REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

SUCCESSION CAUSE NO.89 OF 2002

IN THE MATTER OF THE ESTATE OF:

S B S.....DECEASED

AND

IN THE MATTER OF AN APPLICATION FOR GRANT OF LETTERS OF ADMINISTRATION

AND

D S S .....1ST ADMINISTRATOR

S S S.....CO-ADMINISTRATOR

JUDGMENT

1. S BS (hereinafter "the deceased") died on 12th June, 1998. He left behind two widows constituting two houses and 18 other beneficiaries these are as follows:-

A. 1ST HOUSE

1. G C S – 1st widow
2. D S S
3. B S S
4. L S
5. S M
6. J P
7. M C S
8. E C S
9. A C S
10. V C S

B. 2ND HOUSE

1. A N S - 2nd widow
2. S S
3. M S
4. K S
5. T S
6. P N S
7. T T S
8. K S
9. V S
10. C V S

He left behind eleven (11) sons and seven (7) daughters. Each house had nine children.

2. In or about between July and September, 2001, the clan members met and attempted to distribute the estate of the deceased. It would seem from Rexh 6 produced by S S S that the clan distributed the estate only between the two houses and not to each beneficiary. Out of the approximately 531 acres identified as available for distribution of the deceased's immovable assets, the 1st house was awarded 197 acres whilst the 2nd House was given 334 acres. It would seem that the 1st House wasnot satisfied and D S S filed the present Succession Cause for re-distribution of the estate.

3. The grant of letters of administration intestate in respect of the estate of the deceased was consequently given on 11th April, 2005 to D S S and A N S the second widow. Later on however, S S S replaced his mother A N Sas a co-administrator to the estate. After years of protracted proceedings, the parties failed to agree on distribution whereby the matter was finally heard before me on the issue of distribution on 13th, 18th and 19th March, 2014.

4. The parties did not fully agree as to which property constituted the estate of the deceased. There are those who alleged that some properties were part of the estate whilst others opposed such contention. Other properties were also said to be under ligation with 3rd parties. Accordingly, the parties submitted the following properties as forming part of the estate and subject to distribution.

A. Immoveable

I) Elgon/Kaptama [particulars withheld] – 13 Acres

ii) Saboti/Saboti Block [particulars withheld] – 15 Acres

iii) Saboti/Saboti Block [particulars withheld] – 39 Acres

iv) Elgon/Kaptama [particulars withheld] – 12.3 Acres

v) Museng Farm – LR. NO. [particulars withheld]– 130 Acres

vi) Cherongos Farm – LR. NO. [particulars withheld] – 102 acres

vii) Cherongos Farm LR. NO. [particulars withheld]– 88 Acres

Viii) Kipsagam [particulars withheld] – 33 Acres

ix) Museng Farm (Kaitabos) LR. NO. [particulars withheld] – 98 Acres

x) Saboti/Saboti/Tiot Luget – [particulars withheld] – 6.3 Acres

xi) Saboti/Saboti/Tiot Luget – [particulars withheld] - 19 Acres

xii) Chesito Market Plot No. [particulars withheld]

xiii) Chesito market Plot No.[particulars withheld]

xiv) Kimilili/Kimilili [particulars withheld]

B. <u>Moveable</u> .[particulars withheld]

I) Mv Reg.– Toyota Lorry

ii) Mv Reg.– Saloon Renault

iii) Mv Reg.– Same Tractor

iv) Mv Reg.– Mersey Ferguson

v) Mv Reg.– Land Rover

vi) Mv Reg. - Mitsubishi Canter

viii) Mv Reg– Toyota Pick Up

ix) Mv Reg. - Mersey Ferguson

x) Mv. Reg.

xi) Cattle

5. From the testimony given in court, it turned out that only a few of the beneficiaries who for the last fifteen (15) or so years have been enjoying or using the assets of the estate for their own personal gain. It became clear from the testimony of the beneficiaries that some of the daughters of the deceased had been married and were not living within the properties of the deceased. All the beneficiaries were in agreement without exception that all of them were entitled to share in the estate of the deceased. There are those who have since constructed and have made improvements to the properties. These urged the Court to allocate them those areas in which they were currently in occupation. Those who had not been using any property or not occupied any portion of the property of the deceased told the Court their desired area of allocation.

6. After hearing the parties, analyzing both the Affidavit evidence oral testimonies, and the submissions of Learned Counsel my view is that the following issues fall for determination.

a) What is the position of the clan distribution? Is the court bound by the same?

b) Is each beneficiary entitled to the area he has hitherto occupied and developed?

c) Do the properties known as Saboti/Saboti block [particulars withheld]Tiot Luget [particulars

withheld] and [particulars withheld], respectively constitute part of the estate and therefore subject to distribution?

d) Are those properties that are part of the estate, to wit, Museng Farm (Kaitabos LR NO. [particulars withheld], Elgon/Kaptama/[particulars withheld] and Kimilili/Kimilili/[particulars withheld], but which are still under litigation with 3rd parties subject to distribution? If not, what orders should be made in respect to them?

e) How should the estate be distributed amongst the beneficiaries?

Issues

a) Distribution of the estate by the clan.

7. From Rexh 6, it is clear that the clan members of the late S B S held various meetings including on the 14th and 28th July, 2001 and 4th and 18th August, 2001, 23rd September, 2001 and 21st October, 2001. In those meetings, the clan distributed all the immovableand movable properties of the estate between the two families of G S and A N S, the widows. It would seem that the families were satisfied and settled for sometime. However, a year later, the 1st Petitioner who is the 1st born in the 1st house came to Court and sought to administer the estate of the deceased. Although at the time he came to Court he only cited the children of the 1st widow as the only beneficiaries of the estate and only two properties Saboti/Saboti Block [particulars withheld] Tiot Luget [particulars withheld] and [particulars withheld] were disclosed, the 2nd family got wind of the Succession Cause and joined the cause. The 1st House seems to have been aggrieved by the distribution that the clan had proposed and/or effected.

8. I have carefully considered the distribution proposed by the clan. The said distribution was based on the two houses of the deceased, i.e 1st and 2nd House. Whilst the moveable assets seem to have been equitably distributed between the two houses as no immediate dispute of disagreement arose, it is not so with the immoveable assets. As earlier indicated, although both houses had equal number of children, the 1st house was allocated approximately 197 acres whilst the 2nd family was allocated 334 acres of immoveable property, land. It is for this uneven distribution that the succession of this estate has taken over a decade to settle. In the Affidavits, D S, the 1st Administrator from the 1st House kept on insisting that the second house should cede some of the land it currently occupies to the first house so as to make the distribution equal. Of course S S S for the 2nd House could hear none of that. As a result, the matter dragged on.

9. To my mind, the proposed distribution by the clan run foul of Section 40 of the Law of Succession Act, Cap 160 Laws of Kenya (hereinafter *"the Act"*). That Section provides:-

"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 of children 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 in Sections 35 to 38." (underlining mine).

It is clear from the above provision that the distribution in a polygamousunion must be equal in accordance with the number of the children each house has and not otherwise. The clan distribution did not comply with this requirement. In its proposed distribution, the 2nd House seems to have been favoured by getting more immoveable property as opposed tothe 1st House leading to disagreements between the two (2) houses.

10. Accordingly, the distribution of the estate as undertaken by the clan cannot stand and must be set aside, as I hereby do. In this regard, all the properties of the estate of the deceased as agreed by the parties and set outin paragraph 3 above are up for consideration in the distribution. Any other property dealt by the clan and not submitted to the Court as set out in paragraph 3 above is not subject of this Judgment. Accordingly, sincethe deceased passed on after 1981, this Court is not bound by thedistribution of the estate as undertaken by the clan in or about 2001 and shall undertake the distribution of the estate in accordance with the Law of Succession Act, Chapter 160 of the Laws of Kenya.

b) <u>Is each beneficiary entitled to each area he has hitherto occupied and developed?</u>

11. Under Section 42 of the Act, it is provided that:-

"42. Where-

a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

b) property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35, that property shall be taken into account in determining the share of the net intestate finally accruing to the child, grandchild or house; or taken had he not predeceased the intestate that property shall be taken into account in determining the share of the intestate estate finally accruing to the child, grandchild or house."

12. To my mind, this means that the law recognizes that during ones lifetime he/she may settle any of his/her properties upon any of his/her beneficiaries. Upon such a person's demise, it is a requirement that such a property settled should be taken into account when distributing the estate. This in my view means that, such a settled property or portion will not be subject to distribution but will be taken into account when undertaking distribution. That it will not be removed from the hands or possession upon whose beneficiary it was settled by the deceased. This is so in order to avoid a situation whereby any particular beneficiary is favoured by having to share twice in the property of the deceased, that is, during his life time, and after his demise.The provision seeks to maintain equity in the distribution of a deceased's estate. In this regard, Section 42 of the Act seeks to respect the wishes and decisions arrived at by the deceased during his lifetime. It would seem therefore that, once a deceased has settled any property during his lifetime, the same may not be subject to disruption after his demise.This presupposes that in the event any person felt aggrieved with such a settlement, he has the opportunity to raise the issue with the settlor whilst he is still alive. In other words, the law respects how a person decides to deal with his free property during his lifetime.

13. It is for this reason that, in situations where there are more than one house, the Court would and indeed should be very slow to uproot and remove the widows from the properties and/or spots where they have been living and/or settled by the deceased during his lifetime. This is so because, if during his lifetime the deceased had made a conscious decision that his widows would be settled and live in a particular manner, place or area, why should such a conscious decision be interfered with upon his demise? In my view, what the family court should do, is to take into account such circumstances when carrying out distribution so as to be equitable in the circumstances.

14. In the case before me, there was evidence that the widows were living in specific properties during the lifetime of the deceased. G C S (1st widow) lived in Museng LR NO.[particulars withheld] and has to date continued to live thereon on a permanent premises. A W S (2nd widow) was occupying Cherongos farm LR. No.[particulars withheld] during the lifetime of the deceased but upon his demise, she moved to Cherongos Farm LR. NO.[particulars withheld] wherein she has a permanent residence.

15. Apart from the widows, there was no sufficient evidence before me to show or suggest that any of the other beneficiaries had been settled by the deceased in any of the properties during his lifetime. I am alive to the submissions of Mr. Areba, Learned Counsel for Mr. D S on this issue. I am also alive to the fact that most of the beneficiaries from the 1st House seemed to suggest that D S S had built a residence

in Saboti/Tiot Luget [particulars withheld] and [particulars withheld] before the demise of the deceased, but there was no acceptable evidence that he had been settled by the deceased

on those properties. Indeed, it should be recalled that in none of the very many Affidavits sworn by the said D S S starting with the one filed in support of the very first application for confirmation on 8th May, 2003 to the very last Witness Affidavit sworn as late as 11/2/2014 did he, D S, state that he or any other beneficiary had been settled by the deceased. The fact that he may have built his house on that property during the lifetime of the deceased does not give him any priority thereon over the others. The insistence by his siblings about him having been settled by the deceased was but an afterthought.

16. Accordingly, I hold that the deceased did not settle any of his properties on any particular beneficiary during his lifetime. Any developments carried out by the beneficiaries on the properties they have been occupying is therefore subject to the final distribution of the estate.

c) Do the properties known as Saboti/Saboti Block [particulars withheld] Tiot Luget particulars withheld] and [particulars withheld] constitute part of the estate and therefore subject to distribution?

17. D S S testified that the above properties belonged to him. That he had purchased the same from one Philip Kigen in or about 1997. As at the time he purchased the same, Philip Kigen had not yet been registered as the owner, that he and Philip went to the Lands Office and caused Phillip Kigen's name to be replaced with that of D S.That when the titles finally came out, the properties were in the names of D S S. He produced in evidence, the titles in respect of the said properties. He also produced a copy of a sale agreement dated 16/2/1997.

18. D S called John Kirui (PW2) as his witness. Mr. Kirui told the Court that he had leased a portion of 2 acres from the Saboti/Saboti Block [particulars withheld] Tiot Luget [particulars withheld] in the years 1996 and 1997 from Philip Kigen whowas the owner of that property. That, he later learnt that the same had been sold to D S and he was refunded the money he had paid for the lease for the year 1997.

19. S S S testified that as far as he was concerned, the above properties formed part of the estate of their late father. That D S had irregularly caused himself to be registered as the owner. He admitted that he had no evidence to show that it was his late father who had acquired the properties. RW2, A N S told the court that the documents relating to the properties may have been in the possession of her co-wife G C S the mother of D and that therefore she had nothing to show that the properties were purchased by her late husband.

20. I have examined the evidence on record and submissions of counsel. There is an agreement of sale dated 16/02/97 between one Philip Kigen and D S the former selling some undisclosed properties to the latter. The consideration is shown to have been Ksh.560,000/=. The document relates to a total of 9.5 acres but does not disclose which particular property it was in relation to. It cannot therefore be evidence of the purchase of the above properties by D S.

21. I have also seen on record the title deeds for the properties. They are in the names of D S S. The title for Tiot Luget/[particulars withheld] was issued on 25th July, 1998 whilst the one for Tiot Luget/[particulars withheld] was issued to him on 17th September, 1998. In Tiot Luget/[particulars withheld] David is shown to be the 2nd registered owner after the Government of Kenya. His was therefore first registration under the former Registered Lands Act, Cap.300. Under the Provisions of that law, such registration was unassailable.

22. As regards Tiot Luget/[particulars withheld], he is the third registered owner. There was no evidence that was produced to show who were the first two owners. That title was issued on 27th July, 1998. The deceased passed away on 12th June, 1998. Is it feasible that upon the demise, the deceased's eldest son would rush to have himself registered as owner of his father's properties within three (3) months of his demise. I entertain doubt. In any event, I have carefully read R1 Exh6 the minutes of the

clan meetings of 14/7/01,28/9/01 and 21/10/01 and there is nowhere that the above properties were indicated to belong to the estate. Further, none of the beneficiaries indicated that D S had wrongly taken over possession of or had the properties transferred to his name.

23. Accordingly, I am satisfied and so hold that the properties known asSaboti/Saboti Block [particulars withheld] Tiot Luget[particulars withheld] and [particulars withheld] do not form part of the estateof the deceased as they are private property of D S S.

d) Are those properties that are admittedly part of the estate, to wit, Museng Farm (Koitabos) LR NO.[particulars withheld], Elgon/Kaptama [particulars withheld] and Kimilili/Kimilili[particulars withheld] but which are still under litigation with 3rd parties subject to distribution? What orders should be made in respect of them?

i) Kimilili/Kimilili[particulars withheld]

24. This is a plot at Kimilili Township. There is evidence that this property belonged to the deceased as shown in a title dated 19/08/1982. However, a subsequent title in the name of John Mwaura Warima was issued in respect of the property. D S, as the administrator of the estate of the deceased commenced **BGM HCCC No.51 of 2006 D S S -vs- John Mwaura Warima & 2 Others** to recover the property. There is overwhelming evidence on record that the title toJohn Mwaura was issued after that of the deceased. In this regard, it is likely that the estate may succeed in recovering this property. Since the dispute has not been settled by the Land Court, the property is not subject to distribution. However, the administrators are directed to pursue the case and when the property finally reverts to the estate, the same shall be allocated to D S S as his share in the estate.

ii) Elgon/Kaptama[particulars withheld]

26. This is a property lying at Mt. Elgon. It is the subject of **BGM H.C. Succ. Cause No.26 of 2002, In the matter of the estate of Sisimwo Psia.** The entire succession file was produced as exhibit "A" by the Deputy Registrar of this Court. From that file, S P was the father of the late S S B the deceased in this case. The deceased is listed in Form P&A 5 as one of the beneficiaries of the estate of the late S P. The grant in that matter was confirmed on 24/03/2011 and the share of the deceased in the above property was identified as 12.3 acres. An application to revoke or amend the grant is pending hearing. However, in that application, the applicant D S who is the 1st Administrator in this case seeks that the share of his late father in the above property be increased to 16 acres from 12.3 acres given.

27. In this regard, I am of the view and so hold that, there is no dispute whatsoever that the share of the deceased in Elgon/Kaptama [particulars withheld] has been determined at 12.3 acres which is not disputed. The dispute that is pending is to have that share increased to 16 acres. I hold therefore that the 12.3 acres in Elgon/Kaptama [particulars withheld] is part of the estate of the deceased and subject to distribution. It cannot escape this Court that the file in **P&A NO.26 of 2002** shows that the administrators and the beneficiariesin those proceedings are ready to go by the distribution as confirmed by the Court. It is only that D S, the 1st Administrator in this Cause, wants that share increased to 16 acres. Accordingly, which ever way one looks at, 12.3 acres in Elgon/Kaptama[particulars withheld] belongs to and has been ascertained to the estate of the deceased and is subject to distribution.

28. This is a property which is in occupation of and has been developed by B S. I shall hereinafter distribute it to him.

iii) Museng Farm (Koitabos) LR NO.[particulars withheld]

29. This is a property measuring 465 Acres belonging to one Daniel CNM. It was subject of **KTL H.C. SUCC CAUSE NO. 71 OF 2009** whereby the entire property was distributed amongst the beneficiaries of the late D M. Before me, however, evidencewas tendered to show that before his demise, the late S S B had purchased 98 acres from that property. Indeed his family has been in possession of the property since 1988. Further, his son S S S has constructed a modern permanent house

thereon had has beenin occupation for more than 15 years.

30. It would seem however, that because the administrators of the estate of the late S were content in what they had, after being granted the grant they did not pursue the collection and preservation of the propertiesof the deceased. That is why the grant in **KTL HC SUCCESSION CAUSE NO.71 OF 2009** was confirmed without their knowledge and the interest of the estate of the deceased not noted. I note however through exhibit Rexh 5 that the second Administrator S S S has madeeffort to secure the property. There is pending in **Kitale HCC Case No.111 of 2011** between Mr. S and the Administrator of the Estate of the late D M in which the said S is claiming the property for the estate.

31. That suit is pending and its outcome is unknown. Mr. Murunga Learned Counsel for the 2nd Administrator submitted that this not being a freeasset of the deceased, it cannot be subject to distribution and relied on the Cases of **P&A No.35 of 2002 Margaret Chepkorir Charito -vs- Chebet Kimugai and Benson Irungu kariuki [2009] LKR** in support of his submission. Mr. Areba was of the opinion that the same can still be distributed. I agree with Mr. Murunga that the court can only distribute that which can be termed as free assets of the deceased. However, whilst the Court will refrain from distributing the said property at this time, as it cannot be said to form part of the free assets of the deceased, the Court will take it into consideration.

32. However, that does mean that no order can be made on it. In the event the **Kitale HCCC NO.111 of 2011** is decided in favour of the estate, that property shall become part of the estate. For that reason, the Court can make observations on the same for the ends of justice.

e) How should the estate be distributed amongst the beneficiaries?

33. I have considered the evidence on record and submissions of Counsel. I have considered the dictatesof the law as stipulated in Sections 27, 28 and 40 of the Act. I have considered that the administrators in this case, D S S and S S S have been managing the affairs of the estate for over a decade now. They have been farming large tracks of the estate land for their benefit. I make this conclusion because they did not tell the Court where they were taking the proceeds of the farming. It can only be assumed that they applied the same for theirbenefit. I have also considered that there are those beneficiaries who have never enjoyed a penny from the estate since the demise of thedeceased. Some complained so at the hearing of this Cause.

34. Further to the foregoing, I note the advanced age of the widows. The fact that some of the daughters of the deceased are already married and have moved away from the deceased's home. Indeed, save for E C, C S and V S who told the Court that they were still living with their mothers, all the other daughters were living away from the deceased's home.

35. I have also noted from the report of the Registrar of Lands Bungoma and Mt. Elgon Districts dated 21st March, 2007 together with the valuation annexed thereto. In that report, the registrar clearly specified the topography for each property. I note that certain parts of the properties of the estate are rocky. These are as follows:-

a) Cherongos Farm – [particulars withheld] - 17 acres

b) Kipsagan [particulars withheld] and [particulars withheld] - 10 acres

c) Cherongos Farm – [particulars withheld] - 5 acres

d) Tiot Luget [particulars withheld] - 30 acres

For this reason, the shares of those who are to be allocated the rocky parts may seem to be higher than those allocated flat and arable land.

36. The other factor which I have taken into consideration is the developments undertaken by

individual beneficiaries. There are those who told the Court that they have already constructed permanent homes in certain areas. In this regard, the court has tried to ensure that while trying to maintain equity, the lives of the beneficiaries are to be disrupted at the minimum. The other factor I have considered is that the 98 acres in Museng Farm (Koitabos) LR NO.[particulars withheld] may never become part of the estate. Further I have also considered the sharing of the moveable assets.

37. Accordingly, applying the principles set out in Sections 27, 28 and 40 of the Act, and taking into consideration the foregoing factors, the estate of the late S S B is distributed as hereunder:-

a) the widows shall get 10 acres each of flat arable land .

b) the daughters will get 15 acres each of flat arable land.

c) the rest of the estate will be divided amongst the sons in the portions shown both rocky and arable.

38. **Distribution:**

A) Museng Farm –[particulars withheld] (130 Acres)

1) G C S - 10 acres - flat and arable

2) E C S - 15 acres - flat and arable

3) A C S - 15 acres - flat and arable

4) S M - 27 acres

5) J P S - 27 acres

6) L S - 9 acres

7) B S S - 9 acres

TOTAL 130 ACRES

B) Cherongos Farm [particulars withheld] (88 Acres)

1) A W S -10 acres - flat and arable

2) P N S - 22 acres

3) S S S - 10 acres

4) C V S - 15 acres – flat and arable

5) T T S - 26 acres

6 V S - 5 acres – flat and arable

TOTAL 88 ACRES

C) Kipsagam/[particulars withheld] (33 Acres)

K S S - whole

D) Cherongos [particulars withheld] (102 ACRES)

1) M S - 24 acres

2) T S - 24 acres

3) K S - 15 acres – flat and arable

4) M C S - 15 acres – flat and arable

5) V C - 15 acres – flat and arable

6) V S - 9 acres - flat and arable

TOTAL 102 ACRES

E) Tiot Luget [particulars withheld] (15 Acres)

D S S - 15 acres

F) Tiot Luget [particulars withheld] (39 Acres)

1) D S S - 11 acres

2) B S S - 10 acres

3) P N S - 9 acres

4) M S - 3 acres

5) T S -3 acres

6) S S S - 3 acres

G) Elgon/Kaptama/[particulars withheld] (12.3 Acres)

B S S - whole

H) Elgon/Kaptama/[particulars withheld] (13 Acres)

S S S - whole

I) Chesito Market Plot No.[particulars withheld]

B S S

J) Chesito Market Plot No.[particulars withheld]

T T S

K) Moveables

1) L S - KLR [particulars withheld]

2) S M S - Tractor

3) J P S - KYM

4) D S S -

5) S S S - Mv Reg.

6) T S - Tractor

7) M S - Tractor

8) T S - Mv Reg

9) P N S

- Tractor

L) Cattle

I did not see any sufficient evidence regarding this particular asset. Although RW 2 testified that there were 32 cows that had been shared in her favour by the clan in 2001 but were taken by the beneficiaries from the1st house, there was no sufficient evidence to show that anyonedrove them away from her homestead. The dates of such *"stealing"* or *"conversion"* was not disclosed, the police station where the same was reported or any OB numbers in respect thereof. Accordingly, I make no orders in respect thereof.

39. As regards Museng Farm (Koitabos) [particulars withheld], I have already held that there are strong indications that the property may ultimately revert to the estate. If and when that happens, considering the diligence with which S S S has shown in protecting and attempting to recover the same, and that he has already constructed a permanent home thereon. It isonly fair that that be taken into consideration. If and when the property is recovered, the certificate of grant shall be amended accordingly to reflect that S S be entitled to a share thereon of 18 acres whilst the rest of the sons of thedeceased shall share equally the balance with each getting 8 acres. In order to avoid proclastination in pursuing the conclusion of the litigation relating to that property, I direct that from the next farming season, all the male children of the deceased shall be entitledto the proceeds from the use of the said farm in equal shares until the Kitale suit is heard and determined.

It is so decreed.

DATED and **Delivered** at Bungoma this 7th day of April, 2014.

A. MABEYA

JUDGE