



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KERICHO**

**SUCCESSION CAUSE NO.270 OF 2004**

**IN THE MATTER OF THE ESTATE OF LATE MOSES**

**KIPCHOIMET MAINA.....DECEASED**

**VERSUS**

**RODAH CHEPKURUI MAINA.....1<sup>ST</sup> ADMINISTRATOR**

**SAMUEL KENDUIYWO.....2<sup>ND</sup> ADMINISTRATOR/PROTESTOR**

**RULING**

1. In this Succession cause relating to the estate of MOSES KIPCHOIMET MAINA who died in May 1995 Letters of Administration intestate were issued by the court on 13<sup>th</sup> June 2007 to Rebecca Maina and Roda Chepkurui Maina, both widows of the deceased following a court ruling of same date, and a Certificate of Grant of Letters of Administration issued and signed by Koome J., as she then was.
2. Thereafter, a Summons of confirmation of grant of Letters of Administration dated 25<sup>th</sup> June 2007 was filed. I am told that Rebecca Maina had died and the Summons for confirmation of grant was filed by only Roda Chepkurui Maina. The properties listed in the Summons for confirmation of grant were only two land assets namely Kericho/Kimulot/28 and Kericho/Kimulot/797, and with the Summons was filed a proposed mode of distribution of the two land assets between the two houses.
3. An affidavit of protest sworn on 28<sup>th</sup> January 2010 by Samuel Kenduiywo was however filed challenging the proposed mode of distribution, and after some considerable delays to the progress of this matter, mainly by the protestors side, it was agreed that the matter proceeds by way of tendering viva voce evidence.
4. At the hearing, the protestor Samwel Kenduiywo testified as PW1 and stated that he was one of the administrators of the estate, having replaced his late mother Rebecca Maina, the first wife. He called one witness PW2 James Cheron. It was PW1's evidence that when Rodah Maina the first administrator was married to the deceased in 1977 the whole family lived on land parcel Kericho/Kimulot/28 and that Rodah was thereafter moved by the deceased to a separate parcel of land – Kericho/Kimulot/106 and resided thereat until the deceased died, while the first house resided on parcel No.28. He testified further that before his father (the deceased) died the deceased directed that 4.8 acres of parcel No. Kericho/Kimulot/28 should go to Rodah's house, and that Rodah thereafter sold off her parcel on Kericho/Kimulot/106 even before confirmation of Grant after she had transferred it to herself on 11/8/1999 as Parcel No. Kericho/Kimulot/797. According to him, this was the land where Andrew Koech one of the buyers built Sunshine Academy.
5. According to his evidence also, the proposal by Rodah herein to subdivide parcel 28 into two was not justifiable as Rodah had already been given her share. He testified further that parcel No.106 now had a new parcel No.797. In cross-examination, he admitted that land parcel No.28 was bigger than parcel No.106. He denied knowledge of parcel Nos.1556 and 1557. He maintained that he and his brothers picked tea from respective portions of land on land parcel No.28.
6. PW2 was James Kipsigei Cheron, a farmer and brother of PW1, who testified that he lived on land parcel No. 28 while Rodah lived on land parcel No.106. It was his evidence that Rodah had sold 3 acres of land to Andrew Koech and another 1 acre from land parcel No.106 to her brother in law. He also stated that 1 acre was previously sold by Rodah and the deceased, during the deceased's lifetime. He said that his mother had 3 sons and 9 daughters all of whom lived on land parcel No.28. According to him, his siblings and himself had separate portions of land on parcel No.28. He further said that there were two tractors belonging to his late father which were in Rodah's home. He also stated that two other town centre plots belonged to his later father, one of which was sold by Rodah to Keino, and that there were 2 other acres land in Kericho town belonging to his late father on which Rodah planted millet/sorghum. According to him, Rodah was not entitled to a share of land parcel 28.
7. In cross-examination, he stated that land parcel No.28 was not ancestral land, and agreed that the protestor was a co-administrator in the estate herein since 2012. He said that he did not know the land parcel numbers of the other plots he mentioned. He agreed that one (1) acre

was sold from parcel 106 by his father in his lifetime. He did not know the number of children in the 2<sup>nd</sup> house of Rodah. He agreed that 4 acres of parcel 28 was sold to a school. This was the close of the protestor's evidence.

8. Rodah Chepkurui Maina DW1 on her part, adopted her witness statement as evidence in chief. In cross-examination, she admitted that she was married to the deceased when Rebecca had children, but insisted that land parcel No.28 be divided equally among the two houses, and that she should keep land parcel Kericho/Kimulot/07/797. She insisted that she should get 3 acres from Kericho/Kimulot/28, which would give her house a total of (13 acres). She said that though she did not plant tea on land parcel No.28, they used to harvest tea with the deceased on 3 acres of that land. It was her position that she persuaded the deceased not to sell the land. She agreed that she sold a portion of land parcel on 797 to Andrew Koech who still did not have title.

9. She agreed further that land parcel Kericho/Kimulot/797 was registered in her name on 11/08/1999, and added that though she did not initially propose Rebecca as an administrator in 1994, she included her as a beneficiary. In re-examination, she said that the tractors were sold by the deceased in 1984, and that the deceased also sold the plots in Kapleby.

10. After the closure of the oral evidence, parties counsel filed written submission which I have perused and considered.

11. It is clear to me that the issue herein is the mode of distribution of the assets of the deceased. Though in evidence, the witnesses have testified on other assets, the records and documents filed only relate to two land assets, that is parcel Kericho/Kimulot/28 and Kericho/Kimulot/797.

12. I am guided that the mode of distribution of a deceased person's intestate estate where he is survived by more than one wife and children is governed by the provisions of section 40 of the Law of Succession Act (Cap. 160), which provides as follows–

***40 (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 two 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 intestate estate within each house shall then be in accordance with the rules set out in section 35 and 36 .***

13. There is no dispute herein that both widows survived the deceased, though Rebecca the first widow is now dead. From the list of survivors given by Rodah Chepkurui Maina in the affidavit in support of the Summons for confirmation of grant, which is not disputed, the house of Rebecca Maina (first wife) had 13 survivors including Rebecca, and the house of Rodah Chepkurui Maina had 12 survivors including Rodah. Rebecca Maina is now deceased but since she survived the deceased she was entitled to be a beneficiary.

14. I have considered the evidence tendered by witnesses on both sides. There is no evidence that the deceased orally divided the land among the survivors or any of them. He however settled the two houses on different parcel of land. Rodah Chepkurui Maina also sold some land, at least 1 acre or more and even registered land parcel No.797 in her name without consultation with the 1<sup>st</sup> house of Rebecca and even before confirmation of grant of letters of administration herein. There is no evidence that Rodah or any of her children lived on land parcel No.28 at any time after the deceased moved Rodah to parcel 797, formerly parcel No.106. Rodah stated in evidence that she picked tea from parcel No.28 during the lifetime of the deceased, but agreed that she did not plant any tea there. According to her the picking of tea amounted to entitlement to share part of that land parcel No.28.

15. In my view, the conduct of the deceased in settling the two household on separate and distinct parcels of land, and letting each of the two houses live exclusively on those two parcels of land until he died, meant that he actually subdivided the land assets in his lifetime among the two houses. The conduct of Rodah of registering her portion of land in her name without consulting the other house also confirms her understanding of exclusive entitlement of that land parcel as against the other house. I agree with the reasoning in the case of **Makueni H. C Succession Cause 131 of 2017 – Fransisca Syombua Nzuvi – vs – Angela Mue Makau** and the case of **Nyeri Succession Cause No.100 of 2013 – in the Estate of Ngamini Kirira** deceased, in which the court held that an African can divide his or her assets among beneficiaries when alive. In the present case, in my view the deceased by conduct divided the assets and thereafter Rodah even sold part of her household's share.

16. I find no injustice caused by the division of the land assets among the two houses as children of the first house became adults earlier and had more reason to use their portion much earlier than the children of the 2<sup>nd</sup> house of Rodah. If Rodah wanted to complain she should have complained when the deceased was alive, but she did not.

17. I thus agree with the protestor and hold that the 1<sup>st</sup> house is entitled to parcel No.28, while the 2<sup>nd</sup> house of Rodah retains land parcel No.797.

18. I confirm the letters of administration herein and order that the mode of distribution of the two land assets be as above.

**Dated this 23<sup>rd</sup> day of April 2020.**

**GEORGE DULU**

**JUDGE**

Delivered through video conferencing in the presence of Mr. Langat Court Assistant, Mr. Musyoka ICT Officer, Mr. Miruka for the

administrator and Ms. Wanderi for the protestor.