



REPUBLIC OF KENYA

High Court at Eldoret

Probate & Administration 179 of 1998

IN THE MATTER OF THE ESTATE OF CHEMELI KOBOT KIMUTAI (DECEASED)

SARAH CHEPTOO.....PETITIONER

VERSUS

PRISCILLA LELEI.....OBJECTOR

JUDGMENT

This succession cause was filed in 1998. It proceeded before various Judges. The Petition for Grant of letters of administration apparently jointly by the Petitioner and the objector who are sisters following the death of their mother Chemeli Kobot Kimuati on the 26th January 1998. Grant of letters of Administration was issued jointly on the 15th July 1999 to them to administer the estate of the deceased.

However before the confirmation of the Grant the Objector who is the elder sister of the Petitioner filed a Notice of Objection dated 1st March 1999 to the confirmation of the Grant.

The petitioner filed for confirmation of the Grant under Section 71 of the Law of Succession Act for orders that the only asset of the deceased Land Reference No. Nandi/Itigo/124 be distributed in equal shares to the Petitioner and Objector respectively. The Objector filed a replying affidavit dated 20th July 2000 objected to the distribution of the land in equal shares arguing that before the death of their mother she orally shared out her piece of land Nandi/Itigo/125 with her sister being given 10 acres while she was to get 11 acres. She averred that local elders have deliberated over the issue and she exhibited the said deliberations dated 1.6.1998.

The petitioner subsequently applied for directions on 7th November 2000 on the distribution of the estate of the deceased.

The court gave directions on the 27/9/2001 that since there was a dispute on the distribution of the estate the parties to give viva voce evidence.

Before the start of the hearing the Objector filed a further affidavit dated 5th April 2004 claiming that she bought the land Nandi/Itigo/124 and gave it to their deceased mother to live in and cultivate after she was chased away by their father in 1964. That she constructed a house and a fence for their mother and that the petitioner never contributed anything. The Objector argued that the land wholly belongs to her and should not be distributed equally as proposed by the petitioner.

On the 23/6/2004 Priscilla Leilei gave her oral testimony in Nandi language and was interpreted through Henry Rotich. She stated that Sarah Cheptoo is her younger sister. That their mother Chemeli died on the 26/1/1998. That she was living in a farm which she bought for her that is Nandi/Itiko/179. That the farm is 21 acres and she bought it from Kipsegen Kelenjin in 1964. That she was living alone in the farm. That their father chased away the deceased at the time the petitioner was 9 years old. That the farm was in the name of the deceased because she thought the deceased will give birth to a boy who will inherit it. That Sarah Cheptoo was married in 1971. She is still with her husband. That she cannot give the farm to her because she is the one who bought the farm. That according to their customs if you buy a farm for your mother and she dies it reverts to the buyer.

The 2nd witness for the objector was Simon Kibirgen Somoei who also testified in Nandi language. He stated that he knew Priscilla Leilei who is the daughter of his sister. That Priscilla took the deceased to her farm when she was having a problem. That he went there when his deceased sister was ill. That Cheptoo was somewhere else in her farm. That the deceased was chased away by her husband. He stated that according to their customs if a person buys a farm for the mother and she dies it is the buyer who is entitled to the farm.

On cross-examination he stated that he was not there when the farm was bought and he does not know who paid the money. That only Priscilla said she was going to buy a farm.

The 3rd witness for the objector was Benjamin Kipkemboi Salem who also testified in Nandi language which was interpreted by Henry Rotich.

He stated that he lives in Chemuta Location Bursome Location Soi division. That in 1963 and 1964 they lived in Itigo Nandi where his father used to live. His father is Kipsegen Kalya. That his father sold 23 acres to two people, the bigger portion to Priscilla Leilei. That the husband to Priscilla was a relative of his father and he come to negotiate. That they agreed at a purchase price of kshs. 2500 in 1964. That he was not involved in the negotiations between Priscilla's husband Marko Leilei and his father. That kshs. 500 remained outstanding which his father sent him to collect in 1966. That he went and was given the money by Priscilla. He was given kshs. 360 the rest was collected by his father. He stated that he did not know in whose name the title was issued.

On cross-examination he stated that he is 55 years old and was in 1964 he was in class 6. That he was sent by his father to go to the farm that the survey has been done but he did not know the number of the farm. That he did not know Sara Cheptoo but knew Priscilla who bought the farm from them. That since they shifted he did not go back. That I knew that Priscilla and her sister are contesting in court over the farm of Priscilla's husband. He stated that he was only testifying that Priscilla and her husband bought the farm. He stated that he was 14 by then but he reduced his years in his identification card which shows that he was born in 1957.

The 4th Witness for the objector was Mark Leilei who testified in Nandi Language. He stated that he is married to Priscilla leilei and is the son in-law of the deceased. That the deceased had 2 children, Sarah Cheptoo and his wife Priscilla. That he married Priscilla when Sarah was 6 years and was living with her deceased mother in Itigo. That he married Priscilla in 1963. That in 1964 the deceased was chased away by her husband because she only gave birth to girls and that he bought a farm for her. That his brother Kisegegen Arap Kalya was selling a farm and his wife suggested and he agreed that he buys his mother in-law the farm. That he gave her the money, the farm borders his and originally it belonged to his father who divided it between him and his brother. That it was 21 acres and they agreed at a purchase price of kshs. 2500. That he initially paid him shs. 2000, he then paid a little amount and later he paid him three hundred and something. That in 1968 Surveyors come to survey the land and in 1973 title was released in the name of the deceased and Priscilla agreed to that. That Priscilla has the title. That Sarah was 9 years at the time and did not pay any money. She come in 1998 after her Mother died. He states that wants Priscilla Chemutai, his wife to inherit all the land.

On cross-examination he stated that he does not have any documents to show that he paid the money. That he gave Priscilla the money to buy the farm. That the registered owner is Chemeli and she gave the

title to Priscilla and said that Sarah should not get part of the land.

With the 4 witnesses the objectors closed her case.

Before the petitioner testified and called her witnesses the Objector filed an application dated 22nd September 2006 seeking for stay of proceedings pending the filing her filing of a civil suit and that the 2nd Administrator Sarah Kosgei be deemed to be the sole administrator.

Justice Kaburu Bauni gave a ruling on this application on the 11th June 2007 where the Court only granted the prayer that Sarah Kosgei be deemed to be the Sole administrator of the estate.

This matter came before me for the 1st time on 8.12.08.

Learned counsel Chepkonga for the petitioner stated that he was ready to proceed but the Objector is alleging trust. That the objector has not filed a civil suit and they were seeking directions. Learned Counsel for the objector submitted that this matter substantively proceeded before Hon. Justice Dulu and the objectors case was fully heard and closed.

The court directed that matter raised by Counsel Chepkonga be presented in the Petitioners submissions.

The Petitioner Sarah Cheptoo Kosgei testified in Nandi. She states that she lives in Itigo location in Nandi. That she is a farmer. That the deceased is her mother and she died on the 26.1.1998. That the deceased had 2 children, Priscilla and herself. That the deceased had land Plot No. nandi/Itigo/124 which is 21 acres. That the land is occupied by Priscilla and herself. That she occupies around 5 acres while Priscilla occupies the remaining 16 acres. That Priscilla took the bigger portion forcefully. That the property be distributed equally. That the elders divided the property equally, that her uncle was present.

She further testified that the objector did not buy the property but it was her mother who bought it and registered in her name. that she wished to inherit her rightful share.

On cross-examination she stated that she is 52 years. That in 1963 she was 9 years. That her mother was chased by her father from the matrimonial home. That the deceased rented a house. She worked hard as a farm hand and bought the present land in 1965. At the time she was 11 years old, that the seller of the land was Kesegyen kalya and she was present. That she lived on the land until she was married. That the deceased bought the land for shs. 200. That the land is adjacent to Priscilla's husbands land. That she bought the land near the in-laws because it was available. That her mother had 3 big cows which she sold to pay for the land. That she processed the title. That her children stayed with the deceased and she took possession 2 weeks after their mother died. That her sister wants the property for herself but she did not buy it. That their uncle Kibirgen Somoei who testified lied because he was threatened.

After her testimony the petitioner closed her case.

The parties advocates by consent agreed to file written submissions.

Counsel for the Petitioner in his submissions gave a summary of the proceedings as above which shall not reproduce.

He argues that the objector's evidence are mere allegations and has no basis in law. Counsel referred to section 107 of the Evidence Act Cap. 80 that provides “ **whoever desires any court to give judgment as to any legal right or liability dependent upon the existence of facts which he asserts must prove those facts exist..**”

Counsel submitted that the land in issue belonged to the deceased Chemeli Kobot Chemutai who died intestate. That the objector and the petitioner are the only beneficiaries and heirs of the deceased's estate.

That in accordance with the Law of Succession Act section 138 provides that the intestate estate shall devolve upon the Surviving Child, if there be only one or be equally divided among the surviving children. He submits that in view of the foregoing the land Nandi/Itigo/124 measuring 21 Acres be divided equally with each beneficiary getting 10.5 acres.

Counsel for the Objector also filed written submissions. Counsel in his submissions has set out the summary of the proceedings which I will not reproduce.

Counsel argued that the deceased was dependant on the objector and the objector's husband. That they bought her land worth kshs. 2500 in 1964. That the objector took care of the deceased before her death when she was ill. Counsel argue that the Succession Act does not address this unique issue and resort should be made to the Customs of the deceased.

Counsel further submits that the land NANDI/ITIGO/179 was bought by the objector in accordance with the evidence submitted to the court. That the land was intended to benefit a son if one was borne to the deceased, that none was born. That the land was subject to the interest of the purchaser. Counsel cited the authority in the case of **Kanji Vs. Muthiora (1984) KLR 712**.

Counsel submitted that the parcel of land was subject to customary trust. He argued in establishing a custom the court under section 87 of the evidence act may summon to its assistance one or more competent assessors. Counsel argued that PW2 who is the not only a "chumo" elder but also the parties uncle testified that where a child bought a property for a deceased under the Nandi customary law the child who bought inherits that particular asset.

Counsel further submitted that under section 35 (g) of the Succession Act the court shall have regard to the circumstances of the case. he referred to the case of **RE ESTATE OF KEITANNY 2002 KLR 720** where the Court stated that the court will be guided by the fact that whoever lived longest with the deceased and contributed substantially to the development of the deceased estate.

Counsel also cited the provisions of section 3(2) of the Judicature Act which provides that courts t be guided by African Customary Law in civil cases in which one or more of the parties is subject is so far as applicable. Counsel submits that court should award the parcel of land to the objector.

He however states that on *exgratia* basis the objector was willing to cede 2 ½ acres to the petitioner.

Learned counsel for the Petitioner at the time of highlighting the submissions further gave oral submissions to reply to the issue of trust raised by the objector. He argues that on the 20.7.2000 the objector swore an affidavit that she based her claim on oral will. That she is stooped from now raising issue of trust. That Land parcel No. Nandi/Itigo/124 is registered in the name of the deceased. It forms part of the estate of the deceased, it should be distributed equally in accordance with section 38 of Cap. 160.

That the claim based on customary trust must be strictly proven, it was not proved on balance of probability, no expert in Nandi customary law was called. That the objector should have filed originating summons. She is making independent claim. He stated that the estate be divided equally among the sisters.

Counsel for the objector in reply stated that estoppel has never arisen in the proceedings. That the issue of oral will was not raised during the trial. That the registration of the deceased proprietor in Nandi/Itigo/124 was subject to customary trust. That customary trust is recognized under section 163 of the RLA.

That Pw2 stated the position with regard to the Nandi custom. That his evidence was not challenged.

Further he argued that section 38 of the Succession Act does not apply as the deceased was married and separated. That the court should consider the contribution of a beneficiary during distribution of the

estate. That in this case the property was acquired by the objector.

As I have stated before this matter has proceed before various Judges. It has unnecessarily protracted, what started as a straight forward and simple case of distribution of an estate with only 2 beneficiaries who are sister and which involved only I asset Nandi/Itigo/124.

I have carefully considered all the testimonies and the submissions by counsel.

The first point for determination is whether the land Nandi/Itigo/124 which forms the only asset for distribution was bought by the Objector as claimed or it forms proper as part of the estate of the deceased and should be distributed to the deceased heirs.

The objector alleges to have bought the land for the deceased after she was chased away by their father. The fact that the deceased was chased away sometimes in 1964 is not in dispute.

The Objector's husband has testified that he gave money to the objector to buy the land for his mother in-law. Two other witnesses testified with regard to the acquisition of the land.

Simon Kibirgen Somoei who was the uncle of the parties also stated that he was not there when the farm was bought and did not know who paid the money. He stated that the objector only told him of buying a farm. He stated that according to the Nandi customs where a child bought a property for a deceased under the Nandi customary law the child who bought inherits that particular asset.

Benjamin Kipkemboi Salem states that his father sold the land to the objector and her husband. He stated that he did not take part in the negotiations but at one time the objector gave him shs. 360 which was part of the balance of the sale.

There is no dispute that the land is registered in the name of the Deceased. however the objector contends that the ownership of the deceased is subject of a customary trust. That the land was registered in the name of the deceased in the expectation of a son to be born who was to inherit it. That no son was born and in accordance with the Nandi custom having paid for the land it reverts back to her.

I find this allegations of the Objector to be in complete contrast with her affidavit dated 20th July 2000. I that affidavit which was sworn before a commissioner of oaths M.k Chemwok the objector stated in paragraph 7 as follows:

“That before the death of my late mother she orally shared out her piece of land known as where a child bought a property for a deceased under the Nandi customary law the child who bought inherits that particular asset to myself and the my co-administrator with herself being given 10.0 Acres whereas I was to take 11 acres, the reason that my sister was to take possession of my mother's house, kitchen and store which properties are currently in her exclusive possession and use”.

In the same affidavit the objector has annexed a photocopy of deliberations of local elders attesting to the said position.

The objector has not sworn an affidavit retracting or specifically explaining how the facts she deponed to above have changed.

I am not persuaded the objector is truthful in her claims. I am not convinced by the evidence submitted by the witnesses who testified to proof that the land was indeed bought by the objector.

Even the objector's husband who said to have given the money to purchase the plot did not have any evidence to proof he paid the money. It is unfortunate that the dead do not tell tales otherwise that would have been the best way to confirm the truth.

I have looked at the death certificate of the deceased. she was 75 years at the time of her death. The objector cannot say that there was reasonable expectation in the last two decades before the death of the deceased to expect a male child to inherit the property. The objector should have if her allegations are true taken steps to register her interest over the land. She cannot conveniently after the death of the deceased raise such a claim.

I am persuaded that the land Nandi/Itigo/124 properly forms part of the estate of the deceased. I reject the claim of customary trust or resulting trust raised by the objector. The same has no merits and is aimed at locking out the petitioner from getting her rightful share of the estate.

Both the Petitioner and the objector are now elderly and they should burry their differences and embrace themselves as sisters.

I will order that the only asset in the estate of the deceased being Nandi/Itigo/124 should be shared equally between the Petitioner and the objector with each getting 10.5 acres.

DATED AND SIGNED AT NAIROBI ON THIS 22ND DAY OF AUGUST 2012.

M.K. IBRAHIM

JUDGE

DATED & DELIVERED AT ELDORET ON THIS 31ST DAY OF OCTOBER 2012.

F.AZANGALALA

JUDGE

In the presence of: N/A for Parties though served with Notice of delivery judgment