



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 299 OF 1992

IN THE MATTER OF THE ESTATE OF ISAAC KIPKORIR ARAP SALAT (DECEASED)

JOSEPHINE CHESANG CHEPKWONY SALAT.....APPLICANT

VERSUS

ELIZABETH CHEPKOECH SALAT.....RESPONDENT

J U D G M E N T

Isaac Kipkorir Arap Salat (the deceased) died on 29th November 1987. He was survived by two (2) widows, namely, Josephine Chesang Salat (Josephine) and Elizabeth Chepkoech Salat (Elizabeth). Elizabeth is the first wife. She was blessed with nine (9) children namely, Michael Salat born in 1958 (he is now deceased), Nelson Salat born in 1961, Margaret Salat born in 1964, Edwin Salat born in 1968, Nicholas Salat born in 1970, Johnstone Salat born in 1971, Nancy Salat born in 1974 (she is deceased), Beatrice Salat born in 1978 and Collins Salat born in 1996. Josephine is the second wife. Her children are, Joyce Salat born in 1979, Stella Salat born in 1981, Raymond Salat born in 1983 and Walter Salat born in 1985. The grant of letters of administration intestate was issued to Elizabeth and Josephine to enable them administer the estate of the deceased. The two have not been able to conclude the administration of the estate of the deceased due to a dispute in regard to how the estate of the deceased should be distributed to the dependants. There is no dispute between Elizabeth and Josephine regarding who the beneficiaries of the deceased are. The dispute between the two is in regard to what properties comprise the estate of the deceased, and secondly, how the estate of the deceased should be distributed among the deceased's beneficiaries. Prior to the hearing of the case, Elizabeth and Josephine filed their respective proposals on how they wish the properties that comprise the estate of the deceased should be distributed to the deceased's beneficiaries.

This court will first deal with issue regarding the determination of the properties that comprise the estate of the deceased. There is generally no dispute regarding the properties that constitutes the estate of the deceased save for a parcel of land known as LR.No.13287/35(Ngata farm) measuring about 30 acres. According to Elizabeth, the said parcel of land is part of the estate of the deceased. Elizabeth told the court that the former president, Daniel Arap Moi allocated the said parcel of land to Josephine on behalf of the estate of the deceased. It was Elizabeth's case that soon after the death of the deceased, the family of the deceased made a request to the former president to allocate land to Josephine on account of the fact that the deceased had not settled Josephine prior to his death. Elizabeth argued that although the

said parcel of land was allocated to Josephine after the death of the deceased, the parcel of land could not have been secured had it not been for the intervention of members of the family of the deceased to the former president soon after the death of the deceased. In her view, the said parcel of land should therefore be considered as part of the estate of the deceased.

On her part, Josephine submitted that the Ngata farm ought not to be considered as part of the estate of the deceased because at the time of the death of the deceased, the said parcel of land was not in existence. Josephine narrated to the court how the said parcel of land was allocated to her soon after the death of the deceased. She reiterated that although she was allocated the said parcel of land at the intervention by the former president, she was later required to purchase the said parcel of land from the Agricultural Development Corporation. It is common ground that indeed Josephine paid the purchase consideration of Kshs.90,000/- to Agricultural Development Corporation when she was so required by the then Managing Director of the corporation. She was further required to pay conveyancing fees and other disbursements to enable the said parcel of land to be transferred to her. There is no dispute that Josephine is the registered owner of the said parcel of land.

The issue that this court has to determine is whether the Ngata farm should be considered as part of the estate of the deceased or should be considered as the property of Josephine. Having carefully evaluated the evidence on record, it was clear to the court that at the time of the deceased's death, the Ngata farm was not part of the properties that were owned by the deceased. However, during the funeral of the deceased (which was attended by the former president), a request was made by members of the family of the deceased, who included the father of the deceased, Mr. Joshua Sonoiya, for the former president to allocate land to Josephine since she had not been settled by the deceased prior his death. The former president acceded to this request and duly instructed the then managing director of Agricultural Development Corporation, Dr. Walter Kilele to allocate land to Josephine at Ngata farm. The former president specifically directed that the said parcel of land should be allocated and registered in the name of Josephine. Elizabeth and members of the extended Salat family insist that were it not for the intervention of the family, Josephine would not have been allocated the Ngata farm. They therefore urge the court to reach a finding that the said parcel of land is part of the estate of the deceased.

On the part of this court, it clear that the Ngata farm belongs to Josephine. Although members of the Salat family were at the forefront in making the request to the former president to allocate the Ngata farm to Josephine, the legal position is that a property which was not in existence or which did not belong to the deceased at the time of his death cannot, by any stretch of imagination, be considered as part of the estate of the deceased. The Ngata farm was allocated directly to Josephine by the former president. The land was not allocated to the family of the deceased. Josephine was later required to pay the purchase consideration for the said parcel of land. If this court were to uphold the contention by Elizabeth that the said parcel of land belongs to the estate of the deceased, why then was Josephine required to pay the purchase consideration to Agricultural Development Corporation for the same? Having carefully evaluated the evidence in record, this court finds no difficult in reaching the finding that the Ngata farm (LR.No.13287/35) is not part of the estate of the deceased. It has not been established that funds from the estate was utilized or used to purchase the said parcel of land. It may be that the family of the deceased was moved by the plight of Josephine in that she had not been settled by the deceased before his death to make the request to the former president. It may also be possible that the former president, knowing of Josephine's circumstance, decided to allocate her land. What is not in doubt is that the property belongs to Josephine and is not available for distribution to the dependants of the deceased.

As regard distribution, there is no dispute regarding the properties that were owned by the deceased. The said properties are as follows:

- (i) LR.No.8934/43 – A commercial plot measuring 50ft x 100ft at Bomet township (the Bomet plot).
- (ii) LR.No.Kericho/Olokyin/62 (Mulot farm) which measures 10 acres.
- (iii) LR.No.Kericho/Ndubai/113 (Siwot farm) measuring 15 acres.

- (iv) LR.No.6055/9 (Sotik farm) measuring 143 acres.
- (v) LR.No.7288/272 (Club 181 farm) measuring 9 acres at Sotik township.
- (vi) LR.No.631/1075 (Kericho town residential property) measuring 0.1142 hectares.
- (vii) LR.No.630/1036 (Kericho town commercial property) measuring 0.2983 hectares.
- (viii) LR.No.209/10223 (Nairobi industrial plot) measuring 0.5060 hectares.
- (ix) Kenya Aerotech dividends and shares.
- (x) Animals of the estate.

In distributing the above properties that belongs to the estate of the deceased, the court shall take into account the following principles:

(a) The fact that the deceased at his deathbed indicated that the Siwot farm property should be inherited by Elizabeth while the commercial plot at Bomet township devolves to Josephine. The court shall take into consideration that the deceased had constructed a house and indeed settled Elizabeth before his death. On the other hand, the deceased had not constructed a house for Josephine neither had he settled her. The deceased further expressed the wish that all his properties should be shared equally among his dependants. The court shall take into consideration the wishes of the deceased in so far as is practicable with a view to achieving an equitable settlement of the said assets of the estate of the deceased to the beneficiaries.

(b)The court will take into consideration the fact that at the time of the deceased's death, and during the intervening period before this judgment is delivered, the children of the deceased had various needs, especially educational needs, which ought or should have been met from the assets of the estate of the deceased.

(c) The court shall apply the provisions of **Section 28** of the **Law of Succession Act** which provides that:

“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 the deceased's 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 dependant during his lifetime;

(e) The conduct of the dependant in relation to the deceased;

(f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

(g)The general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.”

(d)The court shall take into consideration the provisions of **Section 40(1)** of the **Law of Succession Act** in so far as it will aid the court to arrive at an equitable distribution of the properties that comprise the estate of the deceased to the dependants.

(e) The court shall further take into account the fact that the High Court made a finding that Elizabeth had misappropriated the sum of KShs.4,492,000/- from the estate of the deceased. The ruling was delivered on 1st March 2007 by Rawal J in *Nairobi HC Misc App No.44 of 2005 Josephine Chesang Chepkwony vs Elizabeth Chepkoech Salat.*

(f) The court shall take into account the evidence that was adduced by the disputing parties before the court regarding how they propose to distribute the properties that comprise the estate of the deceased and the reasons for making such proposals.

The above principles shall be applied by the court in a holistic manner to enable the court reach a just decision. On distribution, this court hereby distributes the properties that comprise the estate of the deceased as follows:

(i) The Siwot farm (LR.No.Kericho/Ndubai/113) shall be inherited by Elizabeth Salat. On this property, the deceased erected a four-bedroomed tiled house which has been recognized by all the disputing parties as the matrimonial home of Elizabeth. This property is 15 acres. The deceased specifically indicated his wish that Elizabeth inherits the said parcel of land.

(ii) The Bomet township commercial plot (LR.No.8939/43) shall be inherited by Josephine Salat. All the parties to this dispute agreed that they would abide by the wishes of the deceased when he indicated that the said parcel of land shall be inherited by Josephine Salat.

(iii) The Mulot farm (LR.No.Kericho/Olokyin/62) shall be inherited by Nicholas Salat. Although Josephine claimed that the deceased had laid foundation for her matrimonial home on this parcel of land, it was clear from the evidence adduced by both parties that Nicholas Salat has already constructed a house and indeed settled on this parcel of land. Although a proposal was made that Nicholas Salat and Walter Salat settle on this parcel of land, it is the view of this court that Walter Salat, being a son to Josephine will benefit by being compensated by an appropriate parcel of land elsewhere. This court has taken into account of the fact Nicholas Salat has already settled on this parcel of land while Walter Salat is yet to settle on the said parcel of land. Taking into consideration the acreage of the land, it would be unfair to Nicholas Salat if the said parcel of land is divided into two yet Walter Salat can get an equivalent parcel of land elsewhere.

(iv) LR.No.6055/9 (Sotik farm). This parcel of land measures 143 acres. There is a temporary house on the farm. Evidence was adduced to the effect that some zero grazing units had been constructed on the farm. Both Elizabeth and Josephine proposed that the parcel of land be sub-divided in varying degrees to all the dependants of the deceased. So as to compensate Josephine for having not been settled by her late husband, she will, in the first instance, inherit the temporary house on the farm that is currently being occupied by Elizabeth. She shall also inherit 15 acres of land equivalent to the acreage of land that is owned by Elizabeth at Siwot farm. This acreage shall adjoin the farm house at the Sotik farm. The remaining portion of land measuring 128 acres shall be distributed as follows: All the children of the deceased (twelve (12) in number) (including the dependants of the two children of Elizabeth who are deceased) except Nicholas Salat shall be allocated 10.6 acres. Elizabeth shall not benefit from the said parcel of land since she already was settled by the deceased at the Siwot farm. For the distribution to be realized, it may be necessary that the said parcel of land be sub-divided. The land that shall be required for common purposes such as roads shall be contributed pro-rata by each beneficiary.

(v) LR.No.7288/272 (Club 181 farm). On this parcel of land is erected a hotel called Club 181. There are other buildings erected on the property. According to the evidence adduced, the developed portion of the property is about one acre. The rest of the acreage (about 8 acres) is undeveloped. From the evidence adduced, it was apparent that from the time the deceased died, Elizabeth and her children have been utilizing this property for business. Josephine has not at all utilized this property. Elizabeth suggested that the property be distributed equally among all the beneficiaries of the deceased, while Josephine was of the view that the property should be divided between the two widows. Having considered the totality of the evidence adduced, it is the considered view of this court that the commercial benefit of this property would be diminished if the property is distributed in the manner proposed by either Elizabeth or

Josephine. If the said proposals are carried through, in the long run, none of the dependants of the deceased would benefit. It is therefore the decision of this court that this property shall be inherited by Elizabeth on her own behalf and behalf of all her children.

(vi)LR.No.630/1036 (Kericho commercial plot). Having allocated Elizabeth the Sotik property, it is only fair that this property be allocated to Josephine. Josephine shall inherit this property together with her children. The issue regarding the outstanding land rates and land rent shall be addressed later in this judgment.

(vii)LR.No.631/1075 (Kericho residential property). There was consensus between Josephine and Elizabeth that this property should be sold and the proceeds therefore be divided between the two widows. This court would further add that should either Josephine or Elizabeth be interested in purchasing this property, the same shall be valued and either Josephine or Elizabeth shall pay the other half of the valuation of the property. In light of the fact that Josephine has been allocated the Kericho town commercial plot, it would only be fair that Elizabeth be given the first option to purchase the property from Josephine. If Elizabeth shall decline the offer, then Josephine will be given an opportunity to take up the offer. Elizabeth is hereby given six (6) months from the date of this judgment to take up the offer. Should there be disagreement, then the property should be sold to a third party and the proceeds therefrom shall be divided equally between the two widows.

(viii)LR.No.209/10223 (Nairobi Industrial area plot). Josephine proposes that the parcel of land be sold to recover the school fees that she paid on behalf of the estate for the education of her children. Elizabeth proposes that the parcel of land be distributed equally among all the beneficiaries of the deceased. From the evidence adduced, it was clear that at the time the deceased died, the deceased had educated some of the children of Elizabeth to university level. The children of Elizabeth benefited from the goodwill of the deceased immediately after his death since some of the children were offered scholarships by the government to complete their university education. Since Josephine's children were young at the time, they did not substantially benefit from the estate in regard to their education. Josephine told the court that she struggled on her own to educate her children. Elizabeth countered this argument by stating that if Josephine was to be compensated for the education of her children, then she should likewise be compensated for the school fees that she paid for her younger children. It is the view of this court that there is no doubt that Josephine's children did not benefit from the opportunities that the children of Elizabeth were availed during the lifetime of the deceased. It was further apparent that the estate had accumulated a substantial unpaid land rent and land rates in respect of the urban properties that are owned by the estate of the deceased. It is therefore the view of this court that the above property be sold and the proceeds there from be applied as follows:

(a) The accumulated land rent and land rates in respect of the Kericho municipality properties, the Sotik township property and the Nairobi property shall be settled.

(b)Josephine shall be refunded the sum of Kshs.10,000,000/- in respect of the amount that she expended on behalf of the estate of the deceased to educate the children. This court has not fully refunded the amount claimed by Josephine, because, in this court's view, as a parent, Josephine was required to contribute for the education of her children. Josephine cannot sit back and fold her arms expecting that the estate of the deceased would shoulder the entire burden of educating her children.

(c) Josephine shall be paid half of the sum of Kshs.4,492,000/- (i.e. Kshs.2,246,000/-) that the court established that Elizabeth had misappropriated from the estate of the deceased.

(d) The remaining balance shall be distributed equally among all the 15 dependants of the deceased.

(ix) The Kenya Aerotech shares and dividends. Josephine proposed that the said shares should be divided between the two widows while Elizabeth proposes that the said shares be divided equally among all the beneficiaries of the deceased. Having carefully considered the entire fact and circumstances of this case, it is this court's opinion that it will be just and fair for the said shares to be distributed equally among all the beneficiaries of the deceased. In that regard, the said shares shall be divided into 15 equal shares. Each

beneficiary shall be entitled to 1/15 of the said shares.

(x) Animals of the estate. There was dispute regarding the number of animals that are owned by the estate of the deceased. Taking into consideration the period that it has taken for this succession dispute to be resolved, it was apparent to the court that over that period of time, it is difficult to ascertain (with certainty) the number of animals that belong to the estate of the deceased. Elizabeth claims that there are three cows remaining that belong to the estate of the deceased while Josephine claims that the number of animals are 101. Taking into account what the court has observed above, this court will go by the number of animals that was adduced in evidence by Elizabeth. This is because Elizabeth is the one that took care of the animals. The three animals shall be distributed as follows:

Elizabeth shall inherit one cow while Josephine shall inherit two cows.

At the close of the hearing, Josephine was insistent that she should be paid costs that were awarded to her in the previous case that she filed, on behalf of the estate of the deceased, against Elizabeth. She further urged the court to award her costs of these proceedings. Succession disputes are normally disputes between members of a family. Unless sufficient grounds are established, normally, this court will not condemn any of the parties to pay costs. No evidence has been placed before this court to enable it reach a decision contrary to the norm regarding the issue of costs. In the circumstances therefore, with a view to promoting reconciliation between the members of the two families of the deceased, this court directs that each party shall bear their own costs. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2011

**L. KIMARU
JUDGE**