



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KERICHO**

**SUCCESSION CAUSE NO.98 OF 2014**

**IN THE MATTER OF THE ESTATE OF ZAKAYO KIPNGETICH CHEPKWONY *alias*  
ZAKAYO KIPNGETICH CHOLYO (DECEASED)**

**CECILIA CHEPNGENO.....PETITIONER**

**THOMAS NGETICH.....PROTESTOR**

**JUDGMENT**

1. This matter relates to the estate of **Zakayo Kipngetich Chepkwony *alias* Zakayo Kipngetich Arap Cholyo** who died intestate on 9<sup>th</sup> February 1996 at Itibei, Ainamoi, Kericho. Letters of administration intestate were granted to Cecilia Chepngeno Chepkwony, the petitioner/administrator (hereafter '**the petitioner**') herein, on 13<sup>th</sup> November 2014.

2. The deceased was survived by the following beneficiaries:

**1<sup>ST</sup> HOUSE**

1. Mary Ngetich
2. Anne Seronei
3. Christine Matwek
4. Thomas Kibole Mabwai

**2<sup>ND</sup> HOUSE**

1. Joseph Kimetet Sang
2. Christine Chepkoech Bii
3. Petrolina Chebii Businei
4. Ann Chepkirui Tonui
5. Didacus Kipchirchir Ngetich

6. Cecilia Chepngeno Chepkwony

7. Thomas Kiprotich Ngetich

3. The sole asset of the estate of the deceased is **Land Parcel Number Kericho/Ainamoi/745** comprising 7.8 hectares or 19.26 acres.

4. By an application dated 26<sup>th</sup> May 2015, the petitioner sought confirmation of the grant issued to her on 13<sup>th</sup> November 2014. She also filed an affidavit in support of the application for confirmation of grant in which she proposed a mode of distribution of the estate of the deceased. Her proposal was that the estate should be distributed, in accordance with Kipsigis customary law, according to houses. The children of each house would then divide the property among themselves, excluding the married daughters. As an unmarried daughter of the deceased, the petitioner proposed that she should receive an equal share of her mother's house's share of the estate with her three brothers.

5. In an affidavit of protest sworn on 23<sup>rd</sup> June 2015, Thomas Ngetich, a brother of the petitioner, opposed the application for confirmation of grant. He deposed that the petitioner had not sought the consent of other beneficiaries before filing the application for grant of letters of administration intestate. Further, that she had not given a full inventory of the assets of the estate of the deceased.

6. The protestor further deposes that the deceased had, prior to his death, subdivided his land among his sons. He had given the petitioner another portion of land which is not listed among the assets of the deceased. The petitioner had, however, not moved to the parcel of land allegedly given to her by the deceased. The protestor avers that the deceased's parcel of land, Kericho/Ainamoi/143, should be shared equally among the 6 sons of the deceased. The other land situated at Ainamoi measuring 0.5 acres which the protestor avers the petitioner has not included in the application for grant should be given to the petitioner. The protestor has not indicated the title number of this latter parcel, nor has he annexed any document with regard to the said property.

7. In her affidavit sworn on 23<sup>rd</sup> September 2015 in reply to the protest, the petitioner deposes that she had not failed to obtain the consent of other beneficiaries. Rather, her brother, Thomas Ngetich, the protestor, and other beneficiaries had been opposed to the succession process. She had therefore, on 3<sup>rd</sup> December 2012, taken out citation proceedings, but her citation had been struck out and she had been directed to apply for letters of administration. This order was made on 11<sup>th</sup> February, 2014 on the basis that she had equal right with the citees to apply for letters of administration intestate to the estate of the deceased.

8. She further deposes that she had served the protestor with the citation and he had even entered appearance. She has annexed a copy of a Memorandum of Appearance filed by the firm of **E. K. Korir & Co. Advocates** on behalf of the protestor and other beneficiaries, namely Didacus Ngetich, Joseph Sang, Thomas Ngetich, Christina Chepkoech Bii, Petrolina Chebii Busienei and Anna Chepkirui Tonui.

9. Following the striking out of her citation and the direction of the court, she filed the present succession cause. However, the other beneficiaries refused to sign the consent due to what the petitioner terms the hostility exhibited by the protestor who has incited the others and has threatened and manipulated them to support him.

10. The petitioner avers that she is aware that none of her brothers is willing to cede a share of their deceased father's estate to her. Further, that the deceased had not subdivided his land between his sons, but had subdivided the land equally between his two houses.

11. The petitioner contends that she has all along been living on the family land and was living in her father's house where she resides todate, and her four sons used to sleep in their grandfather's house and take care of him.

12. She denies the contention by the protestor that she had been given a parcel of land by the deceased. If such land had been in existence, the protestor would have identified it. Her contention is that her father wanted her to inherit part of his land, and had only one parcel of land.

13. With respect to the land measuring 0.5 acres of land that the protestor alleges she was given by their father, the petitioner avers that the protestor may be referring to a parcel measuring 0.2 acres which the protestor bought and which he had been trying to compel her to accept in lieu of a share from their father's estate. The petitioner avers that she has declined to accept the said parcel of land as it is too small for her and her children, and to compel her to accept it in the circumstances is tantamount to discrimination.

14. Through their respective counsel, Mr. Koech for the petitioner and Mr. Motanya for the protestor, the parties indicated to the court on 7<sup>th</sup> of June 2016 that they wished to proceed by way of written submissions. Directions were accordingly given and timelines for the filing of submissions by the protestor and petitioner given. No submissions were filed, however, on behalf of the protestor. On 5<sup>th</sup> December 2016, the court directed that the matter should be mentioned on 21<sup>st</sup> January 2017 when the court would give a ruling date on the basis of the submissions then on record.

15. On that day, Mr. Motanya informed the court that he had filed the wrong submissions in the matter. He sought leave to withdraw the submissions filed and to file the correct submissions within seven days. He was given time as prayed, and the matter was fixed for the purpose of highlighting submissions on 26<sup>st</sup> March 2017.

16. No submissions had been filed by that date on behalf of the protestor. Through Mr. Mutai who was holding his brief, Mr. Motanya again sought time to withdraw the submissions filed on 26<sup>th</sup> January 2017 and to file fresh submissions. Apparently, he had filed submissions on the wrong assumption that he was acting for the objector.

17. This application was opposed by Counsel for the petitioner, who observed that the same excuse had been given on 26<sup>th</sup> January 2017, that the matter had been pending since 7<sup>th</sup> June 2016 when directions had been given for the filing of submissions, and the petitioner had filed her submissions on 15<sup>th</sup> July 2016.

18. The court accordingly declined to give any further indulgence to the Counsel for the protestor. This judgment on the protest is therefore based on the pleadings of the parties and the only submissions on record, those filed on behalf of the petitioner dated 15<sup>th</sup> July 2016.

## **Determination**

19. I have considered the affidavit of protest filed by the protestor, and the petitioner's affidavit in reply. I have also considered the petitioner's submissions.

20. The protestor opposes the confirmation of grant and the mode of distribution of the deceased's estate proposed in the matter on two main grounds. The first is that the petitioner failed to obtain consent from all the other person who were entitled to apply for grant of letters of administration intestate, and the second is that she did not give a full inventory of the estate of the deceased.

21. With respect to the first ground, I note, as averred by the petitioner, that indeed she had served her siblings with citation proceedings. She was however, directed to file succession proceedings as she too is a beneficiary of the estate and is equally entitled to apply for the grant. I note further that none of her siblings signed the application for grant, nor did they file objection proceedings when she did apply. In the circumstances, I am inclined to believe her when she avers that her siblings refused to sign the consent to the application for grant. Consequently, she was entitled to file the application as she did.

22. The second complaint is that she has not included a full inventory of the deceased's estate. She is

alleged to have left out a 0.5 acre piece of land, which she was allegedly given by the deceased and directed to move to. However, no title documents have been annexed by the protestor to show that such a parcel of land exists, and that it belongs to the deceased.

23. Even if it did exist, however, is the protestor's contention that the deceased had distributed his land among his sons, and that the petitioner should move to the 0.5 (or 0.2) acre piece of land and leave the 19.26 acres to the sons of the deceased, her brothers acceptable in law?

24. The deceased died intestate in 1996. The distribution of his estate is therefore governed by the provisions of the Law of Succession Act. He died intestate, leaving no will, so his estate must be distributed in accordance with the provisions on distribution of the estate of a deceased person who dies intestate and, as in this case, leaves children surviving him but no spouse (s).

25. Section 38 of the Act provides as follows:

***“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall...devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”***

26. Given the above provisions, there can be no basis for distributing the estate of the deceased and leaving out the daughters of the deceased. Even had the 0.5 acre piece of land that the protestor alleges was given to the petitioner by the deceased existed, and from the material before me, it does not seem to, there is no reason why she should be entitled to a paltry 0.5 acres, while her brothers share 19 acres amongst themselves. I need do no more here than point out the express provisions of Article 27 of the Constitution, which prohibit discrimination on the basis of, *inter alia*, sex. Further, long before the enactment of the non-discrimination provisions in the 2010 Constitution, the Court of Appeal, in its decision in **Rono vs Rono Eldoret Civil Appeal No. 66 of 2002**, clearly expressed the view that customary law cannot be the basis of discrimination against daughters when such discrimination is prohibited by international conventions, to which Kenya is a party, which expressly prohibit discrimination on the basis of sex.

27. The petitioner has proposed distribution of the estate on the basis of Kipsigis customary law, according to houses, leaving out the married daughters of the deceased. As I observed earlier, the estate of the deceased is to be distributed in accordance with the Law of Succession Act. This means that **all** the children of the deceased, including his married daughters, are entitled to a share of his estate, unless they renounce any interest in the estate.

28. Accordingly, I find that the protest before me is unmerited, and it is hereby dismissed.

29. The estate of the deceased shall be distributed in accordance with the Law of Succession Act, meaning that it shall be distributed equally between the children of the deceased, including the married daughters. From the pleadings before me, the following are the beneficiaries of the estate of the deceased:

**1<sup>ST</sup> HOUSE**

1. Mary Ngetich
2. Anne Seronei
3. Christine Matwek
4. Thomas Kibole Mabwai

**2<sup>ND</sup> HOUSE**

1. Joseph Kimetet Sang
2. Christine Chepkoech Bii
3. Petrolina Chebii Businei
- 4 Ann Chepkirui Tonui
5. Didacus Kipchirchir Ngetich
6. Cecilia Chepngeno Chepkwony
7. Thomas Kiprotich Ngetich

30. Should any of the beneficiaries have no interest in the estate, then he or she shall file an affidavit renouncing his or her interest within 30 days hereof, after which period a certificate of confirmation of grant shall issue with the estate of the deceased being distributed equally among the beneficiaries of the deceased evincing an interest in the said estate.

31. It is so ordered.

**Dated, Delivered and Signed at Kericho this 24<sup>th</sup> day of May 2017.**

**MUMBI NGUGI**

**JUDGE**