



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS SUCCESSION APP. NO. 754 OF 2008

RE: ESTATE OF TUPTUBOR ARAP CHIRCHIR (DECEASED)

JEPSONGOK CHERUIYOT.....1ST PETITIONER

KIRWA TARUS.....2ND PETITIONER

VERSUS

DAVID MARITIM ROTUK.....1ST OBJECTOR

PETRONILA CHEPKURGAT KEBENEI.....2ND OBJECTOR

JUDGMENT

1. The deceased, Tuptubor Arap Chirchir, died intestate on 21st January 1983. He had three wives: Jepkemboi Bot Cherus; Sigei Taprandich; and, Jepsongok Cheruiyot. The latter survived the deceased. She is the 1st petitioner in this cause. The first house had five children; the second house two; while the last house had one child.
2. The primary issue for determination is the mode of distribution of a parcel of land known as Nandi/Ndalat/260 measuring 90 acres or thereabouts. The land has been subdivided into two portions: Nandi/Ndalat/742 measuring 18.23 hectares registered in the name of Cherus Bitok; and, Nandi/Ndalat/743 measuring 18.23 hectares registered in the joint names of Jepsongok Cheruiyot and Kirwa Tarus (the petitioners) in equal shares. The partition is contested in this cause.
3. Jepsongok Cheruiyot and Kirwa Tarus initially petitioned for a grant of letters of administration intestate in succession cause number 35 of 2008 at Kapsabet Principal Magistrates Court. A grant of letters of administration was made on 13th October 2008 and confirmed on 4th November 2008. That precipitated the present action. The objectors filed a summons for revocation of the grant dated 30th December 2008. The pertinent grounds were that the subordinate court lacked jurisdiction because the value of the estate exceeded Kshs 5,000,000; and, that the grant was obtained fraudulently or by concealment of material facts.
4. On 17th March 2009 the parties entered into the following consent at the High Court: first, that the grant of letters of administration and confirmation thereof issued at Kapsabet Principal Magistrates' Court succession cause 35 of 2008 be revoked; secondly, that a fresh grant of letters of administration be issued to David Maritim Rotuk, Petrolina Chepkurgat Kebenei, Jepsongok Cheruiyot and Kirwa Tarus; and, thirdly, that the title for parcel number Nandi/Ndalat/742 issued to Cherus Bitok be surrendered to the High Court for safe custody. Finally, the parties agreed that the dispute be determined by *viva voce* evidence.
5. David Rotuk testified on behalf of the objectors. He is 70 years old. He is a son to the deceased. He stated that the other objector, Petrolina Kebenei is the widow of his late brother Thomas

- Kebenei. In his opinion, the property should be distributed as follows: Cherus Bitok 30 acres; Thomas Kebenei 15 acres; David Rotuk 15 acres, Jepsongok Cheruiyot 15 acres and Kirwa Tarus 15 acres. He said that they had occupied those portions for over 30 years, planted trees and passed on some of the land to their children. He opined that it would be unjust to divide the land equally between the three households. He said that he and Cherus had been allocated their portions when their father was still alive. Under cross-examination, he denied that his father had bought him land in Kormaet measuring 30 acres. He said he bought it using his own resources. He also denied that his father had bought land at Sugoi for Thomas Kebenei for the consideration of one hundred cows.
6. The first petitioner testified that she is the third wife of the deceased. She said her husband gave Cherus Bitok about 40 acres of the Ndalat land. She said Thomas Kebenei was given 24 acres in a place called Sugoi while David Rotuk was given 30 acres in Kormaet. She said the deceased did not allocate the remainder of the Ndalat land. She was of the view that the remaining land be shared equally between the three households. When cross-examined, she conceded that she did not have the details of the purchase of the land at Kormaet and Surgoi or the consideration. In re-examination, she clarified that the consideration was one hundred cows and twelve cows respectively.
 7. Kirwa Tarus testified that Jepsongok Cheruiyot bought Nandi/Chemnoet/49, a separate piece of land. Regarding the suit property, he proposed that 45 acres should go to his brother Cherus being the first son of the first wife. The remaining 45 acres should be distributed to the other two houses. When cross-examined, he conceded that he had omitted the name of Cherus in the original succession cause at Kapsabet Magistrates Court. He confirmed the deceased died in 1983 before subdivision of the land into the two portions mentioned earlier. He confirmed that his brothers Cherus, Kebenei and Rotuk were living on the suit land. He had no documentary evidence about the purchase of the Sugoi and Kormaet land. He said he is currently occupying 8 acres of the Ndalat land, while his brothers Rotuk and Cherus are occupying 30 and 45 acres respectively.
 8. Both parties have filed written submissions. Those of the by the petitioners are dated 17th October 2014; those by the objectors are dated 30th October 2014. I have considered the oral evidence, the pleadings, depositions on record and the rival submissions. From the evidence and the pleadings, the key issue for determination by the court is how the original land Nandi/Ndalat/260 or the portion belonging to the deceased should be shared among the beneficiaries. A supplementary question is whether the subdivision of the land into the two portions Nandi/Ndalat/742 and 743 in the year 2006 or 2008 was valid.
 9. It is common ground that the deceased died on or about 21st January 1983. The land Nandi/Ndalat/260 was jointly registered in his name and his first son Cherus Bitok in equal shares. The subdivision into the two portions Nandi/Ndalat/742 and 743 in the year 2006 and 2008 and registration into the names of Cherus Bitok on the one hand, and Jepsongok Cheruiyot and Kirwa Tarus on the other hand, was done on the basis of the annulled grant in succession cause 35 of 2008 at Kapsabet Magistrates Court.
 10. I find that the entire process of subdivision and new entries was tainted by material non-disclosure and fraud. The names of all the beneficiaries of the estate were not disclosed. That was in contravention of section 51(2) of the Law of the Succession Act. From the summons for revocation of the grant, it is also evident that notice of the application for a grant was not delivered to all beneficiaries as required by Rule 26 of the Probate and Administration Rules. It follows as a corollary that the necessary consents to the grant and the mode of distribution required by sections 51 and 76 of the Law of Succession Act as read with Rules 26, 40(8) and 41(8) of the Probate and Administration Rules were not obtained. See *Re Estate of Evaristus Njagi Mugo* High Court, Embu, Succession Cause No. 324 of 2005 (2008) eKLR.
 11. Furthermore, from the apparent size and value of the land, the subordinate court lacked pecuniary jurisdiction to deal with the succession cause. Section 47 of the Law of Succession Act states as follows;

“47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”

12. The subordinate court's jurisdiction in such matters is limited to the value of Kshs 100,000. The grant was made pursuant to a certificate of urgency filed in that court on 13th October 2008. It was confirmed on 4th November 2008 well before expiry of six months; again under a certificate of urgency. In view of the consent of the parties at the High Court dated 17th March 2009 that I set out earlier, the subdivision and resultant transfers were invalid. I would have no hesitation in cancelling the transfers and ordering the land to revert to the original title of Nandi/Ndalat/260 in the joint names of the deceased and Cherus Arap Bitok.
13. I will now confront the elephant in the room. How should the suit property be distributed? I have studied the green card marked PCK 8 annexed to an earlier deposition of Petrolina Kebenei sworn on 30th December 2008. It shows that as far back as 4th February 1959, the deceased and Cherus Arap Bitok were jointly registered as the proprietors of the suit land with a half share each. From a legal standpoint, there would be nothing to prevent Cherus Arap Bitok from claiming 45 acres (half of the suit property). However, before the deceased passed on, he had allocated 30 acres of the suit land to Cherus Arap Bitok, his eldest son from the first house. Cherus has lived on the land for over thirty years. Furthermore from the oral evidence in court, there was no serious contest about it. I would thus order that the portion of 30 acres now occupied by Cherus Arap Bitok be apportioned to him. That is not to say he is not entitled to a share of his father's estate. I would accordingly add to him 15 acres to bring him to his rightful share of half of the property. I have noted that he is not laying claim to a greater portion.
14. It is common ground that the deceased was polygamous. Two of his wives predeceased him. The law is clear on the subject. Section 26 of the Law of Succession Act requires the court to make reasonable provisions for all the dependants. Section 27 gives the court wide discretion to order a specific share to be given to a dependant. A closer reading of sections 26, 27, 29, 38, 41, 42 and 66 of the Act places all the children of the deceased on an equal footing to inherit the estate. But the court must take into consideration any advancement or gift to a dependant during the lifetime of the deceased. The law does not discriminate between sons and daughters or married daughters. See *Re Estate of Simeon Kamau Kuriu*, Eldoret High Court Succession Cause 218 of 1997 (unreported). I note however that the three surviving daughters of the deceased Priscilla Chelimo and Mary Jepwambok Sang from the first house; and, Cheruto Tabunei from the second house are not claiming any share of the estate.
15. As the deceased was polygamous, section 40 of the Law of Succession Act is material. It provides as follows-

“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 estate shall, in the first instance, be divided among the houses according to the number 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 estate within each house shall then be in accordance with the rules set out in sections 35 to 38”

16. Jepsongok Cheruiyot, the 1st petitioner and surviving widow, is entitled to a portion of the net intestate estate as one unit of the third house. The objectors submitted that she had been given other land by the deceased being Nandi/Chemnoet/49. The widow however insisted that she bought the land using her own resources. Kirwa Tarus testified before me that Jepsongok had bought Nandi/Chepnoet/49 through her resources. He said he witnessed her paying the purchase price. When David Rotuk took the stand, he did not lead evidence on the purchase of that land to show it is the deceased who bought it. To be fair to him, his learned counsel Mr. Momanyi, tried to raise the matter during re-examination. That was overruled for running counter to the rules of evidence, the matter having not arisen during the cross. As it is, the land is registered in the name

- of Jepsongok Cheruiyot. I have no evidential basis to hold that Nandi/Chemnoet/49 belonged to the deceased or forms part of the net intestate estate. If it had, then I would have taken it into account under section 28(c) of the Act in determining the share to go to the widow.
17. From the evidence, it is clear that the deceased had purchased other land for David Rotuk and Thomas Kebenei at Kormaet (Tuiyo farm) measuring 30 acres and at Sugoi measuring 24 acres. The two had settled on those portions during the life time of the deceased. When they tried to return to Nandi/Ndalat/260, the deceased had rebuffed them. They nevertheless settled on some portion of the Ndalat land. When David Rotuk testified, he did not lead evidence to show that either he or his brother Thomas Kebenei had bought those pieces of land using their own resources. It was information especially in their knowledge. When cross-examined on the matter he stated that he was unaware that the deceased paid for the land for consideration of livestock.
 18. Jepsongok Cheruiyot, the surviving widow, was emphatic that the deceased bought the land for the two sons for 12 cows and 100 cows respectively. On cross-examination, she said the Sugoi land was bought from one Wilson Koech. She had no details of who sold the Kormaet land. She did not have documentary evidence or the finer details of the conveyance. Kirwa Tarus also testified that the deceased bought the two portions of land for David Rotuk and Thomas Kebenei. I would then have expected David Rotuk in his testimony to lead cogent and direct evidence on how he purchased the land. Like I stated it was information especially in his knowledge. The widow of Thomas Kebenei, who is the 2nd objector, adopted the evidence of Rotuk. She never took the stand. I have reached the inescapable conclusion that the parcels of land at Sugoi and Kormaet were bought by the deceased and given during his lifetime to David Rotuk and Thomas Kebenei respectively. I will thus take those gifts into consideration in determining any share for the two to the net intestate estate.
 19. I also find that it was unjust and against the Law of Succession Act for Kirwa Tarus and Jepsongok Cheruiyot to allocate themselves 9.115 hectares each of the suit land. As I stated earlier, the purported partition of the land of the deceased was unlawful and void.
 20. For all the foregoing reasons, and in the interests of justice, the suit land shall be distributed as follows: Cherus Arap Bitok shall get 45 acres. The third house consisting of one child Norah Chepkorir and the widow Jepsongok Cheruiyot shall get 15 acres. I have considered that David Rotuk and Thomas Kebenei had been given other land by the deceased at Sugoi and Kormaet measuring 24 acres and 30 acres respectively. But since they had occupied portions of Nandi/Ndalat/260, and in line with sections 27 and 28 of the Act, they will share 15 acres, which is to say 7.5 acres each. The shares I have given the two are not unreasonable considering their other sizeable gifts of land *inter vivos*. The remaining 15 acres shall go to Kirwa Tarus.
 21. For the avoidance of doubt, I finally order as follows-
 - a. THAT the partition of parcel number Nandi/Ndalat/260 into two portions being Nandi/Ndalat/742 measuring 18.23 hectares in the name of Cherus Arap Bitok; and, Nandi/Ndalat/743 measuring 18.23 hectares registered in the joint names of the Jepsongok Cheruiyot and Kirwa Tarus (the objectors) in equal shares is hereby *cancelled*. I order that the land shall revert to the original title of Nandi/Ndalat/260 in the names of the deceased and Cherus Arap Bitok with a half share each.
 - b. That parcel number Nandi/Ndalat/260 measuring approximately 90 acres shall be now distributed as follows-
 - i. Cherus Arap Bitok shall get 45 acres;
 - ii. Jepsongok Cheruiyot (in trust for Norah Chepkorir) shall get 15 acres;
 - iii. Kirwa Tarus shall get 15 acres;
 - iv. David Maritim Rotuk shall get 7.5 acres; and, lastly,
 - v. Thomas Kebenei, or his estate, shall get 7.5 acres.
 - c. THAT the grant of letters of administration intestate issued to David Maritim Rotuk, Petrolina Chepkurgat Kebenei, Jepsongok Cheruiyot and Kirwa Tarus by this Court on 17th March 2009 is confirmed in terms of this judgment. A certificate of confirmation of the grant shall issue in accordance with the distribution of the estate in order **b**) above.
 - d. THAT considering that this is a family dispute, there shall be no order on costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 22nd day of January 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

No appearance for the petitioners.

No appearance for the objectors.

Mr. J. Kemboi, Court clerk.