



REPUBLIC OF KENYA



Chepyator v Chepyator & 11 others; Kogo (Petitioner); Rono (Interested Party) (Probate & Administration 17 of 2016) [2024] KEHC 10918 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 10918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION 17 OF 2016
RN NYAKUNDI, J
SEPTEMBER 20, 2024**

IN THE MATTER OF THE ESTATE OF CHEPYATOR KIPTOROMOS (DECEASED)

BETWEEN

ESTHER JEPTANUI CHEPYATOR APPLICANT

AND

TABARNO CHEPYATOR & 11 OTHERS & 11 OTHERS & 11 OTHERS & 11 OTHERS OBJECTOR

AND

ROSALEEN CHELAGAT KOGO PETITIONER

AND

JOSPHAT KIPKOSGEI RONO INTERESTED PARTY

RULING

1. The brief background of this case is that vide a ruling dated 22nd July, 2020, this Honourable Court adopted a mediation settlement agreement dated 25th October, 2019 which was duly signed by Mr. Isaac K. Chemrokok, mediator and the parties herein.
2. It was recorded as follows;
 - a. That no member of the family of Chepyator Kiptoromos (deceased) shall sell any of the land parcels: - Lolkinyei/Itet/Plot 70 measuring 15.5 acres, Sergoit Senetwet/Kaprobu/22 measuring 13.3 acres, Moiben-moiben/Merewet/241 measuring 15.5 acres and Irong/Sergoit/plot No. 319 measuring 23.6 acres. That these parcels of land shall remain as they are.
 - b. That the parcels of land which have already been distributed to the beneficiaries shall have titles produced in the names of the respective beneficiaries as follows: -



- i. Lolkinyei/Itet/Plot 70 measuring 15.5 acres to Benjamin K. Chepyator ID No. xxxxxxxx.
 - ii. Sergoit Senetwet/Kaprobu/22 measuring 13.3 acres to Mokicho Taparno Chepyator ID No. xxxxxxxx
 - iii. Moiben-moiben/Merewet/241 measuring 15.5 acres to Esther Jeptanui Chepyator of ID No. xxxxxxxx
 - c. That the land parcel Irong/Sergoit/plot No. 319 measuring 23.6 acres is still contested. This Honourable Court ordered that parties are free to pursue distribution of the same in court.
3. Moreover, vide a ruling dated 22nd July, 2020, this Honourable Court adopted a mediation settlement agreement dated 27th September, 2019 which was duly signed by Mr. Isaac K. Chemrokok, mediator and the parties herein.
4. It was recorded as follows;
 - a. That the following parcels of land shall be distributed as follows: -
 - i. Lolkinyei/Itet/Plot 70 measuring 15.5 acres shall be given to Benjamin Chepyator as whole.
 - ii. Sergoit Senetwet/Kaprobu/22 measuring 13/3 acres shall be given to Tabarno Chepyator ID No. 1110569 as whole.
 - iii. Moiben-moiben/Merewet/241 measuring 15.5 acres shall be given to Esther Jeptanui Chepyator as whole.
5. The Applicant/Objector filed her proposed mode of distribution dated 19th September 2023 as follows
Title No. Irong/sergoit/319 To Be Shared/distributed As Follows: -

No.	Beneficiaries	Property	Share
1.	Benjamin K. Chepyator (1 st House)	Irong/sergoit/319	7 Acres
2.	Wilson Kibet Chepyator (2 nd House)	Irong/sergoit/319	9 Acres
3.	Estherjeptanui Chepyator (3 rd House)	Irong/sergoit/319	7 Acres

6. Consequently, in respect to the land parcel Irong/Sergoit/plot NO. 319, the Petitioner also filed her Witness statement dated 9th October 2023 in which she deposed as follows:
 1. I make this statement in addition to my supplementary affidavit which I swore on 11th October, 2018, and filed on 22nd October, 2018.



2. I am the third widow to the deceased herein.
 3. I was married by the deceased herein in or about 1976.
 4. Upon being married by the deceased herein, my matrimonial property home became Irong/Sergoit/319.
 5. I lived with the deceased on the said parcel of land until he passed away on 15.10.1995. He passed away while at home and under my care. The cause of his death was cancer.
 6. After about six (6) months of my said late husband's death, Wilson Kibet Yator came with a number of people, using a lorry and demolished my matrimonial house and forced me onto the said lorry and relocated me to land parcel No. Moiben/Moiben Block 5 (Merewet)/241. I was left there without a house or food or water. I had to take refuge at somebody's house. My children were taken care of by my sister.
 7. I remember having taken care of Benjamin Kimeli Chebiator (of the 1st house) (while he was in school until he completed his secondary education), James Kipkogei (of the second house), Sarah Jepkoros (of 2nd house) and Margaret (of the 1st house).
 8. I also lived with Rossey Chepkorir together with her children for ten (10) years or so. That was on the said parcel of land (No. 319).
 9. The said Rossey is not older than me.
 10. Land parcel Irong/Sergoit/plot No. 319 belongs to me and the other houses.
 11. The said parcel of land ought to be divided among the three (3) houses as shown by me in paragraph 16(d) of my said affidavit, which I swore on 11th October 2018. The reason as to why I am praying that larger parcel of land, that is 9(nine) acres should go to the second house so that the two (2) acres on top would cover for the short fall of the two (2) acres.
 12. I also wish that Wilson Kibet Yator and Benjamin Kimeli Chebiator do render an account in respect of the income they have derived from the said parcel of land since 1997 to date. The said parcel of land by measurement is approximately Two Three Decimal Six Ha. (23.6 acres).
 13. I humbly pray that the said plot No. 319 be divided among the three (3) houses as stated by me.
7. The Objectors equally filed their witness statements. Magrina Chemisto Kipsat filed her witness statement dated 9th November 2023 and she deposed as follows;
1. That I was born in 1948 to the late Daudi Kiptoromos Kotut and the late Maria Soti Kiptoromos.
 2. The late Chepyator Kiptoromos was my brother.
 3. I lived with my brother for some time and I was actively engaged in taking care of his children with the 1st wife the late Rebecca Kabon Chepyator and later he got married to the 2nd wife the late Mokicho Kipyator Mokicho.
 4. Both wives lived on the parcel of land Irong/Sergoit/plot No. 319
 5. After marriage to the 2nd wife, I was blessed with a husband and I moved in with my husband to start our family.
 6. The late was a hardworking man. In his lifetime he married three wives.



- 1st wife the late Rebecca Kabon Chepyator
- 2nd wife the late Mokicho Kipyator Mokicho
- 3rd wife Esther Jeptanui Chepyator
7. Initially he was married to 2 wives
 - 1st wife Rebecca Kabon Chepyator
 - 2nd wife Mokicho Kipyator Mokicho
8. In the year 1976, I was among those who attended the cultural marriage ceremony between the deceased and the 3rd wife to make it 3 wives.
 - 1st wife Rebecca Kabon Chepyator
 - 2nd wife Mokicho Kipyator Mokicho
 - 3rd wife Esther Jeptanui Chepyator
9. The deceased bought the 3rd wife land in Merewet being land Moiben/Moiben Block 5 (merewet) 241 where she established her home and she lived with her kids.
10. The land Irong/Sergoit/319 belongs to the 1st and 2nd House.
11. The Applicant Esther Chepyator was married in 1976 after the land had been divided between the 1st and 2nd House.
12. The land belongs to the 1st and 2nd House to be shared equally.
13. The 3rd House does not own the land.
8. Josphat Kibiwott Chebii filed his witness statement dated 9th November 2023, in which he deposed as follows:
 1. I was born in 1958.
 2. My father and the Deceased herein were brothers and they enjoyed cordial relationship, hence the late Chepyator Kiptoromos was my father.
 3. I was the eldest amongst all the sons of my fathers.
 4. The late married three wives.
 - 1st wife the late Rebecca Kabon Chepyator
 - 2nd wife the late Mokicho Kipyator Mokicho
 - 3rd wife Esther Jeptanui Chepyator
 5. Initially he was married two wives who both lived in parcel of land Irong/sergoit/319
 - 1st wife Rebecca Kabon Chepyator
 - 2nd wife Mokicho Kipyator Mokicho
 6. In the year 1976, I was among those who attended the cultural marriage ceremony between the deceased and the 3rd wife to make it three wives.
 - 1st wife Rebecca Kabon Chepyator



2nd wife Mokicho Kipyator Mokicho

3rd wife Esther Jeptanui Chepyator

7. The deceased bought the 3rd wife land in Merewet being land Moiben/Moiben Block 5 (merewet) 241 where she established her home and she lived with her kids.
 8. The land Irong/Sergoit/319 belongs to the 1st and 2nd House.
 9. The Applicant Esther Chepyator was married in 1976 after the land had been divided between the 1st and 2nd House.
 10. The land belongs to the 1st and 2nd House to be shared equally.
 11. When the deceased was sickly, he called me and said to me that the 3rd wife has land in Merewet Uasin Gishu being land Moiben/Moiben Block 5 (merewet) 241.
 12. He called the three wives and gave them sheep
One black sheep to the 1st House
One white sheep to the 2nd House
One white sheep to the 3rd House
 13. The late developed severe sickness which led to his death. It is important that I state the deceased died in my hands.
 14. The 3rd House does not own the land Irong/Sergoit/319 due to the fact that they own land Moiben/Moiben Block 5 (merewet) 241
9. Philip Kipkelum Chebon filed his witness statement dated 9th November 2023 in which he deposed as follows;
1. That I was born in 1948.
 2. The late Chepyator Kiptoromos was a good friend of mine and he took me as one of his sons. I lived with him ever since I was a young man.
 3. The late was a hardworking man. In his lifetime he married three wives.
1st wife Rebecca Kabon Chepyator
2nd wife Mokicho Kipyator Mokicho
3rd wife Esther Jeptanui Chepyator
 4. Initially he was married to 2 wives
1st wife Rebecca Kabon Chepyator
2nd wife Mokicho Kipyator Mokicho
 5. In the year 1969, the late was among those who attended my cultural marriage ceremony.
 6. In the year 1976, I was among those who attended the cultural marriage ceremony between the deceased and the 3rd wife to make it 3 wives.
1st wife Rebecca Kabon Chepyator



2nd wife Mokicho Kipyator Mokicho

3rd wife Esther Jeptanui Chepyator

7. The deceased bought the 3rd wife land in Merewet being land Moiben/Moiben Block 5 (merewet) 241 where she established her home and she lived with her kids.
 8. The land Irong/Sergoit/319 belongs to the 1st and 2nd House.
 9. The Applicant Esther Chepyator was married in 1976 after the land had been divided between the 1st and 2nd House.
 10. The land belongs to the 1st and 2nd House to be shared equally.
 11. The 3rd House does not own the land.
10. Rossey Chepkorir Tanui filed her witness statement dated 9th October 2023, in which she deposed as follows:
1. That I was born in 1960 to the late Chepyator Kiptoromos and Rebecca Kabon Yator both deceased.
 2. That I am the daughter in the 1st House.
 3. The land Irong/Sergoit/319 belongs to the 1st and 2nd House.
 4. That I am older than the Applicant, the 3rd wife to my father.
 5. The Applicant Esther Chepyator was married after my father had already divided the land between the 1st and 2nd House.
 6. My father bought another parcel of land whereby the Applicant resides with her family.
 7. We are not interested in her share of land and she also needs to be satisfied with her won.
 8. The land belongs to the 1st and 2nd House to be shared equally.
 9. The 3rd House does not own the land.
11. Atanas Kiprono Rotich filed his witness statement dated 9th October 2023 in which he deposed as follows:
1. That I was born in 1968 to the late Chepyator Kiptormos and Josephine Mogicho Yator.
 2. That I am the first born son in the 2nd House.
 3. The land Irong/Sergoit/319 belongs to the 1st and 2nd House.
 4. The Applicant Esther Chepyator was married way later and my father bought her a parcel of land in which she lives upon.
 5. The land belongs to the 1st and 2nd House to be shared equally.
 6. The 3rd House does not own the land.
12. Wilson Kibet Yator filed his witness statement dated 9th October 2023 in which he deposed as follows:
1. That I was born in 1974 to the late Chepyator Kiptormos and Josephine Mogicho Yator.
 2. That I am the son in the 2nd House.



3. The land Irong/Sergoit/319 belongs to the 1st and 2nd House.
 4. The Applicant Esther Chepyator was married way later and my father bought her a parcel of land in which she lives upon.
 5. The land belongs to the 1st and 2nd House to be shared equally.
 6. The 3rd House does not own the land.
13. Benjamin Kimeli Chebiator filed his witness statement dated 9th October 2023 in which he deposed as follows:
1. That I was born in 1970 to the late Chepyator Kiptormos and Josephine Mogicho Yator both deceased.
 2. That I am the son in the 1st House.
 3. The land Irong/Sergoit/319 belongs to the 1st and 2nd House.
 4. The Applicant Esther Chepyator was married way later and my father bought her a parcel of land in which she lives upon.
 5. The land belongs to the 1st and 2nd House to be shared equally.
 6. The 3rd House does not own the land.

Analysis and Determination

14. I have considered the application therein, the Supporting Affidavits, the witness statement in support and the witness statements in opposition thereto. There is only one issue for determination:
- Which is the fair mode of distribution of the land parcel Irong/Sergoit/319
15. Section 40 of the *Law of Succession Act*, provides for guidelines for distribution of the estate of a polygamous intestate in the following terms:-
- “(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children;
 - (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38”.
16. The provision is the applicable law in the present circumstances where there is no agreement on distribution of the estate. Any proposed mode of distribution ought to be compatible with and in accordance with the provision thereby leaving no room for distribution based on the whim of the holder of the grant or his/her sentimental feelings.
17. In the case of *Esther Wanjiku Burugu v Margaret Wairimu Burugu Civil Appeal No. 319 of 2002*, the court of Appeal sitting in Nakuru observed that the provision does not state that the division of the estate must be equal and that it specifically states that although the distribution of the estate of



- a polygamous person is in the first instant to be among the houses, it nonetheless specified that that would be done according to the number of children in each house.
18. The court was of the view that the provisions negates any proposal that the division must be equal between the houses, for to say so, would ignore the fact that in most instances, the number of children in each house is never equal.
 19. In the Case of *Mary Rono v Jane Rono & Another* (2005) eKLR, the court of Appeal stated that if parliament had intended that there must be equality between the houses, there would have been no need to provide in Section 40 of the Succession Act that the number of children in each house be taken into account.
 20. The case of *Elizabeth Chepkoech Salat v Josephine Chesang Salat* Civil Appeal NO.211 of 2012 at Nairobi, reiterated and fortified the fact that Section 40 of the *Succession Act* does not provide for equality between houses or that each child must receive the same or equal portion. The court held that: -

“Section 40 of the *Act* does not give discretion to a court to deviate from the general principles therein annunciated.

Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court had no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to make adjustment to the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust”.
 21. This provision of section 40 of the *Law of Succession Act* has been the subject of various judicial pronouncements. The Court of Appeal in *Scolastica Ndululu Suva v. Agnes Nthenya Suva* [2019] eKLR expressed itself at paras 15-21 as hereunder:

“In *Mary Rono v Jane Rono & another* (*supra*), Waki JA in the leading judgment, accepted the proposition that the Court had the discretion in ensuring a fair distribution of the deceased’s estate but that the discretion must be exercised judicially on sound legal and factual basis. ...It is therefore evident, that, although section 40 of the *Law of Succession Act* provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”
 22. It is therefore clear on judicial authority that the strict application of section 40 of the *Law of Succession Act* may well lead to an absurdity and I associate myself with the opinion of the Court of Appeal that the said section only provides a general provision for the distribution of the estate of a polygamous deceased person. However, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate. It is my view that the relationship between the deceased and his beneficiaries as well as the age of the beneficiaries may well determine the mode of distribution in order to attain fairness.
 23. Given the background of this estate from the affidavit evidence, the other assets have been distributed among the beneficiaries save for Irong/sergoit/319. It is clear that each house has taken a position as to who is better entitled to inherit this parcel of land. In giving weight as to who between the deponents is more convincing than the other, I am afraid the scale of justice here does tilt in favor of the house to



house model under Section 40 of the *Law of Succession Act*. As a consequence, the parcel of land shall be shared equally among the three houses and the administrators be at liberty to consider the claim of 0.5 acres as asserted by the Jacob Kiprono Kiplagat. That the grant on record be and is hereby confirmed in those terms and a certificate of confirmation of grant shall issue accordingly. In the same breadth each party shall bear their own costs of this litigation.

DATED SIGNED AND DELIVERED AT ELDORET, THIS 20TH DAY OF SEPTEMBER 2024

.....

R. NYAKUNDI

JUDGE

