceased) contributed towards acquisition of Kericho/Kapsoit/483, constituting the estate of the deceased, however, I find that there was no evidence produced to ascertain her contribution towards acquisition of the suit parcel.
29. I have also considered Dw. 2 assertion that Dw. 1 was entitled to a larger share of the estate because she was the wife to Chepkoit Kimunai, who was the son to the deceased and the main contributor in attainment of the estate, However, I find that this transaction was not documented. Furthermore, no evidence was furnished to support this assertion and in any case the certificate of title is registered in the name of Tabaige w/o Arap Chesino the deceased herein.
30. I have also taken cognizance of the viva voce evidence by Pw. 1, Pw. 2 and Pw. 3 who testified that there was a protracted dispute about the distribution of the estate and that there were various clan meetings held on diverse dates to resolve the dispute on distribution of the estate and the resolutions made to the effect that the estate should be shared equally, however, the petitioner/respondent was unwavering in her claim for a bigger share of the estate. I have noted that this dispute was escalated to the Ainamoi Land Dispute Tribunal and it was resolved that the estate be divided equally, this award was subsequently adopted in Kericho CMCC No. 18 of 2011 and I have noted that the petitioner/respondent never appealed on the outcome of the tribunal.
31. I also wish to take cognizance of the wishes of the deceased, Pw. 3 testified that prior to her demise, his grandmother was resolute that the estate should be divided equally among all her beneficiaries and



proceeded to distribute her estate. This is also supported by averments of the affidavit on the proposed mode of distribution dated 11th June, 2016 sworn by Rael Koech the 1st objector that the deceased prior to her demise had divided her estate as per the contents of paragraph 5 of the proposed mode of distribution dated 11th June, 2016.

32. In these circumstances, I find that the most fair, just and equitable way of distribution of the estate, is in line with the objector's proposed mode of distribution dated 11th June, 2016. In view of the foregoing, the objectors affidavit on the proposed mode of distribution of the estate of the Late Tabage Arap Chesino alias Tabaige w/o Arap Chesino dated 11th June, 2016 is hereby allowed giving rise to issuance of the following orders;

(a) The Amended Grant of Letters of Administration issued on 9th June, 2016 is confirmed and the estate of the Late Tabage Arap Chesino alias Tabaige w/o Arap Chesino should be distributed as proposed in the objectors' affidavit as follows:

- (i) Elizabeth Chepkemoi Mundui - 5.5 acres,
- (ii) Rael Koech - 5.5 acres
- (iii) Ruth Kendagor Koech and Cheptonui Tabutany - to share 5.5 acres
- (iv) Agnes Matinyit - 5.5 acres

(b) Each party to bear their costs.

DELIVERED, SIGNED AND DATED AT Kericho THIS 23RD DAY OF NOVEMBER 2023.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistat – Rutoh

Miss Kitur for the Objector

No Appearance for Motanya for the Petitioner

