



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO. 42 OF 1993

IN THE MATTER OF THE ESTATE OF MAINA ARAP MELIT – DECEASED

KIBET MAINA PETITIONER

VERSUS

ZACHEUS SANG (**legal representative of the estate of**

KIPSANG MAINA OBJECTOR

JUDGMENT

This judgment is the outcome of the summons for confirmation of grant dated 4th January, 2009 and the affidavit of Protest filed to oppose the summons. When the dispute came up for hearing, learned counsels appearing in the matter resolved to have the dispute determined by affidavit evidence and by written submissions.

I have considered the grounds set out on the face of the summons for confirmation of grant plus the averments contained in the affidavits filed in support and against the application. I have also taken into account the rival written submissions. In the summons for confirmation of grant, **Zacheus Sang** in his capacity as the legal representative of the Estate of one **Kipsanga Maina**, deceased, hereinafter referred to as the Objector, proposed for **L.R.No. Kericho/Sosiot/601** to be shared equally between;

1. Zacheus Sang
2. Kipyegon Arap Maina
3. Kipsegenen Arap Maina

Kibet Arap Maina, hereinafter referred to as the Petitioner opposed that mode of distribution claiming the same to be unfair and proposed to have the same distributed equally between the deceased's five sons. There is no dispute the only asset available for distribution is **L.R.No. Kericho/Sosiot/601**. There also no dispute that the deceased was survived by five sons namely;

1. Kiplangat Maina
2. Kibet Maina
3. Kipsang Maina
4. Kipyegon Maina and
5. Kipsegenen Maina

It is further not in dispute that the late **Maina Arap Malit** gave land to his sons inter vivos as follows:

1. Kiplangat Maina -LR.No. Kericho/Sosiot/604 – 2.2. Ha
2. Kibet Maina -LR.No. Kericho/Sosiot/603 – 2.3. Ha
3. Kipsang Maina -LR.No. Kericho/Sosiot/1216– 1.2. Ha
4. Kipyegon Maina
5. Kipsegenen Maina -LR.No. Kericho/Sosiot/602 – 2.2. Ha

The deceased reserved for himself **L.R.NO. Kericho/Sosiot/601-2.2Ha**. According to the Protestor, the distribution of the Estate should be done according to the **Kipsigis Customary Law** since the **Law of Succession Act** does not apply by dint of **Section 2** of the **Law of Succession Act**. It is a well documented practice among the Kipsigis people that a man had no obligation to distribute his land equally amongst his sons. Both sides appear not to dispute the fact that the applicable law in distributing the Estate is Kipsigis Customary Law and not the Law of Succession Act in view of the fact that the deceased passed away in 1978 before the Law of Succession Act came into operation. The Objector is of the view that the issue touching on distribution was finally determined by the Honourable Justice Musinga vide his ruling delivered on 19th October, 2006. The Petitioner is of the opposite view, that it was not the intention of the court to determine distribution vide objection proceedings. I think this is an issue which merits this court's attention. There is no dispute that on 19th October, 2006, Justice Musinga as he then was delivered a ruling on objection proceedings. In his lengthy and detailed ruling, the honourable judge made the following conclusions *inter alia*:

- i. **That the deceased subdivided his land into five portions distributing four to his sons while retaining one portion i.e. LR.NO. Kericho/Sosiot/601.**
- ii. **That the deceased had promised Kipsang Arap Maina, Kipsegenen Arap Maina and Kipyegon Maina that since they had received smaller portions of land inter vivos, they would be given L.R.NO. Kericho/Sosiot/601.**
- iii. **That it is proper that L.R.NO. Kericho/Sosiot/601 be shared equally between the trio as opposed to the five sons.**

It is therefore clear that the honourable judge proceeded to distribute the Estate at the stage of determining objection proceedings. No appeal nor an application for review has been preferred against the order on distribution. The schedule of distribution proposed by the Zacheus Sang strictly follows the decision of Justice Musinga. Even at this stage none of the protagonists has attempted to upset the ruling of Justice Musinga. The honourable judge made clear and conclusive findings on distribution. I have not been properly moved to interfere with those orders. The orders were made by a judge of concurrent jurisdiction and it is only fair to leave those orders undisturbed. The affidavit of Protest is an attempt to circumvent the decision of 19th October, 2006. That cannot be allowed. Consequently, the Protest is dismissed and the summons for confirmation of grant dated 4th January, 2009 is allowed as prayed.

Dated, signed and delivered this 27th day of September, 2013.

J.K. SERGON

JUDGE

In open Court in the presence of Mr. Ong'anyi for Protestor and

Mr. Koech holding brief for Mr. Orina for Objector