



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**PROBATE AND ADMINISTRATION CAUSE NO. 74 OF 2001**

IN THE MATTER OF THE ESTATE OF THE LATE NGEIYWO CHEPTOT  
KIBOI..... DECEASED

SARAH NGEIYWO CHEPTOT..... PETITIONER

VERSUS

JULIUS MBOGA CHEPTOT..... 1<sup>ST</sup> OBJECTOR

JOASH NUNU CHEPTOT..... 2<sup>ND</sup> OBJECTOR

**JUDGMENT**

1. The objectors **Julius Mboga Cheptot** and **Joash Nunu Cheptot** (brothers) have objected to the issuance of grant of letters of administration to their uncle's estate (Ngeiywo Cheptot Kiboi – deceased) in this cause where his widow Sarah Ngeiywo Cheptot is the petitioner.
2. The objection is a culmination of a long outstanding land tussle between the family of Ngeiywo Cheptot Kiboi deceased and that of his sister Rosa Fwamba (also deceased).
3. To appreciate the case the court considered the history of the land tussle between Rosa Fwamba and her brother Ngeiywo Cheptot Kiboi deceased that was subject to at least two court cases.
4. Both parties agree that Ngeiywo Cheptot Kiboi and Rosa Fwamba were a brother and a sister; children of the late Ngeiywo Matenga and the land subject of this succession initially belonged to late Ngeiywo Matenga. Both parties also agree that Rosa Fwamba was married to Sangoro, the marriage broke down and she returned and settled on her father's land. It is not in contention either that Ngeiywo Cheptot deceased worked in Uganda for several years and thereafter returned to his father's land as well. It is not in dispute either that Ngeiywo Cheptot deceased educated and circumcised the two sons of his sister Rosa assuming the role of a father in this respect.
5. What is in dispute is whether Rosa Fwamba was entitled to be on the land; how the deceased Ngeiywo Cheptot Kiboi came to be registered as owner and whether the objectors have a claim on the land and ought to inherit alongside other beneficiaries.
6. According to the objectors their mother Rosa Fwamba deceased was married to one Sangoro in 1940 which marriage lasted for 1 year and she returned to her parents in 1941. Later between 1951 and 1953 she gave birth to her 2 sons the objectors herein Julius Mboga Cheptot and Joash Nunu Cheptot. That their uncle Ngeiywo (deceased) married the petitioner in 1947 and lived in Uganda where he worked and returned to Kenya for some time in 1958 and later returned back to Uganda returning back to Kenya in

1970 and that in 1972 he secretly registered land parcel N.Malakisi/S. Wamono/870 in his name and that although this registration took place, their mother continued to occupy 10 acres of the land despite several court cases between their uncle and their mother. Further that their mother was buried on the land subject matter of this succession. They also argue that between them (the objectors) they have continued to occupy the 10 acres since 1958.

7. On the other hand the petitioner denies that the objectors were born on the land subject matter. She stated further that at no time did she move to live in Uganda. Further that her husband only accommodated Rosa his sister on humanitarian grounds. That her deceased husband was legally entitled to register the land in his name. She further argues that the objectors ought to inherit from their own father and not their uncle and since the objectors are not beneficiaries of the estate of her late husband she was not obliged to seek their consent nor include them in the list of beneficiaries.

8. In 1979 the deceased Ngeiywo Cheptot Kiboi filed a private criminal prosecution being case No. 649 of 1979 against his deceased sister Rosa Fwamba Sangolo for the offence of trespass on private land.

9. In that case Ngeiywo the deceased admitted that the sister lived with him on the land subject matter. He gave the year she married as 1940. He also admitted that his sister returned home and had asked him to assist in looking after her children. He further stated that one son was crawling when the sister moved to stay with him and the other was breast feeding. He accepted that he educated and circumcised the said children and that he stood as their father as he circumcised them.

10. On the other hand in her defence Rosa gave her names as Rosa Chemutai a sister to Ngeiywo. She said she got married in 1940 but divorced with one child, her daughter in 1941 and that thereafter she returned to her parents after which she gave birth to both her sons whose fathers she did not know as she lived as a prostitute. It was also her evidence that both Ngeiywo and her father took care of her and her children. Her father died in 1960 after which her brother Ngeiywo took care of her sons and circumcised them.

In the said case, she was found guilty and convicted. Rosa appealed and the appeal in appeal No. 1 of 1980, where the conviction was quashed and the sentence was set aside.

11. The two had another case in the RM's court case. No. 43 of 1985 where the trial court referred the matter to arbitration by elders. In the said arbitration the late Rosa maintained that she was married for 1 year and returned to her father's land where she gave birth to her two sons and had been there ever since. The deceased Ngeiywo on his part maintained the land belonged to him.

12. In the arbitration the panel found that Rosa had a life interest in the property and further were of the view that since Rosa's sons were born out of bounds of a legal marriage they had to look for alternative parcel to reside on.

13. The above decision was appealed against in Civil Appeal No. 5 of 1987 and by consent of the parties the appeal was allowed on point of jurisdiction.

14. In a nut shell, none of the claims by Ngeiywo Cheptot succeeded. The criminal prosecution was set aside and the award by elders which formed the decision of RM's case No. 43 of 1985 collapsed once a consent was filed in the appeal allowing the same.

15. It therefore appears that after the judgment (appeal) that was delivered on 3<sup>rd</sup> June, 1985 the parties and their families continued to occupy the land subject matter.

16. In the petition by way of cross application for grant the first objector Julius Mboga Cheptot deponed as follows;

**Paragraph 16:**

***“That all along our mother had been in occupation of (10) ten acres only which we now occupy while the petitioner occupies 9 acres of the said land.”***

**Paragraph 22:**

***“That I and my brother Joash Nunu Cheptot have been in occupation of (10) ten acres of land parcel No. North Malakisi/S. Wamono/870 since 1958.”***

17. In her response, the petitioner in her reply to the cross-petition states that;

**Paragraph 10**

***“That contrary to what is stated in paragraph 16 of the cross petition the mother of the objector occupied less than 7 acres.”***

**Paragraph 11**

***“The objector and his brother, are supposed to be given a share by their father and were not entitled to any share in the property of the deceased.”***

18. It will be appreciated that the claim by Rosa Fwamba on her late father’s estate remained unresolved due to the death of her lawyer initially, then her brother then of course her own demise. The cases filed between her and her brother were in court yester years when daughters were marginalized in succession matters in line with discriminatory customary practices as it happened to Rosa. Rosa survived on her father’s land as the decisions were set aside “for technical reasons”.

19. In the recent past courts applied International and regional instruments in disregarding customary practices that discriminated against daughters.

20. In ***Rono Vs. Rono (2008) KLR*** the justices of appeal unanimously held that the estate of the deceased should equitably be distributed to his children irrespective of gender or marital status

The court further stated;

***“... the possibility that girls in any particular family may be married is only one factor among others that may be considered in exercising the courts discretion. It is not a determining factor.”***

21. In the Estate of ***Lerionka Ole Ntutu (2008) e KLR*** the court held;-

***“I shall, without any reservation find that even if provisions of Section 32 do apply to Uasin Gishu area or even if Masaai customary Law would be applicable to the estate, the customary law which shall abrogate the right of daughters to inherit the estate of a a father cannot be applicable as it shall be repugnant to justice and morality (Section 3 (2) of the Judicature Act).”***

22. The Constitution 2010 made a milestone stride in including provisions that have completely outlawed discrimination on account of gender and status hitherto not part of our laws which necessitated reference to regional and international conventions.

**Article 10 (b)**

Provides as part of National values.

***“Human dignity, equity, sound justice, inclusiveness, equality, non-discrimination and protection of marginalized.”***

Article 27 (1)

**“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”**

Article 27 (3)

**“Women and men have the right to equal treatment including the right to equal opportunities, in political, economic, cultural and social spheres”.**

Article 27 (4)

**” The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour age, disability, religion, conscience, belief, culture, dress, language or birth.”**

Article 27 (5)

**‘A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause 27(4).**

Article 2 (4) of the Constitution provides;

**“Any law, including customary law that is inconsistent with this constitution is void to the extent of that inconsistency, any act or omissions in contravention of this Constitution is invalid.”**

23. It follows therefore that whether or not Rosa Fwamba was married to one Sangoro and stayed married to him and had children with him or not; she was then, and more so now under the current law entitled to inherit her father’s land irrespective of her marital status and therefore it cannot be said that she stayed on her father’s land from 1941 courtesy or on the good will of her brother. She had an equal right with her brother (s) to inherit and what was left for determination was how much of her father’s land she was entitled to, as her sons are now claiming her share.

24. Any registration that was done in the name of the brother whether secretly or within the sister’s knowledge is to be deemed to have been in trust for her and so I find.

25. The objectors have gone further to suggest that apart from claiming their mother’s share their uncle took them in since their birth, (or even childhood as is suggested by the petitioner) as his children, he educated and circumcised them and therefore they are entitled to a share of the estate as his children. They regarded the deceased as their father.

In defining a child the Act states;

**“3 (2) reference in this Act to ‘child’ or ‘children’ shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he expressly recognized or in fact accepted as a child of his own and for whom he has voluntarily assumed permanent responsibility.**

26. It is my considered view that the objectors herein have a valid case in pursuing what belonged to their mother, they therefore have a stake in this estate. Secondly their maternal uncle took them in, circumcised them (an important event in the life of a male African) and educated them. He took up responsibilities of a father, they cannot therefore be wished away, either way they have an interest in this estate.

27. The protest by the objectors therefore succeeds. In the interest of justice and for ease of

administration and distribution the first objector will represent his interest and the interest of his co-objector and together with the petitioners will be the joint administrators of the estate of Ngeiywo Cheptot Kiboi. A grant earlier issued to the petitioner is hereby revoked and a fresh grant issued accordingly.

28. Due to the age of the matter the co-petitioners are directed to jointly or separately within 45 days make proposals on mode of distribution consideration by the court. Costs in the cause.

**DATED and DELIVERED at BUNGOMA this 20<sup>TH</sup> OF DECEMBER 2016**

**ALI-ARONI**

**JUDGE**