



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**Succession Cause 52 of 1994\**

**IN THE MATTER OF THE ESTATE OF KITE TIREN – DECEASED**

**EILEEN KURUMEI**

**MARY JOAN CHERONO ..... APPLICANTS**

**- V E R S U S -**

**PHILIP TIREN**

**JAMES TIREN**

**THOMAS TIREN ..... RESPONDENTS**

**RULING**

When on the 22<sup>nd</sup> day of February, 1998 the Honourable Lady Justice R. Nambuye gave her Judgment in the objection proceedings brought by certain beneficiaries of the estate of the late KITE TIREN, the said honourable Judge varied the will of the deceased and provided for the 5<sup>th</sup> house of the said KITE TIREN and directed the rest of the beneficiaries consisting of some four widows and several children to agree on distribution amongst themselves, of the remaining assets of the deceased. The honourable judge also ordered that all debts of the estate would be paid half by the 5<sup>th</sup> house and the other half by the other houses and that in the event of a disagreement any party would be at liberty to apply. There has been such a disagreement and hence the application dated 23<sup>rd</sup> April 2008 and filed in court on 30<sup>th</sup> April 2008.

The Chamber Summons taken out pursuant to the provisions of section 83(f) of the law of Succession Act and Rules 49 and 73 of the Probate and Administration

rules as well as all other enabling provisions of the law is brought on behalf of the 1<sup>st</sup> and 4<sup>th</sup> houses in the application represented by Eileen Karumei and Mary Joan Cherono respectively. They pray that as there has been disagreement in distributing the residue of the estate after the Judgment of 7<sup>th</sup> February, 1998, then this court be pleased to distribute such residue amongst the four(4) houses, seeing that the 5<sup>th</sup> house was fully catered for. They have given their proposed mode of distribution.

Philip Tiren swearing the Replying Affidavit on his own behalf and on behalf of the other objectors in opposition to the application describes the application as being bad in law and an afterthought stating that it was the objectors successful challenge to the will that resulted in the will of their late father being varied and the applicants herein did not participate in the said objection proceedings and therefore they lack *locus standi* to bring the present application and further they lack *locus standi* to propose a mode of distribution to be adopted by the court. He states that the application is an attempt to vary the Judgment of the Honourable Lady Justice Nambuye and that can only be done vide an appeal which the application under consideration is not. He annexed a proposed schedule of distribution to his application and said it was the right one to follow should the court be minded to distribute the estate.

At the hearing of the application learned Counsel Mr. Cheruiyot for the applicants submitted that the remainder of the estate should now be distributed equally between the four houses irrespective of the sex of the beneficiaries in those houses as the law does not distinguish between male and female children. And it does not discriminate between married and unmarried children and therefore he saw no justification for the male children getting over double their female siblings. He prayed that distribution be done equally between all the children.

Submissions for the Respondents by learned counsel Mr. Kitur was that their proposed distribution was based on the number of children in each house and not

on gender.

I have had time to consider this application and this is the view I take of it. I start by disabusing the respondents of the notion they hold that because they are the ones who activated and pursued the objection until the court was pleased to vary the will, that *per se* does not give them a prior right to or better share of the estate of their late father than those of the children who did not participate in the objection proceedings. The law of succession Act does not make distinction between those that may take part in court proceedings and those who passively wait for such proceedings to end. If they were the children of the deceased they will remain the children of the deceased and will share in his estate irrespective of the role they played in court. The only extra that those that pursue the cause in court may get is the amount of money spent in pursuing the proceedings if that money be their own and not taken from the estate. And that is the reason the honourable Justice R. Nambuye decreed that the remaining four houses (and not those that went to court) would distribute the residue of the estate amongst themselves. And this is stated for the benefit of the Respondents, it matters not if the female beneficiaries are married for the male beneficiaries are also married and they only emphasized the marriage of the females and not theirs. My finding is that the applicants herein therefore have as much *locus standi* as any of their male siblings who participated in the objection proceedings.

I find further that the respondent's proposed schedule of distribution is based, not on the number of children in each house, but on the issue of sex. That fact is loud in the proposed distribution mode of the respondents. I note also that as long as the female applicants, while noting that the issue of their gender is totally irrelevant with respect to the law of succession, have not declined their share in the estate of their late father, then they are entitled to share in it in such proportion as the justice of the case and the law command. For reasons not made clear to the court one of the Respondents by the name Philip Tiren has been given more assets

by the Respondents' proposed mode than any of the other beneficiaries and definitely more than double that distributed to the 1<sup>st</sup> and 4<sup>th</sup> houses herein. That is inequitable, is against the law and it is not supported by logic.

**Section 29 of the Law of Succession Act** does not make a distinction as to whether a dependant child is male or female. **Section 82(1) of the Constitution of Kenya** outlaws discrimination on account of sex. Kenya subscribes to international customary laws and she has ratified various international covenants and treaties including the **Universal Declaration of Human Rights (1948)** with its Bill of Rights which is not discriminatory in terms of sex, and the **Convention on the Elimination of All Forms of Discrimination Against women "CEDEW"** which Kenya ratified in 1984. I must here quote Article 1 of "CEDAW" in respect to its definition of discrimination against women.

**"Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social cultural, civil or any other field".**

**The African Charter of Human Rights and Peoples Rights** which is also known as the **BANJUL CHARTER, 1981** was ratified by Kenya in 1992. In it and more particularly in Article 18 member states are enjoined to ".....  
**ensure the elimination of every discrimination against women and also ensure the protection of rights of the woman and the child as stipulated in international declarations and conventions,"** amongst other things. Kenya is a member state.

I have referred to those instruments with the view of putting the respondents in the right perspective as to how to regard women dependants/ children of their father. It is hoped that that has persuaded them to regard their sisters as the law

treats them.

Doing the best I can in the circumstances and guided by these principles I now distribute the estate as hereunder;-

The property known as IRONG/ITEN/545 being land measuring 109 acres to be distributed between the four houses not catered for in the will. This will be shared as follows;- The first house of Kimoi Tiren now represented by Eileen Kurumei will get 10 acres of land to be excised around the place where the late Kimoi Tiren's house stood. The fourth house of Tingo Tiren now represented by Mary Joan Cherono will get 10 acres of land to be excised around the place where the late Tingo Tiren's house stood. An equal share of the entire 109 acres divided between the four houses would be 27.3 acres per house. In distributing as above I have considered that there is now left only one child each in house numbers one and four while there are more than one child in the remaining two houses. As regards the parcel of land known as LR. NO. 8344 measuring 408 acres the first house of Kimoi Tiren now represented by Eileen Kurumei will get 40 acres and that of the fourth house of Tingo Tiren now represented by Mary Joan Cherono will get 40 acres for the same reasons above. The four(4) town plots will be shared a plot for each house as follows; to house No.1 Iten Twonship/22 and the unnamed plot in Tambach to house No.4. I do not consider it prudent to give any motor vehicles to house No.1 and 4 for the same reasons given in respect of the distribution of parcel of land known as Irong/Iten No. 545.

House number two and three have worked in unison and consent and proceeded by consent in the distributions of the estate. In light of that I order that continuing in their such unison and consent they shall proceed to share the residue of the estate as they have proposed with minor alterations to accommodate the distribution to house numbers 1 and 4 above as ordered above. Either party is at liberty to apply, however it is hoped that this long outstanding matter may now be brought to a close and the beneficiaries may have time to enjoy their share while

they still appreciate the taste of it without that taste being diluted by age and the passage of time. I apologize to those who may have been affected by the delay in the delivery of this ruling. Such delay was not intended.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 28<sup>TH</sup> DAY OF JULY, 2010**

**P.M. MWILU.**  
**JUDGE.**

In the presence of

**Cheruiyot 1<sup>st</sup>, & 4<sup>th</sup> house Advocate for Applicant**

**Mrs Adala** holding brief for Chebii Advocate for Respondent

**Andrew Omwenga** – Court Clerk.

**P.M. MWILU**

**JUDGE**