



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO. 91 OF 2008

In the Matter of the Estate of the late Makerer Arap Birir..... (DECEASED)

JANE CHEPTOO BIRIR.....PETITIONER

VERSUS

LUDIAH CHEROP BIRIR.....OBJECTOR

JUDGMENT

1. These proceedings relate to the estate of the late Makerer Arap Birir, who died on 25th May, 2007. A grant of letters of administration intestate was made to the petitioners, the 1st and 2nd widows of the deceased, on 29th September, 2008.

2. An application for confirmation of grant dated 26th April, 2011 was filed by the 2nd petitioner, Ms. Jane Cheptoo Birir, (hereafter Jane). However, the 1st petitioner, Ms. Ludiah Cherop Birir, (hereafter Ludiah) protested against the mode of distribution proposed in the application for confirmation of grant.

The application was initially heard in the absence of the 1st petitioner before Sergon J. However, pursuant to a consent between Counsel for the parties, the proceedings were set aside and directions given for them to begin afresh. The parties were heard by Ong'udi J on 13th July, 2015.

3. Subsequent to the hearing, parties agreed to file written submissions, and directions were given with respect thereto on 13th July, 2015. The matter was not, however, placed before the judge who had dealt with it for close to a year. It was eventually placed before me for directions on 6th June 2016, when the parties indicated that they had filed submissions and wished to take a date for judgment. I therefore directed that the proceedings be typed with a view to rendering a decision on the matter.

4. In her testimony, the protestor, Ludiah told the court that she and her co-wife had applied for letters of administration to the estate of the deceased. They had given the list of properties forming the estate as being L. R. Kericho/Koyet/168, Kericho/Manaret Scheme/70, Kericho/Chemagel/1980, and shares in various companies namely Chepalungu Company Plot 7 and KCB.

5. She was however dissatisfied with the mode of distribution proposed by her co-petitioner in the affidavit dated 26th April, 2011 in support of the application for confirmation of grant. Her testimony was that she had no objection to the proposed distribution in relation to items 1 and 2, Kericho/Koyet/168 and Kericho/Manaret/S.S./70, the first of which she stated belongs to her and her children and the second of which belongs to her co-wife and had been distributed to Jane's Children, Alfred and Bernard.

6. She was aggrieved, however, that L.R. Kericho/Gelegele/107, which measured 25 hectares, had not been distributed, yet it belonged to the deceased and a certificate of search had been produced in respect thereof. She stated that she wished to have this property divided equally between the two houses, noting, however, that it was in the name of John Kipkirui Koech, Jane's son.

7. Ludiah, however, had no problem with Kericho/Koiyet/119, which was in the name of her son, Wilson K. Koech, nor with the distribution of L.R Kericho/Gelegele/105 in the name of Phillip K. A. Koech, who was also her son.

8. It was her evidence further that plots No.119 & 105 were bought by her sons and do not belong to the deceased, while plot No.107, which is occupied by John Kipkurui Koech, belongs to the deceased. The core of her protest was with respect to L.R. No 107 and No.168 (Koiyet).

9. Kiplangat Birir, the deceased's brother, told the court that Ludiah stays on the land at Koiyet. He further stated that the lands had been subdivided at the time the deceased died, and that the 2nd wife, Jane, was residing on land at Maneret. He stated that the situation should remain as the deceased had left it, and that the son of the second wife should continue to stay on the land at Gelegele.

10. The evidence of the 2nd petitioner, Jane, is that she filed for confirmation of grant and proposed a mode of distribution to which her co-wife filed a protest. She stated further that some properties were not included in the estate as the deceased had dealt with them when he was alive. She named Kericho/Gelegele/107 which belonged to the deceased but which he had given to John Kipkurui Koech as evidenced by a certificate of search which she produced; Kericho/Gelegele/105 which also belonged to the deceased but which he gave to Phillip K. Arap Koech; and Kericho/Koiyet/119 which is in the name of Wilson K. Arap Koech but which she stated also belonged to the deceased.

11. Four sons of the deceased, namely Paul Kipngetch, Julius Kipyegon, Alfred Kibet and Bernard Cheruiyot had not benefitted from the distribution by the deceased and it was her position that they should benefit from the distribution which she was proposing.

12. She further testified that she was residing on land at Manaret which is 36 acres while her co-wife, Ludiah, was staying on land at Koiyet which is also 36 acres. According to Jane, both petitioners had lived on the respective parcels of land they occupied for 30 years.

13. In her submissions, Ludiah argues that she did not accept the mode of distribution proposed by Jane as L.R. No. Kericho/Gelegele/107 was not included in the schedule of properties forming the estate of the deceased.

She reiterated the evidence she had given that on 20th June, 2013, a panel of elders had met and deliberated on the mode of distribution of the estate and had resolved that:

(i) Land parcel No. Kericho/Koiyet/168 be wholly inherited by Ludiah Cherop Birir and her children.

(ii) Land parcel No. Kericho/Manaret/70 be wholly inherited by Jane Cheptoo Birir and her children.

(iii) Land parcel No. Kericho/Gelegele/107 be shared equally between the two petitioners.

14. She maintained that she was opposed to the mode of distribution proposed by Jane, which is as follows:

(i) Kericho/Manaret S.S/7 – (a) Alfred Kibet Koech - 7.75 ha.;

(b) Bernard Cheruiyot - 7.75 ha.;

(ii) Kericho /Koiyet/168 – (a) Paul Kipngetich Koech - 6.9 ha.;

(b) Julius Kipyegon Koech - 6.9 ha.

15. Her position was that each widow and her children should inherit the land that they were occupying, in accordance with the wishes of the deceased.

She relied on the evidence of the deceased's brother, Kiplangat Birir, and the minutes of the meeting of elders she had produced in court.

16. It was her submission further that where the deceased has distributed his property and given the necessary directions as to how the property shall be distributed it is not open for the beneficiaries to challenge the directions, except in the circumstance permitted under S.26 of the Law of Succession Act. In this case, no such application had been brought. It was also her submission that where parties file conflicting proposals with respect to distribution, the court should be guided by the wishes of the deceased in adjudicating the conflicting claims. Since, in her view, the deceased had directed before his death how the property would be distributed, his wishes should be respected.

17. In her submissions in response, the 2nd petitioner pointed out that in their application for grant, the 1st and 2nd petitioner had set out in form P&A5 the assets of the deceased. She noted that in her objection, Ludiah had introduced Kericho/Gelegele/107 as belonging to the deceased. Her submission was that only those properties listed in form P&A 5 should be the subject of distribution. In her view, the mode of distribution that she had proposed was the most reasonable in the circumstances of this case.

Determination

18. I have considered the respective cases of the parties before me, their affidavit evidence, and the oral evidence taken by my predecessor in the station, Hon. Justice Ong'udi. I have also considered their respective submissions with respect to the distribution of the estate of the deceased.

19. I begin by considering the question of the estate of the deceased available for distribution. From Form P& A 5 filed by the petitioners jointly when they applied for letters of administration intestate, the following are the assets of the deceased:

- i. Kericho\Chemagel\1980
- ii. Kericho\Manaret\S.S./70
- iii. Kericho\Koiyet S.S.\168
- iv. Standard Chartered Bank Shares
- v. Kengen Shares
- vi. KCB Shares
- vii. KCB Bank Account

20. In her affidavit of protest sworn on 4th March, 2011, Ludiah, the 1st petitioner introduces additional properties, not included in the list of assets, in her proposed mode of distribution. These are:

- i. Kericho/Gelegele/107
- ii. Kericho/Sotik/7288/07 commercial shop

iii. Goods/stock in the two shops.

21. In the application for confirmation of grant, the 2nd petitioner, Jane, has also included assets that are not in P&A 5. These are:

i. Shares in Chebalungu Company registered under No. 42492.

ii. British American shares.

22. Let me deal first with the issue of property number Kericho/Gelegele/107. This property was not included in the list of assets by the petitioners when they applied for letters of administration intestate in 2008. I note from the Certificate of Official Search dated 17th March 2014 that the proprietor of the property as at 4th October, 2006 was John Kipkurui Koech. A title deed was issued to him on 22nd April, 2008.

23. On the material before me, I am unable to find that the land parcel forms part of the estate. While there was an allegation that the transfer to the registered owner, who is also a beneficiary of the estate of the deceased, was obtained fraudulently, there is nothing before me that can assist in making a determination on that score. Further, the fact that the petitioners had excluded it from the inventory of assets of the deceased implies that they were aware that it did not fall among the assets of the deceased. It may, as submitted by the 2nd petitioner, have belonged to the deceased. However, the evidence before me suggests, as I note later in this judgment, that it was intended, and was indeed transferred *inter vivos*, to the current registered owner.

24. The 2nd petitioner has also introduced a property known as Kericho/Sotik/7288/07 commercial shop, as well as “*Goods/stock in the two shops*”. There is no documentary support for asserting that these are assets belonging to the estate. They were not included in form P&A 5, and the only document before me that makes reference to a shop in Sotik is a certificate of registration of a business name dated 6th December, 2005 showing that John Kipkurui Koech is carrying on a business known as Koiyet

Farmers Stores on Plot No. 7288/07 Sotik Road. It is my view, therefore, on the basis of the material before me, that this is not a property that belongs to the deceased and which falls for distribution to the beneficiaries of the deceased.

25. On her part, the 2nd petitioner has introduced shares in Chebalungu Company registered under No. 42492 as well as shares in British American Unit Trust. I note, first, that these shares are in the name of the deceased, and further, that there is no dispute with respect to their distribution.

26. The petitioners agreed about the distribution of Kericho/Chemagel/1980, which both have proposed should go to the two of them, in equal shares of 0.2 ha each.

27. Which leaves the two properties, Kericho/Manaret/S.S./70 and Kericho/Koiyet/S.S./168 in contention. The 2nd petitioner proposes that Kericho/Manaret/S.S./70 should be distributed to Alfred Kibet Koech and Bernard Cheruiyot, each getting 7.75 ha. With respect to Kericho/Koiyet/ S.S./168, her proposal is that it should be distributed to Paul Kipngetch Koech and Julius Kipyegon Koech, with each of them getting 6.9 ha. The proposal by the 1st petitioner, on the other hand, is that she and her sons should retain Kericho/Koiyet S.S./168, while the 2nd petitioner and her sons inherit Kericho/Manaret S.S./70.

28. The evidence given by the petitioners that is not contradictory is that each of the widows was residing on separate parcels of land belonging to the deceased for over 30 years. The 1st petitioner was residing in Kericho/Koiyet S.S./168, which is 13. 8 ha, while the 2nd petitioner was residing on Kericho/Manaret S.S./70, which is 15.5 ha in size.

29. There is, however, quite some disagreement on whether or not the deceased had disposed of some of his properties *inter vivos*. The 2nd petitioner, Jane, testified that the deceased had given his properties, Kericho/Gelegele/107 to her son, John Kipkurui Koech, Kericho/Gelegele/105 to Ludiah's son, Phillip K. Arap Koech, and Kericho/Koiyet/119 to Wilson K. Arap Koech, who is also Ludiah's son. On her part, Ludiah testified that Jane's son, John Kipkurui Koech, had fraudulently transferred to himself title number Kericho/Gelegele/107. With respect to the land parcels that the deceased had allegedly given to her own sons, Ludiah's testimony is that they had bought these parcels themselves.

30. The duty of the court in a matter such as this, where the evidence is so contested, is to try and do justice between the parties. What emerges as uncontested, and is supported by the evidence of the deceased's brother, Mr. Kiplangat Birir, is that each of the widows was occupying a separate parcel of land, roughly equal in size, though the parcel occupied by Jane is slightly bigger, for a period in excess of thirty years. Their sons have parcels of land that they obtained from the deceased, which are as follows:

i) John Kipkurui Koech -Kericho/Gelegele/107 measuring 10. 1 ha.

ii) Phillip K Arap Koech-Kericho/Gelegele/105 measuring 7.4 ha.

iii) Wilson K. Arap Koech- Kericho/Koiyet 119 measuring 6.6ha.

31. Judging from the fact that these three sons of the deceased have renounced any interest in the estate of the deceased, it is, I believe, safe to conclude that they had, contrary to the assertion of the 1st petitioner, received their land parcels from the deceased.

32. Which raises the question of the entitlement of the remaining sons who have not renounced their interest and who, from the evidence, had not received any land from the deceased.

33. In cross-examination at the hearing of this matter, Ludiah was questioned about the case that the deceased had filed against her son, Paul Koech. She denied knowing that her husband had ever taken their son to court, asserting that there is no such case.

34. I have, however, looked at the judgment of the court in **Sotik RMCC No. 128 of 2005-Makerer Birir vs Paul Koech**. From the judgment, it is evident that Paul Koech, a son of the deceased with the 1st petitioner, had been sued by his father. It appears that the suit was precipitated by the actions of the said Paul Koech in preventing his father and his step-brother, Julius Kipyegon Koech, from accessing Kericho/Koiyet/S.S./168. From the evidence in that court which the said Paul Koech did not controvert, having not appeared at the hearing, it would appear that the intention of the deceased was for his son, Julius Kipyegon Koech to build a home on the said land.

35. In my view, the suit filed by the deceased in Sotik manifests his express intention in his lifetime, and it accords more with the distribution proposed by the 2nd petitioner. Two of the sons of the deceased with the 2nd petitioner would get equal shares in Kericho/Manaret S.S./70, while one son of the 1st petitioner, Paul Kipngetich Koech, and one son of the 2nd petitioner, Julius Kipyegon Koech, would each get 6.9 hectares out of Kericho/Koiyet/ S.S/168. To distribute the estate of the deceased as proposed by the 1st petitioner would work an injustice against the second house of the deceased, would doubtless end in a larger share of the estate comprised in Kericho/Koiyet S.S. /168 in the hands of Paul Koech, and would not be in accord with section 40(1) of the Law of Succession Act which provides that:

“(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.”

36. In the circumstances, I find that the protest by the 1st petitioner is without merit, and it is hereby dismissed. The estate of the deceased shall be distributed as proposed by the 2nd petitioner in the

application dated 26th April, 2011.

37. Each party shall bear their own costs.

Dated, Delivered and Signed at Kericho this 28th day of October, 2016.

MUMBI NGUGI

JUDGE