



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 257 OF 2005

RE ESTATE OF PHILIP KIPRONO ARAP BETT (DECEASED)

PASILISA CHEPKOECH BETT.....1ST PETITIONER

SISILIA JEBAGA KIRONGO.....2ND PETITIONER

VERSUS

HELLEN JEPKURGAT BETT.....OBJECTOR

JUDGMENT

1. *Philip Kiprono Arap Bett* (hereafter *the deceased*) died intestate on 23rd March 1989. He was 84 years. He is survived by *two* wives and *eight* children. The deceased was the registered owner of a parcel of land known as *L.R. Langas 8500* (hereafter *the suit property*). It measures approximately 3.2 acres.
2. The objector is a *daughter* of the deceased. She claims that on 18th June 1984, the deceased *sold* to her a portion of the property measuring approximately one acre. The consideration was Kshs 30,000. She testified that there was written agreement witnessed by three people. She claims the portion was surveyed and is now known as Plot 281.
3. The deceased died before the plot was transferred to her. The personal representatives of the deceased (the 1st and 2nd petitioners) refused to recognize the sale agreement. The objector then filed proceedings to annul the grant on 6th July 2004. The grant was annulled on 3rd October 2005.
4. By a consent dated 17th October 2006, the parties agreed that the grant of letters of administration be issued to the following four persons: Pasilisa Cheploch Bett (1st petitioner); Sisilia Jebaga Kirongo (2nd petitioner); Jepkurgat Hellen Bett (the objector); and, Sylvester Kimeto Kirongo (a son).
5. The deceased had other properties. There is no dispute over their distribution. On 10th December 2007, the disputants agreed that *all* the other properties except *L.R. Langas 8500* be divided *equally* between the two houses.
6. Directions were taken on 10th December 2007 regarding the disputed property. First, the objection proceedings would proceed by way of *viva voce* evidence. Secondly, some eight purchasers of some plots were to be given notice of the proceedings.
7. PW1 is the objector. She is the *fifth* born child from the *first* house. Her mother is *Sisilia Jebanga Kirongo* (the 2nd petitioner). PW1 said her father was suffering from prostate cancer; and, that the last

born child had heart disease. The deceased did not have money to meet the medical costs. The objector paid the deceased Kshs 30,000 to meet those expenses in consideration for one acre of the suit land. She said that she continued to give further assistance to the ailing child.

8. She testified that the agreement was witnessed by John Kibirgen, Silas Kipchoge Birech and Busienei Kipkoech. The sale agreement was produced by *consent* as exhibit 1. She said the survey was done by *Alliance Surveyors*. She produced a receipt for their fees; and, a photocopy of the survey map [exhibits 2 [a] and [b]).

9. Upon cross examination the witness said she was employed as a teacher in 1980. She lives in Kabilach, Lessos, with her family. She conceded there was another *Succession Cause Number 14 of 1995* in the lower court at Kapsabet. That petition was presented by her mother and stepmother. In those proceedings there was no mention of the disputed plot. But she said the proceedings had been lodged with concurrence of the whole family.

10. She also referred to another case, *Kapsabet SPMCC 132 of 1997*. She said she sued her step-mother and brothers for blocking her from tilling the suit land. She said the deceased had left an *oral will* giving her the suit land. She was thus surprised that the defendants in that case had changed their minds. She conceded that the witnesses to the sale agreement were not family members. She said that her mother, Sisilia, had initially agreed to donate her share of the disputed land (1.5 acres) to her. That marked the close of the objector's case.

11. DW1 was Sylvester Kimeli Kirongo. He is a son of the deceased. He is the first born son from the 2nd house. His mother is Pasilisa Chepkoech Bett (the 1st petitioner). He disputed that the deceased sold the disputed plot to the objector. He was unaware of the sale agreement (exhibit 1). He said he did not know the witnesses to the agreement. He claimed that the details of the vendor seemed to have been inserted later in ink. He said the family was not privy to the agreement. He testified that in the proceedings at the Magistrates Court at Kapsabet, the objector claimed the plot was a gift. In short, DW1 said the disputed plot forms part of the net intestate estate of the deceased.

12. Under cross examination, he conceded that his relationship with the 1st house was frosty. He had no minutes of the family meeting. He said the objector could not claim the land on the one hand as a purchaser; and, on the other hand as a gift. He did not have proceedings or ruling of the court in *Kapsabet SPMCC 132 of 1997*. Lastly, he opined that the financial assistance by the objector to the deceased did not entitle her to the land. He said she was obligated to assist her father or siblings.

13. Pasilisa Chepkoech Bett is the 1st petitioner. She is a widow of the deceased and mother of DW1. She relied largely on her witness statement dated 13th July 2015. She clarified that the objector lost the case in the lower court at Kapsabet, *Civil Case No. 132 of 1997*. She said the objector had sought a declaration that she owned the disputed portion. She denied that that the deceased sold or bequeathed the land to the objector.

14. In her opinion, the suit land should be divided equally between the two widows of the deceased to hold in trust for all the children of the deceased. Upon cross examination, she said that it would be unfair to give the objector land and deny all the other daughters. She conceded that her son, Silvester Kirongo (DW1), has sold 0.2 acres of the suit land. She did not have details of the purchase price. She was emphatic that the deceased never informed her of the sale or gift of one acre to the objector.

15. The 2nd petitioner is the objector's mother. Her *witness statement* filed on 24th September 2015 was admitted in chief. Her position was that the objector *bought* Plot 281 measuring one acre from the deceased; and, that the two widows should share the *remainder* of the suit land *equally*. She also prayed for costs.

16. Upon cross examination she could not tell the date of the sale. But she said it was sometime in 1984. She did not know the witnesses to the agreement named as John Kibirgen, Silas Kipchoge Birech and

Busienei Kipkoech. She could not also tell where agreement was executed. She denied that she had laid a claim to the Langas land in the lower court. She said the deceased sold one acre to the objector and that his wishes should be respected. She clarified that when deceased sold the Langas land to the objector she (Sisilia) was sick. She said the objector was a teacher; and, that at the material time, the children in the other house were minors. That marked the close of the 2nd petitioner's case.

17. The parties filed submissions. Those by the objector are dated 21st April 2017 with authorities annexed. The 1st petitioner's submissions were filed on 24th April 2017. The 2nd petitioner appeared in person; and, did not file any submissions. I have considered the rival arguments. I have also paid heed to the evidence, the records, materials and the pleadings.

18. From the pleadings and the evidence, the issues for determination can be condensed into four-

- i. *Whether the deceased sold or gave one acre of the suit land to the objector;*
- ii. *If the answer is in the affirmative, whether the portion should be removed from free estate of the deceased; and, the remainder distributed equally between the two houses;*
- iii. *If the answer to the first issue is the negative, whether the entire suit land should be distributed equally between the two widows; and,*
- iv. *Who should bear the costs of this suit?*

19. The objector alleges that she *purchased* the suit land from the deceased. She who alleges must prove. See sections 107 and 109 of the Evidence Act. See also Evans Nyakwana v Cleophas Ongaro, High Court, Homa Bay, Civil Appeal 7 of 2014 [2015] eKLR. The objector's case is that her *father* (the deceased) was suffering from prostate cancer while their *last born child* had heart disease. The deceased did not have money to meet the medical costs. The objector gave him Kshs 30,000 to meet those expenses in *consideration* for *one acre* of the suit land. She said that she continued to give further assistance to the ailing child.

20. The 1st petitioner alleges that there is *fraud*. She had the onus to prove it. The standard of proof for fraud is *higher* than a balance of probability. It approaches, but is below, proof beyond reasonable doubt. See Koinange v Koinange Nairobi, High Court case 66 of 1984 [1986] eKLR, Ratilal Patel v Lalji Makanji [1957] EAR 314 at 317. I am *not* satisfied that the objector was acting fraudulently by assisting the family or merely attempting to purchase part of the property from the deceased.

21. I will now focus on the impugned sale. True, there is a *written* sale agreement (exhibit 1) between the deceased and the objector. I am also satisfied that survey to carve out plot number 281 was conducted by *Alliance Surveyors*. Doubt is erased by the receipt for their fees and a photocopy of the survey map [exhibits 2 [a] and [b)]. The agreement on the face of it meets the requirements of section 3 (3) of the Law of Contract Act.

22. But there are *five* key reasons that cast *doubt* on the sale to the objector. First, the deceased died prior to the transfer of the land. He had placed a *thumb print* impression on the agreement. The validity of the agreement has been challenged. The burden falls on the objector to *prove* the agreement. No evidence was led to confirm that the thumb print impression was made by the deceased.

23. Secondly, *none* of the *three* witnesses was called to testify. The objector deposed to an earlier affidavit, without documentary evidence, that two of the witnesses had also passed on; and, that the third was senile. The trouble is that *neither* the petitioners (including the objector's mother), *nor* the siblings of the objector *know* the identities of the witnesses to the agreement.

24. Thirdly, there was no evidence of *who* drew it or *where* it was executed. The consideration paid was meant to be Kshs 30,000 towards medical expenses of the deceased and the last born child. If the

deceased wished to convert the assistance into *purchase price* for the land, he could have notified affected family members. The only person who acknowledges the agreement is the 2nd petitioner. Her evidence has to be taken with caution because she is the objector's mother. Upon cross examination the 2nd petitioner could *not* tell the precise date of the sale. She said it was sometime in 1984. She did *not* know the witnesses to the agreement named as John Kibirgen, Silas Kipchoge Birech or Busienei Kipkoech. She could not also tell *where* agreement was executed.

25. Fourthly, in *Kapsabet SPMCC 132 of 1997*, the objector sued her step-mother and brothers for blocking her from cultivating the suit land. She pleaded in the plaint that the deceased had left an *oral will* giving her the suit land. That is *inconsistent* with the claim of *purchase* in these proceedings. Furthermore, the conditions precedent to creation of a valid *oral will* have not been met in this case. See *Re Estate of Rufus Ngethe Munyua* [1977] KLR 137.

26. Fifthly, the suit property was *agricultural* land. There is no evidence that the *mandatory* consent of the Land Control Board to *sell* the disputed plot was ever obtained. The transaction would accordingly be void. See *Karuri v Gitura* [1981] KLR 247, *Kariuki v Kariuki* [1983] KLR 225.

27. The upshot is that from an evidential and legal standpoint, the objector has failed to prove, on a balance of probabilities, that *the deceased sold or gave her one acre of the suit land*. The answer to issue number i) that I framed earlier is thus in the *negative*. It must follow as a corollary that plot number 281 forms part of the *free estate* of the estate to be distributed as per the provisions of the Law of Succession Act.

28. 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”.

29. Furthermore, all the other properties of the deceased were shared equally between the two houses. There would be no basis for departure from that understanding which is backed by the clear letter of section 40 of the Act. My answers to issues number ii) and iii) that I framed earlier are that the entire property known as L.R. Langas 8500 shall *in the first instance be divided among the two houses according to the number of children in each house, but also adding the two surviving widows as additional units to the number of children*.

30. I have to add the following direction: 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. I thus order that the *objector* and all daughters of the deceased are *entitled*; and, *shall* thus get a *share* of the suit property as ordered in paragraph 29 of *this* judgment.

31. That leaves the issue on costs. Costs normally follow the event and are at the discretion of the court. 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 16th day of May 2017.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Kagunza for Mr. Omwenga for the objector instructed by Omwenga & Company Advocates.

Ms. Cheronu for the 1st petitioner instructed by A. K. Chepkonga & Company Advocates.

2nd Petitioner absent.

Mr. J. Kemboi, Court Clerk.