



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
FAMILY DIVISION
SUCCESSION CAUSE NO. 4 OF 2011
IN THE MATTER OF THE ESTATE OF LAZARO CHEPKAITANYI CHEBII DECEASED)

RULING

1. Before this Court for consideration is a Summons dated 13.11.17 seeking Confirmation of Grant in respect of the estate of Lazaro Chepkaitanyi Chebii (“the Deceased”). The record shows that the Deceased died on 29.1.11 at the Coast General Hospital aged 72 years. The record further shows that the Deceased was initially married to Mary Chebii with whom he had 8 children namely Frederick Kosgey, Charles Kiprop Chepkaitany (Charles), Peter Kipchumba, Betty Cheronno, Matthew Kiplagat, Monica Chepkemboi, John Kipruto and Joseph Kiptoo. Mary Chebii died in 1992. Thereafter on 24.4.2002 the Deceased married Susan Wamboi Chepkaitanyi (Susan) but did not have any children together. Following the demise of the Deceased, Susan filed a citation dated 29.4.11 against the children of the Deceased to accept or refuse letters of administration. By consent, the Court ordered on 1.11.16 that a grant of letters of administration be issued to Susan and Charles jointly after gazettelement of the petition.

2. The gazette notice published on 26.2.16 contained the name of Susan only and omitted Charles. One of the key assets of the estate of the Deceased is compensation from the National Lands Commission for acquisition of part of Plot No. 1055 (Original No. 1013/2) Sec VI/MN. There was apprehension on the part of the children of the Deceased that Susan intended to get the compensation amounting to Kshs. 10,580,000/= on her own to their exclusion. This prompted Charles to file an application dated 22.6.16 seeking an order stopping the National Land Commission from paying the compensation to Susan. By consent of the parties, the Court did on 16.1.17 order that the proceeds of the compensation be deposited in a joint account with Kenya Commercial Bank in the names of Susan and Charles, the joint administrators. The Court then directed that the administrators to file the summons for confirmation of grant. The parties could not agree on the mode of distribution whereupon the Court directed Susan to file the summons and Charles to file his response thereto. It is this Summons that is now before this Court for consideration.

3. In her application, Susan listed the beneficiaries as herself, Charles, Peter, Betty, Monica, John and Joseph. Susan also listed the following assets of the estate:

- i) Kshs. 10,580,000/= plus interest in account no. [xxxx] KCB Changamwe.
- ii) Plot No. 1055/VI/MN
- iii) Monthly rent of Kshs. 30,000/= from Plot No. 1055/VI/MN with effect from 29.1.11.
- iv) Shares in Chaani Good Hope Investment Company Limited.
- v) Land in Moiben (20 Acres)
- vi) Land in Sergoit (13 acres).
- vii) Karuna/Sosian Block 4 (Kambi Simba) 70 (2.700 HA).

4. Susan proposes that she gets ½ the estate while the Deceased’s 6 surviving children get the other ½.

5. In his Replying Affidavit sworn on 28.1.18, Charles listed Fredrick Kosgei and Matthew Kiplagat both deceased as children of the Deceased in addition to those listed by Susan. Charles listed the following as the assets of the estate of the Deceased:

- i) Kshs. 10,580,000/= plus interest in account no. [xxxx] KCB Changamwe.

ii) Plot No. 1055/VI/MN (0.571 acres less portion acquired by the National Land Commission).

iii) Monthly rent of Kshs. 30,000/= from leased out portion of Plot No. 1055/VI/MN.

iv) Pension from Kenya Petroleum Refinery collected by Susan at the rate of Kshs. 23,000/= per month from 29.1.11., date of demise of the Deceased.

v) Shares in Chaani Good Hope Investment Company Limited.

vi) Karuna/Sosian Block 4 (Kambi Simba) 70.

6. According to Charles, the property known as Karuna/Sosian Block 4 (Kambi Simba) 70 was given to the late Matthew by the Deceased in 2003. Matthew built a house thereon in 2005 and settled his family there. Matthew's wife Lilian and her 3 minor children occupy the said property. As such, this property is not available for distribution. Charles proposes that the said property be transferred to Lilian and Peter in trust for Matthew's 3 children. Charles further averred that the land in Sergoit is part of a 60 acre ancestral land in the name of their grandfather Chebii Kimeto and is not available for alienation to any person. The land is available to members of the extended family for social and economic purposes and several family members including the Deceased and his father are buried there. The land can only be subdivided once the over 150 extended family members agree to do so. Charles further states that the rent from Plot No. 1055/VI/MN was used for the Deceased's treatment and funeral expenses. The rent was also used for building a perimeter wall, change of user, payment of rates and utilities and maintenance of the property. The rent has also been used for school fees for Onesmus Kemboi the son of the late Frederick and supporting the children of the late Matthew.

7. Charles proposes that the estate be distributed to Susan and the 6 surviving children of the Deceased in equal shares.

8. The law relating to intestacy is found in Part V of the Law of Succession Act which provides for distribution of the estate of a deceased person who dies intestate. Section 35 provides for a situation where an intestate has left one surviving spouse and a child or children. Section 36 provides for where an intestate has left one surviving spouse but no child or children. Section 38 provides for where an intestate has left a surviving child or children but no spouse. Section 39 makes provision for where an intestate has left no surviving spouse or children and finally Section 40 stipulates how the estate should be distributed where the intestate was polygamous.

9. In the present case, the Deceased was a monogamous man. He had however married twice. His first wife Mary Chebii died in 1992. Ten years later on 24.4.02, the Deceased married Susan under the repealed African Christian Marriage and Divorce Act. The fact is that the Deceased left 2 house households. The first household has children but no spouse while the second had a spouse but no children. The law however does not anticipate the situation where the deceased was a serial monogamist. As observed by Musyoka, J. in the case of In Re Estate of John Musambayi Katumanga – (Deceased) [2014]eKLR:

The Act does not appear to have provisions to govern circumstances where a monogamous deceased ends up with two households consequent upon remarriage following the death of the first wife. It would appear that in dividing the estate of such a deceased person the court should be guided by the provisions of both Sections 35 and 40 of the Act.

10. Section 35 gives a life interest of the residue of the estate to the surviving spouse of a deceased intestate and thereafter to the surviving child or equally among the surviving children. It would appear that this provision was intended for a surviving spouse who is also the mother of surviving children where the possibility of conflict would be minimal. However, in this situation, Susan the surviving spouse, is not the mother of the Deceased's surviving children. There is already conflict between her and the children as evidenced by the application dated 22.6.16 and filed by Charles who alleged that Susan had attempted to obtain the compensation from the National Land Commission on her own to the exclusion of other beneficiaries. This Court did on 29.6.16 grant an order stopping the National Land Commission from releasing the said compensation to Susan. It is clear that Section 35 does not address the situation obtaining in the present case. Given the foregoing circumstances it would appear unjust to allow Susan to enjoy a life interest over property that ought upon her death or remarriage to devolve to children that are not her own.

11. Section 40 provides that where an intestate has married more than once under any system of law permitting polygamy, his estate shall be divided to each house according to the number of children. A surviving widow is to be counted together with her children as an additional unit. The record does not show under what system of law the marriage between the Deceased and his first wife, the late Mary Chebii was contracted. Section 40 of the Act provides for distribution according to houses taking into account the number of children and wives in each house. Susan proposes that the estate be divided equally between her house and that of the first wife so that she gets half the estate while the children of the first wife get the other half. There is however nothing in the Act to suggest that there was ever an intention that there be equality between houses. This issue was considered in the case of Mary Rono v Jane Rono & another [2005] eKLR and Omollo, JA had this to say about Section 40 of the Law of Succession Act:

My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.

12. Charles submitted that Karuna/Sosian Block 4 (Kambi Simba)70 had been given to Matthew by the Deceased in 2003. However, no evidence was led to support the submissions. Charles further submitted that the 13 acre piece of land in Sergoit was not available for distribution as it was part of a larger 40 care piece of ancestral land. He has however not denied that the Deceased is entitled to 13 acres thereof. In the circumstances, I find that the said piece of land is part of the estate of the Deceased and the fact that it is part of the larger ancestral land is not sufficient reason to exclude the same from the distribution of the estate. Additionally, the proceeds of rent of Plot No. 1055/VI/MN cannot be excluded for the reason that the same is used for maintenance and outgoings of the property and school fees for the grandchildren of the Deceased. This property together with any income arising therefrom form part of the estate of the Deceased.

13. Charles has included the Deceased's pension as part of the estate of the Deceased. He stated that Susan has collected the pension amounting to Kshs. 23,000/= from 29.1.11 the date of the demise of the Deceased. It is trite law that pension does not form part of the estate of the Deceased and is paid out in accordance with the pension scheme rules. Section 36A of the Retirement Benefits Act provides:

Upon the death of a member of a scheme, the benefit payable from the scheme shall not form part of the estate of the member for the purpose of administration and shall be paid out by the trustees in accordance with the scheme rules.

14. Having taken all the foregoing factors into account, my finding is that estate of the Deceased is comprised of the following assets:

- i) Kshs. 10,580,000/= plus interest in account no. [xxxx] KCB Changamwe.
- ii) Plot No. 1055/VI/MN (0.571 acres less portion acquired by the National Land Commission).
- iii) Shares in Chaani Good Hope Investment Company Limited.
- iv) Karuna/Sosian Block 4 (Kambi Simba) 70.
- v) Land in Moiben (20 Acres)
- vi) Land in Sergoit (13 acres).

15. The Deceased had 8 children. Frederick and Matthew are however deceased. Charles averred in his affidavit that Matthew is survived by his wife Lilian Kiplagat and 3 children. Charles stated that Onesmus Kemboi is the son of Frederick. It is not clear however if Frederick was survived by a wife or other children besides Onesmus Kemboi. The estates of Matthew and Frederick must be taken into account in the distribution of the estate.

16. Having considered the matter in its entirety, I am persuaded that justice will be best served if the estate of the Deceased is distributed in accordance with Section 40 of the Act. Accordingly, I direct that the estate of the Deceased be distributed in equal shares to the following:

- i) Susan Wambui Chepkaitany
- ii) Estate of Frederick Kosgey
- iii) Charles Kiprop Chepkaitany
- iv) Peter Kipchumba Keitany
- v) Betty Cherono Chepkaitany
- vi) Estate of Matthew Kiplagat
- vii) Monica Chepkemboi Keitany
- viii) John Kipruto Keitany
- ix) Joseph Kiptoo Keitany

17. This being a family matter, there shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 25th day of January 2019

M. THANDE

JUDGE

In the presence of: -

.....for the Petitioner

.....for the Respondent

.....Court Assistant