



**In re Estate of Kipkoech Kibirgen (Deceased) (Succession Cause  
280 of 2010) [2024] KEHC 3098 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3098 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 280 OF 2010  
HM NYAGA, J  
MARCH 13, 2024**

**BETWEEN**

**JOSEPH BIRGEN KOECH ..... 1<sup>ST</sup> ADMINISTRATOR**

**DANIEL KIPKEMOI BARKANDA ..... 2<sup>ND</sup> ADMINISTRATOR**

**AND**

**ERIC K KEINO ..... 1<sup>ST</sup> OBJECTOR**

**DOREEN JEROTICH ..... 2<sup>ND</sup> OBJECTOR**

**NANCY JEPKORIR LIMO ..... 3<sup>RD</sup> OBJECTOR**

**SOLOMON SAGT CHEROGONY ..... 4<sup>TH</sup> OBJECTOR**

**JOSHUA SIMOTWO ..... 5<sup>TH</sup> OBJECTOR**

**AND**

**MICHAEL KIPSANG KOECH ..... PROTESTOR**

**JUDGMENT**

1. The deceased herein died in 1989 at the age of 83 years.
2. On 8<sup>th</sup> June 2010, Joseph Birgen and Michael Kipsang Koech petitioned for letters of administration intestate. Subsequently, by consent of the parties, Daniel Kipkemoi Barkanda was allowed to become a co-administrator, in place of Michael Kipsang Koech.
3. By a Summons for Confirmation of Grant filed on 22<sup>nd</sup> March, 2017 the Petitioners, Joseph Birgen Koech and Daniel Kipkemoi Barkanda, applied for confirmation of Letters of Administration of the Estate of Kipkoech Kibirgen issued to them on 6<sup>th</sup> February, 2017.



4. In their affidavit in support of summons sworn on 15<sup>th</sup> March, 2017 they deponed that the deceased died intestate leaving the following 4 households surviving him;
- i. KABILO KIPKOECH- 1<sup>ST</sup> WIDOW(DECEASED)
    1. Kipkeino Koech
    2. Joseph Birgen
    3. Tabratich Koech
    4. Joseph Koech (Deceased)
    5. Eunice Koech (Deceased)
  - ii. SOTI KOECH- 2<sup>ND</sup> WIDOW (DECEASED)
    1. Markanda Kipkoech (Deceased) to be represented by Daniel Barkanda(Grandson)
    2. Salina Kipno
    3. Lilian Pawai
  - iii. KABON KOECH - 3<sup>RD</sup> WIDOW (DECEASED)
    1. Michael Koech
    2. Jona Koech
  - iv. KIMOI KOECH -4<sup>TH</sup> WIDOW (DECEASED)
    1. Edward Koech
    2. Daudi Koech
5. They averred that the identification and shares of all persons beneficially entitled to the said estate have been ascertained and determined as follows: -
- a. Land known as LEMBUS/SAOS/35 Measuring approximately 18.688 (46.178048) Hectares to be shared equally among the four households and each house hold to get 11.54 acres to be shared among the beneficiaries as follows: -
    - i. Kabilo Kipkoech – 1<sup>st</sup> Widow(deceased)  
Joseph Birgen & Tabratich Koech- To share 11.54 acres equally
    - ii. Soti Kobilo – 2<sup>nd</sup> Widow (Deceased)  
Markanda Kipkoech (Deceased to be represented by Daniel Barkanda(Grandson), Salina Kipno and Lilian Pawai to share 11.54 acres equally.
    - iii. Kabon Koech – 3<sup>rd</sup> Widow  
Michael Koech and Jona Koech to share 11.54 acres equally
    - iv. Kimoi Koech- 4<sup>th</sup> Widow  
**Edward Koech & Daudi Koech to share 11.54 acres equally.**
6. They averred that there is no estate duty payable or that remains unpaid in respect of the deceased's estate.



7. Before the said Grant could be confirmed the objectors namely Dorine Jerotich Cirnfus, Nancy Jepkorir Limo, Solomon Saigut Cherogony & Joshua Simotwo filed objections to the making of the grant on 6<sup>th</sup> May, 2016 on grounds that the petitioners filed the petition without consulting them and other members of the family and that the petitioners intend to exclude the beneficiaries to the estate of the deceased.
8. The protestors Michael Kipsang Koech and Jonah Koech also filed the affidavit of protest to confirmation of grant dated 14<sup>th</sup> August, 2017. It was their case that the deceased, prior to his death divided the land known as LEMBUS/SAOS/35 into four portions and gifted each one of them to Joseph Birgen Koech, Michael Kipsang Koech, Jonah Koech and Daudi Kibirgen Koech.
9. They asserted that subsequently the said land was partitioned into the said four portions and each one of them were shown their respective portions.
10. They contended that when the petition herein was filed it was with a view to having the deceased's wishes fulfilled by having the said portions transferred to aforesaid persons.
11. It was also their averment that Daniel Kipkemoi Barganda who is a grandchild of the deceased is not entitled to share in the estate of the deceased since his father was not entitled to the deceased's estate.
12. They stated that the person named as Edward Koech and appearing as a beneficiary is not also entitled to share in the deceased estate for reasons that, he is not a son of the deceased and the deceased did not acknowledge him as such, and that his putative father one Chebor Kibui acknowledged that he is his father, taken him into his family and given him land.
13. They contended that their brother Daudi sold part of the deceased's estate to Doreen Jerotich and another person while Joseph Birgen Koech sold portions to Nancy Jepkorir Limo and Solomon Saigut Cherogony.
14. They further deposed that Joseph Birgen Koech, Daudi Koech, Daniel Barganda and Edward Koech appearing as objectors are purchasers and as such they should not participate in this proceeding but wait for the grant to be confirmed and thereafter claim their entitlements from the shares of those whom they purport to have sold them land.
15. They asserted that the said sales were illegal and amounted to intermeddling with the deceased's estate as they were done during the pendency of this cause.
16. They prayed that the estate be distributed to Joseph Koech, Michael Koech, Jonah Koech and David Koech in accordance with the wishes of the deceased.
17. Daniel Kipkemoi Barkanda and Edward Koech swore a replying affidavit in response to the protest on 23<sup>rd</sup> October, 2023. They described themselves as a grandson and a son of the deceased respectively.
18. They disputed that the deceased subdivided the land prior to his demise and that the 1<sup>st</sup> protestor has been unfair by wanting to have the estate of the deceased distributed discriminatorily.
19. They averred that the objectors are purchasers of the part of the deceased's estate.
20. Edward Koech swore a further affidavit on 9<sup>th</sup> March, 2020. He averred that prior to deceased's demise he had divided the parcels of land to each of his four household wherein they live to date and each house hold occupies 11.54 acres.
21. He deponed that the purchasers can only obtain their share after the grant herein has been confirmed to each of the beneficiary.



22. It was his further averment that Daniel Kipkemoi Barganda is the son of Barkanda Kipkoech who is deceased and was the 1<sup>st</sup> born son of the 2<sup>nd</sup> house and he is therefore entitled to have a part of the father's share, if not all of it.
23. The matter was canvassed via viva voce evidence.

### **Petitioners' Case**

24. The 1<sup>st</sup> petitioner Joseph Birgen koech adopted the contents of the affidavit in support of the summons as his evidence in chief.
25. He said the members of the 3<sup>rd</sup> house did not consent to their mode of distribution. He said that the deceased divided the subject land into four portion prior to his death and each household got over 11 acres. It was his testimony that the deceased took care of Edward Koech as his son.

### **Protestor's case**

26. The protestor Michael Kipsang Koech testified that he is the child of the 3<sup>rd</sup> house. He said he is not agreeable to each house getting 11 acres as the deceased had divided the land to his sons. He stated that Joseph and David sold part of their land and they were encroaching on their land and denied the existence of the 2<sup>nd</sup> household.
27. Following the close of the respective parties' case, parties were directed to file submissions.

## **SUBMISSIONS**

### **Petitioners Submissions**

28. The petitioners framed three issues for determination
  1. Whether the protestors made a case for excluding the 2<sup>nd</sup> house as beneficiaries of the estate of the deceased herein.
  2. What is the most equitable and acceptable way of distributing the estate of the deceased herein.
  3. Who is to bear the cost of the application?
29. On the first issue, the petitioners submitted that pursuant to Section 107 of the *Evidence Act* the onus was on the protesters to prove that the members of the 2<sup>nd</sup> house were not beneficiaries of the deceased and thus they should not benefit from the deceased estate.
30. They submitted that the protestors did not lead any evidence in support of their position and as such the 2<sup>nd</sup> house should not be expunged from inheriting from the estate of the deceased.
31. In regards to the second issue, the petitioners submitted that the deceased being a polygamous man, his estate should be distributed in accordance with section 40 of the *Law of Succession Act*. They posited that their proposal is in line with the said section unlike that of the protestor.
32. It was their case that the protestors' averment that the deceased had subdivided the land and distributed it as alleged was untrue and unsupported by concrete evidence.
33. The petitioners argued if there was gift inter vivos the same was incomplete as there was no memorandum or title deed to show the deceased intended the land to be shared amongst the said 4



persons. To support this position reliance was placed on the case of In re Estate of Etete Masakhalia (Deceased) [2021] eKLR.

34. They urged the court to adopt their proposed mode of distribution.

### **Protestors' Submissions**

35. The protestors reiterated the contents of their affidavit in their submissions and urged the court to adopt their proposed mode of distribution.

36. In addition, they submitted that the deceased had only three wives and they do not have recollection of 2<sup>nd</sup> widow being the wife of the deceased as she neither visited nor resided in the deceased's homestead.

37. They contended that the members of the 2<sup>nd</sup> household are strangers to the estate.

### **ANALYSIS & DETERMINATION**

38. The following issues fall for determination;

1. Whether the objectors/purchasers have a claim against the estate;
2. Whether Edward Koech is a beneficiary of the estate;
3. Whether or not the members of the second household are entitled to inherit the estate of the deceased;
4. Whether or not there was an inter vivos gift made by the deceased to some beneficiaries;
5. What is the fair mode of distribution of the deceased's estate?

39. Before I go to the analysis of the issues, let me first recount the chronology of events herein.

40. Initially, the petition for letters of administration herein was presented by Joseph Birgen Koech and Michael Kipsang Koech. The petitioners listed the following surviving beneficiaries;

- i. Joseph Birgen Koech(son),
- ii. Michael Koech(son),
- iii. Jonah K. Koech (son),
- iv. Daudi K. Koech(son),
- v. Gladys Jesang Barkanda (Grand daughter).

41. It is plain, having looked at the evidence adduced, the petitioners did not disclose the identity of all the beneficiaries of the deceased, whether surviving or not.

42. The record shows that an objection to the making of a grant was filed by Daniel Kipkemoi Barkanda and Edward Kipsang Koech on 4<sup>th</sup> June 2012 and subsequently, they filed a cross petition on 20<sup>th</sup> July 2012. They listed the following surviving beneficiaries;

- i. Joseph Birgen Koech(son)
- ii. Michael Kipsang Koech(son)
- iii. Jonah K. Koech (son)



- iv. Daudi Kibirgen Koech(son)
  - v. Gladys Jesang Barkanda(grand daughter)
  - vi. Daniel Kipkemoi Barkanda(grandson)
  - vii. Edward Koech(son)
  - viii. Eric K. Keino (son)
43. The cross petitioners had claimed that the petitioners had unlawfully excluded some beneficiaries when presenting the petition in court. They also accused the petitioners then of selling part of the estate. This court gave orders restraining the two petitioners then from disposing of any part of the estate of the deceased.
  44. In his answer to the cross petition, Joseph Kipsang deposed that the deceased was survived by four(4) sons only, contrary to the averment by the cross-petitioners. He further deposed that Eric Keino was not a son of the deceased, but a grandson, whose father had his own land as provided by the deceased long before his death. He also deponed that David Kipkemoi Barkanda had been provided for elsewhere and was thus not entitled to the estate. He also averred that Edward Koech, was not a son of the deceased having come to the family with his mother, but had been provided for by his biological father who gave him 70 acres of his land.
  45. In a strange turnaround, the said Joseph Birgen, in the application for confirmation of the grant, has listed Daniel Kipkemoi Barkanda and Edward Koech, who he had expressly denied as beneficiaries, as being entitled to the estate.
  46. In yet another strange turnaround, Michael Kipsang Koech, has now disowned Gladys Jesang Barkanda who he had initially acknowledged when he made the petition for the grant with Joseph Birgen Koech. It is important to note that the said Gladys Jesang Barkanda is apparently the daughter of Markanda Kipkoech, listed as being from the 2<sup>nd</sup> house, which Michael now denies its existence!
  47. It is also noted that the application for the grant of letters of administration made herein and the cross-petition did not include some of the parties now named in the application for confirmation. These include Salina Kipno and Lilian Pawai.
  48. Also, Eric Koech, who was listed in the cross petition, has suddenly disappeared into thin air. Has Daniel Kipkemoi the co-cross petitioner then, now disowned him as a beneficiary of the estate?
  49. Further, it is noted that there is no grant in the court file, yet subsequently, a rectified grant was issued on 6<sup>th</sup> February 2017 in the name of Joseph Birgen and Daniel Kipkemoi Barkanda. This could be an inadvertent slip by the court then which can be cured once the parties confirm if there was no grant issued in the first place.
  50. When the petitioners applied for the confirmation of the grant, the protestors and the objectors moved the court with their respective applications.
  51. As regards to the objection by the alleged purchasers, I think that the matter is pretty straightforward. The purchasers claim to have purchased their respective portions of land in 2006. The deceased died in 1989. Therefore, the sale could not have been conducted by the deceased. It is apparent that the said purchasers bought land from some of the beneficiaries. As such the said purchasers have no claim against the estate, but against the persons who sold them the land. I have no difficulty in dismissing the objections by the purchasers and I hereby do so.



52. As regards the rest of the issues, I am of the view that the parties herein are guilty of failing to provide full information to the court. For instance, they have failed to disclose all the children of the deceased. The initial petition and the cross petition omitted the names of several children of the deceased, who have now been named in the application for confirmation.
53. I think that the problem arose when the petition was filed. The letter from the chief listed only four children/beneficiaries, which clearly is very far from the truth. The letter did not disclose the number of wives that the deceased had, a crucial consideration when making the grant.
54. In addition, the parties appear to be shifting their stances as days go by, depending on what suits them. Parties are obligated to provide the correct and full information to the court.
55. I am thus of the view that the grant itself was obtained without full compliance with the law and stands to be revoked by the court of its own motion under section 76 of the Act which provides as follows;

“

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;”

56. Having said so, I think that at the moment the revocation may not be the right course. I am of the view that the court ought to right what was wrong, before it can proceed to make any further orders. Without sufficient information, the court may not be able to make suitable, just and fair orders.
57. It is thus my directive that the administrators do provide a list of all the children of the deceased alive or otherwise, male or female and the consents of those who are agreeable to the proposed mode of distribution afresh. To this end I will call upon the administrators to seek the local administrator/chief to provide a fresh letter, setting down all the houses and the children of the deceased. Since there have been different letters giving different information, from the same office of Saos Kibas Location, the said letter is to be confirmed by the Sub-County Commissioner’s office before it is filed in court.
58. I will give further directions after the above orders are complied with.

Dated, signed and delivered at Nakuru this 13<sup>th</sup> day of March, 2024.

---

**H. M. NYAGA**

**JUDGE**

**In the presence of;**

C/A Oleperon

Ms Matoke for Nyagaka for Administrators



Ms Maina for Protestors

Nakuru H.C. Succession Cause Number 280 of 2010 Page 7 of 7

