



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**PROBATE AND ADMINISTRATION CAUSE 26 OF 1998**

**IN THE MATTER OF THE THE ESTATE OF CHUMO ARUSEI (DECEASED)**

**JUDGMENT**

The proceedings herein relate to the estate of one Chumo Arusei who died at the age of 69 years on 8.7.1997 at Tuiyo Lemock Uasin Gishu. The petition was filed on 11.2.1998 filed by Philip Chumo and Joshua Chumo whom the Court has been told are sons from the first house. The deceased had two wives named in P&A 5 as Rael Arusei and Chemosbei Arusei but in court the second widow described herself as Jane Metto.

On 12.2.1998 the petitioners filed on application to be granted *Ad Coligende Bona* to pursue a civil case against Japhet K Lelel and they were granted the same on the same day. The cause was gazetted vide Gazette Notice No 2925 of 12.6.1998 objection on issuance of the grant was filed by Jane Cheptanui Metto on 15.6.1998 and then filed answer to petition and cross petition.

On 15.12.1998 consent was reached whereby the grant was to be issued to four persons being two representatives from each house.

These are:-

1. Philip Kipkering
2. Johana Kipkemboi
3. Cheptanui Metto
4. Teresa Chepchirchir Metto

The parties failed to agree on the mode of distribution. Directions were taken, *viva voce* evidence taken for the Court to distribute the estate of the deceased. The witnesses for the petitioners were PW1 Philip Chumo a son of the deceased from the elder house, PW2 John Maritim an elder from the clan and the one who chaired, the meeting held on 14.6.1998, PW3 Kiptalam Martim also one of the elders who attended the meeting held on 14.6.1998. The witnesses for the objector were Jane Cheptanui Meto 2nd widow of the deceased PW2 Teresa Chepchichir a daughter of the 2nd widow and deceased, DW3 David Kipsang Arusei a neighbour of the objector in Tuiyo farm and DW4 Simeon Arusei also a resident of Tuiyo farm. Both sides gave evidence and their witnesses were fully cross examined. This Court will only deal with the evidence touching on distribution and those who qualify to be beneficiaries from each house. It is agreed that the deceased died intestate and left two households. The senior house belongs to Rael Arusei the first widow who had six children named as:-

1. Philip Chumo

2. Joshua Chumo
3. Wilson Chumo
4. David Chumo
5. Selina Cheptepkeny
6. Esther Chepkoech

It is the evidence of PW1 that all the daughters of the first house are married and are not contenders in these proceedings. Those to inherit are the widow Rael and her 4 sons named.

The second house belongs to Jane Cheptanui Meto the second widow. Her children were named as:-

1. Prisca Chebo adult daughter
2. Hellen Chepkemboi adult daughter
3. Teresa Chepchirchir adult daughter
4. Kenneth Kirwa Chumo adult son
5. Stephen Kipngetch Chumo adult son
6. Christine Cherop a minor daughter as at 29.10.1999
7. Eliud Cheruyot Chumo minor son as at 29.10.1999.

The identifiable properties forming the estate were:-

1. Heads of cattle
2. Goats/sheep
3. Tractor plough with a furrow wheel
4. Harrow
5. 2 hand mills
6. Plot No 15 at Tuiyo centre
7. Land parcel number Nandi Cheptil 168 comprising 10 acres of land
8. Land parcel number plot No 150 at Tuiyo farm
9. Share worth 80,000.00 in Tambul Farmers Company Limited
10. Proceeds in Account Number 4060878 Barclays Bank Eldoret
11. Land parcel number Nandi/Cheptil/246 under litigation
12. House holds.

The overall view of the evidence on the record is that when the first widow was married she resided on

land parcel number Nandi Cheptil 168 and since then she has always lived on this land with her children. The second wife Jane Cheptanui was married around 1966/67 as per the evidence of PW1 as she could not remember when she was married herself. She was married and a house put up for her on parcel number 168. Thereafter the deceased purchased 8 acres of land from one Chumo Arap Chemaketi and moved the second wife onto this land. They resided there for some time. It is the evidence of PW1 that the deceased had problems with people who sold him the land and sold the eight acres to go and buy the Tuiyo farm comprising 30 acres. It is the evidence of the petitioners and their witnesses that the money which went to pay for the Tuiyo farm came from the sale of the 8 acres registered in the name of the deceased and some heads of cattle from the first house. The Tuiyo farm was registered in the name of the deceased. He settled here with the second wife and her children. It is also clear that the first widow and her children have never lived on the Tuiyo farm during the life time of the deceased. It is the stand of the petitioners and witnesses that the deceased had not shared out his property during his life time and he only left a wish that it be shared according to Nandi Customary Law. It is on this basis that the elders met on 14.6.1998 at Tuiyo farm and shared out the cattle and land equally between the two houses. They ask this Court to confirm that decision.

The stand of the objector and her witnesses including 2 elders and her daughter is that the deceased shared out his property during his life and gave the first house their land Nandi Cheptul 168 and second house Tuiyo farm plot 150. He also shared out heads of cattle and gave 22 heads of cattle to the first house and then gave 6 heads of cattle to the younger wife. Thereafter each wife looked after her property and when the deceased died PW1 allegedly used force and came and took 10 heads of cattle, one handmill and a furrow wheel from the second widow. DW3 confirmed that 10 heads of cattle were taken. PW1 says he took only 8 as the share of the first house according to the elders decision. He also said they took a handmill because they were two and left one for the second house. That they were also entitled to the share of the deceased's property. All they want is an equal share of the property.

The stand of the objector is that each house to remain where they were left by the deceased. Counsel for the petitioner put in written submission and the points stressed by them are:

1. That the agreed facts are that the deceased had 2 wives the petitioner's mother is the senior wife while the objector is the junior wife. The deceased left all the properties enumerated in the petition, all the properties are in the deceased's name each of the deceased's wives has children who were his dependants.

2. That petitioner prays for the estate to be distributed equally because

(i) The deceased died intestate

(ii) Both houses have equal stake at the deceased's property

(iii) The cows and goats have already been shared out equally

(iv) Each of the houses ought to receive half share of the deceased's estate

Nandi Customary Law also faintly invoked.

3. That the second houses contention is that the deceased expressed in the 1970's his wish on how his estate should be distributed calling into play the provision of section 3, 8, 30 and 33 which applies to oral wills and how they are to be upheld. It is his submission that what the deceased purportedly uttered in the 1970's does not qualify to be a will as they were not uttered in the presence of 2 or more competent witnesses and secondly the deceased did not die within 3 months from the date of the making of the said oral will.

4. Having found that there was no oral will and since none of the deceased's properties was transferred to any of the wives the presumption is that the deceased never distributed his property during his life time. Secondly Nandi Customary Law could not be applied to agricultural land which had not been registered. So the issue of Nandi Customary Law may not apply to the instant case. On the basis of the foregoing

counsel urged the Court to distribute the estate equally amongst the two houses who will in turn distribute the same to the beneficiaries in their respective houses.

On the Court's assessment of the facts herein it is clear that since no witness supported the issue of the existence of the deceased's wish to share out the property according to the physical occupation of his wives and there having been no move on his part to finalize that move during his life time what amounts to that wish if ever it was made is that the wish amounts to an incomplete gift. The position in law is that an incomplete gift cannot be perfected. The effect of that finding is that the oral wish stands no chance and the operative words are that the deceased died intestate. He had a free hand over his property from either house and it was still his free property as at the time of his death. None of the wives could stop him from dealing with it in any manner he liked. It formed part of his free estate and so it is part of his distributable estate. It is on record that the cattle, goats and sheep, handmills and households have all been shared out. The objector said the 10 heads of cattle removed from her home were hers but she has not asked for their return and so the matter will rest there. The Court will deal with the distribution of the land plot and tractor plough and proceeds in the bank account. It is on record and it has featured prominently that according to Nandi Customary Law the estate is to be shared equally among the houses. Counsel has submitted that Nandi Customary Law they may apply to agricultural land which is not registered and then at the same time urges the Court to distribute the estate equally thus upholding the principle of Nandi Customary Law. The observation of the Court is that in as much as customs should not be ignored when considering distribution herein this Court cannot overlook the provision of the Act – Succession Act (cap 160) Laws of Kenya. Section 28 of the said Act enjoins the Court to consider the following.

- (a) The nature and amount of the deceased's property.
- (b) Any past present or future capital or income from any of the source of the dependent.
- (c) The existing and future means and needs of the dependent.
- (d) Whether the deceased had made any advancement or other gift to the dependant during his life time.
- (e) The conduct of the dependant in relation to the deceased.
- (f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will.
- (g) The general circumstances of the case including so far as can be ascertained the testator's reason for not making provision for the dependant.

I have applied principles to the facts of this case and considered the fact that the beneficiaries of the first house are all adults. Although the source of income for each of them was not given PW1 is employed as a police officer and provides extra income to that house. That is nobody going to school who needs financial support from the property of the estate.

However in the junior house there are 3 children who are still in school. None of the other children was said to be in gainful employment to support the widow to educate these children. PW1 admitted that he does not support them because of their utterances. But if they sit down to discuss as a family then the first house can assist them. From the evidence it appears that the two families were far much removed from each other as there was no mention that children from either side had free access to the others house or that they mingled together freely. This means that the second widow has to solely shoulder the responsibility of educating her children to whatever levels of education they may be able to reach. This is a factor to be considered when distributing the estate. Distribution

1. Proceeds of Bank account No 4060878 with Barclays Bank Eldoret branch to go to Rael Arusei and Jane Cheptanui Metto in equal shares.
2. Plot No 15 at Tuiyo centre to go to Rael Arusei and Jane Cheptanui Metto in equal shares

3. Tractor plough to go to Jane Cheptanui Metto only.

4. Land parcel No Nandi Cheptil 168 to go to

(i) Rael Arusel

(i) Philip Chumo

(ii) Joshua Chumo

(iii) Wilson Chumo as joint proprietors in equal shares

5. Five(5) acres out of land parcel No Tuiyo Lemok form plot No. 150 to go to

(i) Rael Arusel

(ii) Joshua Chumo

(iii) Wilson Chumo

(iv) David Chumo

On the same holdings as in No 4 above

6. 25 twenty five acres out of land parcel plot No 150 Tuiyo Lermok farm to go to

(i) Jane Cheptanui Metto 2nd widow

(ii) Kenneth Kirwa Chumo

(iii) Stephen Kipngetch Chumo

(iv) Eliud Cheruiyot Chumo to hold as joint proprietors in equal shares.

7. It was not indicated whether the adult daughters in the second house are married or not besides Christina Cherop. If there are any in addition to Christina Cherop they will have a life interest in the 25 acres given to their house. The said life interest to terminate upon their marriage or death.

8. Share worth 80,000,00 in Tambul Farmers Company Ltd. It was given in evidence by PW1 that he contributed 40,000/- out of the total 80,000/- paid and that half of the land should go to him. There is no proof of the payments and there is no witness to that transaction. PW1 conceded that the receipt bear the name of the deceased only. This is proof that the deceased was the one to get the land. The same principle will apply to this land and hold that it solely belongs to the deceased and it is part of the distributable estate. The Court is informed that the share is equal to 40 acres. The same is to be distributed considering what has been shared above and it is to be distributed as hereunder:-

(a) Twenty three (23) acres to go to

(i) Rael Arusel

(ii) Philip Chumo

(iii) Joshua Chumo

(iv) Wilson Chumo

(v) David Chumo

On the same holdings in No 4 and 5 above

(b) 17 seventeen acres to go to

(i) Jane Cheptanui Metto

(ii) Kenneth Kirima Chumo

(iii) Stephen Kipgetich Chumo

(iv) Eliud Cheruyot Chumo

On the same holding as in No 6 above

9. Nandi Cheptil 246. The Court was informed it is still under litigation.

It was not indicated the anticipated share of the deceased. It is not therefore possible to share it out except to order that the resultant acreage from the said litigation if any to be share as hereunder.

(i) 3/4 to the house of Rael Arusel

(ii) 1/4 to the house of Jane Cheptanui Metto

10. Each party will bear his/her own costs.

11. There will be liberty to apply.

Dated and delivered at Eldoret this 21<sup>st</sup> day of February, 2003

**R.N.NAMBUYE**

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**JUDGE**