



REPUBLIC OF KENYA

High Court at Eldoret

Succession Cause 67 of 2004

IN THE MATTER OF THE ESTATE OF BASEN CHEPKWONY (DECEASED)

THE PUBLIC TRUSTEEPETITIONER

VERSUS

ESTHER JEPSONGOK KETER.....OBJECTOR/APPLICANT

JUDGMENT

A dispute arose on the mode of distribution of the estate of the Basen Chepkwony, Deceased. The Objector filed an application contesting the mode of distribution. It was a ground of the petition that the petitioner one Rael Chepkwony had misled the court and had omitted the names of the first widow and her children among the list of beneficiaries. The issue in dispute was whether one Esther Jepsongok Keter (Objector) and her seven children qualify as dependents within the meaning of Section 29 of the Law of Succession Act. Secondly whether Nandi customary law was relevant in the mode of distribution. The Objector called four witnesses in support of her case. She was married to the deceased in the year 1967. They had four children. Ezra Kipsang' born in 1974, Noah Kibiwott born in 1976, Abigael Chepkemboi born in 1980 and Judith Chelimo born in 1984. The deceased married a second wife Rael Chepkwony. The Objector and the second wife could not coexist. The Objector decided to leave the farm and went to her brothers place. The deceased was working with Kenya Power & Lighting Company in Eldoret. She used to meet the deceased there for a period of three years and they got one child called Milcah Kiplagat. That she did not know that her husband had died. She came to learn much later. That she came back and asked the petitioner about their husband's properties. That the petitioner did not co-operate. She decided to file the objection application. She said she knew Johana Arap Maiyo. He was a neighbor. She did not cohabit with him.

The second Objector's witness was Sila Sitienei. He is the elder brother of the deceased and therefore an in law to the Objector. He stated that the Objector was married to the deceased. They lived at Lessos. The Objector was the first wife. The deceased married second wife Rael. Esther and Rael disagreed. Rael used to come drunk and harass Esther. Esther left and Rael remained. Esther left before Basen died. She left with three children. Kipsang was the eldest. They are two girls and one boy. The dowry was never returned. She is still married to deceased. She never got remarried. She was away for ten years after his brother had died. Rael claimed that the land belongs to her. For them they knew that Esther is still theirs. She was their brother's wife. He wondered where will the children go and what they will eat if Esther is not given land. He denied going to look for Esther to settle scores with petitioner. He stated that Esther has seven children. The other four were born outside. They are not the deceased children. But according to custom they are still their children.

The third witness was Joseph Chepkwony. He is also a brother to the deceased. He confirmed that Esther was first wife of the deceased and left with three children after disagreement with Rael. The children were two boys and one girl. The other four children were born out of wedlock. According to Nandi customary law all the children are entitled to inherit.

The fourth witness was Simeon Kipketer Tum. He is an old man aged 70 years by then. He was conversant with Nandi customary practices and could pass as an expert. He stated that according to Nandi customary law even if a wife leaves and goes with her children, she is still recognised. There is no dissolution of marriage. It does not matter the length of time even over 30 years. Even if she goes away and gets children she is still married. Even if she gets children out of wedlock. They still belong to the husband. Provided there is no divorce the children will belong to the father. The children even if of other men will get property. If the lady comes back she will be received by the family and given land. She will come back to her husband's home. The property will be divided according to the number of houses. Each house will get equal share. If a man dies the houses will get equally. If he is alive he would distribute as he wishes. If a man has children with another man's wife he cannot claim the children. The man has no legal rights over the children. He will be given a heifer and told to go back. He is given a heifer to avoid a curse to his children. The Objector closed her case

The Petitioner said that she was married to Basen Chepkwony in 1969. They had six children together namely Tecla Chelagat, Shadrack Kiprotich, Helen Chebet, Ismael Kipkurui, Hagar Chepchirchir and Japhet Kipkorir. The deceased had married Esther before her. Esther did not have any child. That Ezra Kipsang was brought to Esther by his brother John Kiptum. Esther gave birth to a son called Noah. This was in 1975. In 1978 she fought with the deceased over the child. She went away in 1978. She had not seen her until they met in court. That Esther did not come for the burial of the deceased. That her in-law Silas Sitienei and Joseph Chepkwony came and took over part of the land. That they have no right to do so. That her problem was with her brothers –in-law and not Esther. That her brothers in law had brought Esther to champion a proxy fight. That deceased did not divorce Esther. She is not willing to share with Esther's children. That she had sold some portion of the land as follows to get money to defend court cases:

1 acre Joel

6 acres Josephat

1 acre Sila Kiptum

½ acre Omolo

4 ½ acres are left. She concurred in cross examination that under Nandi customary law the land would usually be divided among houses in equal shares. That if the deceased had children with Esther they would be entitled to a share. The second witness for the petitioner was Ziporrah Cheptalam. She is a neighbour of the deceased. She stated that Esther got one child with deceased and ran away with a man called Arap Maiyo. She got other children where she went. She stated that Esther did not have three children when she left, only one. She confirmed that there was no divorce to her knowledge. That the deceased had two wives. Esther and Rael. The petitioner closed her case and the court directed that written submissions be filed.

I have considered the written submissions of counsels together with the evidence on record. Most facts are not in dispute. It is common ground that Esther was a wife of the deceased. The number of children she got before the death of the deceased differs from one, three and four. According to Esther she had four children. The brothers of the deceased stated that she had three when she was leaving. According to Ziporrah and Rael she only had one. It may not be necessary to resolve the number of children that Esther has if one were to take into account the provisions of the Law of Succession Act and the Nandi customary law.

Section 29 of the Law of Succession Act provides:

“For the purpose of this part, “dependant” means—

- a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.**
- b) Such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had take into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**
- c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”**

Section 28 of the Act.

“In considering whether any order should be made under this part, and if so what order, the court shall have regard to—

- (a) The nature and amount of deceased property.**
- (b) Any past, present or future capital or income from any source of the dependant.**
- (c) The existing and future means and needs of the dependant.**
- (d) Whether the deceased had made any advancement or other gift to the dependent during his lifetime.**
- (e) The conduct of the dependant in relation to the deceased.**
- (f) The situation and circumstances of the deceased other dependants and the beneficiaries under any will.**
- (g) The general circumstances of the case, including so far as can be ascertained the testators, reasons for not making provisions for the dependant.”**

There is no dispute in law that Esther as a wife or former wife of the deceased is a dependent. The same applies to her children. Nandi customary law recognizes children born out of wedlock as belonging to the deceased. This custom is not contrary to the Law of Succession Act. It was common ground that under Nandi customary law the property is divided equally as per the houses. The deceased had two wives and hence two houses for that matter. The number of children does not matter according to Nandi customary law. However, under the Law of Succession Act when distributing personal property the number of children in each house is to be used as a determinant ratio. In total Rael had six children and Esther had seven children.

Counsel for the Objector has submitted that the estate be divided equally. Counsel for petitioner feels that the Objector had been absent for over ten years and it cannot be taken that she participated in improving the Estate. He submitted that the Objector be given 1/3 of the estate and the petitioner together with her children $\frac{3}{4}$ of the Estate. The assets of the deceased in issue were Land parcel known as Nandi/Olessos/52 measuring approximately 5.8 Hectares and final dues from Kenya Power & Lighting Co. Ltd of Kshs. 58,255.35/= . Nandi customary law does not oust the discretion of the court to take into account circumstances provided in section 28 of the Act. I do not however see any value in departing from the Nandi customary tradition of dividing the property equally. There was no evidence as to improvements made by Rael on the land. I also take into account that Esther left because of disagreement with Rael. The number of sons are equal in both houses. For these reasons I order that the mode of distribution will be on 50:50 basis of the final dues of Kshs. 58,255.35 and also all that parcel of land known as Nandi/Olessos/52. Each party will bear own costs. It is so ordered.

Dated AND signed at Nairobi on 22nd day of August 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Eldoret on this 31st day of October 2012.

F. AZANGALALA
Judge

In the presence of : Mr. Barasa h/b for Mr Kiboi for Petitioner

Mr. Muhoro h/b for Mr. Omwenga for objector

Mr. Nguabi h/b for PJ