



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PROPATE & ADMINISTRATION CAUSE 29 OF 1996

In re Estate of Ngetich

Succession - transfer of land – incomplete transfer of land – proceedings commenced to transfer land to the petitioner – objector filing case to stop the transfer – deceased dying before determination of the case – whether the Court can effect the transfer.

Succession - application for grant – application for grant with will annexed – requirement that the application be accompanied by an affidavit – what the affidavit should contain.

Succession - application for grant – procedure for such application – distinct procedures applicable in testate and intestate petitions – where a party uses the wrong procedure to apply for grant – whether the law provides for substitution with the proper procedure – whether the fact that the wrong procedure has been used means the will has to be ignored – section 53 (a) and (b) of the Law of Succession Act (cap 160) – rule 14 (1) of the Probate and Administration Rules (cap 160 sub leg).

Succession - will – nature of a will – whether a will is absolute – matters a court needs to consider in making an order interfering with a will – sections 26 and 28 of the Law of Succession Act (cap 160). The petition in this case was presented by the executor of the last will of one Miriam Ngetich but was objected to by Ann Jepkios who alleged to be the wife of the deceased under Nandi customary law.

The objector argued that she had not been consulted when the proceedings were filed and that she should be the one to be issued with the grant. She argued further that when she learned that the suit land was being transferred to the petitioner, she filed a case in a Kapsabet court to block the transfer but the deceased died before the case was determined. It was her evidence that as the lawful wife of the deceased, it was her and her son who were entitled to inherit the deceased's property.

The petitioner had wrongly used form No 80 which is prescribed for intestate succession applications. A consent was filed and endorsed whereby the petitioner was allowed to substitute the wrongly filed form with the correct form No 78 which applied to testate petitions.

The objector submitted that the use of the wrong form meant that the application was a nullity ab initio which could not be cured by an amendment by consent or otherwise.

Held:

1. The law cannot move to perfect an incomplete gift. The transfer of land to the petitioner in this case was blocked and hence was not completed.
2. Section 53(a) and (b) of the Law of Succession Act (cap 160) provides for distinct modes of presenting

applications for forms of grants in case of testate succession and in cases of intestacy.

3. When making an application for a grant with the will annexed, such application should be accompanied by an affidavit giving details of the form of the will, names and addresses of the execution and the names and addresses of the witnesses as well as other details required by rule 7 of the Probate and Administration Rules.

4. Where a party, as in this case, uses a wrong statutory form to apply for a grant, there is no procedure for substitution with the proper form.

5. Where the wrong procedure is used in applying for a grant the law provides for an amendment and not substitution. Rule 14(1) of the Probate and Administration Rules provides that an amendment be made by filing form 62.

6. In this case form 62 was not filed and therefore the substitution order made following a consent between the parties was erroneous and it could not hold. What the Court was dealing with, therefore, was an intestacy.

7. The fact that a wrong procedure had been followed to present a will to the Court did not mean that the will had to be ignored. It had to be looked at. When the will is so looked at, the Court has to decide whether the same is to be upheld.

8. Section 26 of the Law of Succession Act (cap 160) stipulates that a will is not absolute. Where there is contention, the Court can interfere and make provision for a dependant left out of inheritance.

9. In exercising the powers given under section 26 of the Law of Succession Act (cap 160) the Court has to bear in mind the provision of Section 28 dealing with the circumstances a court needs to consider in making an order to interfere with a will.

#### Cases

No cases referred to.

#### Statutes

1. Law of Succession Act (cap 160) sections 3(2), 26, 28, 29, 53(a), (b),

2. Probate and Administration Rules (cap 160 Sub Leg) rules 13, 14(1) February 21, 2003, Nambuye J delivered the following Judgment.

The proceedings herein relate to the estate of Miriam Jepkios Ngetich who died on 27.10.1995 at the age of 85 years.

The petition was presented by Mary Cheboo Kimnyigel in her capacity as the executor of the last will of Miriam Jepkios Ngetich with the will annexed (testate).

The petition was filed on 30th January 1996 on 29th March 1996 one Ann Kugun Jepkios issued notice of objection to the making of the grant to one Mary Cheboo Kimnyigel on the grounds that:- 1. She is the wife of the deceased having married to the deceased under Nandi Customary Law being woman to woman marriage, that there is one issue born to them being Nicholas Kipkosgei Kogo born in 1975, that since she was married in 1973 she has always resided on land parcel number Nandi/Chamase/678 with the deceased, that she was not consulted when the proceedings were filed and she is the proper person to be issued with the grant and if the grant is issued to the petitioner she objector will suffer loss and damage.

The petitioner put in a replying affidavit averring that it is not true that the objector lived with the

deceased soon after the alleged marriage, that the objector never used to look after the deceased, that the deceased had filed divorce proceedings against the objector but she deceased died before they were finalized. The petitioner had wrongly used form No 80 which is for an intestate application. A consent was filed and endorsed on 1.7.1997 whereby the petitioner was allowed to substitute the wrongly filed form No 80 with the correct form No 78 which applied to testate petition.

Leave was sought and obtained for the objector to file answer to petition for grant and petition by way of gross petition filed on 15.4.1997. Directions were taken on 8.10.1998 for parties to proceed by way of viva voce evidence.

The objector gave evidence first and three witnesses testified on behalf of the objector namely PW1 Ann Kugun Chepkios who died before the conclusion of the proceedings and was substituted by her son Nicholas Kipkosgei Kogo, PW 2 Nicholas Kipkosgei Kogo and PW 3 Samuel Kibor Kambui.

The petitioner gave evidence as a defendant and called 7 witnesses namely DW 1 Mary Cheboo Kimnygel, the petitioner DW 2 Jacob Kiptum Rono, DW 3 Luka Kiprotich Kimaru, DW 4 Alfred Momanyi Nyairo, Karoli Mwara Okwaro, DW5, DW 6 Mary Cheptoo, DW 7 Rodah Chemaiyo.

An overview picture of the evidence adduced by both sides is to the effect that the deceased herein Miriam Jepkios Ngetich was a paternal aunt to the petitioner Mary Cheboo being a sister to her father. It is her testimony that the deceased had two other siblings namely the petitioner's father and another sister called Rosa. The petitioner's father had only one child who is the petitioner while Rosa had only one daughter also called Chebo.

The deceased had allegedly married a white man but she had no children of her own. It was the testimony of Mary Cheboo that the deceased had been staying with them since her childhood. Both the deceased and her paternal grandmother resided with her mother (deceased's mother) in the homestead of her father each with her own house. That the grandmother died and was buried in their home. The father had a shamba at Chemase which he sold and moved to Kaptumo. He later on acquired another land at Chemase and then gave it to the deceased to go and reside on the same which is the property being disputed over. She resided on this land alone and she also acquired a centre plot. Later on the father of Mary sold the Kiptumo land and he came to purchase a bigger portion of land of 100 acres at Kipkenyo. They came and settled here. Meanwhile she became of age and she got married at Kabiyet in 1953 but being an old child she was obligated to look after her parents and their property. According to her after the deceased moved to reside on the shamba given to her by Mary's father at Chemase she Mary never used to visit her there. It is the deceased who used to come and stay with them both at Kaptumo and Kipkenyo and then go back to Chemase. At some point she Mary went to overseas for studies and she did not know what was going on there. This was contrary to what her witnesses DW 2 and DW 6 said that she Mary used to visit Chemase though not frequent.

Along the line the deceased decided to enter into a woman to woman marriage under Nandi Customary Law. She married the objector who is also deceased Ann Kugun Jepkios. According to objector her son and their witness since marriage she resided with the deceased and she had 3 children two of whom died leaving one DW 2. She denied the suggestion that when she married the deceased she already had the first child who was DW 2. According to them they resided peacefully although they had the usual problems between husband and wife and she later went away to her people and stayed there for one year but the deceased came for her and she came home and stayed. She PW 1 agreed that the deceased used to go visiting her relatives and would stay there for long but would come back home and stay for while and then go back again. Further that their only source of income came from leasing a piece of the land and when the deceased leased the land they share the proceeds. She PW 1 also cultivated a portion she also used to do some small business to supplement the money from leasing of the land. The deceased also used the proceeds from leasing of the land to educate their only child DW 2.

PW 1 denied the suggestion that:-

1. She was cruel to the deceased

2. She forced deceased to eat food mixed with a child's faeces

3. Threatened her with a knife.

She PW 1 said all these were lies. PW 2 said he never witnessed any of the episodes while PW 3 said that their stay was peaceful.

It is further added by them that some relatives of the deceased were nice to them but not others like the petitioner who had sworn that a Luo woman will not get the land. She even recalls that at times while the deceased was staying with relatives at Kipkenyo or elsewhere she PW 1 and her son would attempt to take money to her or visit her but they would be chased away. The last episode was when they were chased away and prevented from accompanying the body for burial. It is her testimony further that she learned that the land was being transferred to petitioner and she filed a case in Kapsabet court to block the transfer to the petitioner, that the divorce proceedings were commenced but the same were not determined before the deceased died. It is her evidence that she is the lawful wife of the deceased and it is her and her son who are entitled to inherit the property of the deceased.

Concerning the will of the deceased she said that she does not agree with it as at the time the deceased allegedly had it prepared the deceased was an old woman and could easily be manipulated. That she and her son do not know any other home and they have nowhere to go and so the will should not be upheld.

The version of the petitioner is that she herself DW 1 she did not know the deceased had entered into a woman to woman marriage under Nandi Customary Law. She came to learn of this fact from the deceased in 1995. That since she was working as a civil servant she did not visit Chamase.

But the deceased used to come to Kipkenyo to reside with her mother (Mary's mother) and or come to stay with her in Eldoret. It is her testimony as supported by DW 2 and DW 6 that trouble started between the deceased and objector as soon as the dowry was paid. DW 2 and DW 6 confirm the existence of a customary marriage. Dowry was paid and none was returned.

That objector started mistreating the deceased soon after the marriage and she objector kept on running away and mistreating the deceased. Soon after the marriage about one year as per the evidence of DW 2 the deceased moved to Kapkole to stay with her elder sister Rosa. From Kapkolei she could visit Mary's home and then go back. When the sister died she moved to Kibongwa and when the clashes broke up she moved to stay with other relatives including Mary. She fell sick taken to hospital and died. The witnesses agree that objector and her son were at the mortuary but they did not accompany the funeral party and DW 1 does not know why. She said it is not her who told objector and her son not to accompany the funeral party but another relative.

Further due to the mistreatment meted out on her the deceased decided of her own volition to give her property to the petitioner on 2.9.1992. The deceased accompanied by a man whom DW 4 the advocate who drew the will and DW 7 who witnessed it cannot recall she deceased described as an elderly lady was escorted into DW 4's Alfred Nyairo Seniors Officer and explained a wish to write a will. DW 4 talked with her in Swahili and she communicated well and her mental faculties were proper. DW 4 took a precaution because of her age and he called in the secretary DW 4 who is a Sabaot but conversant with Kalenjin to explain to her the consequences of making a will. The old lady assured DW 4 that she had understood the implication. She then told DW 4 her wish and he reduced it into writing.

It was read to her and she confirmed the contents and she thumbprint guided by DW 7 and then the two DW 4 and 7 signed. It is their testimony that the deceased was not senile though fairly old. The will made the petitioner the executrix of the will as well as the beneficiary of plot No 678. The centre plot is also included.

It is the evidence of DW 1 that the deceased made the will of her own volition and she DW 1 was not aware of it. Later in 1993 or thereabout is when she handed DW 1 the will and the ID card, and exhibit D 9 which she was explaining the reason why she did not want to give the objector the land. The Court

authorized the court clerk to translate this document but he did not and so the Court's knowledge of the contents of exhibit D9 was limited to what was put down in evidence concerning that document. DW 2 said he was alone with the deceased when she wrote the document and there are no witnesses to it. After the documents had been handed to the petitioner plus the ID card it was decided to process the transfer of the suit property into DW 1's name. The two went to Kapsabet and filed the application form exhibit 6 dated 13.10.1994. The transaction was approved as shown by exhibit 18 and 19 and consent given exhibit D7.

On 7.11.1994 the daughter of petitioner took the deceased to DW 3 a lawyer who prepared the transfer documents exhibit 8 in favour of the petitioner. The Court was informed that the process was stopped by a court case filed by the objector being Kapsabet Civil Case No 152/94. This prompted the deceased to file Kapsabet Divorce Case No 2 of 1995 but the same was not dealt with.

It is the stand of the petitioner and her witnesses that the objector separated from the deceased long time ago though she continued residing on the said land. That she never attended to the needs of the deceased and she objector was very cruel to her that the objector had no child of the marriage with the deceased and she came with PW2. It is further their evidence that the deceased gave away her property to DW 1 as she took care of her and it was out of love. That she was never manipulated into doing that or taken advantage of because of her age she did the transaction on her own and it is not true that she was senile although it is accepted that she was fairly old and she used to walk with help of a walking stick.

At the close of the whole case only counsel from the objector filed written submission and the grounds stressed by them are:-

1. That after the death of the deceased the petitioner purported to apply for letters of administration intestate with the will annexed which application was a nullity ab initio and cannot be cured by an amendment by consent or otherwise. The basis, of their submission is that the jurisdiction to prove a will and the jurisdiction to grant letters of administration intestate are different as they are catered for separately under section 53(a) and 53(b) and rule 13 of the Probate and Administration Rules provides separate modes of application for grant of probate with will annexed or intestate rule 14 provides for amendment of application for grant but there is no substitution of application changing an application for letters of administration intestate to application for grant of probate and the purported consent cannot confer the Court with jurisdiction. It is their submission that the purported consent for change was ineffectual and the Court should deem the proceedings to be relating to grant of letters of administration intestate.
  2. That as concerned the evidence on the will the identity of the person who made the will is in doubt as the evidence of DW 4 and DW 7 contradicted each other DW 4 said she knew the lady who had been coming to the office in the company of the petitioner mother for at least on 3 occasions while DW 7 said that she had never seen the lady before and she does not know the mother of the petitioner. Further DW 4 said he knew her as having married a white man and she spoke fluent Swahili while DW 7 said that she knew little Swahili and conversed in Kalenjin.
  3. That there is evidence that the deceased was aged and senile and was susceptible to twist and to do as instructed. It is further evident that in the last years of the deceased's life the petitioner did all she could to inherit the property of the deceased evidenced by the fact that barely two years after the will had been written the petitioner sought to have the property transferred to her and one wonders why the deceased should make a move to divest herself of her entire estate while she is still alive and also one wonders why she should disinherit her family.
- (ii) There is evidence that the deceased executed a lease with the late objector Anna Kugun as late as 1994 and this raises doubt as regards the validity of the will. Further the divorce case allegedly filed at the instance of the deceased was never prosecuted and one wonders why steps were not taken to prosecute the same.
4. There is no certificate in the will itself that the contents of the will have been read to the deceased and

she understood the same. The factors leading to a suggestion that the contents were not understood are that it is evident that the deceased was illiterate and could not speak Swahili unlike what DW 4 said that she was fluent in Swahili she was conversant in Nandi language but the translation was done to her by a Sabaoti whose dialect is different from that of the deceased.

5. That on the construction of the will it is their submission that clause (a) of par 3 of the will is incomplete and uncertain in objects rule 25 of the first schedule on construction of wills to the Succession Act states that a gift or disposition not expressive of any definite intention shall be void for uncertainty and they urge this Court to find that the disposition of land parcel number Nandi/Chemase/678 is not expressive of any definite intention and fails for uncertainty of objections and they urge the Court to distribute the estate as an intestacy.

6. That should the Court find that the will was proper then they urge this Court to make reasonable provision for Nicholas Kipkosgei Kogo and the estate of Ann Kugun for the reasons that :-

(i) Both dependants had no other means of survival other than the two properties in issue and Nicholas was born on this land and there is no other way he can earn a living other than from the estate of the deceased, that no advancement had been made to them from the estate of the deceased and no adverse evidence was made concerning the relationship of the deceased and Nicholas Kipkosgei Kogo, that no concrete evidence was given about the relationship between Ann Kugun and the deceased other than scandalous hearsay allegations which are not true as no report was made to the police or local authority personnel concerning these instances.

7. That the petitioner admitted she is a wealthy woman as she is the sole beneficiary of her father's estate at Kipkenyo of 100 acres of land. She also has 20 acres of land belonging to her husband. Also owns 1/8 acre of a plot at Kapsoya and Kipkalen and 5 acres of land at Cherenganyi and she is also a pensioner.

8. No proof was given that Nicholas was born in 1973 before the marriage of Ann to the deceased and the definition in section 3(2) of the Law of Succession Act applies to the deceased as she had taken the said Nicholas as her own child and assumed responsibility over him by looking after him and educating him and he fits the definition of a dependant under section 29 of the Law of Succession Act as he was a child the deceased had taken as her own into her own family.

9. That they propose that the centre plot be given to the petitioner and shamba to be given to the estate of Ann Kugun and Nicholas. However if the Court finds that both properties are subject to intestacy then the same should be ordered to be shared equally between the estate of Ann Kugun and Nicholas.

The Court did not trace any submissions from counsel for the petitioner on record.

On the Court's assessment of the facts herein it is clear that one Ann Kugun Jepkios now deceased was married to the deceased subject of these proceedings under Nandi Customary Law of woman to woman marriage.

It is also clear that dowry was paid for her and this dowry was not refunded. Despite the allegation of the petitioner as to what the deceased told her about her relationship with Ann and despite what DW2 and DW6 alleged to have witnessed of the bad relationship it is clear that for a very long time the deceased never took traditional steps to try and bring that marriage to an end and no reasons were given for her failing to call elders in order to bring to an end her relationship to a cruel woman. Her effort made by filing a divorce cause No 2/95 do not assist much as the same was not determined. It means that as at the time of the death of the deceased subject of these proceedings Ann Kugun was still the lawful customary wife of the deceased. It is on record that she Ann used to run away and then come back in 1978 and settled on this land till the time of the deceased death. There is no evidence that the deceased at any time made attempts to get Ann out of this land. The evidence that she had no power to do so cannot hold as she could have mobilized her relatives to assist her remove Ann from the land.

As regards Nicholas there is no doubt that he is the son of Ann. According to Ann he was born after

marriage a fact the petitioner and her witnesses disputed but there is no evidence to show that he was born before the marriage. Even if that were to be taken to be true then there is no evidence that the deceased objected to his presence and the presumption should be that the deceased married the mother and took the mother along the child. That aside there is no proof that Nicholas was not born in 1975 during the subsistence of the marriage. That being the case he qualifies as a son of the deceased. After all the sole purpose of the deceased's marriage was to raise children through woman to woman marriage and the issue of illegitimacy in relation to the deceased cannot arise as the deceased woman could never turn herself into a man and be a putative father. It is the finding of this Court that both the deceased Ann and Nicholas were dependants of the deceased as at the time of her death. They objected to the proceedings because they had been disinherited.

The petitioner seeks to shut them out of the inheritance because of:-

1. The bad relationship between the deceased and Ann.
2. There was an intention of the deceased before she died to transfer the property to the petitioner.
3. There is a will willing the land to her and the plot had allegedly been sold to a 3rd party from whom she retrieved it by refunding the purchase price to the person who had purchased it and by paying all the rates on the same and that it had now been registered in her name by the Nandi County Council.

As regards the bad relationship between Ann Kugun and the deceased this Court has already ruled that it did not bring to an end the marriage contracted and it does not operate to injure the rights of late Ann and Nicholas as they did not make the deceased to move and bring the marriage to an end or do anything to chase Ann and the son away from the land.

As regards the intention to transfer the land to petitioner this has been proved by production of exhibit 7, 8, 18 and 19. It is on record that the process was not completed because the late Ann filed Kapsabet SRMCC 152/94 and blocked the transfer since that process was blocked and it was not completed it remains in law an incomplete gift which the law cannot move to perfect it.

The petitioner has to fall back on to the will exhibit D 1. This Court has been urged to disregard the same for the reason given. However this Court finds that the evidenced of DW 4 and DW 7 rules out the possibility of an irregularity on the part of the said witnesses. The only thing which the Court finds not to have been taken keen interest in the same is the identity of the person who brought her in DW 4's office in order to determine a link to the petitioner or not. In the absence of the identity of this person this Court is not in a position to rule whether the decision to write a will was voluntary or induced in view of the age of the deceased who could easily be manipulated her denial of being manipulated made to DW 4 not withstanding. All the same there is a will exhibit D1 and this Court rules that the same is a valid will.

Having ruled so the next question is to determine whether it has been properly presented to this Court for proving of the same. Counsel for the objector has argued that it was not and therefore it should be ignored. As noted earlier at the start of the judgment the petitioner filed form P&A 80 which is filed for letters of administration intestate. It is on record that the parties filed a consent substituting form P&A 78 for form P&A 80. Counsel for the objector has submitted that there is no procedure for substitution.

I have perused the provision of section 53 (a) (b) of the Law of Succession Act and I agree that indeed they provide for distinct modes of presenting application for letters of administration with will annexed and that of intestacy. I have also perused rule 13 of the Probate and Administration Rules which lays down the procedure to be followed in the event of probate being applied for with will annexed. It was also to be accompanied with an affidavit in form No 4 or 6 giving the details of the form of the will the names and addresses of the execution and the names and addresses of the witnesses as well and other details as required by rule 7. It is evidently clear that this rule was not complied with.

Counsel also raised issue with the substitution saying that the law provides for an amendment and not substitution rule 14(1) of the Probate and Administration Rules provides that an amendment be made by

filing of form 62. Form 62 was not filed in this Court in compliance of that rule and it follows that the substitution order made by this Court following a consent between the parties was erroneous and it cannot hold. It follows that what the Court is dealing with is an intestacy.

In an intestacy the Court has to determine the beneficiaries who are:-

1. Late Ann Kugun
2. Nicholas Kipkosgei
3. Mary Cheboo

The objector and the petitioner. Ann is now deceased and this Court has been urged to consider the interests of her estate as well. This Court has perused the record and finds that there are letters of administration Ad colligenda Bona to the estate of the deceased and so it is proper that late Ann's interests be catered for. The only observation I make in respect of the same is that the interests of late Ann and that of Nicholas were joint and so they will be treated as one more so when it is only Nicholas who stands to benefit from both sides. Mary Cheboo the petitioner defends her own rights.

The next thing to be identified is the assets of the deceased namely Nandi/ Chamase/678 comprising 23 acres and plot No 4 at Kibigong Trading Centre. There is no dispute over that.

The next issue to be determined is the eligibility to inherit of the beneficiaries. This Court has already ruled that Nicholas is eligible to inherit and also Mary Cheboo because of the will. The fact that a wrong procedure has been followed to present it to the Court does not mean that it has to be ignored. It has to be looked at.

When it is so looked at the Court has to decide whether the same is to be upheld. Counsel for the objector submitted that it is vague but I find no vagueness in it. It states clearly what was being given out and to whom.

Section 26 of the Act (cap 160) Laws of Kenya stipulates that a will is not absolute where there is contention the Court can interfere and make provision for a dependant let out of inheritance. In exercising those powers given under section 26 of the Act the Court has to bear in mind the provision of section 28 of the Act which are:-

1. The nature and amount of the deceased's property.
2. Any past, present or future capital or income from any source of the dependant.
3. The existing and future means and needs of the dependent.
4. Whether the deceased had made any advancement or other gift to the dependant during his life time.
5. The conduct of the dependant in relation to the deceased.
6. The situation and circumstances of the deceased's other dependants and the beneficiaries under any will.
7. The general circumstances of the case including so far as can be ascertained the testation reasons for not making provision for the dependant.

I have considered all the relevant factors herein, the evidence in totality, the need of each side, the law and doing the best I can distribute the deceased's estate as hereunder:-

1. Plot No 4 Kibigong Trading Centre to be shared equally between

a) Mary Cheboo

b) Nicholas Kipkosgei Kogo

2. It was noted by production or receipts that the petitioner paid rates for the centre plot totaling Kshs 11,875.00. Nicholas Kipkosgei Kogo is to refund half of this money to Mary Cheboo being Ksh 5,937.50 within 45 days from the date of the judgment.

3. As regards Nandi/Chemase/678 comprising 23 acres. It is evident that Mary Cheboo the petitioner has other properties of her own and she also used to assist the deceased substantially. However it is also to be borne in mind that Nicholas Kipkosgei has no other property to sustain him. The said property is shared out as follows

(a) Nicholas Kipkosgei Kogo 13 acres of land

(b) Mary Cheboo Kimnyiget 10 acres of land.

4. Each party to bear his own costs.

5. To give to the above the grant herein intestate is to be issued to

1. Mary Cheboo Kimnyiget

2. Nicholas Kipkosgei Kogo

**High Court, at Eldoret February 21, 2003**

**Nambuye J**