



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 401 OF 1999

IN THE MATTER OF THE ESTATE OF ELIJAH KIPKETER MISOI (DECEASED)

JUDGMENT

BACKGROUND

1. On 24th February 1999, Rachel Chemutai, Jackson Kiprotich Keter and Eric Keter petitioned this honourable court for a grant of letters of administration relating to the estate of Elijah Kipketer Misoi who died intestate on 18th April 1996 leaving behind the following survivors:-

- 1. Rachel Chemutai Misoi (widow)**
- 2. Leah Cheronno Misoi (daughter)**
- 3. Jackson Kiprotich Keter – Son**
- 4. Eric Keter – Son**
- 5. Joyce Chengetich – Daughter**
- 6. Lonah Chepkemoi – Daughter**
- 7. Florence Chepkoech – Daughter**
- 8. Elvis Cheruiyot Keter – Son**
- 9. Tecla Kiplangat Keter – Son**
- 10. Edison Kipyegon Keter – Son**

According to Form P & A 5, the deceased left L.R. Kericho/Kipchimchim/ 1940 as the only asset comprising the estate.

2. Subsequently, a grant of letters of administration intestate was made on 22nd April 1996. However, one Joshua Kipkoech filed a chamber summons for revocation or annulment of grant on 4th June 1999 claiming that as the first born son of the deceased, he was not notified of the succession cause proceedings as filed by his step-mother the 1st petitioner herein. However, by consent entered on 29th November 1999 before J. Githinji, the applicant Joshua Kipkoech Arap Keter was recognized as a beneficiary of the estate and his name added under Paragraph 4 of the affidavit in support of the petition.

3. Consequently, the administrators moved this honourable court under chamber summons dated 18th May 2013 for confirmation of the grant and proposed to share the estate equally amongst the eleven beneficiaries at 9.09% each. Before confirmation of the grant, Joshua Kipkoech Misoi died and was survived by his children the protestors herein. Aggrieved by the proposed mode of distribution, Philemon Kiprono Koech and George Kipkurui Koech being children (sons) to Joshua Kipkoech Keter a son to the deceased and therefore deceased beneficiary, filed affidavit of protest sworn on the 11th March 2016 but filed on 14th March 2016 challenging the mode of distribution.

4. It is the protestors' contention that their grandfather had two wives (two houses) namely Taplelei Misoi (1st house) mother to the late Kipketer Misoi their late father and Rachel Chemutai Misoi (2nd house) mother to the rest of the beneficiaries. They therefore claimed half share being the entitlement of their deceased grandmother who was the mother to their late father. That the proposal to divide and share the estate into 11 units at 9.09% each instead of two units (50% each) is not tenable under the law of succession.

5. In reply, Eric Keter on his own behalf and that of his co-administrators filed a replying affidavit deponed on the 18th March 2016 arguing that since the deceased died a polygamous person, his estate was subject to distribution under Section 40 of the law of succession hence the division of the estate equally amongst the 11 units inclusive of the surviving spouse as an additional unit but with life interest thereon.

6. Further, the petitioners claimed that the protestors had failed to disclose that their father had two wives and that they never revealed one beneficiary by the name of Lawrence Kipkurui Koech who is their step-brother.

7. On 18th July 2016, the court gave directions directing both parties to file their witness statements and documentary exhibits and that the matter was to proceed by way of viva voce evidence.

8. During the hearing, PW1 – (Protestor witness) Philemon Kiprono Koech adopted his affidavit of protest jointly sworn with George Kipkurui on 11th March 2016 but filed on 16th June 2016 as their evidence. He also adopted his witness statement of even date filed on 4th October 2016. He basically prayed for the estate to be shared equally between the deceased's two wives whose beneficiaries will in turn share their portion equally in accordance with the Kalenjin Customary Law.

9. PW2 Moses Kibore Koima and pw3 Chelule Arap Misoi both nephews to the deceased also adopted their witness statements dated 27th September 2016 basically corroborating the testimony of PW1 to the effect that according to Kalenjin Customary Law, the land should first be shared equally between the two wives (houses) and each wife to share her share amongst her children.

Petitioner's/Respondent's Case

10. In her testimony, DW1 – Rachel Chemutai Misoi widow to the deceased and co-administrator, adopted her averments contained in the affidavit in support of the application for confirmation and her witness statement filed on 29th August 2016 plus the annexures thereof. She confirmed that her husband had two wives with her being the second wife. She recognized that the first wife Teplelei predeceased their husband leaving one son Kipketer Misoi who also died leaving the protestors and another son from the second wife.

11. She prayed for the estate to be shared equally amongst the 10 children and not as per the house. On cross examination, she admitted that the land had been divided according to Kipsigis customs with Kipketer getting 3 acres and the rest left to her and her children. DW2 – Leah Cherono Kosgei a daughter to DW1 – corroborated DW1's evidence. On cross examination, she stated that before her father died, he had shown Joshua his three acres of land on which he was cultivating and staying. That the rest were not shown their share because they were school going. That each child has been shown his share on which they have built their homes and the rest cultivating. At the close of the hearing, counsels agreed to file submissions and list of authorities.

SUBMISSIONS

a. Objectors'/Protestors' Submissions

12. Appearing for the objectors/protestors, Mr. Arusei filed his submissions dated 4th May 2018. Mr. Arusei reiterated the averments contained in the affidavit of protest and testimony of the protestors. Counsel urged the court to find that the deceased's estate should be shared out according to Kalenjin customs in which the two houses would share the estate equally.

13. Learned counsel asserted that Articles 11 and 45 (4) (b) of the Constitution recognizes application of customary law. He referred the court to a South African case of **Nonkululeko Letta Bhe & Others vs Magistrate, Khayelitsha Case cc 43/03** in which the court observed that Kenyan Constitution had recognized customary law in its legal system hence the same must be accommodated rather than being tolerated. To fortify his arguments, Mr. Arusei made reference to the case of **Mary Rono v Jane Rono & Another (2005) eKLR** in which J. Omolo held that Section 40 of the Succession Act does not mean equality hence equity must apply.

14. Counsel also made reference to the case of **Wambugi w/o Gatimu vs Stephen Nyaga Kimani (1992) 2 KAR 292** where the court observed that, where customary law is applicable but incapable of judicially noticed, the same should be proved by evidence of expert opinion adduced by parties. Making reference to Article 27(1) of the Constitution, Mr. Arusei urged the court to consider the element of equality before the law. At the conclusion of his submissions, Mr. Arusei prayed for summons for revocation of grant issued on 15th October 2013 allowed and that a fresh grant to issue in joint names of the petitioner and objectors.

Petitioner's Submissions

15. In response to the objector's submissions, Mr. Onesmus Langat appearing for the petitioners filed their submissions on 29th May 2018.

Mr. Langat opined that the deceased having died in 1996, the law applicable is the succession Act pursuant to Section 2 (1). He urged the court to apply Section 40 of the Law of Succession which recognizes distribution of estate in case of a polygamous marriage. He asserted that the estate should be shared equally amongst the ten children with the surviving spouse as an additional unit.

16. To buttress his claim, counsel referred the court to the case of **John Musambayi Katumanga (2014) e KLR** where J. Musyoka held:

“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, comprising the children and 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 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.

Analysis and Determination

17. I have considered the application herein for confirmation, affidavit of protest, testimonies by witnesses on both sides and insightful rival submissions by both counsels. There is no dispute that the deceased died a polygamous man with the 1st wife Teplelei having predeceased and the second wife Rachel Chemutai surviving him. It is also not in dispute that the 1st wife Teplelei left only one son one Kipketer Misoi who also died leaving the protestors herein and their step-brother who did not participate in these proceedings.

18. According to the petitioners, the law applicable in distribution of the estate is the Law of Succession Section 40(1) pursuant to which they distributed the estate equally amongst 10 children with the widow as the additional unit thus each getting 9.09% out of a total of 18 acres. To the contrary, the objectors urged the court to share the estate according to Kalenjin Customary Law in which the property should be shared equally between the two houses (wives).

19. It is not in dispute that the deceased died in 1996 hence the Law of Succession which came to force on 1st July 1981 is applicable pursuant to Section 2 (1) which provides:

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons”.

Sub-Section 2-

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act”.

20. In the case of Rono v Rono (2005) IEA 363 the court of appeal held that:

“The application of customary law whether Marakwet, Keiyo or otherwise is expressly excluded unless the Act itself makes provision for it. The Act indeed does so in Sections 32 and 33 in respect to Agricultural land and crops thereon or livestock where the law or custom applicable to the deceased’s community or tribe apply. But the application of the law or custom is only limited to such areas as the minister may by notice in the gazette specify.....”

Similar position was held in the case of Francis Njoroge Mungai and Others vs John Njoroge Mungai HCC Appeal No. 18/2001 where Judge Kamau held that the distribution of the estate in accordance with customary law, of a person dying after the commencement of the Law of Succession Act, is inconsistent with Section 2(1) of the Act. The effect of Section 2(1) is to oust the application of African Customary Laws.

21. From the wording of Section 2(1) of the Law of Succession and case law quoted above, it is clear that the law applicable in this case is the Succession Act and not Kalenjin Customary Law. With this clear statutory provision, one cannot deviate at his or her convenience to apply customary law in the face of clear and an unequivocal statutory provision which under section 3 of the Judicature Act takes precedence. The application of customary law is subject to the chain of command as provided under the Judicature Act Section 3 which prescribes when customary law is applicable. That does not mean that Section 2(1) of the Law of Succession Act is by all means unconstitutional in the face of Article 11 of the Constitution which recognizes culture as the foundation of our nation.

22. The law applicable is therefore statutory law which is the Succession Act. Which particular section is relevant? Both parties did agree that Section 40 was applicable but differed on its interpretation and applicability. According to Arusei, Section 40(1) means division of the estate according to houses implying shared equally between houses and not children. On the other hand, Mr. Langat for the petitioner argued that section 40 only refers to putting together all children plus a surviving spouse as additional unit and then share equally.

23. For avoidance of doubt, I wish to reproduce Section 40(1) which provides:

“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 share, 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 additional unit to the number of children”.

24. There is no doubt there is only one surviving spouse hence the only additional unit besides the children. There is no dispute that there are 10 children in total with one Kipketer now deceased as the only unit in the first house. We cannot therefore count the deceased 1st wife as an additional unit as purported by the protestors and Mr. Arusei counsel for the protestor. The operative word is “surviving spouse as an additional unit”.

25. What does that mode of distribution entail? In the case of John Musambayi Katumanga (deceased) (Supra), J. Musyoka held that Section 40(1) means, adding children from the houses with the addition of a surviving spouse then share the estate equally and thereafter, each house take their share and split it with their surviving mother if any having a life interest.

26. In the case of **Re estate of Ikubu Kinyungu Mwaga (deceased) 2017 eKLR** Justice Matheka held that:

“...the applicant’s contention that the estate of his father ought to be divided into two equal shares between the two houses is unfounded”.

Similar position was also held in the case of **Saweria Wamuruoma Muchanji vs Jimano Ngare (2008) eKLR** where the court held that:

“This is a plain unequivocal language meaning the estate shall be divided equally amongst the surviving children of the deceased adding surviving spouse as additional unit. It does not say that the estate should first be shared equally among the children within each house”.

27. There are several authorities in our legal system including **Rono v Rono (Supra)** in which courts have authoritatively held that Section 40(1) does not mean equal distribution amongst the houses. The clear position is that, the estate of a deceased person who dies while married under polygamous marriage, shall be divided amongst the children with the surviving spouse as an additional unit. This does not contravene Article 27 of the Constitution as alluded by Mr. Arusei. To the contrary, to share the estate in accordance to houses will even be more offending to Article 27 of the Constitution in that there will be inequality and discrimination amongst the children.

28. Although there are various dissenting views with regard to interpretation of this section as to being unfair to the first wives who would have contributed a great deal towards the acquisition of the estate vis a vis other wives who join the marriage later, it is incumbent upon the legislature to amend the law and make a provision similar to that of the matrimonial property where each wife as a beneficiary benefits to the extent of her contribution towards acquisition of the property in question during the subsistence of the marriage. Equally, the section does not expressly require or provide special treatment to young beneficiaries who may be disadvantaged struggling with life as compared to their elder brothers and sisters who could be stable in life after the deceased’s death.

29. As it stands now, the law applicable is Section 40(1) which means that we lump up the deceased’s children from the first house being one unit to those of the second house being 9 units plus the spouse as additional unit making a total of 11 units hence a ratio of 1:11. That means $1/11 \times 18 \text{ acres} = 1.65$ for 1st house and $10/11 \times 18 \text{ acres} = 16.35$ to be shared equally amongst the 2nd house giving rise 1.635 each and in accordance with Section 35 of the Act their mother to hold life interest. It then follows that the property shall be shared in the mode proposed by the petitioner in the application for confirmation.

30. Since there was no claim of gifts intervivos, despite Leah (DW2) saying that some children were shown where to cultivate, none of them claimed any specific share implying that the property had not been distributed or shared by the deceased during his life time.

31. Accordingly, the protest is hereby dismissed and the application for confirmation herein allowed and grant issued on 22nd April 1996 confirmed and estate shared out equally between the 11 beneficiaries with the 1st petitioner having a life interest on the shares given to her children in respect of her house. The protestors together with their step brother Lawrence Kipkurui shall share their father’s share equally. This being a family matter each party shall bear his or her costs.

SIGNED, DATED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF JULY, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of: N/A.....Counsel for the petitioner

M/S Kiget H/brief for Mr. Arusei.....Counsel for the objector

Edwin.....Court Assistant