



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**PROBATE & ADMINISTRATION CAUSE 145 OF 1996**  
**RE ESTATE OF CHEBOI MAINA (DECEASED)**

DAVID MAINA.....1<sup>ST</sup> PETITIONER

ESTHER MAINA.....2<sup>ND</sup> PETITIONER

VERSUS

MICHAEL ROTICH MAINA.....1<sup>ST</sup> OBJECTOR

JOAN CHEBOI.....2<sup>ND</sup> OBJECTOR

**JUDGMENT**

1. Cheboi Maina (hereafter *the deceased*) died intestate on 12<sup>th</sup> August 1993. He was married to two wives: Tabase Siokwei Maina; and, Teriki Maina. The deceased was blessed with *sixteen* children: Ten daughters; and, six sons. A dispute has arisen over the distribution of two properties: *Uasin Gishu/Ainabkoi East 31* and *Uasin Gishu/Ainabkoi East 32*.

2. The original petition for letters of administration was presented on 11<sup>th</sup> October 2002 by Michael Rotich Maina and Joan Cheboi. They falsely represented themselves in form *P & A 5* as the *brother* and *widow* of the *deceased*. A grant was issued to them on 14<sup>th</sup> October 2002; and, confirmed on 22<sup>nd</sup> September 2003.

3. By an application dated 22<sup>nd</sup> February 2009, Teriki Maina *objected* to the grant. On 7<sup>th</sup> December 2009, the grant was *revoked*; and, Teriki Maina and Michael Rotich Maina were appointed the *joint administrators*. As fate would have it, Teriki Maina died on 1<sup>st</sup> January 2010. On 5<sup>th</sup> August 2011, she was substituted with David Maina and Esther Maina, the current petitioners.

4. On 22<sup>nd</sup> November 2011, the new petitioners filed a fresh summons for confirmation of the grant. It was contested by the objectors. The matter proceeded by way of *viva voce* evidence. The 1<sup>st</sup> objector Michael Rotich Maina was the first witness. He relied on his *witness statement* dated 10<sup>th</sup> April 2013. He is the eldest son of the deceased from the 2<sup>nd</sup> house. His mother was Siokwei Maina. He said that his younger brother, William Kiprop Cheboi, was married to the 2<sup>nd</sup> objector, Joan Cheboi. William Cheboi died before his father. He said his father (*the deceased* in this cause) gave land parcel *Uasin Gishu/Ainabkoi East 32* to William Cheboi. It was his evidence that the land should go to the widow, the 2<sup>nd</sup> objector.

5. PW1 said that the deceased had given the 1<sup>st</sup> petitioner, David Maina, land at Kerio Co-operative Society, Burnt Forest. In his view, it would be unfair for David to claim more land; and, more particularly, the one belonging to his late brother. He testified that his mother (Siokwei), his step mother (Teriki) and all his sisters were not given any land. Finally, he said the deceased did not divide his land according to houses; but directly to his sons.

6. Upon cross examination, he claimed that he bought parcel number *Uasin Gishu/Ainabkoi East 31* in 1962 but in his father's name. He did not have documents to support that assertion. He said the 2<sup>nd</sup> petitioner, Esther Maina, lives on parcel *Uasin Gishu/Ainabkoi East 32* with the 2<sup>nd</sup> objector. He also referred to a Land Disputes Tribunal case. The resultant decree was adopted in CMCC 16 of 2003 at Eldoret (exhibit 1). The elders awarded the two widows equal shares in *Uasin Gishu/Ainabkoi East /31* and 32.

7. PW2 was Joan Cheboi. She said that in the year 1990, the deceased gave her *Uasin Gishu/Anaibkoi East/32*. She is residing there; and, cultivates about 4 acres. The land is about 33 acres. She said her husband, William Kiprop, died in 1988. She testified that Esther Maina, the 2<sup>nd</sup> petitioner, was present when the deceased distributed the land to her; and, that it would be unfair to share the land with her. She said the two petitioners are the son and daughter of Teriki Maina. She said the first widow is buried in Kitale; and, the other on *Uasin Gishu/Ainabkoi East/32*. That marked the close of the objectors' case.

8. The petitioners relied on their *joint witness statement* filed on 12<sup>th</sup> October 2012. At paragraph 5, they stated that their mother, Teriki Maina, was allocated *Uasin Gishu/Ainabkoi East/32* while her co-wife, Siokwei, was given *Uasin Gishu/Ainabkoi East/31*. They stated further that the 2<sup>nd</sup> objector remarried the 1<sup>st</sup> objector.

9. In his testimony in court, the 1<sup>st</sup> petitioner stated that Teriki Maina was living on *Uasin Gishu/Ainabkoi East/32*. She was buried there. He testified that he bought land in *Burnt Forest* in 1972 for the consideration of Kshs 1000 per hectare. He said the land is about 10 acres; and, that it initially belonged to his father. He claimed he was evicted due to a debt owed to AFC. He then purchased the land afresh in 1972; or, repaid the debt.

10. The 1<sup>st</sup> petitioner testified that he is laying claim to part of parcel number 32 on behalf of his mother. He said that the 1<sup>st</sup> objector does not reside on the land. Upon cross examination, he conceded that his father had other land besides the two portions in dispute. In *Reserve* he had two other parcels; and, one in *Kipsomba*. His brother, Elkana Kipkoech was given land in Kipsomba, Tarakwa. Two other brothers, Kitiem Cheboi and Stephen Maina, were given land in *Mosop*. He said his father did not give him any land. That marked the close of the petitioners' case.

11. All the parties have filed written submissions. Those by the objectors were filed on 15<sup>th</sup> February 2017; those by the petitioners on 6<sup>th</sup> March 2017. I have considered the evidence and rival submissions.

12. I will start with the *legal implications* of the *award* by elders in the decree registered in CMCC 16 of 2003 at Eldoret. The Land Disputes Tribunal awarded the two widows *equal shares* in *Uasin Gishu/Ainabkoi East/31* and 32. The operative law was the Land Disputes Tribunal Act (now repealed). Section 3 of the Act stipulated as follows;

“3 (1) *Subject to this Act, all cases of a civil nature involving a dispute as to-*

(a) *The division of or the determination of boundaries to, land including land held in common;*

(b) *A claim to occupy or work land, or,*

(c) *Trespass to land shall be heard and determined by a Tribunal established under section*

13. The land in dispute belonged to the *deceased*. At the time the dispute came before the tribunal, he was *dead*. It was *registered land*. The questions of *succession* to the estate; or, the shares of beneficiaries were *beyond the jurisdiction* of the tribunal. See *M'Marete v Republic & 3 others*, Court of Appeal, Nyeri, Civil Appeal 259 of 2000 [2004] eKLR. The deceased died *intestate*. The Law of Succession Act applied. By the time the lower court registered the award in 2004, the High Court (Etyan'g J) had already issued a grant in favour of the original petitioners on 14<sup>th</sup> October 2002. I am alive that no *appeal* was filed against the award of the Land Disputes Tribunal. But failure to appeal would not cure the *illegality*. It is not surprising that none of the disputants has sought to enforce the decree.

14. The deceased was polygamous. The starting point is section 40 of the Law of Succession Act which 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 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 within each house shall be in accordance with the rules set out in section 35 to 38”.

15. Section 40 does not however take away the discretion of the court to distribute the estate *fairly*. By dint of sections 27, 28 and 35 of the Act, the court has been clothed with wide *discretion* to provide for dependents or beneficiaries. This point was succinctly captured by Omollo J A in *Rono v Rono & another* [2008] 1 KLR (G&F), [2005] 1 KLR 538 at 553-

“I had the advantage of reading in draft form the judgment prepared by Waki, JA, and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned judge to be laying down any principle of law that the Law of Succession Act, Cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr. Gicheru. I can find no such provision in the Act”.

16. The two widows of the deceased are also *dead*. Under section 35 (2) of the Law of Succession Act, a surviving widow would have enjoyed a life interest in the property. It is thus instructive to remember that this dispute relates to the estate of *Cheboi Maina*, and *not* the two widows. I am satisfied from the evidence that the deceased did not divide his property as per the houses: But to all the sons. It is telling that none of the sons, except David Maina, has come back to claim a share in *Uasin Gishu/Ainabkoi East/32 or 31*.

17. However, the second widow (original objector) *survived* the deceased. She was living on *Uasin Gishu/Ainabkoi East/32*. She and her husband are buried there. It would be *unjust* to sweep her interest under the carpet. Her daughter, Esther Maina (2<sup>nd</sup> petitioner), was married at the time the deceased died. She has since *separated* from her husband; and, is living on the land with Joan Cheboi.

18. Joan Cheboi conceded that she is only cultivating about 4 acres of the land. The rest is a grazing field. True, none of Esther's sisters was given land by their father. And none has stepped forward to claim inheritance. However sections 26 and 29 of the Law of Succession Act do *not* discriminate between sons and daughters; or, even married daughters. See *Re Estate of Simeon Kuria Kamau* High Court, Eldoret Succession Cause 218 of 1997 (unreported), *Re Estate of Hellen Muthoni Karanja*, High Court, Eldoret Succession Cause 180 of 2006 [2015] eKLR.

19. I stated earlier that the court has wide discretion to distribute the estate *fairly*. I will give Esther Maina a share of the deceased's land. Like I have stated, she is living there with Joan Cheboi. I grant her half of

*Uasin Gishu/Ainabkoi East/32*. The other half shall go to the 2<sup>nd</sup> objector, Joan Cheboi. The reason is simple: William Kiprop Cheboi was married to the 2<sup>nd</sup> objector. William Cheboi died before the deceased. I am satisfied that the deceased had given land parcel *Uasin Gishu/Ainabkoi East/32* to William Cheboi. It must follow as a corollary, that the property devolved to his widow Joan Cheboi and her children. There is no evidence that William had received any other land from his father. But I have taken into consideration that Joan Cheboi *remarried* the 1<sup>st</sup> objector. The 1<sup>st</sup> objector owns another piece of property *Uasin Gishu/Ainabkoi East/31*.

20. I did not believe David Maina. He testified that he bought land at Kerio Co-operative Society, *Burnt Forest*, in 1972. He said the consideration was Kshs 1000 per hectare. He said the land is about 10 acres; and, that it *initially* belonged to his father. He claimed he was evicted due to a debt owed to AFC. He then purchased the land afresh in 1972; or, repaid the debt. First, he had no documentary evidence to support his claim. There was no iota of evidence of payment to AFC. I have reached the conclusion that the land in *Burnt Forest* belonged to the deceased; and, that the deceased gave it to him.

21. I also took the evidence of Michael Rotich Maina with a pinch of salt. For one, he had an *indirect* interest in *Uasin Gishu/Ainabkoi East/32*: He had since inherited Joan Cheboi; and, fathered a number of children with her. His claims that the entire piece of land should go to his late brother must be taken with caution: he would ultimately become a beneficiary. But I am satisfied that he bought the other parcel *Uasin Gishu/Ainabkoi East/31* in 1962 but in his father's name. He also did not have documents to support that assertion. But there was no solid evidence in *rebuttal*; and, I have taken into consideration that he is now the registered owner of *Uasin Gishu/Ainabkoi East/31*.

22. Granted the evidence, it would be unjust for David Maina, to now claim an additional share of land in *Uasin Gishu/Ainabkoi East/32*. The 1<sup>st</sup> petitioner submitted that he was pursuing the land because his late mother was entitled to a share. Like I have stated, the two widows are deceased. Under section 35 (2) of the Law of Succession Act, a surviving widow would have enjoyed a life interest in the property. Unlike his sister Esther Maina, I have found that David Maina had been provided for by the deceased. His claim fails.

23. My final orders are as follows:

- i. That the administrators of the estate shall remain Michael Rotich Maina, David Maina and Esther Maina.
- ii. That the property known as *Uasin Gishu/Ainabkoi East/31* does *not* form part of the estate of the deceased. That property belongs to *Michael Rotich Maina*.
- iii. That the other property known as *Uasin Gishu/Ainabkoi East/32* forms part of the *net intestate estate* of the deceased. It shall be divided *equally* between the 2<sup>nd</sup> objector, *Joan Cheboi* (as widow of the son of the *deceased*, William Kiprop Cheboi); *and*, the 2<sup>nd</sup> petitioner, *Esther Maina* (as daughter of the *deceased* in this cause, Cheboi Maina).
- iv. That the 1<sup>st</sup> petitioner, David Maina, is *not* entitled to a share of *Uasin Gishu/Ainabkoi East/32*.

24. A certificate of confirmation of grant shall issue in terms of this judgment. That leaves the question of costs. I have taken into account that this is a succession matter; or, a family dispute. In the interests of justice, each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 23<sup>rd</sup> March 2017.

**KANYI KIMONDO**

**JUDGE**

***Judgment read in open court in the presence of:-***

Mr. Okara for Mr. Omboto for the petitioners instructed by Rioba Omboto & Company Advocates.

No appearance by counsel for the objectors.

Mr. J. Kemboi, Court clerk.