



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO 266 OF 2010

IN THE MATTER OF THE ESTATE OF KIPSITET ARAP SUTER

FRANCIS KIPTARUS SUTER.....1ST PETITIONER

ANNA TERIKI SUTER.....2ND PETITIONER

ALPHONCE KIPTANUI KIPSITET.....3RD PETITIONER

VERSUS

RAEL JEPKOSGEI MUTAI.....OBJECTOR

JUDGMENT

1. After **KIPSITET ARAP SUTER** (Deceased) died intestate, **FRANCIS KIPTARUS SUTER, ANNA TERIKI SUTER and ALPHONCE KIPTANUI KIPSITET** petitioned and obtained grant of letters of administration which were confirmed on 30th July 2018 in their capacity as sons and a daughter of the deceased. They distributed the estate as regards **IRONG/ITEN/248** as follows:

· SALINA KOECH	5 ACRES
· FRANCIS KIPTARUS SUTER	8 ACRES
· ALPHONCE KIPTANUI KIPSITET	4 ACRES
· TABUTUMOI SOTE KIPSETIT	13 ACRES
· PAUL KIPSITET	20 ACRES
· ANNA TERIKI	5 ACRES
· KAPKISABAN FAMILY	1 ACRE

As regards land parcel No. **IRONG/ITEN 226**, the whole share was bequeathed to **ALPHONCE KIPTANUI KIPSITET**.

2. This mode of distribution is objected to by **RAEL JEPKOSGEI MUTAI** (the widowed daughter-in-law by virtue of having been married to **JOHN KIMUTAI**, a son of the deceased), who applied for revocation of the grant on grounds that it was fraudulently obtained by making of a false statement and concealment of facts essential in to justify the grant, as she had been left out from the list of beneficiaries. Also, that some of the deceased's properties have been left out from the list of assets of the estate.

3. It is the objector's case that her late husband is a beneficiary to land **parcel No. IRONG/ITEN/248** which measures **55.8 acres**, and she has been using **26.4 acres** with her children, as half of the estate had been allocated to her late husband **JOHN KIMUTAI**, and the other half to his brother **PAUL KIPKOECH KIPSITET**. She deposes in the supporting affidavit that her late father-in-law had three wives in this order:

i. **TAMINING KIMOI** (Deceased) whose children comprise

- **COSMAS KIPSITET (deceased)**
- **ALBINA KIPKECH (deceased)**
- **VERONICA KIMUTAI (deceased)**
- **PAUL KIPKOECH KIPSITET**

ii. **SOTI TABUTUMOI** whose children comprised

- **FRANCIS KIPTARUS SUTER**
- **ANNA CHEBUTIE (deceased)**
- **SUSANA KWAMBAI**
- **ALPHONCE KIPSITET**
- **JOHN KIMUTAI KIPSITET (deceased)**
- **FLORA KIPSITET**
- **REGINA KIPSITET**

iii. **EUNICE KIPSITET** whose children comprised

- **ERNEST KIPSITET**
- **PETER KIPSITET**
- **ROSE KIPSITET**
- **GRACE KIPSITET**
- **JEMAIYO KIPSITET**
- **JEBET KIPSITET**
- **KIPLAGAT KISITET**
- **KIPKOSGEI KIPSITET**
- **KICHICHIR KIPSITET**

4. The deceased had the following properties:

- a) **IRONG/ITEN /248**
- b) **IRONG/ITEN/226**
- c) **SERGOIT BLOCK 2 (CHEMARMAR)6667**
- d) **TEMEBELIO/ELGEYO BERDER BLOCK 5 (EXTOULEY) 143**
- e) **CHEMARMAR FARM**

5. At the hearing, parties agreed to retain the administrators, but the mode of distribution and list of assets was contested. It was **RAEL's (PW1)** testimony that she lived with the late **JOHN** from 1977 and between them, they had 5 children. She denied suggestions that she had left the matrimonial home, insisting that she was with him and even attended his burial. It is her evidence that the deceased owned all 5 the parcels she has listed, and rejects any suggestion that some of them were individually owned by her brothers in law.

6. It is her father evidence that the deceased had said she should share the land with **PAUL**. She also denied ever hearing the deceased instruct that **SARAH KABON** (a daughter to the deceased's brother) should be given 5 acres, saying the deceased had directed that **SARAH** should go to stay on her own. She however confirms that the family of **KAPKISABAN** were entitled to 1 acre. She later changed her mind and said she did not even know the **KAPKISABAN** family nor was she aware of any land which was to be given to them. As far as she

14. He pointed out that although the deceased had three wives, the 3rd house had no issues regarding the mode of distribution, as they had their own parcel at **KARUNA** within **UASIN GISHU COUNTY**. He also conceded to 5 acres being hived out of **IRONG/ITEN /248** be given to their cousin **SALINA KABON KOECH**. He proposed that the remaining 66 acres be distributed as follows:

1ST HOUSE OF KIMOI TAMINING

· ANNA TERIKI widow of COSMAS SUTER to get a total of 16.5 ACRES which comprises

a) LR No 9129 - 10 ACRES

b) IRONG/ITEN/248 6.5 ACRES

· PAUL KIPKOECH KIPSITET - IRONG/ITEN/248 - 16.5 ACRES

2ND HOUSE OF TABUMOI SOTE KIPSITET

· FRANCIS KIPTARUS SUTER - IRONG/ITEN/248 - 11 ACRES

· ALPHONCE KIPTANUI KIPSITET IRONG ITEN 248 - 5 ACRES

IRONG/ITEN/226 - WHOLE SHARE

· RAEL JEPKOSGEI MUTAI (WIDOW OF JOHN KIMUTAI) IRONG/ITEN 248 –11 ACRES

15. FRANCIS told this court that he only listed some of the properties, because there was a property which was already in possession of the 3rd house, so they were not even listed as beneficiaries. He only listed the two houses, and some of the properties, as the deceased had distributed some of his property *inter vivos*. He maintained that as a consequence, their father had only 4 properties available for distribution, being:

· KAPKURGAT (TILATEL FARM) No 39 measuring 39 acres

· CHEMARMAR

· IRONG/ITEN/248

· IRONG/ITEN 226

16. It was his evidence that the 2nd wife lives on the Tilatel property with her children, while **CHEMARMAR Parcel No 67** belongs to his late elder brother **COSMAS**, by virtue of him being a purchaser. He explained that at the time of petitioning and obtaining grant of letters of administration, the late **JOHN KIMUTAI**'s children were minors, so he listed their grandmother to take care of their interest in **parcel No 248**, as their mother had deserted the home. He now stated in court: "**No 248 belonged to Rael, she came to live there with her husband and children.**" He however insists that he lived on part of parcel No 248 in 1976, but later moved out, and now his son **KIPLIMO** lives there.

17. On re-examination he stated that their father had given the **TILATEL** property to the 3rd house, which was why he had not listed it for distribution. It was his evidence that the 2nd house has 5 surviving members, and that the girls got married and are not interested in their father's property.

18. **ALPHONCE KIPTANUI SITET (DW2)**, from the 2nd house supported the position taken by the petitioners that only 4 of their late father's properties are available for distribution, saying their father gave him a parcel of land at **KAPKESUM in 1980**, and **FRANCIS** had been given his portion but the **KAPTOOLEY** portion belonged to **FRANCIS** who had purchased it with the help of **HENRY MURGOR**.

19. **DW3 (JOHN KIPRONO KIPLAGAT)**, a nephew to the deceased told this court that at one time in the year 2006, the deceased called him, **WILLY KORIO (Principal BUROTT DAY SECONDARY SCHOOL)**, and a businessman named **ANDREW KIMETTO**, saying he wanted to share out his land but he did not have confidence in his sons and preferred to use outsiders. He directed that his late brother's daughter **SALINA** should get 5 acres, and the **KAPKISABAN** family was to get 1 acre. The remaining 52 acres was to be shared between the 1st and 2nd houses, but the details of sharing out was to be left to the respective houses.

20. It is his evidence that 40 days after the deceased's death, they gathered at the DO's office, with all the sons being present, and disclosed to them their father's wishes. That all were in agreement and they all signed a document, so he was surprised to learn that a dispute had erupted. As far as he knows, the 2nd house already had 6 acres so that was to be subtracted from the 52 acres which were to be shared out between the two houses, and denies suggestions that there was an agreement that only **PAUL** and **JOHN** would remain there.

No record of the deceased's wishes or the alleged family signed agreement was produced as evidence.

21. It is not disputed that the deceased had three wives, nor is it contested that the objectors are also beneficiaries of the deceased's estate. It

also is a common ground that the 3rd house of EUNICE KIPSITET was given parcel No TILATEL FARM No 99 *intervivos*, and they are not party to these proceedings. There is also no objection to ALPHONCE from the 2nd house getting the IRONG/ITEN/226 parcel whole share, and SALINA GETTING 5 acres from parcel No. IRONG/ITEN /248, and the KAPKISABAN family getting 1 acre out of IRONG/ITEN/248. It is also agreed that the

30 acres on CHEMARMAR should be taken over by COSMAS from the first house. Neither do the objectors oppose the TEMBELIO (EX-TOOLEY) 143 parcel being given to FRANCIS KIPTARUS SUTER, the point of departure being that whereas the objectors say it belonged to the deceased, FRANCIS produced evidence to show that he was a member of the land buying company from which he got the land. This was confirmed by the petitioners own witness, so it is not available for distribution as part of the estate. I find as a fact that this parcel does not form part of the assets for distribution

22. The major point of departure is what should happen to the remaining acreage of the parcel IRONG/ITEN 248? The objectors urge this court to invoke section 42 of the Law of Succession Act which provides that: **Where—**

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

23. The petitioner's counsel raised the question as to whether there was proof that the deceased left an oral will. Each side tried to out-do the other by rallying a host of different individuals who each claimed that on different occasions, the deceased spoke to as many individuals, each time giving different instructions regarding the distribution of IRONG/ITEN 248. **Section 9 of the Law of Succession Act provides that:**

1) No oral will shall be valid unless—

(a) it is made before two or more competent witnesses; and

(b) the testator dies within a period of three months from the date of making the will:

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by sections 18 and 19.

Obviously neither side met this test, as none established what time lapsed after the purported oral will.

24. This then brings into focus the next question- which is the most rational and acceptable mode of distribution? The Objector says the sons of the 2nd house should take the entire remaining portion of IRONG/ITEN 248 and share it between the surviving son PAUL, and the widow of the late JOHN. The petitioners suggest sharing half, between the two houses. Ideally since the deceased died intestate then the applicable mode of distributing the estate is as provided under **Section 40 of the Law of Succession Act** which provides that: **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.

25. Yet adhering to this provision *strictu sensu* would rock what has been largely accepted by the parties as uncontested. The petitioners do not deny that some of the siblings already benefitted from the gifts *intervivos*, so that subjecting them to an equal portion approach would be oppressive to those who never benefitted *inter vivos*- I must therefore employ the equitable approach, and refrain from the approach that he who has, more will be added, because that is unfair and irrational. Obviously the two persons who have not benefitted who shall get from the said estate, are PAUL and JOHN- and they are from the two houses, and I find the proposal by the objector reasonable. The mode of distribution is thus altered and the confirmed grant issued earlier be and is hereby revoked. A fresh grant do issue and record the mode of distribution with an alteration on the distribution of IRONG/ITEN/248 to be shared equally between PAUL KIPKOECH KIPSITET and the widow of the late JOHN KIMUTAI KIPSITET who shall hold the same her behalf (having a life interest), and IN TRUST on behalf of the children of the named JOHN KIMUTAI KIPSITET. The only reason I have left out the daughters in the family is that they have shown no interest whatsoever in the distribution of their father's estate of this cause. The petitioners shall bear the costs of this cause.

Delivered, Signed and dated this 23rd day of October 2019 at Eldoret.

H. A. OMONDI

JUDGE