



REPUBLIC OF KENYA

High Court at Eldoret

Succession Cause 167 of 2002

IN THE MATTER OF THE ESTATE OF KIMETTO ARAP MUIGEI

GRACE JEPTOO SAINA.....1ST PETITIONER
DAVID SITIENEI METTO..... 2ND PETITIONER

VERSUS

EVERLYNE MUIGEI.....1ST OBJECTOR

ISSAC METTO.....2ND OBJECTOR

JUDGEMENT

What was in issue in this cause was the mode of distribution of the estate of Kimetto Arap Muigei. The parties agreed to administer the Estate jointly and through a consent recorded on 22nd June 2004 it was agreed that the Grant of Letters of Administration Intestate issued to David Sitienei Metto and grace Cheptoo Saina on 8th January 2003 be amended by removing the name of David Sitienei Metto and in his place put the name of Everlyne Muigei and that a fresh grant be issued. It was further agreed that the parties will attempt to amicably agree on the distribution of the property and in the event of disagreement either party be liberty to apply to the court. The Parties were unable to agree on the mode of distribution of the Estate and on 1st November 2004 the court gave the following directions:

- i. Parties to give a joint list of assets and liabilities of the Estate.
- ii. Each party to file an affidavit on their proposed mode of distribution
- iii. The court will take viva voce evidence of the Petitioners and any witnesses they might call.

The Parties filed the joint list of assets on 3rd February 2005 as follows:

Assets

1. Nandi/Mosombor/361 3.7 Acres approx.
2. Nandi/Mosombor/360 5.93 Acres approx.
3. Nandi/Mosombor/354 1.48 Acres approx.
4. Nandi/Mosombor/313 10.86 Acres
5. Cheptiret/Kapkoi Block 6 (Kaptumo)/27 Approx. 41.21 Ha.

6. Cheptiret/Kapkoi Block 6 (Kaptumo)/26 Approx. 40.75 Ha.
7. Eatec Plot No. 488 Approx. 5 acres
8. Mosombor Center Plot No. 4
9. Mosombor Centre Plot No. 32 ¼ share
10. Mosombor Center Plot No. 13 1/3 share
11. Cheptiret/Kapkoi/Block 6 (Kaptumo) 31 Approx. 4.6 Acres
12. Cheptiret Center Plot No. 65
13. Ford 6600 KLY 733 tractor with plough, harrow, trailer and tiller
14. Isuzu Lorry KSK 488
15. Shares in Kibware Tea Estate
16. Shares in Sirgoi holdings
17. 80 Head of cattle and sheep
18. Retirement benefits department of Defence Office of the President
19. Kshs. 45,000/= held by Public Trustee

Liabilities

1. Kshs. 100,000 Richard Chesimet

The 1st Petitioner filed a separate further list of Assets as follows:

1. Cheptiret/Kapkoi/Block 6 (Kaptumo)/61 Approx. 20 acres bought by deceased on behalf of Issac Metto
2. Peugeot 404 Pick Up KYS 404 – ½ share thereof
3. Shares in Tarakwa Lelkeldo Self-Help Group

The 1st Petitioner filed an affidavit on mode of distribution proposing as follows:

A. **Grace Cheptoo Saina** – on her own behalf and on behalf of her children who are dependants of the deceased (1st house)

- | | | |
|------|--|-------------|
| i. | Nandi/Mosombor/361 | 3.7 acres |
| ii. | Nandi/Mosombor/360 | 5.93 acres |
| iii. | Nandi/Mosombor/354 | 1.48 acres |
| iv. | Nandi/Mosobor/313 | 10.86 acres |
| v. | Cheptiret/Kapkoi Block 6 (Kaptumo)/ 26 | 101 acres |

- vi. EATEC Plot No. 488 5 acres
- vii. Mosombor centre plots (3) Plot No. 4, 13 and 32
- viii. Shares in Kibware Tea estate
- ix. Ford 6600 KLY Tractor with plough, harrow, trailer and tiller
- x. Shares in Tarakwa Lelkeloo Farmers Self Help Group
- xi. 40 Head of cattle
- xii. Half share of the retirement benefits
- xiii. Half of Kshs. 45,000 held by Public Trustee.

B. **Everlyne Muigei** (widow) on her own behalf and on behalf of children of the 2nd house

- i. Cheptiret/Kakoi/Block 6 (Kaptumo)/ 61 20 acres
- ii. Cheptiret/Kakoi/Block 6 (Kaptumo)/ 31 4.6 acres
- iii. Cheptiret/Kakoi/Block 6 (Kaptumo)/ 27 101 acres
- iv. Chetiret Centre Plot No. 65
- v. Shares at Surgoi Holdings Ltd
- vi. KSK 488 Isuzu Lorry
- vii. KYS 404 Peugeot Pick up
- viii. 40 head of cattle and sheep
- ix. Half share of retirement benefits
- x. Half share of Kshs. 45,000/= held by Public Trustee.

The 1st Petitioner proposed that the liability to Richard Chesimet be shared equally. Everlyne Muigei on the other hand also filed an affidavit on the mode of distribution of assets and liabilities. She deponed that he deceased left one surviving spouse who is herself and 11 children. That she proposed that the estate be distributed as follows:

A. To the eldest child Grace Jeptoo Saina

- i. Nandi/Mosombor/361 3.7 acres
- ii. Nandi/Mosombor/360 5.93 acres
- iii. Nandi/Mosombor/354 1.48 acres
- iv. Nandi/Mosobor/313 10.86 acres
- v. Mosombor centre plots No. 4

- vi. Mosombor centre plots No. 13 1/3 share
- vii. Mosombor centre plots No. 32 ¼ share

B. To the other twelve (12) children

- i. Cheptiret/Kapkoi Block 6 (Kaptumo)/26 Approx. 41.21 Ha.
- ii. Cheptiret/Kapkoi Block 6 (Kaptumo)/27 Approx. 40.75 Ha.
- iii. EATEC Plot measuring 5 acres
- iv. Cheptiret/Kapkoi Block 6 (Kaptumo)/31 Approx. 4.6 acres
- v. Cheptiret Centre Plot No. 65
- vi. Ford Tractor KLY 733 together with its implements
- vii. Isuzu lorry KSK 488 Grounded
- viii. All the shares in Sirgoi Holdings
- ix. Retirement benefits from the office of the President.
- x. The money held by Public Trustee Kshs. 45,000,000/=
- xi. The 80 head of cattle.

She proposed that the Estate be given a portion worth Kshs. 100,000/= to be excised from the Nandi/Mosombor/313 and which had been earmarked by the deceased.

The mode of distribution could not be agreed upon because it was not clear whether the deceased was polygamous under Nandi customary law and secondly whether the 1st Petitioner qualifies as a house in her own independent right by virtue of Nandi Customary law. *Viva voce* evidence was taken by Justice Dulu as from 6th June 2005. The 1st Petitioner was sworn in. She testified in Nandi. She stated that she is the daughter of Kimeu Arap Muigei. He had two wives. Her mother was Chepchoge Muigei. She died in 1959 and she was the only child to her mother. The 1st objector was her step mother- Evaline Chemenjo Muigei. She has ten children and none of the daughters was married. She stated that she has five of her own children. First child is Kennedy Kipchumba 25 years; second is Beatrice Chesang Saina 22 years of age; James Kiplimo Saina age 20 years; Videy Chepchirchir Saina age 19 years, and Bedey Chepkemboi Saina 5 years. She lives with the children. The children used to be cared for by her deceased father. He was providing basic needs and they were basically dependants. She produced search certificates of title of properties owned by her father:

Search Nandi/Musombori/361 P Ex 1.

Search Nandi/Musombori/313 P Ex 2

Search Nandi/Musombori/354 P Ex 3

Search Nandi/Musombori/360 P Ex 4

Title copy Cheptiret/Kapkoi Block 6 (Kaptumo)/26 P Ex 5

Title copy Cheptiret/Kapkoi Block 6 (Kaptumo)/31 P Ex 6

She stated that in she views the estate should be distributed according to Nandi Customary Law. This is in equal shares between the two wives of the deceased. She had never been married. She remained at home to take care of her mother's property. Her mother did not say that she should be married. Before her father died he indicated how the property should be divided. He wanted her to divide the property with her step mother and not the children. On cross examination she stated that Cheptiret/Kapkoï Block 6 (Kaptumo)/61 was in the name of Issac Metto though it was purchased by her father. Her mother died when she was four months old. She had to remain at her father's home and get children according to Nandi customary law to continue the lineage of her mother. She had children. The children are of the lineage of her father, the names at circumcision were given in the lineage of her father. Justice Dulu was transferred and it was agreed that the case should proceed from where it had reached. Taking of viva voce evidence proceeded before me as from 26th June 2006. PW2 was Daniel Sitienei Metto. He stated that he was the brother to Kimeto Arap Muigei deceased. He stated that the deceased had two houses. The first wife was the mother of Grace. The second wife was Everlyne Muigei. Grace did not marry because their mother stated that since Garce mother had died then she would take over the rights/place of her mother. His brothers accepted the decision. He said Grace would step in her mother's place. Grace does not work and she has 5 children. The deceased used to help Grace and her children. He stated that the property should be distributed according to Nandi customary law. Everlyne has ten children; 6 boys and 4 girls. Land is 260 acres in Kaptumo Uasin Gishu and 22 acres in Kaptumo Nandi. On cross examination he stated that the deceased was not polygamous. He married second wife after first wife died. PW3 was Linah Serem. She is a sister to the deceased. She stated that deceased said that his property should be divided between the two houses. Grace was to inherit her mother's house. Grace has five children. The fathers are unknown to the family. Grace children depended on their grandfather. PW4 was Kennedy Kipchumba Metto. He is the grandson to the deceased and son to Grace. He stated that his grandfather gave him land but when he died the sons and grandsons from the house of Everlyne chased him away. He went back to stay with his mother at Musombori. He confirmed that his grandfather used to support in providing basic needs.

PW5 was Philip Kiprono. He stated that he was 82 years old. He is a Nandi elder described as "Agui". He stated that he does not know the parties in the suit. He came as an expert in Nandi culture. If a man dies and he has one wife. The wife will inherit all as one house. When you get married you build a house for the wife. If there are two houses. He builds two houses. If he dies the property is shared between the two houses. If he has property it is divided equally among the houses. The widow will stand and be responsible for her children. If a man dies leaving one widow and the children of another wife who passed on before him, the properties are still divided equally according to the houses. The properties are divided equally irrespective of the number of children in each house. If one house has ten children and the other only one house the property are still divided equally. If in one house there is no child; then the deceased brother will look for a wife for the widow. It is to ensure that the widow without a child continues her name. If the childless widow gets a wife, the children of the wife will belong to the deceased. They will be his children. They carry his name. If the wife of a widow gets children they will be named after the deceased. The rationale is that the fire in her fireplace must continue. If the fire place goes out then he will all be cursed.

As regards the case before court he stated that if a deceased lives one child. It is okay. All the children are equal. If he lives a child who is a girl and is not married then she must stay to give birth to her mother's house. She will inherit her mother's house and what it is entitled to. When it comes to inheritance the house with a daughter will share equally with the house where there is a widow with children. They will share equally. The Nandi culture is not discriminative. For instance, a boy who has 5 sisters will get dowry from them. He cannot claim dowry from the houses. The children of a girl who is left in her house become the children of the grandfather. The children are named after the father and his family. The children are then circumcised and thereafter married off. The children belong to the family. The children perpetuate the name of the 'boma'. There is no discrimination by the culture.

PW 6 was Stephen Kitogom Arap Keberei. He stated that he was aged 70 years. He was familiar with Nandi culture. He stated that if a girl is left and her parents die, it is as if she has been left alone. That girl

will light the 'fire' in her mother's house by giving birth to children. She would be entitled to get property. This is called "**Kitunchi Toloch**". This is the pole that holds the roof of the house. She is the one who holds up the house after the death of her mother. If a person has cows around and no bull, if the cow goes out and is mounted by a bull and gives birth to a calf, the calf belongs to the owner of the cow. The bull will not come and claim that the calf as his. The Nandi believe that the life of a family is prolonged and expanded. 'Fire' means life and continuation. To keep the fire going is to give birth to children on behalf of those who had died. Such a girl would get a share equal to those given to the other wives of the deceased. She is treated as a house on behalf of her mother. The children she will bear will be named after the ancestors of the family. She gets the share her mother would have gotten.

As regards children the children will be treated as children of the deceased just like the other children. It was a taboo for cows given as dowry to be shared between the houses. Cows given as dowry were shared by the sons of the house where the girl was born. Nandis never distributed land or assets during lifetime. It was like inviting death.

The 2nd Petitioner Everlyne Muigei was sworn in. She testified that Kimetto Arap Muigei was her husband. She got married in 1958. They married at the District Commissioner. She could trace the marriage certificate. She married deceased after his wife had passed away. She had ten children with deceased. Issac Metto; Rose Cheptoo; David Kipngetch; Wilson Kipkoskei; Philemon Kipkemei; Steven Kirwa; Dickson Kosgey; Samuel Kimutai; Emily Chepkemboi; and Stella Chelangat. She was married as the only wife. The deceased never got married again. She testified that most of the properties were acquired after the death of the first wife. That she brought up Grace and Grace dropped out of school in Form 2 when she got pregnant. That Grace went to Nandi and stayed on the 21 acres that they had bought. She was left with the mother in law. She chased away the man who was looking after the animals. There was no ceremony to 'marry' Grace under Nandi customary law. The deceased never intimated to her that Grace was representing her mother's house. She stated that David and herself do not get along well. They have differences. She stands by her affidavit on mode of distribution. Grace should not get any cows because the deceased gave her cows before his death and she sold. She did not agree that she shares equally with Grace. There will be no sufficient land for her children.

DW2 was Stephen Kirwa Metto. He is a son to the deceased. Stated that Grace has used the 24.5 acres alone and the town plots. Grace should inherit what had been given by the deceased. A buyer of land had paid shs. 100,000/=. He is not on the land. He was removed by Grace. Issac Metto bought land. It was not purchased by deceased. Deceased was supporting some children of Grace. After the close of the 2nd Petitioner's case parties agreed to file written submissions.

I have considered the written submissions of the parties, the evidence on record and the affidavits filed by the parties on the mode of distribution and I think the starting point would be to deal with disputed properties. According to the evidence on record Cheptiret/Kapkoi/Block 6 (Kaptumo)/61 is in the name of Isaac Metto. I find and direct that it is to be excluded from the list of assets. No log book was produced for the Peugeot KYS 404. The 2nd Petitioner Everlyne however said that the motor vehicle is on her compound in Uasin and that it is grounded. She did not dispute that it belonged to the deceased. I find and direct that this motor vehicle KYS 404 is to be included in the list of assets.

The evidence of shares in Tarakwa Lel Keido Self Help Group was not satisfactory. The 1st Petitioner did not submit any proof to support existence of shares. The 2nd Petitioner Everlyne gave testimony that she was aware that the deceased was a member of Tarakwa Leel Keido Self help Group but was not aware of any shares due to the deceased. The burden of proof lies on the party who would fail if no evidence was given on either side. It is the 1st Petitioner who bears the burden of proof. It has her who filed a further list of assets. She did not persuade the court that the shares actually form part of the estate of the deceased. I find and direct that the shares in Tarakwa Lel Keldo Self Help Group are to be investigated and if confirmed to be the subject of subsequent distribution.

The mode of distribution has gravitated on whether the 1st Petitioner was "married" to carry on the fire of her mother according to Nandi Customary law. It was common ground that if the 1st Petitioner was

married then under the Nandi customary practice of “Kitunchi Toloch” she was a house and entitled to inherit in equal proportion as wives of the deceased. In fact the 1st Petitioner advocated for equal distribution between her and the 2nd Petitioner on this basis. Two experts in Nandi customary law were called by the 1st Petitioner. PW5 did not come out clearly on the customary practice of “Kitunchi Toloch.” Even though he made the point that the 1st Petitioner under Nandi Customary law was eligible to inherit in equal with the 2nd Petitioner. Both representing the two houses or wives that were married by the deceased. PW6 was more expressful on the customary practice of “Kitunchi Toloch.” He explained the rationale of the practice and emphasized that in order for a girl to be considered as ‘married’ to carry on the fire of her mother a ceremony must be performed. In his words “when the ceremony is done the family members should know especially the clan of the deceased, the father of the girl. It is after this declaration that she is “married” to the house that she becomes to represent her mother’s house. “When the expert was asked by the court what would have been the effect of not undertaking the ceremony he stated that the ceremony must be done. He further stated that if there is no “Kitunchi Tolochi” he did not know what would happen. The 2nd Petitioner was emphatic that no ceremony took place. All the witnesses of the 1st Petitioner did not give testimony on this issue. The court is left in doubt as to whether the 1st Petitioner was really “married” under the Nandi customary practice of “Kitunchi Tolochi”. Again the burden of proof was on the 1st Petitioner. The case of **Njoki v Mutheru [1985] KLR 874** is apposite. The Court of Appeal held that the existence of customary law must be established by the party who intends to rely on it.

The 1st Petitioner having failed to establish applicability of Nandi customary law this court proceeds to consider the application for distribution of the estate within the framework of the Law of Succession Act. The Law of Succession Act provides for consideration of rights of dependants before confirmation of a grant. From the evidence on record it is clear that the deceased was supporting children of the 1st Petitioner. I have also taken into account that the 1st Petitioner as a child of the deceased would be entitled to inherit in equal share with other children of the deceased.

The 2nd Petitioner has proposed that the 1st Petitioner retains the Nandi properties together with the plots, that she gets no cows because she had been given cows by the deceased before he died and the creditor Richard Chesimet be given 3 acres from the Nandi properties subject to payment of balance of purchase price. I think this is not possible. The contract for the sale of land must be void taking into account the provisions of the Land Control Act and the Law of Contract Act. I am persuaded that a refund of the sum paid would be the best solution in the circumstances. There is rivalry between the 1st Petitioner’s children and the 2nd Petitioner’s children. A forced solution may not work. The children of the 1st Petitioner have no right to inherit their grandfather’s estate when other heirs of prior right are living. Under the law and in accordance with Nandi customary law where there is only one house the wife determines how to distribute the estate to the beneficiaries. I use one house because the 1st Petitioner had failed to establish the case of two houses under Nandi customary law. I am persuaded that as a matter of law the mode of distribution proposed by the 2nd Petitioner should apply subject to the modification which I shall direct as a matter of direction. I find and direct that the mode of distribution of the estate of Kimetto Arap Muigei who died on the 13th October 2001 shall be as follows:

A. To the eldest child Grace Jeptoo Saina (1st Petitioner)

- i. Nandi/Mosombor/361 3.7 acres
- ii. Nandi/Mosombor/360 5.93 acres
- iii. Nandi/Mosombor/354 1.48 acres
- iv. Nandi/Mosobor/313 10.86 acres
- v. Mosombor centre plots No. 4

- vi. Mosombor centre plots No. 13 1/3 share
- vii. Mosombor centre plots No. 32 ¼ share

B. To 2nd Petitioner and her children

- i. Cheptiret/Kapkoi Block 6 (Kaptumo)/26 Approx. 41.21 Ha.
- ii. Cheptiret/Kapkoi Block 6 (Kaptumo)/27 Approx. 40.75 Ha.
- iii. EATEC Plot measuring 5 acres
- iv. Cheptiret/Kapkoi Block 6 (Kaptumo)/31 Approx. 4.6 acres
- v. Cheptiret Centre Plot No. 65
- vi. Ford Tractor KLY 733 together with its implements
- vii. Isuzu lorry KSK 488 Grounded
- viii. All the shares in Sirgoi Holdings
- ix. Retirement benefits from the office of the President.
- x. The money held by Public Trustee Kshs. 45,000/=
- xi. The 80 head of cattle.

Liabilities

The 2nd Petitioner will discharge the liability of Kshs. 100,000/= due to Richard Chesimet out of their share of the Estate. If he is not satisfied, Richard Chesimet knows what legal action to take.

The Grant of Letters of Administration issued to the Grace Jeptoo and David Sitienei Metto on 8th January 2003 as amended by the Order of this Court made on 22nd June 2004 is hereby confirmed. The mode of distribution will be as per this judgment. It is ordered. The costs shall be borne by the Estate.

DATED AND SIGNED AT NAIROBI ON THIS 9TH DAY OF AUGUST 2012

M. K. IBRAHIM

JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 17TH DAY OF OCTOBER 2012

F. AZANGALALA

JUDGE

In the presence of: Mr. Kiplimo h/b for Mr. Kwamba for Plaintiff

Mr. Onyikwa h/b for Mr. Cherirot for Objector