



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 266 OF 2014**

**IN THE MATTER OF THE ESTATE OF TAPRANTICH CHEPKOECH SANGUTET  
(DECEASED)**

**CECILIA CHEPKEMOI SANGUTET.....PETITIONER**

**VERSUS**

**KIPLANGAT ARAP TONU.....OBJECTOR**

**RULING**

1. These proceedings relate to the estate of Taprantich Chepkoech Sangutet, who died intestate on 9<sup>th</sup> November 2013. The deceased was survived by the following beneficiaries as set out in form P&A 5 and the letter from the Chief of Ainamoi dated 3<sup>rd</sup> October 2014:

- i. Linus Kiprotich Sang-son (deceased)**
- ii. Kiplangat Tonui-son**
- iii. Joseph Kimutai Sang-son**
- iv. Richard Kipkoskei Tonui-son**
- v. Cecilia Chepkemoi Sangutet-daughter**

2. In his letter, the chief indicates that one of the beneficiaries, Joseph Kimutai Sang, is mentally challenged and therefore may lack the requisite capacity to execute any consents required for purposes of succession.

3. An application for grant of letters of administration intestate to the estate of the deceased was made on 14<sup>th</sup> October 2014 by Cecilia Chepkemoi Sangutet. In Form P&A 5 dated 14<sup>th</sup> October 2014, Ms. Sangutet sets out the beneficiaries of the estate as being:

- (a) Kiplangat Tonui- Son**
- (b) Cicilia Chepkemoi Sangutet-Daughter**
- (c) Joseph Kimutai Sang-Son (mentally challenged)**

4. She also indicates in her application that two of the deceased's children, namely Linus Kiprotich Sang

and Richard Kipkoskei Tonui, predeceased her. None of the surviving beneficiaries of the estate signed the consent to the making of a grant of administration intestate to a person of equal or lesser priority as required under the Law of Succession Act and the Probate and Administration Rules.

5. The estate of the deceased comprised one asset, Kericho/Ainamoi/121, comprising 4.8 ha. letters of administration intestate were duly issued to the petitioner on 13<sup>th</sup> March 2015.

6. Following the grant of letters of administration intestate to the applicant, an objection dated 27<sup>th</sup> February 2015 was filed by Kiplangat Tonui. The objection was to the making of a grant of representation to Cecilia Chepkemai Sangutet on some five grounds set out in the objection. The first was that the petitioner had not stated all the beneficiaries of the estate as she had left out the wife of the objector's mentally challenged brother. He also objected on the basis that ***“the visitation of surveyors was not communicated to all the beneficiaries”***. The second ground for the objection was that the petitioner had used a forged death certificate issued in respect of the deceased.

7. According to the objector, the death certificate was issued on 12<sup>th</sup> March 2014, while the objector had been issued with a death certificate a month after the death of the deceased, on 18<sup>th</sup> December 2013. As I understand this ground, the objection is that there should not have been two death certificates issued in respect of the same deceased person. The final ground was that the objector had not signed the consent dated 14<sup>th</sup> October 2014, and the petition had not been brought to his attention.

8. For reasons that are not clear from the record, the objection was not prosecuted, and in view of subsequent proceedings, in which the protestor has addressed the court on the protest that he filed against the mode of distribution proposed by the petitioner, this court deems it as having been abandoned.

9. By an application dated 16<sup>th</sup> February 2016, the petitioner sought confirmation of the grant issued to her. In the affidavit in support, she proposed that the estate of the deceased, comprising title No. Kericho/Ainamoi/121, measuring approximately 4.8 ha, be distributed as follows:-

**(a) The estate of Linus Kiprotich Sang 0.96 ha**

**(b) Kiplangat Tonui 0.96 ha**

**(c) Joseph Kimutai Sang 0.96 ha**

**(d) The estate of Richard Kipkoskei Tonui 0.96 ha**

**(e) Cicilia Chepkemai Sangutet 0.96 ha**

10. The objector then filed an affidavit of protest against confirmation of grant sworn on 18<sup>th</sup> April 2016. At paragraph 5 of the said affidavit, the protestor avers that his sister Cicilia Chepkemai Sangutet had gone against the resolutions of a meeting held on 3<sup>rd</sup> August 1999 by family members and the chief and the late Taprantich Chepkoech Sangutet when she was alive and had provided guidance on distribution of her property. He states in the said affidavit that he has annexed a copy of the said resolution, though none was attached. While leave was granted to his Learned Counsel, Mr. Joshua Mutai, on 7<sup>th</sup> June 2016, to file a supplementary affidavit and annex the said resolution, this was never done.

11. The protestor alleges that the estate of the deceased had been divided since 1999, during the lifetime of the deceased, in the presence of the beneficiaries as well as village elders; that it had been supervised by the area chief, Mr. Michael Kile Kirui, and that there had been no disagreement raised by any of the beneficiaries. The distribution then, according to the protestor, should be as follows:

**i. Samwel Kipkorir Rotich- 3.25 acres to be held in trust for his brothers and sisters**

**ii. Kiplangat Arap Tonui- 3.25 acres**

**iii. Joseph Kimutai Sang-3.25 acres**

**iv. Susan Chelangat Biriri-3.25 acres**

**v. Cicilia Chepkemoi Sangutet- 1 acre**

12. The protestor avers that his proposed mode of distribution was in line with the wishes of the deceased, and he did not wish to go against her wishes. The effect of the alleged distribution by the deceased would be for the sons of the deceased or, where the sons are deceased, their respective families, to have a larger share of the estate than their sister, the petitioner.

13. In her affidavit in response to the protest sworn on 2<sup>nd</sup> June 2016, the petitioner avers that the deceased died without having left a valid will. Accordingly, her estate ought to be distributed in accordance with the laws of intestacy. It was her averment further that there has never been any distribution of the estate of the deceased. Had there been such distribution, then nothing would have prevented the deceased from subdividing the land and issuing each of the beneficiaries with a title deed.

14. She terms the protest a gimmick by her elder brother to disinherit her of her rightful share in the estate of her late mother. In her view, the mode of distribution proposed by the protestor is based on a lack of understanding of the law governing intestate succession, and would be overtly unfair and unconstitutional.

15. Directions had been given that the parties would call oral evidence on the protest. However, when the matter came up for hearing on 23<sup>rd</sup> January 2017, the protestor elected, through his Counsel on record, to proceed by way of written submissions and not to call oral evidence, which was acceded to by Counsel for the petitioner. The parties therefore filed written submissions which they asked the court to rely on in rendering its decision.

### **Analysis and Determination**

16. I have considered the affidavit of protest, the affidavit in response, and the submissions in this matter. I believe the determination of the protest turns on the findings of the court on the following issues:

***(a) Whether the deceased had distributed her property prior to her demise;***

***(b) If the answer to issue (a) above is in the negative, how should the estate of the deceased be distributed.***

### **Whether the Deceased had distributed her property in her lifetime**

17. In his submissions dated 31<sup>st</sup> March 2017, the protestor submits that the petitioner had been allocated 1 acre from the estate by the deceased during her lifetime, and that she had never raised any issues with the said distribution of the property. He also alleges that the petitioner had sold part of the property she was allocated, and now seeks to increase her share unfairly. As I noted earlier, the court had directed the parties to adduce oral evidence in support of their respective positions. The protestor elected not to do so, and to rely on written submissions instead. That being the case, he cannot seek to include factual matters, which ought to have been presented to the court by way of oral or affidavit evidence, in his submissions.

18. The law is that if a deceased person had distributed his or her property in his lifetime, such distribution should be respected. This in my view is the intent of 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 for the benefit of a child, grandchild or house; or taken had he not predeceased the intestate. That***

***property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.”***

19. In its decision in **Joseph Wairuga Migwi vs Mikielina Ngina Munga [2016] eKLR**, the court, in considering the application of section 42, stated as follows:-

***“In my view this section of the law seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to be honoured and effected.”***

20. However, such wishes must be demonstrably clear, and can only be so through oral or documentary evidence adduced before the court. As matters stand, the court has no evidence before it that the deceased had distributed her property during her lifetime. Indeed, I note that despite being allowed to file a supplementary affidavit to exhibit the alleged resolution on the distribution of the land by the deceased, the protestor did not do so. The alleged distribution is denied by the petitioner, who filed submissions in opposition dated 20<sup>th</sup> April 2017 in which she reiterates the arguments set out in her reply to the protest which I have summarised above.

21. In the absence of any evidence that the deceased had distributed her estate in her lifetime as alleged by the protestor, I must determine the first issue in the negative.

#### **How shall the estate of the deceased be distributed?**

22. Having found that there is no evidence presented that the deceased had distributed her estate during her lifetime, the next issue to determine is how the estate of the deceased should be distributed.

23. The petitioner submits that the estate of the deceased should be distributed in accordance with section 38 of the Law of Succession Act. This would entitle her to an equal share of the estate with her brothers, 0.96 ha. She urges the court to be guided by the decision in **Eliseus Mbura M’Thara vs Harriet Ciambaka and Another [2012] eKLR** and **Peter Karumbi Keingati & 4 Others vs Dr Ann Nyokabi Nguithi [2014] eKLR** in finding that the Law of Succession Act does not discriminate between male and female children.

24. I believe that in the absence of evidence that the deceased had distributed her property during her lifetime, the only course open to this court is to distribute the estate in accordance with section 38 of the Law of Succession Act. The protestor had every opportunity to bring evidence of such distribution, but elected not to. The attempt by his Counsel to place it before the court by way of submissions, which cannot be tested by way of cross-examination, cannot be allowed. Accordingly, it is my finding that the estate of the deceased shall be distributed in accordance with section 38 of the Law of Succession Act. This calls for equal distribution of the property between the children of the deceased, which is what the petitioner has proposed.

25. The protestor has also challenged the grant on the basis that there are two death certificates in respect of the deceased. He states that he obtained one dated 18<sup>th</sup> December 2013, a month after the death of the deceased, while the petitioner has annexed one issued on 12<sup>th</sup> March 2014. I do not believe that this ground is material to the issues at hand, particularly as the death certificate issued to the protestor on 18<sup>th</sup> December 2013 refers to the deceased, who is a woman, as male, and no evidence of fraud on the part of the petitioner in obtaining the second death certificate has been presented.

26. In closing, I observe that the protestor alleges that there will be lawsuits if the land is distributed as proposed by the petitioner as there have been sales of portions of the property of the deceased. However, the law is clear in section 45 of the Law of Succession Act that any dealing or disposition of the estate of the deceased prior to the confirmation of grant is intermeddling with the estate. Such disposition is null and void.

27. Accordingly, I find and hold that the estate of the deceased shall be distributed as set out at paragraph 5 of the affidavit in support of the application for confirmation of grant as follows:

**(a) The estate of Linus Kiprotich Sang- 0.96 ha**

**(b) Kiplangat Tonui-0.96 ha**

**(c) Joseph Kimutai Sang-0.96 ha**

**(d) The estate of Richard Kipkoskei Tonui-0.96 ha**

**(e) Cicilia Chepkemai Sangutet-0.96 ha**

28. There shall be no order as to costs.

**Dated Delivered and Signed at Kericho this 31<sup>st</sup> day of January, 2018.**

**MUMBI NGUGI**

**JUDGE**