



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Succession Cause 67 of 1995

IN THE MATTER OF THE ESTATE OF KINGETICH KIMATET, (DECEASED)

MARY JEPKEMBOI RUTO1ST PETITIONER

TOYOI NGETUNY2ND PETITIONER

VERSUS

ELIZABETH K. NGETUNY.....OBJECTOR

JUDGMENT

The facts in this dispute are fairly straight forward.

This cause was filed on 13th February, 1995 by Mrs. Mary Jepkemoi Ruto (the 1st Petitioner), the daughter in law of the deceased, Kipngetch Kimatet, although the deceased was survived by two widows, Toyoi Ngetuny (1st widow) and the objector, Elizabeth Kongoto Ngetuny (the 2nd widow) as well as several children.

It is not clear to me at what stage the 1st widow was joined in the proceedings as a petitioner because in the earlier pleadings she is named as one of the sureties to the petitioner. She infact brought an application on 25th July, 2002 jointly with the 1st Petitioner hence I will refer to her as 2nd petitioner. Be that as it may, the dispute really is between the two widows and indeed it is her (the 2nd petitioner) who testified in this matter.

The deceased died intestate on 14th December, 1981. Only one property, the suit property, BARINGO/LEMBUS/NGUBERETTI /10 – (NO.10) was registered in the name of the deceased. The only other property that has featured in this dispute is BARINGO/LEMBUS/NGUBERETTI/12 (No.12) was registered in the name of the deceased person's brother Kipkios Kimatet, who predeceased the deceased. It is also common ground that the late Kipkios Kimatet had no wife or children. He died before the objector was married to the deceased.

Upon marrying the deceased the objector lived with him (the deceased) on No.10. There is also evidence that at some stage, the objector relocated and settled in No.12. However, after the death of the deceased, she returned and constructed two houses on a portion of No.10 where she lives to date. It is her contention that she together with her children are entitled to No.10 being the deceased person's estate; that she inherited No.12 from Kipkios Kimatet through his sister, Tungo.

On the other hand, the 2nd petitioner has maintained that after Kipkios died, the deceased took over and looked after his affairs including No.12; that the deceased arranged for the objector to inherit No.12 by filing succession cause No.241 "A" 1992; that the deceased settled his two widows in separate parcels of land before his death and left an oral will that they should remain on their respective parcels; that in that oral will the deceased directed the 2nd petitioner to settle with A.F.C. the outstanding loan on No.10.

I have considered the evidence presented by the objector as well as that by the 2nd petitioner and her sole witness, Kipruto Kemboi.

What falls for determination is whether the objector is entitled to a share of No.10.

It is not in dispute that No.10 is registered in the name of the deceased. It is said to measure 70 acres. That is where the objector began her marriage life. She subsequently moved to No.12. It is the circumstances of her relocation to No.12 and her eventual registration (together with her three children) as the proprietors of No.12 that I must turn to now. According to the objector, she moved from No.10 to No.12 as a result of hostilities from the 2nd petitioner and her children with the backing of the deceased. There is therefore no doubt that the objector relocated to No.12 from No.10. She did this during the lifetime of the deceased. What is not clear is when she did so.

It is common ground again that No.12 belonged to Kipkios, a brother to the deceased who predeceased the deceased. It is the objector's contention that a sister to Kipkios, Tungo – who would also be by necessary inference, a sister of the deceased, gave her No.12. It is not clear under what circumstances Tungo gave her the land. By the objector's own admission, when she was married in 1967 Kipkios was already dead and No.12 was being used as a grazing field.

In one of the clan meetings held on 27th March, 1992 after the death of the deceased, the objector told the meeting in relation to No.12 as follows:

“I am complaining that my late husband KIPNGETUNY KIMAMET gave me only 43 acres which he acquired from his late brother. He remained with his own 70 acre piece of land that he gave his elder wife MRS. TOYOI KIPNGETUNY. I went to this 43 acre piece of land at (sic) my own will not the will of my late husband and because of misunderstanding between me and my co-wife....” (Emphasis supplied).

I reiterate that it is not clear under what circumstances the objector occupied No.12. Was it through Tungo; was it on her own, was it through a succession case or was it through the deceased? The succession cause came much later. Tungo had no superior right than that of the deceased to allocate her deceased brother's land to the objector. The court was never told where Tungo is or why she did not testify. The objector too could not have woken up one day, packed her belonging and relocated to No.12.

On this question, I come to the conclusion that Kipkios having died intestate and without immediate dependants, the deceased took over his affairs and although he did not file a succession cause, he settled his second family – the objector on No.12. His intention in this regard was clear. For all intents and purposes, No.12 was his and its inheritance by the objector flowed from this fact. Indeed in terms of **section 39** of the **Law of Succession Act**, Kipkios's land could only devolve upon the deceased and not the objector.

Finally, there is allegation that the deceased distributed the two properties between the objector's and the 2nd petitioner's houses by way of oral will.

Under **Sections 8 and 9** of the **Law of Succession Act**, a valid oral will can only be made in the following circumstances:

- i) where it is made before two or more competent witnesses
- ii) if the testor dies within three (3) months from the date of making the will.
- iii) it must not be contrary to any written will which the testor may have made before or after the oral will and which has not been revoked.

It has been alleged both before me and at the two meetings convened by the clan elders and provincial administration that the deceased made a declaration that his two widows must remain on their respective parcels of land which they occupied before his death; that none of them should interfere with the others quiet possession; that he directed the 2nd petitioner to ensure that she settled the loan outstanding on No.10.

The evidence of the 2nd petitioner in both meetings held by the clan elders was to the effect that the deceased expressed his wish in her presence only. In cross-examination, she stated that the deceased had also spoken to a Mr. Kemboi about this. I suppose Mr. Kemboi is the gentleman who testified as petitioner's 2nd witness – Kipruto Kemboi. He confirmed that the deceased made a declaration to him of how he wished to have his widows live on their respective parcels of land. The deceased also told him about a loan on No.10. He was alone when the deceased disclosed to him his death wish. **Sub-section 9(1)(a)** aforesaid only states that the will must be made before two to more competent witnesses. I understand this to mean that the witnesses need not be present or together at the time the deceased makes an oral will. The mischief is that more than one person must have heard the wish. It is sufficient that he states his wish to two or more people, even at different intervals. The 2nd petitioner and Mr. Kemboi are competent witnesses and therefore I am persuaded that the deceased directed that the 2nd petitioner retains No.10 for herself and her children, while the objector retains No.12 for her family. I also find that shortly after

stating his will, the deceased died. That is supported by the evidence of Mr. Kemboi and the 2nd petitioner.

Having come to the foregoing conclusion, I find no merit in the objection, answer to the petition and cross-application, which are hereby dismissed. I make no orders as to costs.

Dated, Signed and Delivered at Nakuru this 29th January, 2010.

W. OUKO

JUDGE