REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Succession Cause 304 of 1996

IN THE MATTER OF THE ESTATE OF ISAYA MEGO SOTOLEL (DECEASED)

BETWEEN

JOSEPH ROTICH ..... 1ST PETITIONER

TECLA CHEPKOROS ……..…. 2ND PETITIONER

PAUL KOSGEI ……..…….. 3RD PETITIONER

PIUS MWEI …….……..……. 4TH PETITIONER

JOHN ROTICH …… 5TH PETITIONER

AND

JOHN KIMELI BUSIENEI ….…….. 1ST OBJECTOR

DAVID S. MEGO ..……..2ND OBJECTOR

JUDGEMENT

This Petition was filed on 30th December, 1996 under the Law of Succession Act, Chapter 160 of Laws of Kenya. The Petitioners seek to be granted Letters of Administration to the Estate of the late Isaya Arap Mego Sotolel who died on 1st March, 1979.

The Petitioners listed are:-

1. Joseph Kibungei Rotich
2. John Kipkalum Rotich
3. Pius Kipchumba Mwei
4. Paul Kiplagat Koskei
5. Tecla Chepkoros Mego

6. John Kimeli Busienei and

7. David Kipkemei Sang

On 3rd October, 1997, an Objection was filed by John Kimeli Busienei and David Kipkemei Sang who are Petitioners Nos. 6 and 7. They are sons of the deceased and deny having been party to the Petition. The main ground for the Objection in that the deceased left a written will which ought to be proved. It is my view that the said question must be dealt with and determined as first preliminary issue before delving into any other questions or issues.

The deceased died on 1st March, 1979. The Law of Succession Act came into operation on 1st July, 1981. Section 2 (2) of the Act provides as follows:-

"**The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of the death, but nevertheless the administration of their estates shall commence or proceed so far as possible within Act."**

The Will under challenge here was signed on 4th May, 1979. It was prepared by Mr. Paul Birech Advocate who testified and produced the same in Court. It was signed by himself and another Advocate K. K. Arap Sego as witnesses.

The applicable law at the material time, to Africans was the Africans' Wills Ordinance 1961, No. 35 of 1961. Section 3 provided that the provisions of the Indian Succession Act, 1865 specified in the second schedule to the Ordinance shall, apply to all Wills and codicils made by any African on or after 1st January, 1962. The Indian Succession Act, heavily borrowed from the English Law.

Section 4 of the Africans' Will Ordinance 1961 provided inter alia,

"**4. Nothing in this Ordinance shall –**

(a) ……..

(b) – deprive any person of any right of maintenance to which such person would otherwise have been entitled to.

(c) …….

(d) affect any law of adoption or of intestate succession or the administration of intestate estates.

(e) validate any testamentary disposition which would otherwise have been invalid, or invalidate any such disposition which would otherwise have been valid."

From the foregoing it is clear that the said Ordinance was not intended to exclude the provisions of the African customary laws of inheritance. To the contrary, the Ordinance did not allow the ouster of the application of the African customary laws of inheritance which primarily were in respect of intestate estates. African customary laws were therefore entrenched in the said Ordinance.

The Africans' Wills Ordinance 1961 remained in force until 1981 when it was repealed upon the coming into operation of the Law of Succession Act, Cap 160. The substantive law in respect of Wills made by Africans before 1981 was the said Ordinance.

I therefore do hold that the applicable law to the Will of the deceased herein is the Africans' Wills Ordinance 1961, No. 35 of 1961. However, the question of administration which is general law was to continue after 1981 as far as possible under the Act.

In the present case we are not dealing with administration of the Estate per se but whether the deceased died testate or intestate and the consequences thereof with regard to inheritance, rights and distribution thereof.

I have considered the testimonies on record and submissions. I am satisfied that the deceased instructed Counsel to prepare his Will and which was done. I am satisfied on a balance of probabilities that he executed the same in the presence of two Advocates. I cannot say much on the alleged signatures on the Transfer documents or A.F.C. documents.

Having found that the Will is the deceased's document and last Will, the Court must ask itself whether it complies with the provisions of the aforesaid Ordinance.

Under the provisions of Section 4 (c), no Will made by an African should affect any law of intestate succession. In the present case, I do find that the deceased and his family were of the Nandi Community. As a result the applicable law to Estate is the Nandi Customary Law regarding succession.

In the Will herein, the deceased devised his property known as Nandi/Lolkeringet/7 comprising 45½ acres to two of his sons namely John Arap Busienei who is to get 16½ acres and David Kipkemei Sang who is to get 18½ acres. The deceased bequeathed "the remaining 10 acres to his other surviving wife Jepkoros who shall hold the same on trust for her children." In fact the balance is 10½ acres.

According to Eugene Contran in **Restatement of African Law Volume 11, P. 115**,

"**The institution of making a Will is recognized by the Nandi and Kipsigis although such a Will must not depart from the general pattern of inheritance. Property may also be and normally is distributed during the father's lifetime to the heirs as they get married, although it is unusual to do this with land."**

He observes in under Part IV – Dispositive and Testate Succession -

"**1. Power of distribution during lifetime ….**

(a) ……..

(b) – LAND – since it is not customary for a father to give land to his sons absolutely during his lifetime, the question does not arise."

I think that the said position of law then was essentially

correct. However, it is a fact that in 1978, the African Will's Ordinance 1961 allowed the deceased to make a Will and which he did.

At P. 122, Cotram says:-

" …… **A person may by Will alter shares of heirs so as to give more to one then the other. This is subject to the rule about equal distribution of livestock."**

In the present case, the deceased has given 35 acres to two of his sons from one house. However he does not devise any land to any of his sons of the other surviving house which has four (4) sons. He gives the mother the discretion and power to share the remaining 10½ acres among the four (4) sons. If they get equally, each will get just over 2.5 acres.

I do hold that this is a serious departure from Nandi Customary Law and the law relating to intestate Estate or Succession.

The general principle under Nandi Customary Law is that each house of each wife gets an equal share

of the property irrespective of the number of children in each house (Cotran P. 120). Considering this principle I hold that the Will and its effect is to affect the law relating to Nandi Intestate estates and succession and purports to validate what is otherwise would be invalid under Nandi Customary Law.

The inequity and imbalance is unfair, unreasonable and unconscionable as far as the law existing and applicable was concerned.

I do there declare that the Will herein is invalid and cannot be sustained under the applicable law.

I do hold and direct that the Will is invalid and not in consonance with Nandi Customary Law.

For some reason, the deceased wished the two sons in the house of the younger wife get more than the sons in the other house. However, the disparity was not justified in the absence of an explanation in the Will or to the family and elders. These are allegations of an intended divorce or separation but under the circumstances no divorce was proven. Separation is no ground to disinherit his sons. No one alleged that they were not entitled to inherit. It is still noted that when she left the home she had only one son.

Doing my best and taking into account the Nandi Customary Law and the wish of the deceased to bequeath more to John and David I do hereby order that the property forming the assets of the Estate of the deceased be and is hereby distributed as follows:-

John Kimeli Busienei - 12 acres

David Kipkemei Sang - 13½ acres

The balance of twenty (20) acres shall go to the other house and shared as follows:-

Joseph Kibongei Rotich – as an undisputed biological son of the deceased - 10 acres

The balance of ten (10) acres shall be and is given to Tecla Chepkoros on trust for herself and the other three sons – John Kipkalum Rotich, Pius Kpchumba Murei and Paul Kiplagat Koskei.

Each party to bear his/her costs. Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 9TH DAY OF JUNE, 2009.

M. K. IBRAHIM

JUDGE

In the presence of:-

Mr. Magare for the Objectors

Mr. Chepsaigut for the Petitioners