



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 166 OF 2003

KIMERIA CHEBONDECEASED

AND

JOHN K. KIBOR

BENJAMIN EDGAR KIPKORIR.....APPLICANTS

J U D G E M E N T

1. The deceased, **KIMERIA CHEBON** died intestate on 17/11/1989. He left behind four wives , several children and grandchildren. The estate of the deceased comprises of **Land Parcel NO. KIPKUNDUL/CHERENGANY/5 measuring 150 acres.**

2. The grant of letters of administration was issued jointly to **JOHN K. KIBOR and BENJAMIN EDGAR KIPKORIR.** The two administrators subsequently filed the summons for the confirmation of the grant dated 28/6/2006. The said summons is supported by the affidavit in support sworn on the same date (28/6/2006) by the 1st Administrator, **JOHN K. KIBOR.** The mode of distribution proposed by the administrators is as follows:-

- (a) **Kimurto Rono - 33.7 acres of Kipkundul/Cherengany/5**
- (b) **Kipserem Kuto - 16.85 acres of Kipkundul/CHerengany/5**
- (c) **Samwel Rono - 16.85 of Kipkundul/Cherengany/5**
- (d) **John Kibor - 35.1 acres of Kipkundul/Cherengany/5**
- (e) **Christopher Tirop -16.85 acres of Kipkundul/Cherengany/5**
- (f) **Barnaba Kimaiyo - 8.425 acres of Kipkundul/Cherengany/5**
- (g) **Tapkigen Chemosir - 8.425 acres of Kipkundul/Cherengany/5**
- (h) **Dr Ben Jamin E. Kipkorir -11.4 acres of Kipkundul/CHerengany/5**
- (I) **Utilities (Roads) - 2.4 acres of Kipkundul/Cherengany/5**

TOTAL 150 ACRES.

3. **JULIANA RUTO** filed an affidavit of protest against the mode of distribution proposed by the

administrators. The said affidavit which was sworn on 11/3/2009. Her contention is that the 2nd house of the deceased has not been given any share. Her further contention is that the 2nd house of the deceased is entitled to 34 acres of land which they will share amongst the children of **SANIAKO RUTO** the late daughter of the 2nd wife of the deceased.

4. On 6//5/2014, directions were given that the protest be heard by way of *viva voce* evidence.

5. The protestor, **JULIANA RUTO** testified (PW1) . A son to the (decease) **KIPSEREM KUTO** also testified (PW2). The two witnesses adopted the contents of their affidavit evidence. The evidence from the protestor's side is that the deceased had four wives/houses as follows:-

1ST HOUSE:

1. KIMOI LOTULIA (widow but deceased)
2. KIPRONO KEMERIA (son)
3. KIPSEREM KUTO (son)

2ND HOUSE

1. TOYOI LOTULIA (widow but deceased)
2. SANIAKO RUTO (Daughter but deceased)

3RD HOUSE

1. KAPILO LOTULIA (widow but deceased)
2. KIBOR KIMERIA (son)
3. KIMURTO RONO (SON)
4. CHEBALAM KIMELI (daughter)

4TH HOUSE

1. KIMONY LOTULIA (widow but deceased)
2. CHEPNGETICH KIMELI (daughter)
3. KIAMIYO KEMELIAM (son but deceased)
4. CHRISTOPHER KIMAIYO (son)

6. It is their evidence that the late **TUIYOI LOTULIA** the 2nd wife of the deceased had only one child, **SANIAKO RUTO** who was survived by the following:

1. **PIUS RUTO (son and Protester herein)**
- b. **VINCENT RUTO (son)**
- c. **CHRISTINE RUTO (daughter)**
- d. **JULIANA RUTO (daughter)**

E. ELIZABETH RUTO (daughter)

7. It is the evidence of PW1 and PW2 that the deceased had divided his land between his four wives and shown them the boundaries. That the protestor (**JULIANA**) lived with her grandmother **TUYOI LOTULIA** the 2nd wife of the deceased. That the said **TUYOI LOTULIA** never adopted **KIMURTO RONO** nor were there any traditional rites carried out in recognition of any adoption. Their further evidence is that **KIMURTO RONO** buried the late **TUYOI LOTULIA** in his farm contrary to the wishes of the elders and the family.

8. **KIMURTO RONO (DW1)**, **JOHN KIPKOSGEI KIBOR (DW2)** and **CHERUIYOT CHEMITEI (DW3)** testified on the side of the administrators. They also adopted their affidavit evidence. Their evidence is that the deceased had four wives. It is their evidence that **KIMURTO RONO (DW1) AND SANIAKO RUTO** the mother to the protestor (**JULIANA RUTO**), are both children of the 2nd wife of the deceased, **TUYOI LOTULIA**. That as a son to the late **TUYOI**, **DW1** lived with her and buried her at his farm when she died. That the daughter to the late **TUYOI** the late **SANIAKO** got married in **KIPTEBER** area where she lived with her family. That the objector who has been married severally has since moved back to the homestead of **TUYOI**.

9. It is common ground that the deceased had four wives. It is also not disputed that the deceased had settled his wives and shown them the boundaries to their land. The point of divergence relates to the 2nd house of the deceased. The protestors side's view is that the 2nd wife of the deceased had one daughter whose children should inherit her land. On the other hand the administrators side has contended that one **KIMURTO RONO** was a son to the deceased and that he is the one entitled to inherit the land from the 2nd house of the deceased. Although the administrators side acknowledges that the late **SANIAKO** was a daughter of the second wife of the deceased, they have stated that **SANIAKO** was married and therefore her children are not entitled to inherit land from their maternal grandparents.

10. Since the deceased was polygamous, the law applicable is **section 40(1) of the Law of Succession Act Cap 160 Laws of Kenya** which provides as follows:

“ 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”.

11. The said provision of the law makes no distinction between male and female children or between those married and those not married. Since the deceased had shown his wives the boundaries to their land, each house is entitled to inherit their mother's Land..

12. Although **KIMURTO RONO's** evidence is that he was the biological son of the deceased, there is evidence to suggest otherwise. **PW2 KIPSEREM KUTO** a son to the deceased was categorical in his evidence that **TUYOI LOTULIA** had one child, a daughter by the name **SANIAKO**. That **KIMURTO RONO** was not a biological child of **TUYOI** and no traditional rites were carried out to signify his adoption. **DW1 CHERUIYOT CHEMITEI** a neighbour to the deceased was unable to confirm whether or not **KIMURTO RONO** was a biological son of the late **TUYOI**. Indeed the second administrator, **DR BENJAMIN EDGAR KIPKORIR** in his affidavit sworn on 13/6/2006 which forms part of this record categorically stated that the late **TUYOI** did not have a biological son. The evidence herein therefore establishes that **KIMURTO RONO** was not a biological son of **TUYOI**. There is no evidence of any rites or formalities carried out for the said **KIMURTO RONO** to be said to have been adopted by **TUYOI**. If **KIMURTO RONO** was a son of the **TUYOI**, he would still not have inherited the entire share of **TUYOI**. He would have shared on equal basis with **SANIAKO'S** children. Burying the late **TUYOI** would not, *per se*, give any rights of inheritance.

13. The protestor came to court as a grandchild of the deceased claiming her mother's share of the estate. There is also evidence from both sides which reflects that the protestor currently lives in the land that she

claims. The protestor therefore had the *locus standi* to file the protest.

14. With the foregoing, I am satisfied that the protest has merits. The children of **SANIAKO** are entitled to their mother's share which is the land of **TUYOI**. The 2nd house of the deceased is therefore entitled to **34 acres** though the beneficiaries of **SANIAKO RUTO**. The other houses of the deceased are at liberty to come up with a new mode of distribution amongst themselves.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Kitale this 26th day of May, 2016.

B. THURANIRA JADEN

JUDGE