



**In re Estate of Chepkwony Kalya alias Samwel Kalya (Deceased) (Succession Cause 7 of 2018) [2024] KEHC 9233 (KLR) (1 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9233 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
SUCCESSION CAUSE 7 OF 2018**

**JK SERGON, J**

**AUGUST 1, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE  
CHEPKWONY KALYA ALIAS SAMWEL KALYA (DECEASED)**

**BETWEEN**

**EUNICE CHELANGAT KIMETTO ..... PETITIONER**

**AND**

**ISHMAEL CHEPKWONY ..... 1<sup>ST</sup> RESPONDENT**

**PAMELA CHEPKWONY ..... 2<sup>ND</sup> RESPONDENT**

**ALICE CHEPKWONY ..... 3<sup>RD</sup> RESPONDENT**

**KERICHO STYLEX LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**KEROMATT LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. On 2nd September, 2023 a partial mediation settlement was executed and the beneficiaries of the estate of the deceased were in agreement with the distribution of several assets comprising the estate of the deceased herein and the partial mediation agreement was adopted by this Court as follows;
  - a. That L.R No. Elburgon/Arimi/Ndoshwa Block 7/36 (Waldai) measuring approximately 3 acres and Legatio Farm measuring approximately 3 acres should be sold and the proceeds of the sale distributed among the 10 beneficiaries of the estate of the deceased
  - b. That all the shares belonging to the deceased in KCB Bank Limited, Barclays Bank Limited, Unilever Tea (K) Ltd, Cooperative Bank Limited, Standard Chartered Bank Limited, Kenya Airways Ltd, EA Breweries Ltd, ICDC Investments Ltd, British American Unit Trust Fund, Sinendet Tea Multipurpose Cooperative. Saptet House Building Block 5/437, Kipsigis



Traders Ltd. Patnas Sacco Ltd, KTDA Litein Factory, Mau Tea Development and Any other unknown shares should be sold and the proceeds of the sale distributed among the 10 beneficiaries of the estate of the deceased

2. The parties however, failed to agree on the mode of distribution in respect of the following assets;
  - a. Kericho/Municipality L.R. No 631/19/III IR 9590 (Urban Plot - Stylex/Keromatt Building)
  - b. L.R. No Kericho/Kedowa (Urban Plot) Sitian Shop & Butchery Building (Unsurveyed)
  - c. L.R. No Kericho/Litein/8839/52 Urban Plot - Lasoi Bookshop Building
  - d. Kericho/Municipality L.R. No 631/IV/2 IR 9450 Urban Plot - Kipsigis Traders Building
  - e. Ng'atumek Kalya Farm measuring approximately 0.2 acres
  - f. Chemosot/Kabartegen Plot No. 410 measuring approximately 50\*100ft
3. Upon the beneficiaries failing to agree on the mode of distribution on the aforementioned properties, this Court directed that the parties be heard on distribution of the properties. The matter proceeded by viva voce evidence. The protestors availed twelve (12) witnesses in support of their case.
4. Zacharia Ngeno (Pw. 1) testified that a meeting was held in which the deceased distributed his property. Pw. 1 said that he executed a witness statement and wished to adopt its contents as his evidence-in-chief. On cross examination, Pw. 1 stated that he attended several meetings including one that was held at Ngatumek, he and the deceased co-chaired the meeting and in the said meeting the deceased gave each of his children a portion of the land parcels. Pw. 1 confirmed that he knows all the properties that the deceased owned.
5. Ismael Kiprono Chepkwony (Pw. 2) testified that the deceased held several meetings in which he distributed his property to his children. Pw. 2 said that he executed a witness statement and wished to adopt its contents as his evidence-in-chief. On cross examination, Pw. 2 stated that the deceased had summoned his children sometime in the year 2000 or thereabouts and distributed his property. Pw. 2 further stated that the deceased transferred the properties he had distributed in the names of his children save for the above listed properties. Pw. 2 stated that at the time of the deceased's demise in 2009, the deceased had not written a will. On re-examination, Pw. 2 stated that the deceased summoned them on 20.2.2000 where he shared all his properties, however, he did not transfer all the properties to his children. Pw. 2 stated that the mediation proceedings resulted in a partial settlement agreement.
6. Samuel Cheruiyot Rono (Pw. 3) a clansman in the family of the deceased, stated the widow of the deceased informed him that the deceased had distributed all his properties to wit agricultural land, plots and the tea farm to his children. Pw.3 further stated that the children of the deceased were living on their respective portions. Pw. 3 said that he executed a witness statement and wished to adopt its contents as his evidence-in-chief. On cross examination, Pw. 3 stated that in respect to the disputed properties he could not tell in whose name the said properties were registered.
7. Stephen Langat (Pw. 4) stated that he attended a meeting in Saptet on 20.2.2000 which was convened by the deceased, whereby the deceased distributed all his properties to his children. Pw. 4 said that he executed a witness statement and wished to adopt its contents as his evidence-in-chief. On cross examination, Pw. 4 stated that during the said meeting, someone recorded how the properties were shared out, however, he was not privy to what was recorded as it remained with the children of the deceased. Pw. 4 stated that the deceased continued to utilise his property during his lifetime and that he merely distributed his property and the said distribution was to take effect upon his demise. On re-examination, Pw. 4 stated that the deceased was intestate, he did not leave a will in respect of his estate.



8. Aurelia Amela Chepteren (Pw.5) stated that she is a daughter-in-law to the deceased, she was married to one Wilson Chepkwony (now deceased) a son to the deceased herein. She stated that on 20.2.2000 she attended a family meeting whereby the deceased shared out his properties to his children and consequently each settled on their respective portion. Pw. 5 stated that Samuel Kimetto who is now deceased recorded the minutes of the said meeting. Pw. 5 said that she executed a witness statement and wished to adopt its contents as her evidence-in-chief. On cross examination, Pw. 5 stated that the deceased did not write a will. Pw. 5 stated that in the meeting held on 20.2.2000 the deceased distributed his properties and the same was recorded in minutes, she confirmed that the said minutes were in their possession, however, they were not produced in Court. Pw. 5 stated that after the properties were shared out, their parents continued to utilise the same properties until their demise. Pw. 5 stated that they collected rent from rental properties during the lifetime of the deceased and even after the demise of the deceased before they could take out the letters of administration in respect of the estate of the deceased. On re-examination, Pw. 5 stated that they were given the titles of their respective portions of the deceased's estate and further that they occupied their respective parcels and collected rent from the rental properties.
9. Alice Chepkwony (Pw.6) stated the deceased was her father-in-law and that she executed a witness statement and wished to adopt its contents as her evidence-in-chief. On cross examination, she said that she attended the family meeting whereby Samuel Kimetto (now deceased) recorded the minutes. Pw. 6 stated that she was aware of the court ruling where the court had deliberated and made a ruling that the minutes of the said meeting could not suffice as a will.
10. Ami Premchand Shah (Pw.7) a resident of Kericho County and trader at Keromatt stated that he executed a witness statement and wished to adopt its contents as his evidence-in-chief. On cross examination, Pw. 7 stated that the deceased and his wife summoned him and informed him verbally that they had sub-divided their property. Pw. 7 stated that the deceased continued collecting rental proceeds until his demise and upon his demise Ishmael Chepkwony, Johana Chepkwony and Wilson Chepkwony started collecting the rental proceedings from the premises and have continued to do so to date.
11. Samuel Terer (Pw.8) said that he executed a witness statement and wished to adopt its contents as his evidence-in-chief. On cross examination, Pw. 8 stated that he was a farm manager for sixteen years from 1989 up to 2000 and was therefore present at the family meeting where the deceased shared out his properties. Pw. 8 stated that the deceased informed him how he distributed his properties including cattle and the commercial plots. Pw. 8 stated that the Litein Plot was given to David Chepkwony and Johana Chepkwony and that the same was recorded in writing.
12. Thomas Rono (Pw.9) a beneficiary of the deceased, the deceased was his grandfather. Pw. 9 stated that he executed a witness statement and wished to adopt its contents as his evidence-in-chief. On cross examination, Pw. 9 stated that he did not attend the family meeting held by the deceased and that he was not aware of the existence of a will. Pw.9 stated that the deceased allocated his plots and did not give out the titles.
13. Hillary Korir (Pw. 10) said that he executed a witness statement and wished to adopt its contents as his evidence-in-chief. On cross examination, Pw. 10 stated that he attended the family meeting held for purposes of distribution whose minutes were taken by Samuel Kimetto. Pw. 10 stated that after the deceased distributed his land, he continued to utilise the commercial plots. Pw. 10 said that the minutes of the said meeting would suffice as the deceased did not leave any will. Pw. 10 stated that in his witness statement, he had comprehensively set out how the deceased had distributed his property which was based on the minutes of the said meeting. Pw. 10 stated that the minutes were not signed



- as they were within the custody of Samuel Kimetto who was deceased. Pw. 10 stated that commercial property known as L.R. No Kericho/Litein/8839/52 which was co-owned by the deceased and one Jonathan, was sold and that he received Kshs. 17 million on behalf of the deceased, yet it formed part of the contested properties in the estate of the deceased.
14. John Kipkorir Ng'eno (Pw. 11) said that he executed a witness statement and wished to adopt its contents as his evidence-in-chief. On cross examination, Pw. 11 stated that he was summoned by the deceased to attend a meeting which was to be held at his residence. Pw. 11 stated that during the said meeting the deceased told them that he had distributed his property amongst his children.
  15. Milan Kantilal Andika (Pw. 12) a businessman operating Kericho Stylex Limited stated that he had been in business since 1992 when he became a tenant to the deceased. Pw. 12 said that the deceased summoned him to attend a meeting where he distributed his properties and the deceased said that the plot housing Kericho Styles Ltd would be inherited by Ismael Chepkwony, Johana Chepkwony and Wilson Chepkwony. Pw. 12 said that he executed a witness statement and wished to adopt its contents as his evidence-in-chief. On cross examination, Pw. 12 stated that in the said meeting, the deceased was clear as to who should inherit the properties.
  16. At the close of the protestors case the petitioner availed two (2) witnesses in support of her case.
  17. Hellen Chemuai Koech (Dw. 1) a daughter to the deceased stated that she was aware of the properties that were in contention and further that their father distributed his properties and gave out the title deeds to the respective properties. Dw. 1 stated that the properties that were not shared ought to be shared equally among the children of the deceased. Dw. 1 stated that the Litein commercial plot was co-owned by the deceased and one Jonathan Kalya and therefore they were entitled to inherit half of the property. Dw.1 stated that she executed a witness statement and wished to adopt its contents as her evidence-in-chief. On cross examination, Dw. 1 stated that the entire family took part in mediation proceedings. Dw. 1 stated that she was collecting rental proceeds with respect to the commercial plot at Kedowa.
  18. Elizabeth Nancy Ngeno (Dw. 2) a daughter to the deceased, stated that she was not aware of the meeting held on 20.2.2000 and that she executed a witness statement and wished to adopt its contents as her evidence-in-chief. On cross examination, Dw. 2 stated that she took part in mediation proceedings and that the entire family participated in the said mediation proceedings. Dw. 2 stated that one of the properties in dispute, specifically Kipsigis Traders was sold, she was not privy to the sale agreement, however, she testified that the said property was sold and the proceeds used to pay the medical bills for her mother. On re-examination, Dw. 2 stated that she was never given minutes of the meeting held on 20.2.2000.
  19. The court directed the parties to file their submissions, which this Court has considered.
  20. The protestors complied and filed their written submissions. The protestors reiterated that the purpose of the meeting on 20.2.2000 was for the deceased to bequeath his wealth upon all his children and in addition to having his children and their spouses present, he invited relatives and close friends, employees to Ngatumek/Sitian and the area chief to the said meeting.
  21. The protestors maintained that in the said meeting, the Ngatumek/Sitian farm as well as urban plots were subdivided and gifted to the respective children. Pursuant to this meeting, the children of the deceased settled in the respective farms and developed them. It is the protestors case that the properties in the urban areas were gifted but not transferred to the respective children immediately as the deceased and his wife intended to use the rent collected from the properties for their maintenance and it was therefore his intention for the properties to devolve the children upon his demise.



22. The protestors urged this Court to focus on the deceased's testamentary intentions rather than the form of the will. The protestors maintained that the meeting held on 20.2.2000 was a medium of distribution and that no beneficiary objected and in any case have since been in possession of various properties including the petitioner. The protestors maintained that the contested properties were gift inter vivos and cited section 42 of the *Law of Succession Act*, which stipulates that if a deceased person distributes their property in their lifetime, such distribution should be respected and relied on the case of In the matter of the Estate of the Late Gichunge Mitterrand alias Gichunge Manthiri (DECEASED) where the court stated as follows; "A person can deal with his property as he wills during his lifetime. Whoever feels aggrieved on how his/her parent has dealt with his property should at the earliest question such person during his/her lifetime. He/she cannot wait until such a person dies to raise issues of discrimination or unfairness. Such issues can only validly be raised in cases of a will since wills are kept secret until the testator passes on. However, bequests that are given as gifts inter vivos, are openly so given and in my view whoever is dissatisfied therewith is at liberty to question the same before the demise of the giftee."
23. The protestors reiterated that the contested properties were valid gift inter vivos and thus enforceable by this Court and that a court cannot compel a donor or those claiming under him to complete and perfect a gift that rests merely on a promise or an unfulfilled intention, there are circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise and in the instant case the beneficiaries had demonstrated that they exercised possession and control over the commercial properties. The protestors cited the case of In re Estate of M'Raaj Kithiano (Deceased) [2017] eKLR where the court observed as follows; "Ordinarily, a gift in land should be effected through a written memoranda or a transfer or a declaration of trust in writing showing that the land was gifted to the husband of the Applicant. But, if a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise." The protestors urged this Court to uphold the wishes of the deceased and distribute the contested properties as set out in paragraphs 40 of their submissions.
24. The petitioners complied and filed their written submissions. The petitioners contended that the protestors case pointed out to an uncontroverted factual position that the deceased distributed his properties by gift inter vivos and effected transfers and handing over possession during his lifetime. The petitioners were adamant that the commercial properties were neither gifted nor transferred. The petitioners argued that the deceased had not taken any preliminary steps towards transferring the titles of any urban and commercial properties to the beneficiaries. The petitioners cited the case of In re Estate of Etete Masakhalia(Deceased) [2021] eKLR, Succession Cause 923 of 2013 where Musyoka J. stated as follows; "Principally any gift inter vivos should be backed by some memorandum in writing, and the gift is complete once title to the subject property is transferred to the name of the beneficiary of the gift."
25. The petitioners contended that contrary to the assertion by the protestors, the meeting purportedly held on 20.2.20 did not result in an oral will. The purported meeting was held on 20.2.2000 whereas the deceased died on 21.9.2009, a period of nine (9) years which was past the statutory period of three (3) months required for an oral will to be valid. The petitioners cited the case of the Estate of Elizabeth Wanjiku Munge [2015] eKLR where Musyoka J. held; "It is clear from the wording of section 9 of the *Law of Succession Act* and rule 13 of the Probate and Administration Rules that the date of making an oral will is critical. The life of an oral will is only for three (3) months, unless it is made by a mariner. The maker of the will should die within three months of its making for it to be valid."



26. The petitioners maintained that the deceased died intestate and therefore a subject of distribution under section 38 of the [Law of Succession Act](#). The petitioners urged this Court to dismiss the protest and consider their preferred mode of distribution in paragraphs 5,6,7 and 10 of the affidavit in support of the summons for confirmation of grant dated 23rd October, 2020.
27. Having considered the viva voce evidence by the parties and the submissions by the parties, the issue for determination by this court is how to distribute the disputed properties constituting the estate of the deceased.
28. This court considered the protesters' case. The protestors are adamant that on 20.2.2000 the deceased held a meeting whereby he distributed all his property including the contested properties (commercial plots) and that the respective beneficiaries had been collecting rental proceeds from the said properties. The protestors therefore urged this Court to uphold the wishes of the deceased.
29. This court also considered the petitioner's case, who were adamant that the deceased did not leave any oral or written will in respect of his estate. The petitioners were adamant that the commercial properties were neither gifted nor transferred to the beneficiaries and that the disputed properties ought to be distributed equally among the children of the deceased.
30. Having considered the viva voce evidence and submissions by both parties, I find that the protestors have proven their case on a balance of probability. The protestors availed several witnesses who had attended the meeting where the deceased divided his properties among his children and the same is supported by the fact that the beneficiaries had taken possession of the residential premises bequeathed to them and control of the said properties including the commercial properties that are subject of this judgement, these include Pw. 1, Pw. 4, Pw. 8, Pw. 10 and Pw. 11 a retired senior chief, these witnesses testified that they attended the meeting on 20.2.2000. This court has also considered the testimony in chief of Pw. 5 and Pw. 10 who were present at the meeting and testified that Samuel Kimetto recorded the minutes of the meeting. This court has carefully studied the contents of the file and there is a copy of the minutes of the said minutes annexed to the affidavit of protest against confirmation of grant dated 9th November, 2020. In the said minutes the deceased distributed the Ngatumek Sitian Farm the commercial properties. This court has considered evidence of Pw. 7 and Pw. 12 businessmen and tenants of the deceased, with no beneficial interest in the estate of the deceased who testified in support of the protestors case that during the lifetime of the deceased, they were informed of the distribution of the properties of the deceased. They further testified that upon the demise of the deceased, the children of the deceased were collecting rent in the respective properties to date.
31. This court also considered evidence of Hellen Chemutai Koech Dw. 1 a daughter to the deceased who testified that she was collecting rental proceeds from the commercial property situated in Kedowa.
32. It is the finding of this court that the deceased had distributed the Ngatumek Sitian Farm and the commercial properties in his lifetime vide the meeting held on 20.2.2000 and the same documented in minutes which are in the court record and therefore this Court will not interfere with the wishes of the deceased. Consequently, the commercial properties constituting the estate of the deceased shall be distributed as follows;
  - (i) Kericho/Municipality L.R. No 631/19/III IR 9590 (Urban Plot - Stylex/Keromatt Building) to be distributed equally between Ishmael Chepkwony, Johana Chepkwony and Wilson Chepkwony.
  - (ii) L.R. No Kericho/Kedowa (Urban Plot) Sitian Shop & Butchery Building (Unsurveyed) to be distributed equally between Eunice Chelangat Kimetto, Hellen Chemutai Koech and Anna Bor.



- (iii) L.R. No Kericho/Litein/8839/52 Urban Plot - Lasoi Bookshop Building to be distributed equally between Alice Chepkwony and Johana Chepkwony.
- (iv) Kericho/Municipality L.R. No 631/IV/2 IR 9450 Urban Plot - Kipsigis Traders Building to be distributed equally between Alice Chepkwony and Bernard Chepkwony.
- (v) Chemosot/Kabartegen Plot No. 410 measuring approximately 50\*100ft to be distributed equally between Ishmael Chepkwony and Wilson Chepkwony on the developed side and Bernard Chepkwony on the undeveloped side.

33. . Each party to meet their own costs.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 1ST DAY OF AUGUST, 2024.**

**J.K. SERGON**

**JUDGE**

In the Presence of

C/Assistant – Rutoh

Kiletyn for Protestors

No Appearance for the Petitioner

