



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 25 OF 2009

IN THE MATTER OF THE ESTATE OF LEAH CHESONGONY CHERUIYOT.... DECEASED

BETWEEN

SISILIA MWIKALI KIRWA PETITIONER/RESPONDENT

AND

HELLEN CHERUTO1ST APPLICANT/OBJECTOR

JAMES S. KPROTICH2ND APPLICANT/OBJECTOR

J U D G M E N T

The late **LEAH CHESONGONY CHERUIYOT** died on the 20.5.1992. The petitioner herein filed the current succession and was issued with a grant on the 27.3.2009. The grant was later confirmed on the 10.11.2010. The objectors herein filed their objection to the grant on 4.3.2011. The matter proceeded to full hearing with the objectors being the plaintiffs while the petitioner was made to be the defendant.

PW1 ABRAHAM SIMATWA, testified that the deceased was his auntie. Sometimes in 1990 the deceased informed him that she wanted to distribute her estate. A document was written at an office at Lumakanda and he was given a copy of the same to keep. He signed the document as a witness. He produced the document dated 31.12.1990 he had been keeping as an exhibit. It is his evidence that the deceased distributed her property to children and a church. The children are **JAMES KIPROTICH**, **STEPHEN KIBET** and **HELLEN CHERUTO**. There was a 4th child **ELIZABETH CHEPKOECH** who is married. She was not given any property. PW1 knows the petitioner as the mother of Stephen Kibet and James Kiprotich. She was the wife of David Kirwa who was the deceased's son. David Kirwa died before his mother's death. The petitioner does not live on the suit land but went back to the land recently. Hellen Cheruiyot was adopted by the deceased.

PW2 HELLEN CHERUTO, testified that she was adopted by the deceased when she was young. She saw the deceased with her brother David Kirwa. David Kirwa had two children James and Stephen but she did not see their mother. Stephen passed away and left his wife **CHRISTINE CHERUBET KIRWA** and six children. The deceased left plot number **KAKAMEGA/SIRIGOI SCHEME/312** measuring 45 acres. The deceased died in 1992 when she was 12 years old. She was born in 1980. The deceased gave three acres to the church and the remainder was to be distributed to the three children namely herself, James and Stephen. She was to take 12 acres which include the deceased's house while

James and Stephen were given 16 acres each. She was not aware of the succession cause and only came to know about it when the petitioner took surveyors to the land. She would like the land to be divided as per the deceased's wish. She got married in the year 2004 and utilizes part of the land. While she was growing up she only saw the deceased with James and Stephen. At one time the petitioner's son by the name Simon Musyoki died and they allowed her to be buried on the portion she inherited.

JAMES KIPROTICH SIROREI was **PW3**. His evidence is that his father is David Kirwa who was the son of the deceased. When he was growing up he only saw the deceased living with himself, his brother Stephen and sister Elizabeth Chepkoech. They used to call the deceased as their mother. Stephen was born in 1962 while he was born in 1965. Hellen was later adopted and he calls her his auntie. When he grew up later he was informed that the petitioner **SISILIA** was his mother. Sisilia was living at Soy Town when the deceased died and she was not living with them. The deceased left plot number 312, cows, furniture and a house on the land. Forty days after the death of the deceased there was a remembrance ceremony and PW1 removed the Will left by the deceased. He came to know about the distribution of the estate. He saw people on the land brought by the petitioner demarcating it. His mother has other children who are included in the succession cause. His brother Stephen died in 2008 and left his wife and children. He allowed Simon Musyoki to be buried on the suit land. The house on the suit land was given to Hellen. He has his own house on the portion given to him. His brother Stephen also has his own house on the land. The petitioner was not given any land. His sister Elizabeth is married and is not claiming any land.

PW4 was **SUSAN LONA KONYA**. She was a neighbor to the deceased. Her evidence is that she was born in 1960 and in 1969 they relocated to Soy. The deceased welcomed them. She saw the deceased living with her three children namely Stephen, James and Chepkoech. Hellen was adopted by the deceased in 1989. Hellen was brought up by Christine who is the wife of Stephen. Stephen is now deceased but left his wife and children. In 1999 she was informed by her sister that the petitioner was indeed the mother of James and Stephen. She has been living in Mombasa and she had visited her home in 1999. In the same year 1999 she heard that somebody by the name **MUNYI** who is a soldier had bought land for the petitioner in Uasin Gishu. The deceased was a friend to her father. The deceased used to run a hotel at Soy. She did not see the petitioner at the suit land.

AMBROSE KIMAIYO KOECH was **PW5**. He knew the deceased as a neighbor since 1970. The deceased used to work at a white settler's farm with his father. He saw the deceased with three children namely Stephen Kibet who is deceased, James Kiprotich and Chepkoech, a girl. Hellen was brought in later in 1989. He came to know about the petitioner in 1992 during the burial of the deceased. The petitioner lives about 1 kilometer from Soy and he never saw her living on the suit land. One side of the land was given to a church and there was a house that was demolished by the church. He went to the same school with James. He used to work for the Air-force and he was in prison between 1982 and 1987.

The petitioner, **SISILIA MWIKALI KIRWA**, testified as **DW1**. Her evidence is that she was married to David Kirwa who is the deceased's son. She had one child with David Kirwa who is Stephen Kirwa, deceased. Her husband died in 1963 and James was born in 1965. She used to have children with Leah's workers and Leah would take them as her own children. She filed the succession and included all her children. She gave each of her sons five acres and the daughters got 2 acres each. Hellen Cheruto was adopted by her mother in-law and she gave her three acres. It is her evidence that the land belonged to her mother in-law and not to David Kirwa. The objectors were aware when she filed the succession cause but they are not agreeable to the mode of distribution. She used to cultivate the land even when Leah was there. She processed 10 title deeds for all the beneficiaries. She got 3.8 acres. She took care of the deceased and she was present during her burial. She was not present during the remembrance ceremony.

The petitioner further testified that she used to live in a small house within the suit land but the house was given to the church by the deceased. She moved into the deceased's main house and lived with her. Her children Stephen and James used to assault her and she moved out and went to live at Soy. Elizabeth Chepkoech is one of her daughters who was born in 1966. She has 11 children. When David died they only had one son Stephen. She has never left the deceased's homestead except in 1990. Her husband was

living with his mother. She knows PW1 who is a relative to the deceased. When the problem started she went to talk with PW1 who was not able to assist her. She denied that she left the deceased's compound in 1963.

JOHN KARANJA KARIUKI is a village elder at Soy Centre and was DW2. His evidence is that the deceased left the suit land to the petitioner. The petitioner has about 10 children. There is a church on the plot that was established in 1985 and the deceased gave a portion of the land to the church. The petitioner was living in a house next to the church but the house was later demolished and the petitioner went to live with the deceased in the same house. The petitioner did not remarry elsewhere neither did she leave Leah's homestead. Some of the petitioner's children have not lived on the suit land. **DW3 TIMOTHY MAKAU MURGOR** is the petitioner's son. His evidence is that he was born in 1974 and their last born was born in 1980. The deceased was his grandmother. He knows the objectors. He calls the late David Kirwa as his father although he is not his biological father. His mother has been living on plot number 312 which belonged to the deceased. They are eleven children but two are deceased. The petitioner's children are *Stephen Kibet (deceased), James Kiprotich, Elizabeth Chepkoech, Isaac Matheka, Naomi Mbeke, Anne Chepchumba, Magdaline Chemeli, Timothy Makau, Nashon Ndete, Thomas Nduva* and the late *Simon Musyoki*. He lived on the suit land in a house next to the church. The house was later given to the church and was used as the church. James and other church members later demolished the house. James used to assault the petitioner and she moved out. The petitioner has been using the land and he has also been using his portion of the land.

Counsel for the petitioner filed written submissions. I have gone through the submissions and counsel reiterates that the mode of distribution by the petitioner is fair. It is also contended that the petitioner lived with her children on the suit land. All the petitioner's children are the deceased's dependants.

The main issue for determination is who are the deceased's dependants, how the deceased's estate should be distributed, whether the deceased left any WILL. The petitioner contends that when her husband died in 1965 they had only one son, the late Stephen. She subsequently used to get children with the deceased's workers. She contends that she has all along lived on the suit land and her children are dependants of the deceased. DW2 testified that all along the petitioner has been living on the suit land. On the other hand there are the objectors who testified that they lived with the deceased together with the late Stephen and Elizabeth Chepkoech. Hellen Cheruto testified that she only came to know of the petitioner after the death of the deceased. James testified that he took the deceased as his mother and it is only when he was a grown up when he learnt that the petitioner was his biological mother. There is the evidence of PW4 Susan Lona who informed the court that she is a neighbor and she never saw the petitioner living with the objectors. The same evidence was adduced by PW5.

The evidence of PW1 who is a relative of the deceased and an elderly man is to the effect that the deceased distributed her estate. It is also his evidence that he was given a WILL to keep and only to produce after the deceased's death. He does not recall the office where the WILL was done. I have looked at the document which is dated 31.12.1990 and is addressed to the District Commissioner, Kakamega and copied to the District Officer Turbo. The details contained in the document is quite in line with the evidence adduced by the objectors. According to the WILL the deceased distributed her land to *Stephen Kibet, James Kiprotich* and *Hellen Cheruto*. *Elizabeth Chepkoech* is mentioned but it is indicated that she is married and has no claim over the property. The petitioner is also mentioned in the document and it is indicated that the petitioner got five sons and two daughters with one Fredrick Munyi from Ukambani after the death of the deceased's son. It is further indicated that the deceased had arranged to buy five acres for the petitioner but the petitioner refused because she has put up a six roomed house where she cannot evacuate from. According to the petitioner this is the house which she used to live with the deceased. I do find that line of evidence to be incorrect as in the same document the deceased gives a house to Hellen Cheruto referred to as Ex-Swiston House. This house was given to Hellen Cheruto and is the same house the petitioner claims to be six roomed. It is indicated that Hellen Cheruto was adopted through the Roman Catholic Fathers to assist the deceased as her daughter. The document gives Hellen Cheruto 5.1 Hectares, Stephen 6.4 Hectares and James 6.4 Hectares. It is indicated in the same document that Stephen used to assault the deceased and this is in line with the

evidence of James who testified that Stephen was a drunkard and he used to assault the deceased.

From the evidence on record it is established that the deceased indicated how she wanted her estate to be inherited. The deceased died in 1992 and this cause was filed in 2009, a period of 17 years after the death. It is not clear how the property used to be managed in between this period.

Given the evidenced on record it is established that the petitioner has not been living on the suit land all her life. She informed the court that she left the suit land due assault by James and Stephen. According to Hellen Cheruto she never used to see the petitioner living with the deceased. PW1 who is a close relative of the deceased and a very elderly man informed the court that the petitioner has not been living on the suit land. It is also established that the deceased did not take all the other children of the petitioner to be her grandchildren. According to DW2 some of the petitioner's children have not lived on the suit land. The documents prepared by the deceased indicate that the petitioner got five other children but the deceased did not even give their names. It is my finding that all the children of the petitioner except Stephen, James and Elizabeth are not the dependants of the deceased. It is established that the petitioner never used to live with her other children on the suit land. A photograph was produced showing the deceased with Stephen, James and Elizabeth. Although it can be concluded that that photograph was taken way before the other children were born, it also indicates that those were the children the deceased considered to be her dependants. The independent witnesses have confirmed that throughout her life the deceased took those three children as her own children. She confirmed that aspect in the Will she left. According to DW2 some of the petitioner's children have not lived on the suit land. I do find that the land belonged to the deceased and not to David Kirwa who was the petitioner's husband. The deceased was entitled to give her land to anyone of her choice. The act of the petitioner to file the succession cause and decide on the mode of distribution is the source of the dispute. I do agree with the objectors that having lived with the deceased on the suit land in the absence of the petitioner and her other children, they were the ones entitled to file the succession cause. It is the evidence of James that he was willing to give his mother part of the land but his mother filed the succession cause without involving him.

The document produced by PW1 was witnessed by one **JOSEPH ROTICH** who signed on the **21.3.1991** and PW1 who signed on the **31.3.1991**. I have gone through that document and I am satisfied that the same can qualify to be a Will and it does give the deceased's intention as to how she intended how estate to be distributed. Section 11(c) of the Law of Succession Act allows a Will to be witnessed in different dates. The deceased had the capacity to make the Will. PW1 who is an aged man witnessed the making of the Will and he kept it as advised by the deceased. Even the objector's were not aware about it until when PW1 removed it during the remembrance ceremony. I do not see any fraud on the part of any party to the processing of the Will.

The next issue is whether the petitioner should be considered as a dependant and beneficiary of the deceased's estate. The Will does indicate that the deceased had intended to give the petitioner five acres of land but the petitioner declined. James testified that he was willing to give his mother part of the land but is not happy because his mother filed the succession without including him. It is clear that the petitioner also used to live in the suit land with her late husband. Even though the petitioner left the suit land and moved to Soy, and even though the deceased did not give any share to the petitioner I do find that the petitioner was to some extent a dependant of the deceased. It will be unfair to leave out the petitioner without benefiting from the suit land. James and Stephen's wife should take into account the fact that the petitioner is James's mother and the mother in-law of Christine. I will therefore consider the petitioner as one of the beneficiaries of the deceased even though she was not included in the Will. Hellen Cheruto is the deceased's daughter by way of adoption and is a beneficiary of the deceased's estate.

Lastly, how should the deceased's estate be distributed? The deceased gave Hellen Cheruto 12 acres plus the house she used to live. I do not see any reason to reduce that share. I will leave the wishes of the deceased intact. James and Stephen were each given 16 acres. I do find that the petitioner's share has to be created from these two portions of land. It is clear that Stephen was the first born. The share of Stephen shall go to his widow Christine Cherubet Kirwa who shall hold in trust for their children. According to the evidence on record the land is 45 acres. It is clear that the three acres meant for the church have already been given out. I will give him one acre more than James and do proceed to distribute

the estate as follows:-

PLOT NO. KAKAMEGA/SERGOIT SCHEME/312

1. **Hellen Cheruto ----- 12 acres**
2. **Christine Cherubet Kirwa -----11 acres**
3. **James Kiprotich Sirorei -----11 acres**
4. **Sisilia Mwikali Kirwa -----11 acres**

In the end I do find that the objection by the objectors is merited and the same is allowed. The grant issued to the petitioner is hereby revoked. The ten title deeds namely Plot numbers **KAKAMEGA/SERGOIT/1995, 1996, 1997, 1998, 1999, 2000, 2002, 2003, 2004, and 2005** are hereby revoked. A fresh grant shall be issued to Hellen Cheruto and James Kiprotich Sirorei who shall be the administrators of the deceased's estate and shall effect the new grant.

Delivered, dated and signed at Kakamega this 20th day of March 2014

SAID J. CHITEMBWE

J U D G E