



REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

SUCCESSION CAUSE NO.8 OF 2004

IN THE MATTER OF THE ESTATE OF KIPSANG CHEPKWONY (DECEASED)

JANE CHEPKIRUI CHEPKWONY.....PETITIONER

VS

EZEKIEL KIPKEMOI SANG.....1ST APPLICANT/OBJECTOR

NANCY CHEPKOECH SANG.....2ND APPLICANT/OBJECTOR

ELIZABETH CHEPKEMOI SANG...3RD APPLICANT/OBJECTOR

ANNAH CHEPKORIR KIMETO.....4TH APPLICANT/OBJECTOR

SELLY CHELANGAT KIMETO.....5TH APPLICANT/OBJECTOR

SARA CHERONO SANG.....6TH APPLICANT/OBJECTOR

RULING

1. In a ruling delivered in this matter on 23rd September 2016, this court declined to revoke a grant issued to the petitioner as prayed by the protestors in this matter. While I found that there were insufficient grounds laid for revocation of the grant, it was my view, that distribution of the estate of the deceased in accordance with Kipsigis customary law as the petitioner had sought in her application for confirmation of grant may result in an injustice against some of the beneficiaries of the estate. I therefore directed the parties to appear before me with a view to arriving at a mode of distribution that was equitable to all parties.

2. The parties did appear before me and sought time to consult and try to settle the issue of distribution amicably. They were, however, unable to agree, and I therefore directed their respective Counsel to file proposed modes of distribution and submissions, if need be, from each side on the reasons for their proposals. The petitioner filed an affidavit on her preferred mode of distribution sworn on 10th July 2017 and filed in court on 17th July 2017. The objectors filed submissions dated 29th September 2017 and filed in court on 2nd October 2017. I will consider the affidavit and submissions in determination the manner in which the estate of the deceased ought to be distributed.

3. First, however, it is important to set out the law with regard to the distribution of the estate of a person who was polygamous and died intestate, as in the present case. It provides as follows:

(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. (Emphasis mine)

(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.”

4. In **Estate of John Musambayi Katumanga (Deceased) [2014] eKLR**, Musyoka J considered the application of section 40 and stated as follows:

“Under Section 40 of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the

children and the surviving spouses together. After that the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the Law of Succession Act, the children would divide the estate equally amongst themselves.”

5. Section 38 provides that:

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

6. In the present case, the deceased had two wives, the first of whom is deceased. The second wife is the petitioner. I believe that there is no dispute with respect to the beneficiaries of the deceased, who are set out in form P&A 5 and in the various affidavits filed in court and are as follows:

1st House

- i. Ezekiel Kipkemoi Sang**
- ii. Sarah Cheronno Sang**
- iii. Elizabeth Chepkemoi Sang**
- iv. Nancy Chepkoech Sang**
- v. Annah Chepkorir Kimeto**
- vi. Selly Chelangat Kimeto**

2nd House

- i. Jane Chepkirui**
- ii. Janeth Chepkemoi**
- iii. Charles Kipyegon Sang**
- iv. Joyce Cheronno**
- v. Robert Kipkurui Sang**
- vi. Judith Chepkorir**
- vii. Elkana Kipkemoi**

7. There is some dispute with respect to one Bernard Kibet. The objector lists him as a son of the second house, while the petitioner asserts that he is the son of Selly Chelangat Kimeto, a daughter of the deceased from the 1st house. I note that Bernard Kibet was not included in form P&A5 filed by the petitioner, and I would expect that a mother would be best placed to know her children and would include them in such an important document as form P&A5. I note that this Kibet has not filed any protest in court with regard to his interest. Accordingly, I will accept the petitioner's averment that Bernard Kibet is a grandchild of the deceased, and not her son.

8. In line with the provisions of section 40 of the Law of Succession Act, the first house of the deceased, in which the widow is also deceased, comprises six (6) units. The second house comprises seven (7) units, adding the widow, the petitioner in this case, as a unit.

9. The estate of the deceased comprised the following properties:

- i. Kericho/Londiani/Joubert/Block 10/74(United Soy) comprising 3.12 ha or 7.7 acres**
- ii. Kericho/ Cheborge/556 measuring 18 acres**
- iii. Kericho/North-Sotik/86 comprising 4.50 ha or 11.12 acres**
- iv. Nakuru/Njoro Ngata/Block 2/832 comprising 6.602 ha or 16.3 acres**
- v. I share Kaptele Tea farm**

vi. 1 share Kaptembwa Tea farm

vii. 1 share Bureti Tea Sacco Growers

viii. 1 share Yas Angwan Investments

ix. 1 share Malinja

Mode of Distribution of the Estate

10. I will begin with the assets of the estate of the deceased where the parties are almost in agreement on the mode of distribution. These, sadly, are the minor assets in the deceased's estate- the shares in various companies. The petitioner proposes that the shares be distributed as follows:

i. 1 share Kaptele Tea farm- Jane Chepkirui Chepkwony

ii. 1 share Kaptembwa Tea farm-Anna Chepkorir Kimeto

iii. 1 share Bureti Tea Sacco Growers- Ezekiel Kipkemoi Sang

iv. 1 share Yasangwan Investments-Selly Chelangat Kimetto

v. 1 share Malinja- Elizabeth Chepkemoi Sang Nancy Chepkoech Sang to share equally.

11. Ezekiel Kipkemoi Sang makes a similar proposal in his affidavit sworn on 29th May 2017, save that he proposes that the 1 share in Kaptele Tea farm should go to his sister-in-law, Elizabeth Chepkemoi Sang. No reason is advanced for this proposed mode of distribution. I take the view that as the surviving widow of the deceased, the petitioner has a higher claim on the share in Kaptele Tea farm. Consequently, there being no reason advanced to justify this share going to the deceased's daughter in law, I direct that the shares be distributed in accordance with the proposal by the petitioner, and that the Kaptele Tea farm share shall go to the petitioner, Jane Chepkirui Chepkwony.

Distribution of the real property

12. The deceased had four properties in respect of which certificates of official search evidencing his title were annexed to the application for letters of administration intestate. The objector, Ezekiel Kipkemoi Soi has included a property known as United Soy comprising 7 acres, but for which there is no documentary evidence in respect of its existence of ownership by the deceased. Consequently, I will consider the following as the real properties of the deceased available for distribution among his beneficiaries:

i. Kericho/Londiani/Joubert/Block 10/74(United Soy) comprising 3.12 ha or 7.7 acres

ii. Kericho/ Cheborge/556 measuring 18 acres

iii. Kericho/North-Sotik/86 comprising 4.50 ha or 11.12 acres

iv. Nakuru/Njoro Ngata/Block 2/832 comprising 6.602 ha or 16.3 acres

13. The total acreage of the deceased's estate is 53.12 acres. The beneficiaries of the estate are 13 in number, six from the 1st house and seven including the widow, from the 2nd house. In accordance with section 40 of the Law of Succession Act, each of the beneficiaries is entitled to approximately 4 acres out of the estate of the deceased. The 1st house, which has 6 beneficiaries, is therefore entitled to 24 acres, and the 2nd house to 28 acres.

14. The question is whether the modes of distribution proposed by the opposing parties in this matter meet this requirement in order to do justice to the parties.

15. In his affidavit sworn on 29th May 2017, the 1st objector, Ezekiel Kipkemoi Sang, proposes that the beneficiaries from the 1st house get the following properties:

i. 7 acres out of Kericho/Londiani/Joubert/Block 10/74(United Soy) comprising 3.12 ha or 7.7 acres

ii. 15 acres out of Kericho/ Cheborge/556 measuring 18 acres

iii. 9 acres out of Kericho/North-Sotik/86 comprising 4.50 ha or 11.12 acres

iv. 18 acres out of Nakuru/Njoro Ngata/Block 2/832 comprising 6.602 ha or 16.3 acres

16. From his proposal, which is inaccurate with respect to the acreage of the deceased's property, the widow of the deceased and the entire

2nd house would get only 3 acres out of **Kericho/Cheborge/556**. The rest of the real properties of the deceased would go to the beneficiaries of the 1st house. Clearly, this is an unacceptable proposal, given what the law, which I have set out earlier in this judgment, requires with respect to the distribution of the estate of a polygamous person who dies intestate.

17. The petitioner's proposal is that all the properties of the deceased be distributed, in effect, equally between the two houses. The result would then be as follows:

i. Kericho/Londiani/Joubert/Block 10/74(United Soy) comprising 3.12 ha or 7.7 acres:

- a. 1st house-3.84 acres or 0.64 for each of the beneficiaries
- b. 2nd house-3.85 acres to be held in trust by the petitioner for the other beneficiaries

ii. Kericho/ Cheborge/556 measuring 18 acres

- a. 1st house- 9 acres or 1.5 acres for each beneficiary
- b. 2nd house-9 acres to be held in trust by the petitioner for the other beneficiaries of the 2nd house.

iii. Kericho/North-Sotik/86 comprising 4.50 ha or 11.12 acres

- a. 1st house- 6 acres or 1 acre for each of the beneficiaries
- b. 2nd house-5 acres to be held in trust by the petitioner for the beneficiaries of the 2nd house

iv. Nakuru/Njoro Ngata/Block 2/832 comprising 6.602 ha or 16.3 acres

- a. 1st house-8.1 acres or 1.35 acres for each of the six beneficiaries
- b. 2nd house-8.15 acres to be held by the petitioner for the beneficiaries of the 2nd house.

18. A consideration of the mode of distribution proposed by the petitioner against what the law requires reveals that she was scrupulously fair in her proposed mode of distribution. Indeed, given the requirements of section 40 of the Law of Succession Act, and considering that her house has a larger number of beneficiaries than the 1st house, she would have been entitled to distribute a slightly larger share to herself and to her children, particularly in view of the fact that one of her children appears to be a minor.

19. In the circumstances, it is my finding that the mode of distribution proposed by the petitioner, Jane Chepkirui Chepkwony, is fair, and shall be followed in the distribution of the estate of the deceased and a certificate of confirmation of grant issued accordingly.

Dated Delivered and Signed at Kericho this 15th day of February 2018.

MUMBI NGUGI

JUDGE