



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO**

Succession Cause 19 of 2005

IN THE MATTER OF ESTATE OF JOHN KIBET TONUUI – DECEASED

AND

AGNES CHEBET TANUI.....PETITIONER

VERSUS

**RICHARD KORGOREN.....
....OBJECTOR**

RULING

I: Procedure

1. Section 21 of the Law of Succession Act provides that where, “a person dies...so far as his Succession to his property is governed by the provision of this act, then on the application by on behalf of a dependant the court may.... (if) not such as its make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”
2. “net estate under Section 3(1) on interpretation means the estate of a deceased person in respect of which he has died intestate after payment of the expenses debt liabilities and estate duty set out under the definition of “net estate so far as the expenses, debts liabilities and estate duty are chargeable against the estate.”
3. Such application made must be so done “before” the grant of representation is confirmed.

II: Background

4. One, Richard Kiptoo Korgoren files summons under Section 26, seeking orders that
“such reasonable provision be now made for him as the applicant and dependant of the deceased John Kibet Tonui who died on 7th November 2004 out of the net estate.”
5. Richard Kiptoo Korgoren (herein referred to as the complainant) claims to be and is indeed the nephew of John Kibet Tonui (deceased). The applicant claims that his father had moved to Tanzania and left the deceased and his sister one Taplelei to be in-charge of the family land. The father then entered to Kenya but passed away soon after. The deceased took the applicant and his two brothers as his children. The applicant acknowledge that the deceased has eight other dependants.

6. When the deceased died his only asset was land parcel No.Kericho/Kipchimchim/2639 measuring 4.2 Ha. (now subdivided to Kericho/Kipchimchim/4379 and Kericho/Kipchimchim/4380).
7. The deceased and his sister divided the land between the two of them and left out his late father. Later Taplelei's land was sold on her demise.
8. During his life time the deceased had made provision for the applicant to have portion of the land in question after meeting with elders, the deceased agreed but later changed his mind to this correspondence or written notes of meetings shows the respondent/petition agreeing to promote him with at least an acre.
9. The applicant now prays to this court that provision be provided for him and the same be held in trust for himself and his two brothers at a ratio of 4 acres house No.1, 4 acres house No.2 2.5 acres to the applicant.
10. In reply the respondent/petitioner stated that the applicant late father Kiprono Arap Tonui did migrate to Tanzania in the late 1960's. No land adjudication had been done at that time at no time was the applicant even a dependant of her late husband.
11. Taplelei, the sister to the applicant's father and her late husband had land that was sold to defray debts she incurred. The applicants further returned to Kenya from Tanzania but resided in the Trans-mara area till his demise in 1988 – a total of 14 years later.
12. The applicant's late father had some land which he sold before migrating with his family to Tanzania.
13. The intention therefore of deceased was to subdivide the land equally between the two houses. The said subdivision included a debt with the surveyors that refused to be paid.
14. The applicant therefore had never been a dependant of the deceased.

II: Opinion

15. I have been called upon to determine whether the applicant Richard Kiptoo Korgoren is a dependant of the deceased, John Kibet Tonui? To this end I turn to Section 29 which defines that a dependant is:-

“For the purposes of this part ‘dependant’ means.

- (a) The wife or wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately, upon to his death;
- (b) Such of the deceased parents, step parents, guard parents, grand children, step children, children means the deceased had taken into his family as his own, brothers and sisters and half brothers and half sisters as were being maintained by the deceased immediately upon to his death and
- (c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

16. I require to further take into consideration the nature of amount of the deceased property. In this case it is 4.2 ha. of land. Any past, present, future capital or income from any source of the dependant. In this case the dependant/applicant claims he relies on casual work only. He needs to exist now and in the future. There was no time that the deceased made advanced or any gift to the applicant. I require considering this evidence but none was deduced by the applicant. The other thing I required to look at is the conduct of the dependant in relation to the deceased and the situation of the other dependants and beneficiaries. To look and determine why the deceased made no provision for the dependant/applicant.

17. The only indication I get is from meetings held with elders who were of the view of the applicant

and his two brothers be provided in the estate of the deceased during the deceased life time. The deceased agreed but later refused. The petitioner had agreed to the applicant only and only one acre. Nevertheless when this application was made there indeed was no such indication that she was willing to part with any of her share in the deceased's property.

18. From the definition of the dependant above the applicant requires to be "a child mean the deceased had taken into his family as his own."

19. The applicant had not disclosed his age. In 2004, the deceased was aged 86 years old. The applicant's father was older at no time as a child – namely a person who had been under 18 years and had he been looked after by the deceased as part of his family.

20. The claim the applicant appears to be making is more of trust of family ancestral land on his behalf. This should have been made by his late father in the 14 years he had been back to Kenya. At no time was this ever made. His late father had sold his share of land and did not return. He was never interested to return to the deceased's land nor was his wife/widow.

21. I accordingly hold that the appellant is not and has never been a dependant of the deceased John Kibet Tonui. He is not entitled to the estate and accordingly his application is dismissed with costs to the petitioner/respondent.

DATED this 12th day of November 2008 at Kericho.

M.A. ANG'AWA

JUDGE

Advocate.

C.K. Korir advocate instructed by M/S C.K. Korir & Co. advocates for the applicant

J. Motanya advocate instructed by M/S Bogonko & Co. advocates for the Petitioner/Respondent