



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**SUCCESSION CAUSE NO 164 OF 2014**

**IN THE MATTER OF THE ESTATE OF KIPSOMOI A. YEGON alias KIPSOIMO ARAP YEGON**

**SELINA C YEGON.....PETITIONER**

**VS**

**LUCIO C. YEGON.....OBJECTOR**

**JUDGMENT**

1. This matter relates to the estate of Kipsoimo A. Yegon alias Kipsoimo Arap Yegon who died intestate on 14<sup>th</sup> November 2011. He was survived by two widows, Lucio Yegon and Selina Yegon. The widows applied jointly for letters of administration intestate which were granted by the court on 17<sup>th</sup> December 2014.

2. Form P&A5 filed with the application for letters of administration intestate indicates that the deceased was survived by the following beneficiaries:

- (a) Lucio C. Yegon - 1<sup>st</sup> Widow
- (b) Estha C. Ngeno- Daughter
- (c) Gabriel Kipkurui Korir - Son
- (d) Mary C. Munai - Daughter
- (e) Julianah Cheruiyot- Daughter
- (f) Jackson Kiptonui Korir - Son
- (g) Selinah C. Ruto - Daughter
- (h) Selinah Chelangat Yegon -2<sup>nd</sup> Widow
- (i) Richrd Kipkoech A. Korir - Son
- (j) Philip Kipkurui Korir - Son
- (k) Josphine Chemutai -Daughter
- (l) Reginah Chebet Kirui -Daughter
- (m) Pascaline Chepkurui Rono Daughter
- (n) Merch Chepkemoi- Daughter
- (o) Caroline Chepnetich Kirui- Daughter

**(p) Milka Chepkoech Koros- Daughter**

3. The estate of the deceased comprises two properties, Kericho/Kapkatet/1156 and Transmara/Angata Barigo/83 measuring 5.2 ha (12.844 acres) and 13.16 ha (32.50 acres) respectively.
4. It appears from the documents on record that the widows, following their appointment as the administrators of the estate of the deceased, did not file an application for confirmation of grant. Though directed to file their respective modes of distribution, they did not do so. Instead, Lucio Yegon filed, through her Advocates, Onsongo & Co. Advocates, what was termed as the 'Objector's Affidavit on Proposal on Distribution.'
5. In the said affidavit sworn on 2<sup>nd</sup> December 2016, she avers that she is aware that under Kipsigis customary law, her co-wife is entitled to inherit a portion of the deceased's ancestral land, but not from any land purchased from the dowry of a co-wife's daughters. She further avers that land parcel number Transmara/ Angata Barigo/83 measuring 13.16 ha was bought by the deceased using the proceeds of dowry paid by the husbands of her daughters. This purchase was done before the second widow of the deceased, Selina C. Yegon, was married to the deceased and she did not therefore participate in the acquisition of the property. She avers that under Kipsigis customary law, the petitioner as the 2<sup>nd</sup> widow was entitled to inherit a share of the property that was ancestral land, Kericho/Kapkatet/1156, but not the property that was purchased from the dowry of her daughters.
6. It is her further assertion that a meeting of clan elders had determined that Kericho/Kapkatet/1156 be shared equally between the widows while she gives 3 acres out of Transmara/Angata Barigo/83 to Selina and keeps the rest.
7. In her affidavit in reply sworn on 27<sup>th</sup> March 2017, Selina avers that both parcels of land are registered in the name of the deceased. They should therefore be divided equally between the widows or houses of the deceased in accordance with the law on the distribution of the property of a deceased person.
8. It is her averment further that the objector has not tendered any documentary evidence to support her claim that the land was bought with proceeds from dowry. Further, that both her children and the children of the objector were residing on Transmara/Angata Barigo/83.
9. Selina denies that the land was bought after she was married, asserting that they both witnessed the registration and issuance of title to both parcels. She further denies that a clan meeting was held or that an agreement was reached on the distribution of the land. She urges the court to distribute the two parcels of land equally between the two houses of the deceased.
10. Given the respective claims of the parties with respect to the purchase of the land comprising the estate of the deceased, the court directed that the matter should be heard by way of oral evidence. Each of the widows testified and called 3 witnesses. They also filed witness statements in support of their respective cases.

**The Petitioner's case**

11. The objector filed three witness statements. In his statement made on 5<sup>th</sup> August 2016, Bii Philip states that sometime in 1944, he was present when Mr. Bore gave Kericho/Kapkatet/1156 to his daughter, Lucio Yegon. She later married the deceased as a second wife. He stated that the land Kericho/Kapkatet/1156 therefore belonged to Lucio Yegon.
12. Soy Mathew Kipkurui, also a village elder from Mabwatta village, made a similar statement regarding Kericho/Kapkatet/1156, asserting that it belonged to Lucio Yegon.
13. Three other witness statements were filed, all dated 24<sup>th</sup> July 2017. The witnesses, John Kipngeno Sigei, Keya Cheruiyot and Joseph Kiprotich Cherero stated that they witnessed when 'the land' was sold by one Kipkering Arap Cheruiyot to the deceased and Lucio. Their evidence was that the purchase price was 4 bulls from the dowry of Lucio's daughter.
14. The petitioner's witnesses filed statements supporting the position that the two parcels of land should be shared equally by the widows. This was deponed to by John (Johana) Arap Cheruiyot, a cousin of the deceased. He deposed that he was aware that the deceased owned the two parcels of land and that each of the widows had two sons who should equally inherit the two parcels. Soi Richard echoed Johana's averments.
15. Selina also filed a further affidavit in which she states that she got married to the deceased in 1976 and bore him eight children. She states that her two sons are entitled to inherit as the daughters are married away from home and have no interest in the land. Her co-wife, Lucio, also has two sons who should inherit alongside her son.
16. Philip Kipkurui Korir, one of the sons of Selina supported his mother's statement in his own statement dated 17<sup>th</sup> August 2017.
17. The parties and their witnesses gave oral evidence and were cross-examined at length. In her evidence, Selina Yegon testified that she was the widow of the deceased. She was the 2<sup>nd</sup> wife and had proposed a mode of distribution in which she sought equal distribution of the estate of the deceased among the two houses. She noted that the objector was opposing her proposal on the basis that she had been given one of the parcels of land by her biological parents, while the other was bought from the dowry of her daughters. It was Selina's testimony that the two parcels of land are part of the estate of the deceased as they were registered in the name of the deceased. She stated in cross-examination that the deceased already had the two parcels of land when she married him, and that he was already married to the objector. She conceded that she did not know how he got the money to purchase title number Transmara/Angata Barigo/83.

18. Her second witness was her son, Phillip Kipkurui Korir, born in 1974. He stated that he and his father's two families had lived happily and peacefully throughout the lifetime of the deceased. It was his testimony that his father had not said that some of his children will be discriminated against in the distribution of the property. It was only after the demise of the deceased that some of the sons of the 1<sup>st</sup> wife decided to discriminate against them in the distribution of the estate of the deceased.

19. He stated that he was aware that there are laws that provide that when a deceased person dies, his estate should be distributed in accordance with the law. He urged the court to use this mode of distribution.

20. In cross-examination, he conceded that he did not know where the deceased got money to purchase Transmara/Angata Barigoi/83 as he was not born at the time it was purchased. He was, however, aware that during the lifetime of the deceased, no-one raised an issue about the ownership of the land, which is registered in the name of the deceased.

21. Johana Arap Cheruiyot, Selina's third witness, adopted his statement already referred to above. It was his testimony that he knew the deceased, who was his cousin. He was aware that they had agreed at home about the distribution of the land. This was that Selina be given 5 acres out of Kericho Kapkatet/1156 while the remaining portion of about 8 acres should be taken by Lucio.

22. The 1<sup>st</sup> house had, however, refused the mode of distribution agreed and had proposed that Selina be given only two acres. He stated that the two parcels of land belonged to the deceased, and the property should be distributed among the beneficiaries in an equitable manner. In cross-examination, his testimony was that Transmara/Angata Barigoi/83 was acquired around 1963/1964, but he did not know the previous owner of the land nor was he a witness when the deceased bought the land. It was his testimony, however, that it was the deceased who paid for the land as it is in his name, and he had 100 cows in his home. He further testified that the deceased could not have bought the land from the cows paid as dowry for Lucio's daughters as the Masai had raided the deceased's home and carried away the cows.

23. In his evidence, Richard Soi, the fourth witness for the petitioner, testified that he was one of the clan members of the family. That they had held a clan meeting and after a long consultation, had agreed that the land parcels belonged to the deceased. It was his testimony that the deceased had organized that both wives should live in Kapkatet while all the sons of the deceased should live in Transmara. He stated in cross-examination that he had no personal knowledge of how the Transmara land was paid for. He was aware that the deceased had four sons, two each from the two wives, and that they had gone to live in Transmara while the wives live in Kapkatet. All the daughters of the deceased were married.

#### **The Objector's case**

24. The objector, Lucio Chepkemoi Yegon, adopted as her evidence in chief her affidavit of protest against the distribution of the estate of the deceased. In cross-examination, she testified that the deceased did not own anything in his lifetime; that she had sold four cows and used the money to buy land. She further stated that she did not chase the petitioner away as she had a parcel of land she resides in. It was her testimony that there was no property to be shared with the petitioner.

25. In response to a question from the court, she stated that the deceased had his land at Kipleli in Sotik; that they had sold the land and proceeded to Bomet, to parcel number Kericho/Kapkatet/1156, which she was given by her father, though she could not recall the year she was given the land. She maintained that even though the title of the land is in the deceased's name, the land is hers, as is Transmara/Angata Barigoi/83 which she bought from the bride price for her daughters. She stated that she had given part of the land to her co-wife; and that her children and Selina's children live on the land together and had been living there for long, from the time that the deceased was alive.

26. Lucio confirmed that she and Selina reside together at Kericho/Kapkatet/1156 which she stated she had been given by her father. She confirmed that she and her co-wife had been living there for many years; that Selina had been married to the deceased when they were living in Masai land, then they had all come to live in Kapkatet together. She stated that she had given Selina a parcel of 5 acres in Kapkatet and 5 acres in Angata. She stated that the issue of ownership of the land had come up after the death of the deceased as he could not allow her to raise the issue of ownership in his lifetime.

27. Lucio's first witness, Keya arap Cheruiyot, testified that land parcel number Transmara/ Angata Barigoi/83 was bought by the first wife of the deceased, Lucio, using dowry from her daughters. That she had bought the land from his brother, one Kipkorir arap Cheruiyot. The deceased had not married Selina at the time the land was bought. In cross-examination, he stated that at the time of the purchase of the land, the deceased was not present and was not party to the purchase. That the land had been purchased by Lucio and her sons, and that her son Gabriel sold cows from the dowry of daughters of Lucio and bought the land. It was his testimony further that the deceased was not around when the land was acquired, though he did not have information regarding the registration process of the land which was registered in the name of the deceased.

28. Joseph Kiprotich Cheri, a neighbour of the deceased and his two wives since 1974, stated that he was aware that they had a land dispute over Transmara/ Angata Barigoi/ 83. That the land had been bought in 1974 by Lucio. That she had initially rented the land before purchasing it. That she had bought the land from Kipkereng arap Cheruiyot, 'by way of cows' which had been paid to her as dowry when her daughters were married. He maintained that land parcel number Transmara/ Angata Barigoi/ 83 belongs to Lucio.

29. In cross-examination, he stated that even though the land is registered in the name of the deceased, the buyer is Lucio as the proceeds for its purchase were not the deceased's. It was registered in his name because during registration, the deceased registered the land in his name but Lucio was in occupation. That during its purchase, the deceased was far away, tending to his business, while the petitioner, Selina, was not married.

30. At the close of the protestor's case, her Learned Counsel, Mr. Onsongo, indicated that as there were no points of law arising in the matter, he would not be filing any submissions. He would instead rely on the affidavit and oral evidence on record.

## Analysis and Determination

31. I have considered the evidence presented before me by the parties. I note that the two properties in dispute are registered in the name of the deceased. Kericho/Kapkatet/1156 was registered in his name on 26<sup>th</sup> May 1987 while Transmara/Angata Barigo/83 was registered in his name on 1<sup>st</sup> November 2002 and a title issued on 12<sup>th</sup> July 2004. Thus, on the basis of the registration of the properties, they comprise the entire estate of the deceased.

32. The deceased died intestate in 2011. Accordingly, his estate is required by law to be distributed in accordance with the provisions of the Law of Succession Act. There is no dispute that he was polygamous. He married the objector, Lucio Yegon, it would appear sometime in the 1940s. The petitioner, Selina Yegon, was married in 1976.

33. Section 40 of the Law of Succession Act provides as follows with respect to the distribution of the estate of a polygamous person who dies intestate:

### **40. Where intestate was polygamous**

***(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 intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.***

34. The rules on distribution set out in section 40 above have been the subject of judicial consideration in several decisions in the recent past. **In re Estate of Kipkemoi Chepkwony Meto Alias Kipkemoi Arap Kimeto – (Deceased) [2017] eKLR** I observed as follows:

***“16. I think there is growing recognition that distribution of the estate of a deceased person on the basis of section 40 without taking into account the fact that the wife (or wives) married earlier had made a contribution to the acquisition of the property the subject of the distribution on the death of the deceased leads to unfairness for the older widows- see in this regard Succession Cause No. 16 of 2010-in the matter of the late George Cheriro Chepkosiom (Deceased) and Probate and Administration Cause No. 244 of 2002-Re Estate of Ephantus Githatu Waithaka (Deceased) Esther Wanjiru Kiarie vs Mary Wanjiru Githatu.”***

35. This position was upheld by the Court of Appeal in its decision in **Esther Wanjiru Githatu v Mary Wanjiru Githatu [2019] eKLR**. This decision, relating to an appeal from the decision of the High Court in **Esther Wanjiru Kiarie v Mary Wanjiru Githatu [2016] eKLR** reinforces the view that where a deceased person had acquired assets with his first widow, she would be entitled to a larger share of the estate on the basis that though the property was registered in the name of the deceased, a resulting trust in her favour arose as she had made a non-financial contribution to the acquisition of the property prior to the marriage of the deceased to his second widow.

36. This, however, is not the case of the objector in the present matter. From her evidence and that of her witnesses, I hear at least three conflicting narratives about the purchase of the property registered in the name of the deceased. The first is that the property Kericho/Kapkatet/1156 measuring 5.2 ha belongs to the objector as it was given to her by her father. The second is that land parcel number Transmara/Angata Barigo/83 measuring 13.16 ha also belongs to her as she purchased it using dowry from the marriage of her daughters. Accordingly, under Kipsigis customary law, she is entitled to the entire land parcel, but she is willing to ‘give’ three acres to her co-widow. A third variation is that the deceased had no assets. Though the properties are registered in his name, the deceased had no properties, was away when the protestor purchased Transmara/Angata Barigo/83, and that it was the protestor’s son, Gabriel, who sold cows received from the dowry of his sisters to purchase the land. There is also a suggestion in the averments of the objector in her affidavit sworn on 2<sup>nd</sup> December 2016 that Kericho/Kapkatet/1156 was the ancestral land of the deceased. There are thus a lot of contradictory positions taken by the objector and her witnesses with respect to the ownership of the land.

37. No evidence was led to prove the Kipsigis custom that land purchased from dowry paid for the daughters of a house must belong to that house. In any event, even if such evidence had been led, I believe that it would not supersede express provisions of law with respect to distribution of the estate of the deceased. I am therefore not satisfied that there is any merit in the objection or protest against the distribution of the estate of the deceased in accordance with the provisions of section 40. I accordingly dismiss the objection.

38. As there is no application for confirmation of grant showing the proposed mode of distribution, I direct the two widows, who are the joint administrators of the estate of the deceased, to file an appropriate application that indicates a mode of distribution that is in accord with the provisions of section 40 of the Law of Succession Act.

39. Should the daughters of the deceased not be interested in a share of the estate as the administrators allege, they shall file affidavits renouncing their interests in the estate.

40. Each party shall bear her costs of the objection.

**Dated and Signed this 12<sup>th</sup> day of July 2019**

**MUMBI NGUGI**

**JUDGE**

**Dated Delivered and Signed at Kericho this 24<sup>th</sup> day of July, 2019**

**GEORGE DULU**

**JUDGE**