



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

SUCCESSION CAUSE NO. 165 OF 2014

IN THE MATTER OF THE ESTATE OF KIPKEMOI CHEPKWONY

METO *alias* KIPKEMOI ARAP KIMETO – (DECEASED)

JOSEPH KIPRONO CHEPKWONY.....1ST PETITIONER

JOHN KIPNGENO CHEPKWONY.....2ND PETITIONER

RULING

1. In a ruling dated 28th February 2017, this court had, in an act of optimism that was evidently misplaced, directed the parties to discuss and agree on a mode of distribution of the estate of the deceased that was acceptable to all the parties.
2. The deceased, **Kipkemoi Chepkwony Meto** *alias* **Kipkemoi Arap Kimeto**, had died intestate at the Kabarnet District Hospital on 18th May 1990. He was polygamous and had three wives and 22 children. Two of his wives were also deceased.
3. From the documents before the court, the houses of the deceased were as follows:

1st House-Wilfrida Kimetto (1st wife, Deceased)

1. **William Chepkwony-son**
2. **Joseph K. Chepkwony-son**
3. **John K. Chepkwony-son**
4. **Simion K. Chepkwony-son**
5. **Tapchelong Talaam-daughter**
6. **Cecilia Chumo-daughter**
7. **Christina Chalulot-daughter**
8. **Tecla Chelule-daughter**

2nd House-Hellena Kimetto –(2nd wife, deceased)

1. **Paul Chepkwony – son**
2. **Joseph K. Chepkwony-son**
3. **Charles K. Chepkwony-son**

4. Leah K. Choche-daughter
5. Richard Chepkwony-son
6. Selina Yator-daughter

3rd House-Annah Cherono Kimetto – (3rd widow)

1. Joseph K. Chepkwony – son
2. Francis K. Chepkwony-son
3. John K. Chepkwony – son
4. Selina Rono-daughter
5. Recho Tapritany-daughter
6. Nancy Chirchir – daughter
7. Evaline Bore-daughter
8. Lilian Chepkori Kitur-daughter

4. The net intestate estate of the deceased that was available for distribution comprised two properties:

- i. **Kericho/Kabartegan/349** measuring 11 acres
- ii. **Kericho/Kabartegan/211** measuring 34 acres.

5. Joseph Kiprono Chepkwony and John Kipngeno Chepkwony, sons of the deceased from the 1st and 3rd house respectively, were appointed the administrators of the estate on 13th November 2014.

6. By an application dated 24th April 2015, John Kipngeno Chepkwony applied for confirmation of the grant issued to him and his step-brother. He proposed that the estate of the deceased should be distributed equally between the three houses of the deceased, with one son from each house holding their house's share of the estate in trust for the others. The effect of this would be that each house would get 3.7 acres out of Kericho/Kabartegan/349 which measures 11 acres and 11.33 acres each out of Kericho/Kabartegan /211. This mode of distribution was not accepted by the other beneficiaries.

7. It appears that the first two houses of the deceased, that of Wilfrida Chepkorir Meto (deceased) and Hellena Chelangat Meto (also deceased) had settled on land parcel number **Kericho/Kabartegan/211** during the lifetime of the deceased. The third wife and only surviving widow, Annah C. Meto had settled on **Kericho/Kabartegan/349**. The first two houses wished to have the distribution of the estate done in such a way that their holdings would not be disturbed, and they proposed that they should remain on **Kericho/Kabartegan/211** while the third house remains on **Kericho/Kabartegan/349**.

8. In considering the most equitable manner of dealing with the estate of the deceased, who died intestate and was polygamous, I bear in mind the provisions of sections 40 of the Law of Succession Act which provides as follows:

(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 estate 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.

9. However, the court is also guided by the provisions of section 42 of the Law of Succession Act, which takes into consideration the wishes of the deceased with respect to the distribution of his estate where the deceased had, "... during his lifetime or by will, paid, given or settled any property" on any of his beneficiaries or houses. In this case, the deceased had expressed a clear intention, and taken steps to implement it, to settle his first two houses on his land parcel number Kericho/Kabartegan/211. This is clearly evidenced by the documents relied on by the first two houses.

10. In a letter dated 29th September 2016 and filed in court on 3rd October 2016, John Kiprono Chepkwony attached an application to the Bureti Land Control Board dated 20th March 1981 in respect of Kericho/Kabartegan/211. The application, in which the first two wives of the deceased are named in the section for transferees, clearly evidenced an intention on the part of the deceased to subdivide the land parcel between the first two wives. These documents have not been challenged by the third house. While John Kipngeno Chepkwony, the son of the deceased from the third house, indicated in his application that each of the two parcels should be divided equally between the three houses, he did not comment on the documents showing the deceased's wish to divide the land between his first and second wife. Nor did he give any reason for wishing to have the two parcels divided into three portions.

11. In his decision in **Nyeri High Court Succession Cause No. 404 of 2012-In the Matter of the Estate of James Migwi Gakau**, Mativo J noted that the wishes of the deceased, who had distributed his land in his lifetime and fixed clear physical boundaries which none of his beneficiaries had interfered with even after his death, should be respected. Similarly, in **Paul Kiruhi Nyingi & Another vs Francis Wanjohi Nyingi Nyeri High Court Succession Cause 508 of 1999** cited by Mativo J in the **Estate of Gakau** case above, Makhandia J upheld the wishes of the deceased. In that case, the court observed that unless it can be demonstrated that the wishes of the deceased were illegal, unfair or discriminatory to the beneficiaries or some of them, his wishes should be respected.

12. In the present case, the deceased had expressed a clear intention to subdivide his land, Kericho/Kabartegan/211, between his first two houses. He had gone to the extent of seeking Land Control Board consent. He had engaged a surveyor and had mutation forms done. His wishes are beyond dispute. Are they unfair or discriminatory?

13. The effect of distributing the land according to the wishes of the deceased would be that the first two houses would remain on **Kericho/Kabartegan/211**, which measures 34 acres, while the third house would remain on Kericho/Kabartegan/349, which measures 11 acres.

14. In the course of reading the ruling in this matter on 18th October 2017, the court noted that it had made an error with respect to the acreage of land parcel number **Kericho/Kabartegan/211**, as a result of which it had indicated that each of the houses would inherit 11 acres from the deceased. As the correct acreage of Kericho/Kabartegan/211 is 34 acres, the effect of distributing the land on the basis of the express wishes of the deceased would be that the first two houses would get at least 3.5 acres more than the third house. This is on the basis that, according to Ms. Chelimo, Counsel for the petitioners, Kericho/Kabartegan/211 measures 29 acres after provision was made for a road on subdivision.

15. Would this be considered to be unfair and discriminatory, and therefore a reason why the wishes of the deceased which, as indicated above, were so clear, should not be followed? I believe not. I think there is growing recognition that distribution of the estate of a deceased person on the basis of section 40 without taking into account the fact that the wife (or wives) married earlier had made a contribution to the acquisition of the property the subject of the distribution on the death of the deceased leads to unfairness for the older widows- see in this regard **Succession Cause No. 16 of 2010-in the matter of the estate of the late George Cheriro Chepkosiom (Deceased) and Probate and Administration Cause No. 244 of 2002-Re Estate of Ephantus Githatu Waithaka (Deceased) Esther Wanjiru Kiarie vs Mary Wanjiru Githatu**.

16. The deceased had taken steps to transfer property to his first two wives, and from the material before me, all three families were living on the parcels that he had settled them on. There is thus before the court express intentions of the deceased on the manner in which he wished his three widows to share his property, the first two to get equal portions out of **Kericho/Kabartegan/211**, while the third wife and her children remain on the slightly smaller **Kericho/Kabartegan/349**.

17. That being the case, though the 3rd house shall end up with a smaller share of the deceased's estate, I am satisfied that honouring the wishes of the deceased in this case is not unfair or discriminatory.

18. Accordingly, I direct that the estate of the deceased shall be distributed as set out hereunder.

19. **Kericho/Kabartegan/211** measuring 34 acres shall be distributed equally to the 1st and 2nd house of the deceased. The 17 acres for the 1st house shall be distributed equally to the following children of the deceased:

1. **William Chepkwony-son**
2. **Joseph K. Chepkwony-son**
3. **John K. Chepkwony-son**
4. **Simion K. Chepkwony-son**
5. **Tapchelong Talaam-daughter**
6. **Cecilia Chumo-daughter**
7. **Christina Chalulot-daughter**
8. **Tecla Chelule-daughter**

20. Similarly, the 17 acres out of **Kericho/Kabartegan/211** due to the 2nd house shall be distributed equally between the following children of the deceased from the second house:

1. **Paul Chepkwony – son**
2. **Joseph K. Chepkwony-son**
3. **Charles K. Chepkwony-son**

4. Leah K. Choche-daughter

5. Richard Chepkwony-son

6. Selina Yator

21. With respect to the 3rd house, though there was no express intention by the deceased on its share, it can safely be presumed that his intention was that they should continue to occupy **Kericho/Kabartegan 349**, which measures 11 acres. As the third wife, **Annah Cherono Kimetto** is still alive, in accordance with the provisions of section 38 and 40 of the Law of Succession Act, she shall have a life interest in **Kericho/Kabartegan 349**. Thereafter, the property shall be distributed equally between her children, as follows:

1. Joseph K. Chepkwony – son

2. Francis K. Chepkwony-son

3. John K. Chepkwony – son

4. Selina Rono-daughter

5. Recho Tapritany-daughter

6. Nancy Chirchir – daughter

7. Evaline Bore-daughter

8. Lilian Chepkori Kitur-daughter

22. Orders accordingly.

Dated Delivered and Signed at Kericho this 31st day of October 2017.

MUMBI NGUGI

JUDGE