



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERICHO

SUCCESSION CAUSE NO. 133 OF 2013

IN THE MATTER OF THE ESTATE OF THE LATE KOMINGOI ARAP BII (DECEASED)

CATHERINE BII.....1ST PETITIONER

JOSEPH K. KOMINGOI.....2ND PETITIONER

VERSUS

ALEXANDER KOMINGOI.....PROTESTOR

JUDGMENT

1. The Affidavit of Protest dated 3/7/2015 was filed by **KIPNGETICH ALEXANDER KOMINGOI (the Protestor)** against the summons for confirmation dated 5/11/2014.
2. The grant of letters of Administration herein was made to **CATHERINE BII** and **JOSEPH K. KOMINGOI** on 13/3/2014.
3. The deceased herein died intestate on 5/9/1989 and he had two wives and several children who were as per the Chief's letter dated 23/11/2012 as follows:-

1ST HOUSE

- (a) Rusi Bii - Widow - (Deceased)**
- (b) Laboso Komingoi - Son (Deceased)**
- (c) Christopher Komingoi - Son**
- (d) John Komingoi - Son**
- (e) Alexander Komingoi - Son - (Protestor)**

2ND HOUSE

- (f) Catherine Bii - Widow - (1st Petitioner)**
- (g) Joseph Komingoi - Son - (2nd Petitioner)**
- (h) John Komingoi - Son**
- (i) Anthony Langat - Son**
- (j) Anthony Komingoi - Son**
- (k) Peter Cheruiyot - Son**

(l) Hilary Rono - Son

(m) Silvester Komingoi - Son

4. The deceased left behind three parcels of land as follows:-

(a) Land LR. No.KEICHO/KOIWA.357 (6.6Ha.)

(b) Land LR. No.KERICHO.KAPKELEI/176 – 11.0 Ha.)

(c) Land LR. No.KERICHO/KAPKELEI/222 – 3.2 Ha.)

5. The two Petitioners **CATHERINE BII** and **JOSEPH KOMINGOI** who are mother and son respectively from the 2nd house filed a summons for confirmation dated 5/11/2014 proposing to share the Estate equally between the 1st and 2nd houses as indicated in the Affidavit in support of the summons dated 5/11/2014.

6. The Protestor who is a beneficiary of the Estate from the 1st house filed the Protest dated 3/7/2015 to the said summons for confirmation.

7. The hearing proceeded by viva voce evidence. The Protestor called three witnesses and the Petitioners also called three witnesses.

8. The evidence on record in summary is that the Protestor is aggrieved by the fact that the two Petitioners are mother and son both from the 2nd house.

9. The Protestor and his witnesses also said that the mode of distribution proposed by the Petitioners is unfair since the properties had been shared in 1991 witnessed by the Area Chief who is now deceased as well as village elders. The Protestor produced minutes of the 1991 meeting.

10. The Protestor also said Land Parcel No. **KERICHO/KOIWA/357** though registered in the name of the deceased did not belong to the deceased but was purchased by the mother of the Protestor with proceeds from the payment of bride price of two of the daughters of the 1st house.

11. The 1st Petitioner said the deceased bought LR. **No.KERICHO/KOIWA/357** and **KERICHO/KAPKELEI/222** with proceedings from his work as a herdsman. She said **KERICHO/KAPKELEI/176** was ancestral land.

12. The Petitioner and her witnesses proposed that the properties be shared Equally between the two houses.

13. The parties filed written submissions which I have duly considered.

14. The protestor submitted that the instant affidavit of protest was filed in response to summons for confirmation of grant dated 5/11/2014.

15. The protestor submitted that he was not agreeable to the proposed mode of distribution rather that the estate of the deceased should be distributed as per the deliberations of the meeting held on 20/6/1991.

16. The protestor further submitted that although **KERICHO/KOIWA/357** was registered as part of the estate of the deceased, it did not form part of the deceased's estate rather that the property was purchased by his mother (the 1st wife, who is now deceased) using proceeds obtained from bride price of his two sisters and as such the said parcel could not be shared between both houses.

17. The petitioners submitted that the protestor had failed prove that proceeds used to purchase **KERICHO/KOIWA/357** were from his sisters' dowry and failed to provide any witnesses to the family meeting held in 1991.

18. The protestors submitted that the burden of proving the allegations raised by the protestor rested squarely on the protestor.

19. The petitioners further submitted that failure of both parties to agree on a preferred mode of distribution, the court was at liberty to invoke the provisions of section 40 (1) of the Succession Act.

20. I have considered the evidence on record in this case together with the rival submissions filed by the parties. I find that it is not in dispute that the deceased had two houses as indicated in paragraph 3 of this Judgment although the daughters do not seem to have been included in the Chief's letter filed herein.

21. It is also not in dispute that the deceased left three parcels listed on paragraph 4 of this Judgment. The issues for determination in this Judgment are as follows:-

(i) Whether the beneficiaries agreed on how to share the Estate in 1991.

(ii) Whether KERICHO/KOIWA/357 belongs to the deceased.

(iii) Which law is applicable in this Estate

(iv) How the estate should be shared.

22. On the issue as to whether the family entered into an agreement on how to share the property in 1991, I find that the Petitioners have denied having entered into the said agreement. The law requires that he who alleges a fact is duly bound to prove the same.

23. I find that there is no evidence that the said agreement was executed by the beneficiaries of the Estate of the deceased herein. The Protestor has failed to prove that they entered into a valid agreement which can be enforced.

24. On the issue as to whether **KERICHO/KOIWA/357** belongs to the deceased, I find that there is undisputed evidence that the said Property is registered in the name of the deceased.

25. The Protestor and his witnesses said the same was purchased with proceeds of bride price from his sisters. Again there is no evidence to substantiate the said assertions and the claim must fail. If the property belonged to the Protestor's mother. It should have registered in her name and not in the name of the deceased. There is no evidence to support the claim that the property **KERICHO/KOIWA/357** belongs to the first house.

26. On the issue as to what law is applicable in this case, I find that there is evidence that the deceased died in 1989. That was after the law of succession came into force on 1/7/1981. I find that the law of succession is applicable in this case.

27. The Law of Succession section 2 (1) provides as follows;

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of persons dying after the commencement of this Act and to the administration of estates of those persons.”

28. In **RE NDUATI MBUTHIA (DECEASED) (2015) eKLR** Musyoka J. stated the following;

“The effect of Section 2 (1) of the Law of Succession Act is that the provisions of the said Act are to apply to the estates of all persons dying after the commencement of the Act on 1st July 1981, subject of course to the exceptions created by the Act. The Act applies both as the substantive law as well as the procedural law to the estates affected.”

29. Section 40 (1) of the law of succession Act which is applicable in this case states as follows:-

“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.”

30. Finally on the issue as to how the Estate should be shared, Section 40 is applicable. The estate shall be shared equally as required by section 40 of the Succession Act adding the surviving widow as an additional unit to the number of children.

31. I find that the issue of the Administrators being from the same house can be redressed by rectification of the grant. The law allows a maximum of four Administrators.

32. I accordingly find that the Protest filed by the Protestor lacks in merit and I dismiss the same.

33. I direct that the three (3) properties be shared Equally as proposed by the Petitioners in paragraph 8 of the summons for confirmation dated 5/11/2014.

34. I direct that the parties take a date for confirmation of grant within thirty (30) days of this date.

35. The 1st house to agree on an Administrator for purposes of rectification of grant.

36. All the beneficiaries of the Estate including the married daughters to appear in Court for the confirmation of grant.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 19TH DAY OF NOVEMBER 2021.

A. N. ONGERI

JUDGE