



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

Succession Cause 142 of 2003

IN THE MATTER OF THE ESTATE OF HELLEN CHEPKORIR

NGERECHI DECEASED

JOSEPH KIPKURUI TESOT PETITIONER

VERSUS

JAMES KIPNGETICH TESOT 1ST OBJECTOR

JOHN KIBET ARAP TESOT 2ND OBJECTOR

JUDGMENT

The deceased, Hellen Chepkorir Ngerchi died on the 8th April, 2001. The deceased was survived by three sons namely: Joseph Kipkurui Tesot, James Kipngetich Tesot and John Kibet Tesot. All the three sons are adults and from the forms filed in court in this Succession Cause they are all over 50 years of age. The deceased was registered owner of all that parcel of land known as Kericho/Silibwet/791 measuring 6.6 hectares or approximately 17 acres. She did not have any other property. It is this parcel of land that the three sons have disagreed on the mode of its distribution. Whereas two of the sons i.e. James Kipngetich Tesot and John Kibet Tesot would like to get a bigger share, Joseph Kipkurui Tesot is desirous that the said parcel of land be shared out equally between the three sons after 1.2 acres has been excised therefrom being the portion of land which he claims to have purchased from a neighbour and had it consolidated with the suit property during the lifetime of the deceased.

Before this cause was listed for hearing, the petitioner and the objectors filed affidavits indicating the mode they each preferred to have this court adopt when distributing the deceased's estate. The objectors James Kipngetich Tesot (PW1) and John Kibet Arap Tesot (PW2) testified that the suit land should be divided as follows: the two of them i.e. PW1 and PW2 should jointly inherit 13 acres with a balance of the acreage of about 3 acres to be inherited by the petitioner. They told the court that one acre out of the suit land had been hived off and transferred to Tenwek Primary School. They testified that the reason why they were proposing the sub division that was skewed in their favour and against their petitioner was because prior to his death their deceased's father had assisted the petitioner to purchase a parcel of land measuring 21 acres at a place called Kamogoso Scheme.

PW2 testified that their deceased's father had sold eight bulls and from the proceeds thereof gave the petitioner money which he used to purchase the said parcel of land at Kamogoso Scheme. Both PW1 and

PW2 conceded that the petitioner had purchased a parcel of land measuring 1.2 acres from a person known as Obot Mushaeli which parcel of land was consolidated with the suit parcel of land to form one parcel of land. PW1 and PW2 were not opposed to the said parcel of land being transferred to the petitioner. Both PW1 and PW2 were of the view that the petitioner should not inherit the house of their mother although PW2 admitted that it is the petitioner who had built the said house for their late mother, the deceased. They proposed that the court adopts their mode of distribution of the deceased's estate in view of the fact that the petitioner had been given land by their deceased's father before his death.

The petitioner testified that the parcel of land which the objectors were claiming was purchased by his late father for him was purchased using his own and his wife's resources. The petitioner produced the title in respect of the land in question i.e. Kericho/Kipsonoi Settlement Scheme/119 measuring 8.6 hectares and registered in the name of his wife Elizabeth Chepchirchir Tesot. He testified that it was not true for the objectors to claim that the said parcel of land had been purchased by their late father after he had sold his bulls. The petitioner produced copies of a cheque and receipts which showed that he was the one who had paid the purchase consideration for the Kipsonoi Settlement Scheme farm and not his father (See defendants' exhibit no. 3, 4 and 5).

The petitioner further testified that he had constructed the house where their deceased mother used to live in before her death. He further testified that although his father had given him a gift of land of 2.68 acres he was not insisting on the same. He was however proposing that the parcel of land which he had purchased from one Obot Mushaeli measuring 1.2 acres be transferred to him and the balance of the acreage be distributed equally between the three brothers i.e. the objectors and the petitioner. The petitioner called two witnesses DW2 Erick Bargetet and DW3 Paul Kimutai Arap Too who testified that the objectors had prevented the petitioner from occupying the parcel of land that he was supposed to inherit from the deceased. They told the court that the efforts by the village elders to reconcile the petitioner and the objectors to enable an amicable distribution of the deceased's estate proved futile after the objectors refused to budge in their insistence that they should get a larger portion of land. DW3 told the court of a meeting called by the deceased that he had attended where the deceased had indicated to the people present that her house was to be inherited by the children of the petitioner.

I have considered the evidence adduced by the parties in these succession proceedings. I have also read the affidavits that the parties have filed indicating the preferred mode that they would like this court to adopt in distributing the deceaseds estate. The objectors and the petitioner are brothers. The deceased in this case was their mother. The deceased was the registered owner of a parcel of land known as Kericho/Silibwet/791 measuring 6.6 hectares (approximately 17.1 acres). This was the only asset that comprised the deceaseds estate. It is this parcel of land that the objectors and the petitioner have disagreed on how it should be distributed. In the affidavit filed in court, the objectors proposed that the petitioner inherits 4.4 acres while each objector inherits 6.35 acres. On the other hand, the petitioner has proposed that the objectors each inherit 5.04 acres while himself he proposes that he inherits 6.2 acres.

I have considered the evidence adduced by both the objectors and the petitioner. The issue for determination by this court is what mode of distribution should be adopted to settle the dispute between the petitioner and the objectors as regard the estate of the deceased. The objectors want this court to distribute the deceaseds estate in such a manner they would get a bigger portion than that of the petitioner. Their reason for this proposal is that they contend that the petitioner was bought a parcel of land by their late father during his life time. In essence the objectors are saying that the petitioner was given a gift by their deceaseds father before his death. The objectors were alluding to the provision of **Section 28(d) of the Law of Succession Act**. This gift, the objectors are contending should be taken into account in distributing the deceaseds estate. The petitioner however adduced evidence which established that the land which was allegedly purchased for him by his late father was in actual fact purchased by the petitioner and his wife. The said parcel of land is registered in the name of the petitioner's wife.

Having evaluated this evidence, I am persuaded by the evidence adduced by the petitioner. He produced documentary evidence which established that indeed the parcel of land known as Kericho/Kipsonoi Settlement Scheme/119 was purchased by the petitioner and his wife. The claim by the objectors that it is their late father who assisted the petitioner to purchase the land does not stand up to legal scrutiny. I

therefore hold that the said parcel of land does not form part of the deceaseds estate. Neither was it given as a gift by the deceased to the petitioner prior to her death. It belongs to the petitioner and therefore cannot be taken into account by this court when distributing the deceaseds estate. The only asset of the deceased which this court shall distribute is parcel no. Kericho/Silibwet/791.

The objectors concede that the petitioner purchased a parcel of land measuring 1.2 acres from Obot Mushaeli which parcel of land was consolidated with the suit land. The objectors are not opposed to the said parcel of land being inherited by the petitioner. I therefore distribute the said 1.2 acres of land to the petitioner. PW1 testified that one acre out of the suit land was hived off and transferred to Tenwek Primary School. None of the parties to this suit indicated any objection to this proposal. I therefore order that the said one acre shall be transferred to Tenwek Primary School. The remaining parcel of land shall be shared equally between the two objectors and the petitioner. However, there shall be one caveat to this distribution: the share of the petitioner's parcel of land shall include the house which the petitioner built for the deceased. DW3 indicated that the deceased had expressed a wish that upon her demise, the said house was to be inherited by the petitioner. No evidence has been adduced in these proceedings to persuade me to reach a contrary decision. As this matter is a family dispute, I will make no orders as to costs.

DATED AT KERICHO THIS 9TH DAY OF FEBRUARY, 2006

L. KIMARU

JUDGE