



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
SUCCESSION CAUSE NO.137 OF 2007
IN THE MATTER OF THE ESTATE OF THE LATE
KIPSANG ARAP CHIRCHIR – (DECEASED)

AND

KIPYEGON ARAP SANG - 1ST PETITIONER

MARIA TAPSANGA CHIRCHIR - 2ND PETITIONER

RULING

Kipyegon A. Sang and Maria Tapsaga Chirchir hereinafter referred to as the 1st and 2nd Petitioners took out the summons for confirmation of grant dated 11th July 2011 whereof they applied for the grant issued to them on 25th September 2005 confirmed. The duo proposed for the Estate to be distributed as follows:

- a. Maria Tapsaga Chirchir - 4.0 Acres.
- b. Kipyegon Arap Sang - 3.0 Acres.
- c. Richard Cheruiyot Sang - 2.8 Acres
- d. Cristina Chelangat Sang - 2.0 Acres
- e. Joseph Kipngeno Sawe - 3.2 Acres.

On 11th September 2012, the 1st Petitioner filed a supplementary affidavit giving further details on the gifts given out *intervivos* by the deceased to some of the beneficiaries as follows:

THAT prior to the death of the deceased, he had already transferred some of the parcels of land namely MOLO SOUTH/IKUMBI BLOCK 12/109 GACHARAGE measuring approximately 0.3974 Hectares to one RICHARD CHERUIYOT SANG and another one MOLO SOUTH/IKUMBI BLOCK 12/129 GACHARAGE measuring approximately 0.3974 Hectares to the late PETER CHEPKWONY SANG who was husband to CHRISTINA CHELANGAT SANG a beneficiary/dependant.

Taking into account of the above gifts *intervivos* the Petitioners proposed the following manner of distribution:

- a. Maria Tapsaga Chirchir - I/D No.0737132 - 4.0 Acres.
- b. Kipyegon Arap Sang - I/D No.0735158 - 3.4 Acres.

- c. Richard Cheruiyot - I/D No.6022592 - 2.15 Acres in addition to 0.397 Ha. transferred to him by the deceased.
- d. Christina Chelangat Sang- I/D No.6245576 – 2.25 Acres on behalf of her late husband Peter Chepkwony Sang in addition to 0.3974 Ha. transferred to her husband by the deceased.
- e. Joseph Kipneno Sawe - I/D No.1068871 - 3.20 Acres.

Paulina Chemutai Chirchir hereinafter referred to as the Protestor filed an affidavit of Protest to oppose the Petitioner's mode of distribution claiming she was unfairly left out. When the dispute came up for hearing it was directed that the dispute be disposed of by written submissions.

At the time of writing this ruling, the Objector was the only party who had filed her own submissions. I have considered the summons plus the facts deponed in the affidavits filed in support and the facts deponed in the affidavit of protest. I have further considered the Protestor's written submissions. It is the submission of the Protestor that Maria Tapsaga Chirchir, the 2nd Petitioner herein was barren hence she married her under the Kipsigis Customs and rites in 1972 and that she was blessed with six children who by virtue of the Kipsigis Customary Law, they belong to the 2nd Petitioner hence they are the deceased's dependants. The Protestor further aver that the 2nd Petitioner entered into a woman to woman marriage between herself and one Sally Chirchir, now deceased on or about 1985. The Protestor alleged that after the celebration of their marriage she moved in and occupied the portion due to the 2nd Petitioner and that she has been in occupation up to date. She accused the Petitioners of failing to disclose all the dependants of the deceased in their application. She claimed that the Petitioners conveniently chose to disclose five beneficiaries excluding the Protestor yet they knew they had a land dispute which was heard and determined by the Sotik Land Disputes Tribunal. The Protestor has made a specific allegation which the Petitioners have failed to controvert and I have no reason not to believe the Protestor's assertion. I am convinced that the Protestor was married by Maria Tapsaga Chirchir in a woman to woman marriage under the Kipsigis Customary Law. In such a marriage, the children take the name of Woman husband and inherit her house's share of his property. It is not also disputed that the 2nd Petitioner in another woman to woman marriage, married Sally Chirchir, who is now deceased, as her second wife. Eugene Contran in the Law of Marriage and Divorce Vol.1 P.117 stated inter alia that any children born to such a woman are regarded as the children of the woman husband who paid dowry and her actual husband. I agree with the Protestor, that the Petitioners erred when they excluded the Protestor and her children as beneficiaries of the Estate of the deceased and to specifically share the entitlement of the 2nd Petitioner.

In the end, I find the protest to be well founded. I hereby decline to confirm the grant on the basis of the Petitioners' proposed schedule of distribution. I direct the Protestor to file and serve within 14 days a further affidavit with the following particulars:

- i. Names of all the beneficiaries of the Estate of Kipsang Chirchir, Deceased.
- ii. Schedule of distribution.

The cause to be mentioned before this court on 20th June 2014 for purposes of ascertaining compliance of the above directive and to confirm the grant. Since the disputants are close family members, I direct that each meets his or her own costs.

Dated, Signed and delivered in open court this 30th day of May, 2014.

J. K. SERGON

JUDGE

In the presence of:

- N/A for Korir for Petitioners
- Mutai for Protestor.