



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Tapoya Amuruk Silaure (Deceased) (Succession Cause
194 of 2004) [2023] KEHC 17482 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17482 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
SUCCESSION CAUSE 194 OF 2004
AC MRIMA, J
MAY 17, 2023**

IN THE MATTER OF: THE ESTATE OF TAPOYA AMURUK SILAURE [DECEASED]

BETWEEN

JAMES MUSA TAPOYO PETITIONER

AND

JOYCE KIMOMWOR TAPOYO PROTESTOR

JUDGMENT

Introduction

1. This judgment arises from the Summons for Confirmation of Grant dated October 12, 2021. The Summons were taken out by the Petitioner/Administrator, James Musa Tapoyo.
2. The Summons is opposed by Joyce Kimomwor Tapoyo, who joined as an Objector, but she is indeed a Protestor pursuant to Rule 40(6) of the *Probate and Administration Rules, 1980* (hereinafter referred to as 'the Rules').
3. On the directions of this Court, the Protestor filed a response to the Summons and thereafter parties filed their respective written submissions thereby resulting to this judgment.
4. This judgment is, therefore, in respect of the confirmation of the grant issued to the Petitioner and the distribution of the net estate of the deceased herein, Tapoya Amuruk Silaure.

The Summons:

5. There is no dispute as to the administration of the estate of the deceased. The only issue is on the mode of distribution of the net estate.
6. It is also of essence to point out that the net estate of the deceased comprises of two parcels of land. They are known as LR No West Pokot/Keringet 'A'/2428 and LR No West Pokot/Siyoi 'A'/4244.



7. As the deceased had two wives, he separately settled each of the wives and their children on the parcels of land. The first wife was settled on the parcel of land known as LR No West Pokot/Keringet 'A'/2428 whereas the second wife on LR No West Pokot/Siyoi 'A'/4244.
8. The first wife had two children and the second wife had 5 children.
9. The Grant in this matter was issued on January 30, 2003 and was subsequently confirmed and the estate distributed on September 29, 2011.
10. On the distribution of the estate, LR No West Pokot/Keringet 'A'/2428 measuring about 13 acres was inherited by the first house and was distributed among the three persons. The first wife got 1 acre and the two sons shared the remainder at 6 acres each.
11. The second house inherited LR No West Pokot/Siyoi 'A'/4244. The record does not, however, have the initial distribution in respect of this parcel of land. Be that as it may, further proceedings were taken out which culminated with the distribution of this parcel of land on July 23, 2020 as follows: -
 - a. Chebii Cheposingemi James - 1 Acre
 - b. Jackson Lokitari Tapoyo - 3 Acres
 - c. Stellah Chebet Kasiwai - 2.5 Acres
 - d. Geoffrey Arimuk Tapoyo - 3 Acres
 - e. John Pkiyach Tapoyo - 3 Acres
12. The above distribution was challenged by the Protestor/Objector herein vide a Summons for Revocation/Annulment of the Grant dated February 23, 2021. The Protestor contended that she was disinherited and yet she was one of the children in the second house.
13. The objection was heard and a ruling rendered on April 21, 2021. The Court allowed the Summons and set aside the above distribution on the land known as LR No West Pokot/Siyoi 'A'/4244. The Court directed the Petitioner/Administrator to file for conformation in respect of LR No West Pokot/Siyoi 'A'/4244.
14. The Petitioner/Administrator duly complied with the order of the Court and filed the instant Summons for Confirmation of Grant dated October 12, 2021 to which this judgment relates.
15. The parties rooted for contrary positions on the mode of distribution.
16. On one hand, the Petitioner proposed as follows: -
 - a. Chebii Cheposingemi James - 1 Acre
 - b. Joyce Kimomwor Tapoyo - 0.5 Acre
 - c. Jackson Lokitari Tapoyo - 3 Acres
 - d. Stellah Chebet Kasiwai - 2.5 Acres
 - e. Geoffrey Arimuk Tapoyo - 3 Acres
 - f. John Pkiyach Tapoyo - 3 Acres
17. On the other hand, the Protestor proposed as follows: -
 - a. Chebii Cheposingemi James - 0.5 Acre



- b. Joyce Kimomwor Tapoyo - 2.5 Acres
 - c. Jackson Lokitari Tapoyo - 2.5 Acres
 - d. Stellan Chebet Kasiwai - 2.5 Acres
 - e. Geoffrey Arimuk Tapoyo - 2.5 Acres
 - f. John Pkiyach Tapoyo - 2.5 Acres
18. The parties filed their respective submissions and referred to several decisions in support of their rival positions.
19. In a nutshell, the Petitioner affirmed that the deceased had settled the second house and allocated portions of the land to the children. He explained that the deceased did not consider the Protestor since she was by then married off.
20. The Petitioner contended that since the deceased expressed his wishes on how the second house will settle on the land, then such wishes must be respected. He, however, opted to allocate one-half of an acre to the Protestor.
21. The Protestor did not agree with the Petitioner. She posited that she was equally entitled to the land in equal share as the rest of the children. She described the Petitioner's proposal as unconstitutional, oppressive and discriminatory. She also impugned the alleged distribution by the deceased saying that the furthest such went, if at all, would only amount to portions allocated for farming purposes and not otherwise.
22. The Protestor urged the Court to do justice by recognizing her as a child of the deceased in the same stature as the others.

Analysis:

23. Having set out the background of the instant Summons, this Court will endeavor to determine the following issues: -
- i. Whether the deceased distributed LR No West Pokot/Siyoi 'A'/4244 during his lifetime.
 - ii. If the answer to issue (i) is in the negative, whether the Protestor is entitled to equal treatment as the rest of the children of the deceased in the second house.
 - iii. How is the parcel of land known as LR No West Pokot/Siyoi 'A'/4244 to be distributed?
24. In this discourse, the Court will deal with each of the above issues in seriatim.

Whether the deceased distributed L.R. No. West Pokot/Siyoi 'A'/4244 during his lifetime:

25. The basis of the Petitioner's contention are the minutes of a meeting held on January 8, 1995 which copies thereof were annexed in the Petitioner's Affidavit in support of the instant Summons.
26. This Court has carefully looked into the minutes. Some issues have crossed the mind of the Court. One, the said minutes is a copy and is not certified as a true copy of the original. The minutes were also not produced in compliance with Section 68 of the *Evidence Act*, Cap 80 of the Laws of Kenya. Two, there are two Plot numbers referred to in the minutes. They are Plot No 101 and Plot No 2171. The minutes did not give any further description of the properties including where they are situated. As the Plot numbers in the minutes are different from the subject parcel of land known as LR No West



Pokot/Siyoi 'A'/4244, there was need to adduce evidence to ascertain that indeed the said Plot No 101 and Plot No 2171 or one of them referred to the subject property. That evidence is missing.

27. Three, the meeting seems to have been attended to by some persons than those from the second house. For instance, there is no evidence, at least by way of disposition, that Jackson Loshalima and Emmanuel Swareng are members of the second house. There is also no disposition by the said two persons on the role they played in the meeting. Four, the minutes fell short of confirming the deceased's real intentions on the land. They are silent on whether the deceased gave out mere licences say like for purposes of cultivation or the actual intention was to transfer.
28. Five, despite the Protestor denying the veracity and authenticity of the minutes and contending that the alleged meeting was never held, the Petitioner did not lead any compelling evidence to confirm the two issues.
29. On the basis of the foregoing, this Court is unable to affirm that a meeting was held as alleged and that the minutes are a true reflection of the matters that were discussed in the alleged meeting. The minutes did not, therefore, attain the evidential threshold as to yield to being of any probative value.
30. In the end, this Court finds and hold that there is no evidence that the deceased distributed the parcel of land known as LR No West Pokot/Siyoi 'A'/4244 during his lifetime.
31. Having answered the first issue in the negative, this Court will now deal with the next issue.

Whether the Protestor is entitled to equal treatment as the rest of the children of the deceased in the second house:

32. There is no doubt that the Protestor is a daughter of the deceased from the second house. The reason given by the Petitioner as to why the Protestor was not considered for any inheritance by the deceased was that she was married off.
33. The issue as to whether daughters of a deceased person, whether married or otherwise, are entitled to inheritance of the deceased estate has by now been well settled.
34. This Court discussed the issue in High Court at Migori [*Succession Cause No 451 of 2014 In the matter of the Estate of Nyacho Ojwando \(Deceased\) between Thomas Tito Nyachawo and Judith Akinyi Ndege \(2016\) eKLR.*](#)
35. This is what was rendered: -
 11. In this cause the Petitioner holds that the Protestor, as a daughter to the deceased, is not entitled to inherit the property which comprises of the estate of the deceased on the ground that she is married. But upholding such a position will be tantamount to discrimination of the Protestor which in itself will be contrary to Article 27 of the [*Constitution*](#) which prohibits any form of discrimination based on race, sex, marital status or culture. Indeed Article 27(3) of the [*Constitution*](#) specifically provides that 'women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres'.
 12. Section 29(a) of the Act in recognizing 'children' of the deceased as dependants does not classify those children as sons, daughters, married or unmarried. However, that distinction happens to be in the Luo Customary Law on inheritance. To that extent, therefore, the Luo Customary Law on inheritance discriminates between the male and female children of a deceased person and as such it is a retrogressive custom which cannot supersede the [*Constitution*](#) and the law. This Court hence concurs with the holding of Makhandia, J (as he then was) in [*In Re Estate of Solomon Ngatia Kariuki \(deceased\) \(2008\) eKLR*](#) at page 8 where he stated that:



The *Law of Succession Act* does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.'

13. I am in further agreement with Kimaru, J when His Lordship addressed the alleged justification under the customary laws as to why married daughters ought not to inherit from their parents in the case of *Peter Karumbi Keingati & 4 others vs Dr Ann Nyokabi Nguthi & 3 others (2014) eKLR* in stating as follows:

As regards to the argument by the Applicants that married daughters ought not to inherit their parent's property because to do so would amount to discrimination to the sons on account on the fact that the married daughters would also inherit property from their parent's in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that courts would grapple with during distribution are the issues anticipated by Section 28 of the Law of Succession Act. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. The ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the *Constitution* 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for those discriminative cultural practices against women be buried in history.'

I say no more.

36. With the foregoing, this Court settles the issue that the Protestor, being a daughter of the deceased, ought to be equally treated as the rest of the children of the deceased.

The distribution of LR No West Pokot/Siyoi 'A'/4244:

37. The deceased in this matter was polygamous. He, however, settled his two wives separately. There is no dispute in respect of the distribution of the land bequeathed to the first house. The dispute only exists in the second house.
38. In such a state of affairs, and without dragging the first house into this matter, this Court will consider the distribution of the parcel of land known as LR No West Pokot/Siyoi 'A'/4244 in line with Section 35 of the *Law of Succession Act*, Cap 160 of the Laws of Kenya which provides for instances where a deceased left one surviving spouse and children.



39. The spirit in Section 35 coupled with Section 40 of the *Law of Succession Act*, fronts the position that spouses and children are all entitled to equal distribution of the net estate of the deceased after the surviving spouse takes the personal and household effects of the deceased and the liabilities of the estate are sorted out.
40. This Court has serious reservations on that mode of distribution. The Court is of the considered position that, in light of the 2010 Constitution of Kenya, the surviving spouse cannot be treated at par with the children unless on the consensus of the parties or on very compelling reasons. However, since the issue is not formally before Court for consideration, the matter will end there. The Court only hopes that an opportunity will present itself where it will render its thoughts accordingly.
41. This Court has considered the proposals on the mode of distribution by the parties. The land measures around 5.5 Hectares. That is about 13.5908 acres.
42. The proposals by both parties amount to 13 acres. That leaves about 0.5 acres out. From the parties' preference on the surviving spouse (who is their mother), it is apparent that they all agree that she be settled on a defined portion. Whereas the Petitioner proposes 1 acre for the surviving spouse, the Protestor proposes 0.5 acres. Since there is 0.59 acres which was not accounted for, and given that the parties seem to agree on the settlement of the spouse on the land, and going by the disposition by the Protestor on her efforts to take care of the spouse, this Court finds that the offer to settle the surviving spouse on a 1.0-acre portion to be reasonable and fair.
43. That leaves 12.5 acres. Going by the spirit in Sections 35 and 40 of the *Law of Succession Act*, the children of the deceased shall each have equal shares. That means each of the 5 children will get 2.5 acres.
44. Having so said, this Court shall order the distribution of the estate as such.

Disposition:

45. The above discussion brings the matter to an end. Consequently, judgment is hereby entered as follows:
 - a. The parcel of land known as LR No West Pokot/Siyoi 'A'/4244 shall be distributed as follows:
 - i. Chebii Cheposingemi James - 1.0 Acre
 - ii. Joyce Kimomwor Tapoyo - 2.5 Acres
 - iii. Jackson Lokitari Tapoyo - 2.5 Acres
 - iv. Stellah Chebet Kasiwai - 2.5 Acres
 - v. Geoffrey Arimuk Tapoyo - 2.5 Acres
 - vi. John Pkiyach Tapoyo - 2.5 Acres
 - b. The portion for Chebii Cheposingemi James shall include where her house is and it shall be next to the portion for Joyce Kimomwor Tapoyo.
 - c. The Petitioner shall undertake the sub-division and transfer timeously and shall update the Court of the progress made on a date to issue. Parties shall share the attendant costs.
 - d. Being a matter involving one family, each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 17TH DAY OF MAY, 2023.



A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

No appearance for Miss Mwemeke, Learned Counsel for the Petitioner.

No appearance for Mr. Onyancha, Learned Counsel for the Protestor.

Regina/Chemutai – Court Assistants.

