

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 346 OF 2007

IN THE MATTER OF THE ESTATE OF STEPHEN KIPKURGAT KIRUI (DECEASED)

JUDGMENT

1. This Judgment is in respect of the Summons for Confirmation of grant dated 7/2/2011 taken out by Zacharia Kirui (Applicant) one of the appointed administrators of the estate of Stephen Kipkurgat Kirui (deceased) and which elicited a protest from Abigael Chepkemei Kirui and Eli Kirui (all co-administrators – Respondents) vide Abigael's affidavit sworn on 22/2/2011.

2. Initially, this matter was to be disposed off by way of viva voce evidence but on the 21/7/2017 the parties agreed to rely on the filed witness statements and affidavits with counsels filing written submissions. I note from the record that both parties have complied.

3. The Applicant proposes to distribute the estate as per paragraph 11 of his affidavit sworn on the 7/2/2011 as follows;

- i) Parcel No. LEMBUS/MOGOTIO/299 be distributed to him since that is where the 1st wife and deceased had always lived.
- ii) Plot No. 27 in Mogotio Township should be distributed to him, since it was jointly owned by the deceased and his mother also now deceased.
- iii) Half of the deceased's pension be distributed to him.
- iv) Half the amount in the deceased's Account No. [particulars withheld] Standard Chartered Bank, Nakuru be distributed to him.
- v) Parcel No's Gituamba/Muhotetu Block 3/521, 116 and 368 (Lembus) be distributed to the 2nd widow's house, Abigael Chepkemei Kirui and her children.
- vi) Plot in Katerina Centre Ngarua be distributed to Abigael Chepkemei Kirui and her children.
- vii) Half of the deceased's pension be distributed to Abigael Chepkemei Kirui and her children.
- viii) Half of the funds at the deceased's account No. [particulars withheld] Standard Chartered Bank, Nakuru be distributed to the Abigael Chepkemei Kirui and her children.

4. The Respondents object to the mode of distribution suggested by the Applicant on paragraph 11 clause (i), (ii) and (iii). It is the Respondent's case that at a family gathering called by the deceased prior to his death on 6/3/1999, it had been agreed that 50 acres from LR NO. Lembus/Mogotio/299 was to be given to the Applicant and 43 acres were to be given to Abigael Chepkemei Kirui and her children. A copy of the family agreement is annexed.

5. Based on that agreement the land was subdivided into 3 portions being number 298, 299 and 300. The mutation form is annexed.

6. The said meeting is alleged to have been a follow up of a land board meeting held on 24/1/1991 and minutes of the said meeting are annexed.

7. The Respondent urges that plot listed at paragraph II (vi) is non-existent as no plot known as plot in Katerina Centre Ngarua exists.

8. The Respondents do not oppose the distribution proposed in clauses (iii), (iv), (vii) and (viii).

9. The assets of the deceased are listed in the form P & A 5 as

- (a) Lembus – Mogotio/299
- (b) Gituamba Muhotetu Block 3/521 (Lembus)
- (c) Gituamba Muhotetu Block 3/116 (Lembus)
- (d) Gituamba Muhotetu Block 3/368 (Lembus)

(e) Mogotio Township Plot No. 27

10. In addition, by a consent of the parties, the following properties were included as part of the assets comprising the estate. These are:

(f) Gituamba/Muhotetu Block 3/366 (Lembus)

(g) Gituamba/Muhotetu Block 3/507 (Lembus)

(h) Gituamba/Muhotetu Block 3/43 (Lembus)

11. So, what mode of distribution of the estate should the Court adopt?

12. The deceased was polygamous and the applicable legal provision in regard to distribution would be **Section 40** of the **Law of Succession Act**. That Section provides;

“40. (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.”

13. A question arises in these proceedings on whether the deceased had distributed part of the estate during his lifetime and more specifically whether land known as Lembus/Mogotio 299 is available for distribution, what other properties are available for distribution and the mode of such distribution.

14. As regards Lembus/Mogotio/299, it is clear beyond per adventure that from annexures ACKI, ACK II and ACK III, that the deceased dealt with this land by indicating that the Applicant (Zacharia) was to get 50 acres out of the land and the remaining 43 acres was to remain in the deceased's hands to be shared by the family of the Respondent (Abigael Chepkemei Kirui).

15. This intention of the deceased is clearly demonstrated in the agreement marked ACKI and was actualized through the subdivision of the said parcel resulting in the Applicant (Zacharia) acquiring one of the sub divisions being Lembus/Chemogoch/298 as can be gleaned from exhibit marked ACK III. This intention was clear and unambiguous.

16. The Court is enjoined to respect the wishes and intent of the deceased where the same are clear. Indeed, our Courts have been faithful in upholding the wishes of the deceased persons who had distributed their estate or part thereof in their lifetime (**See Nyeri Succession Cause Number 100 of 2013, Estate of Ngamini Kirira and Machakos P & A Cause Number 164 of 1999, Estate of Mwailu Muisyo**).

17. The Applicant proposes that the parcel of land Lembus/Mogotio/299 be distributed to him since that is where the 1st wife always lived. In light of paragraphs 14, 15 and 16 above, that proposition cannot stand. It is not only contrary to the wishes of the deceased, but is inequitable and finds no support under **Section 40** of the **Law of Succession Act**.

18. The Applicant proposes that Parcel Nos. Gituamba/Muhotetu Block 3/521, 116 and 368 Lembus should be distributed to Abigael Chepkemei Kirui's house. In her affidavit Abigael Chepkemei Kirui is silent on this aspect of the proceedings. Her counsel, however, appears to suggest in submissions that the said parcels are not available for distribution.

19. Exhibit ACK I, in Abigael Chepkemei Kirui's affidavit talks generally of land in Ngarua with little clarity on what specifically the properties were and unlike in respect of Lembus/Mogotio/299, the intention of the deceased on these properties is not clear cut. In the circumstances, these properties should devolve as provided for under **Section 40** of the **Law of Succession Act** with each child being treated as a unit and any surviving widow as an extra unit.

20. As regards the commercial plot number 27 at Mogotio, the Applicant proposes that the same should be distributed to him since it was jointly owned by the deceased and his (Applicant's) mother (now deceased).

21. No concrete evidence of the joint ownership is laid before the Court. This plot is clearly stated as an asset of the deceased as can be gleaned from the form P & A 5 filed.

22. It is only equitable that this property be sold and proceeds shared out equally among the units (that is children and surviving widow).

23. The same position should apply to plot in Katerina Centre Ngarua which (and which I note the Respondent states does not exist) if confirmed as existing, the same should be sold and proceeds be shared out equally among the units (children and surviving widow).

24. There is an agreement between the parties as regards the proposed distribution by the Applicant of items listed in paragraphs (ii), (iii), (iv), (vii) and (viii). The distribution shall be as proposed.

25. With the result that the grant herein is confirmed and the distribution shall be as follows;

NO.	ASSET	SHARE
1.	LEMBUS/MOGOTIO/299	Abigael Chepkemei Kirui to hold in trust for herself and her children.
2.	GITUAMBA MUHOTETU BLOCK 3/521	To be subdivided according to the number of children in each house with the surviving widow as a unit.
3.	GITUAMBA MUHOTETU BLOCK 3/116	To be subdivided according to the number of children in each house with the surviving widow as a unit.
4.	GITUAMBA MUHOTETU BLOCK 3/368	To be subdivided according to the number of children in each house with the surviving widow as a unit.
5.	GITUAMBA MUHOTETU BLOCK 3/366	To be subdivided according to the number of children in each house with the surviving widow as a unit.
6.	GITUAMBA MUHOTETU BLOCK 3/507	To be subdivided according to the number of children in each house with the surviving widow as a unit.
7.	PLOT 27 MOGOTIO	To be sold and proceeds be shared out equally among the units (children and surviving widow).
8.	PLOT KATERINA CENTRE NGARUA	To be sold and proceeds be shared out equally among the units (children and surviving widow).
9.	DECEASED PENSION	To be shared equally between Zacharia Kirui and Abigael Chepkemei Kirui.
10.	MONIES IN A/C NO. 0100 - 525563 - 00	To be shared equally between Zacharia Kirui and Abigael Chepkemei Kirui.

Dated and Signed at Nakuru this 25th day of May, 2018.

A. K. NDUNG'U

JUDGE