



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO.76 OF 2014

**IN THE MATTER OF THE ESTATE OF THE LATE KIBIRGEN ARAP BET alias KIPBIRGEN
ARAP BETT (DECEASED)**

LUDIAH CHEMUTAI BETT.....PETITIONER

VERSUS

JOSEPH KIPROP TANUI.....PROTESTOR

JUDGMENT

Introduction

1. This matter relates to the estate of **Kibirgen Arap Bet alias Kibirgen arap Bett** (deceased) who died in Kericho on the 22nd day of August 1994. The matter pits the protestor, Joseph Kiprop Tanui, against his mother, the petitioner, Ludiah Chemutai Bett. The protestor is opposed to the mode of distribution of the deceased's estate that his mother proposes.

2. The deceased died intestate and left the following surviving him:

- i. Ludiah Chemutai Bett – widow**
- ii. Peter Birgen – son (now deceased)**
- iii. Agnes Too – daughter**
- iv. Ann Chepwogen - daughter**
- v. Joseph Tonui-son**
- vi. Lilian Chepkirui – daughter**

3. It appears from the averments by the petitioner and protestor that the estate of the deceased comprised one property, **Kericho/Kapsoit/325**. However, no certificate of title or certificate of official search was filed when the application for letters of administration intestate was made.

Background

4. By an application dated 26th March 2014, Ludiah Chemutai Bett applied for letters of administration intestate to the estate of the deceased. Annexed to the application was a consent to the petitioner being

given the letters of administration. The consent was signed by all the beneficiaries, namely Lilian Chepkirui, Peter K. Birgen, Agnes Too, Ann Chepwogen and Joseph Tonui. The application was duly gazetted on 15th July 2014, and letters of administration intestate issued on 25th August 2014.

5. In an application dated 18th May 2015 filed on behalf of the petitioner by the firm of E. M. Orina & Co. Advocates, the petitioner applied for confirmation of the grant issued on 25th August 2014. The proposed mode of distribution of the sole asset of the estate, **Kericho/Kapsoit/325** set out in her affidavit sworn on 18th May 2015 is as follows:

- i. Ludiah Chemutai Bett – 2 acres**
- ii. Ruth Birgen, Alice Birgen and Recho Birgen – 1.5 acres**
- iii. Agnes Cheronno Too – 1.5 acres**
- iv. Ann Chepwogen Cheruiyot – 1.5 acres**
- v. Joseph Tonui – 1.5 acres**
- vi. Lilian Chepkirui – 1.5 acres**

6. A consent to the distribution was signed by Lilian Chepkirui, Agnes Cheronno Too and Ann Chepwogen Cheruiyot.

7. It appears, however, that the petitioner's sole surviving son with the deceased, Joseph Tanui (spelt in the application for letters of administration as Tonui) was unhappy with the mode of distribution proposed by his mother. He therefore filed an affidavit of protest sworn on 25th April 2016 in which he avers that his mother has unilaterally and arbitrarily shared out his father's estate without his consent or contribution in a bid to deny him his rightful share.

8. He complains that though he is the sole surviving son of the deceased, he was not involved in the application for the grant nor was his consent sought with respect to the distribution. He asserts that allocating his two married sisters, Agnes Cheronno and Ann Chepwogen 1.5 acres each is against Kipsigis customary law and is a recipe for marital turmoil for them.

9. With respect to his mother, he avers that as a widow of the deceased, she has a life interest and it is fair that her share of two acres be shared between him and his unmarried sister, Lilian Chepkirui. He argues that he has six children, which has not been taken into consideration in arriving at the mode of distribution.

10. With regard to the allocation of 1.5 acres to Ruth Birgen, Alice Birgen and Recho Birgen, the protestor avers that these widows of his deceased brother, Peter Birgen, have never consented to the filing of the grant, its confirmation or their inclusion as beneficiaries of the estate. This is because their husband had been allocated 12.5 acres of land, being **Kericho/Kapsoit/326**. They therefore had no interest in the distribution of **Kericho/Kapsoit/325**.

11. Peter Birgen's three widows confirm this in their affidavit sworn in support of the protest, which they jointly swore on 5th July 2016. They aver that the deceased had given them land in his lifetime, and they have no further interest in his estate. They aver further that the protestor is the only surviving son of the deceased and his interests should be taken care of in the distribution of the estate. It is their averment further that, for the avoidance of doubt, they have no claim whatsoever in any share of the deceased's estate as they were given their share in the lifetime of the deceased.

12. When the matter came up before the court on the 21st of June 2016, the protestor's Counsel, Mr. Moturi, sought and was granted leave to file a supplementary affidavit. Counsel for the petitioner, Mr.

Orina, indicated that the parties could take directions with respect to the hearing once the protestor had filed his supplementary affidavit, and a mention date was scheduled for the 18th of July 2016.

13. On that date, Counsel for the protestor was absent. However, Counsel for the petitioner, Mr. Orina, indicated that they had been served with the protestor's supplementary affidavit, and he proposed that they could dispose of the protest by way of written submissions. Accordingly, the court directed that the protestor should file submissions within 14 days of that date, and the petitioner to file submissions within 14 days of service. The matter was then scheduled for hearing on 23rd September 2016.

14. On that day, the protestor had not filed his submissions, and Counsel then holding brief for Mr. Moturi sought additional time to file the submissions. The protestor was granted an adjournment and directed to file his submissions within 14 days, and the matter set for hearing on 29th November 2016.

15. No submissions had been filed on behalf of the protestor when the matter next came up on 29th November 2016, and the court declined to grant any further adjournments. The petitioner, who had filed her submissions on the 23rd of September 2016, requested the court to rely on the pleadings and submissions on record and give a date for judgment.

Issues for Determination

16. I have considered the pleadings before me and the submissions filed by the petitioner in this matter. I believe that the protest raises two issues of fact, and two of law. The issues of law relate, first, to the right of the widow under the Law of Succession Act, Cap 160 Laws of Kenya, and secondly, the rights of daughters under the same Act to inherit from their father. Related to this question is whether the protestor, as a son and the sole surviving son of the deceased, has a superior claim to the estate of his father than do his sisters.

17. The issues of fact relate to whether the protestor was informed about the succession proceedings, and whether he has been provided for in accordance with the law.

The rights of a widow

18. Section 35 of the Law of Succession Act makes provision for intestate succession where, as in this case, the deceased has left a widow and children. It provides as follows:

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

...

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

19. Under the Law of Succession Act therefore, the widow has a life interest in the estate of the deceased. This means, in my view, that the estate should not be distributed in her lifetime. Only upon her demise (or remarriage, a provision of the law that in my view does not bear scrutiny under Article 27 of the

Constitution) does the residue of the net intestate estate devolve to the children. Thus, had the petitioner proposed to distribute the estate in accordance with the law, the entire estate should have devolved to her, and only upon her demise would the question of distribution to the children arise.

The Rights of Daughters to inherit

20. The protestor seems to labour under the misapprehension that he has a greater right, not only in relation to his mother, but also against his sisters. His argument is that distributing part of the deceased's estate is contrary to customary law.

21. The starting point when an argument such as this is made is, inevitably, Article 27 of the Constitution. This Article prohibits discrimination on any ground, including race, colour ethnic origin or sex. It provides as follows:

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4). (Emphasis added)

22. In the case of **Mwongera Mugambi Rinturi & Another vs Josphine Kaarika & 2 others [2015] eKLR**, the Court of Appeal observed as follows:

“It would appear from the totality of the submissions made before us and the stance adopted by the appellants all through this protracted litigation that the kernel of their disenchantment lies in the fact that their sister Florence, a married daughter of the deceased, became not only a beneficiary but also an administratrix of the estate. That much was clear from Mr. Kioga’s resort to Meru Customary Law which stipulated, as captured by Dr. E. Cotran in his Restatement of African Law: Vol. 2 Laws of Succession at p30;

“Daughters receive no share of the estate. In the absence of sons, the heirs are the nearest paternal relatives of the deceased, namely father, full brothers, half-brothers and paternal uncles”.

With the greatest respect, such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny; not least because it is plainly discriminatory of itself and in its effect. It is anachronistic and misplaced notwithstanding that it was the norm for a vast majority of Kenya’s communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstance of his or her birth. Each has a share without shame or fear in the parents’ inheritance and may boldly approach to claim it. What RONO –VS- RONO (Supra) decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya, 2010. See also GRACE WACHUKA –VS- JACKSON NJUGUNA GATHUNGU [2014] eKLR.... (Emphasis added)

23. I believe I need not add anything else to these succinct words of the Court of Appeal. A child is a child, regardless of gender or marital status. The protestor cannot seek to disinherit his sisters because of

their gender or marital status. He does not have a special claim to his father's estate because he is a son. Further, an appeal to Kipsigis customary law can also not help him: if its provisions are inconsistent with the Constitution, as they are with regard to inheritance, then they are null and void.

Was the Protestor informed about the application for grant?

24. I noted earlier that when the petitioner filed the application for grant, she filed along with it a consent signed by all the beneficiaries of the estate, including the protestor. It is therefore to be less than truthful to aver that he was not informed about the application. He signed the consent in support of his mother's application, and he cannot now turn around and claim that he was not consulted. It would appear that his disaffection arose only after he realized that the distribution of the estate was to include all his sisters.

Has the Protestor been adequately provided for?

25. In the affidavit in support of confirmation of grant, the petitioner proposes that each of the children of the deceased gets an equal share. This does not please the protestor, as noted earlier, because he thinks he is entitled to a larger share because he is a son. He also seems to consider that the number of children that he has entitles him to a larger share of his father's estate. This, however, is not a consideration under the Law of Succession Act, section 38 of which provides that the children of the deceased get an equal share after the death or termination of the life interest of the widow.

Allocation of a share to the widows of Peter Birgen

26. The protestor is aggrieved by the proposal that 1.5 acres out of the land of the deceased should be allocated to the widows of Peter Birgen, his deceased brother. As the widows of a son of the deceased, they were entitled to his share of the estate. However, as they have renounced any claim to the estate, the deceased having given their deceased spouse a share *inter vivos*, then the portion that had been allocated to them can be distributed among the remaining beneficiaries.

Conclusion

27. The upshot of my findings above is that the protest dated 25th April 2016 has no merit, and must be dismissed. The petitioner is hereby directed to file an affidavit showing a mode of distribution that takes into account the 1.5 acres that was allocated to the widows of Peter Birgen, to be distributed equally among the remaining beneficiaries, including the protestor. The petitioner shall also file a certificate of official search showing that land parcel number Kericho/Kapsoit/325 is registered in the name of the deceased, and the acreage thereof. Thereafter the petitioner shall move the court for the confirmation of the grant in respect of the estate of the deceased in accordance with this judgment of the court.

28. As this is a family matter, each party shall bear its own costs.

Dated, Delivered and Signed at Kericho this 28th day of February 2017.

MUMBI NGUGI

JUDGE