



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.457 OF 2006

IN THE MATTER OF THE ESTATE OF JOSIAH KIPKIRUI ARAP RONO (DECEASED)

JUDGMENT

BACKGROUND

1. This cause is in respect of the Estate of **JOSIAH KIPKIRUI RONO** who died on the 5th December 2005 intestate with no written will. The deceased was survived by undisputed **two wives** and nine children.

2. The 1st household comprises of:

- i. SUSAN CHERONO RONO- WIDOW**
- ii. DAISY CHEPKORIR MELLY- DAUGHTER**
- iii. CHARLES KIPKORIR KIRUI- SON**
- iv. KATHLEEN CHELAGAT RONO – DAUGHTER**
- v. DENNIS KIMUTAI KIRUI- SON**
- vi. MILLIE CHEROTICH RONO- DAUGHTER**

3. The second household comprises of:

- i. JOYCE CHEPKORIR RONO- WIDOW**
- ii. ARNORD KIPKEMOI KELONG- SON**
- iii. ANGELA CHEPKEMOI RONO- SON**
- iv. TONNY KIPTOO KIRUI- SON**
- v. BRIAN KIPKOECH KIRUI- SON**

The above are settled as the beneficiaries of the estate.

4. The assets left behind by the deceased are numerous as shown in the certificate of confirmation of grant date 11th May 2007 comprising of motor vehicles, shares in various organizations and companies banks and properties.

5. The two widows and two sons; SUSAN CHERONO RONO, JOYCE CHEPKORIR RONO, CHARLES KIPKOECH KIRUI and DENIS KIMUTAI KIRUI all of Box No.357 Nakuru, were appointed joint Administrators of the Estate vide **Nairobi High Court Succession Cause No.3030 of 2006** the 8th December 2006.

6. The grant was partially confirmed by consent of the parties. A protest to full confirmation of grant was filed by the 2nd Administrator (2nd

wife) representing the 2nd household by an affidavit of protest sworn on the 28th September 2017.

7. A replying affidavit to the protest was sworn by Dennis Kimutai Kirui, a joint Administrator representing the 1st household on the 29th May 2018, and a further affidavit sworn by Joyce Chepkorir Rono the 1st wife, on behalf of her household.

8. On the 13th June 2018, **Ndungu J**, recorded the following orders that:

1. By consent the summons for confirmation of grant dated 17th November 2018 be confirmed save for items No.22, 26, 29, 30, 31 35 and 43 which are still under contention.

2. That it is further ordered by consent that funds held in items No.46 i.e Standard

Chartered Bank, Nakuru Account number [xxxx] and No.47 i.e. Trans-National Bank Ltd, Nakuru, Account No. [xxxx] be released immediately to the Beneficiaries in equal shares.

3. That summons for confirmation be heard by viva voce evidence and general leave is granted for filing of statements/affidavits within 30 days from the date hereof.

4. The matter be fixed for hearing on 29th October 2018.

9. The Partially confirmed grant on the 13th June 2018 was rectified in respect of item No.47 of the schedule to read as Account **No. [xxxx] and not [xxxx]**.

10. Before arriving at the above consent orders, the parties had approached the court for an order of **Partial confirmation** of grant in respect of properties that they had agreed upon. These are **L.R. No.3734/1049 (Muthangari Property) and L.R. No.209/11842 (Upper Hill Property)**.

11. **A first Partial Confirmation** of grant issued on the 4th May 2007, the **Muthangari Property – L.R. No.3734/1049** was sold for Kshs.21,000,000/= (twenty one million only).

12. **By a further court order issued on the 27th February 2020**, by consent of the Co-Administrators, the Administrators were directed and ordered to account for the proceeds of sale of the said **Muthangari Property** and deposit the balance left after settling debts in the joint administrators bank account at the Commercial Bank wherein the two wives are joint signatories, pending confirmation of the full grant.

13. By a **further consent order dated 27th February 2020**, it was directed that the **Upper Hill Property, LR No.209/11842** be sold and the proceeds shared equally to the eleven (11) beneficiaries being the two wives and their nine children, and further that the matter of **rent collected from the property from 1st January 2007** be determined upon full hearing and determination of this cause.

14. Pursuant to the orders dated 13th June 2018, parties filed their respective documents and statements. The protest was heard by viva voce evidence on the 27th February 2020.

15. For the **1st house, SUSAN CHERONO RONO**, the Administrator testified, while **JOYCE CHEPKORIR RONO**, 2nd Administrator testified as the Protestor for the **2nd house**. At the close of the evidence the parties Advocates filed their submissions.

16. Assets marked as contentious and for court's determination on the schedule of assets filed on 17th November 2016 as items. These are;

1. Item No.22- Sharwa/Gicheha/Block 1/69 – 3 acres

2. Item No.26- Belbur (Ex Kipsalat – Togon) within Nakuru County – 40 acres

3. Item No.29 - Kericho/Chemoiben/427 - 4.4 Ha

4. Item No.30 - Kericho/Chemoiben/429 – 2.2 Ha

5. Item No.31 - Kericho/Chemoiben/799 – 0.14 Ha

6. Item No.35 - Sharwa/Gicheha/Block 2 BE – 6 acres

7. Item No.43 - Upper Hill Property LR No.209/11842 (on account of rent collected from 1st January 2007 upto date of sale).

THE EVIDENCE AND SUBMISSIONS

17. I have considered the evidence tendered viva voce on behalf of each house, and the very detailed submissions filed by Advocate Mutai

Terer instructed by Mutai & Co., Advocates for the 1st Household, and Advocate Kimutai Bosek instructed by J.K. Bosek & Co., Advocates for the 2nd House (Protestor), on the contentious items, and the mode of distribution stated therein that prompted the protest by the 2nd household.

18. **The 1st wife SUSAN CHERONO RONO** was married to the deceased in 1965. They established their Matrimonial home in Chemoiben, Kericho County in two land parcels **Item No.29 and 30**, approximately four (4) acres, and planted tea trees.

The **2nd wife, JOYCE CHEPKORIR RONO** was married to the deceased in 1993. Her Matrimonial home was established at Belba at Ronga Nakuru County comprising of 40 acres – **Item No.26**.

19. **Item No.22** – Sharwa/Gicheha/Block 1/69 is assigned to the second wife. She does not mind if shared equally with the 1st wife.

Item No.26 – Belbur Property – 40 acres. The second wife resides on this land parcel where her homestead is situated. The first wife does not desire a share from this property.

Item No.29 – Kericho/Chemoiben/427 and **Item No.30** - Kericho/Cheboiben/429 – 2.2 Ha. On these, the first wife's matrimonial home stands. The 1st wife urges that the 2nd wife ought not be given a share therefrom as she has her matrimonial home at Belbur – **Item No.26** which is 40 acres. The second wife claims that a portion of the property was shown to her son where he would built his house, and therefore claims half share. No evidence was called to corroborate this averment.

20. **Item No.31** – Kericho/Chemoiben/799 – (2.7Ha). The first wife contends that she has been using the property but was not allocated to her. The 2nd wife prays for equal distribution with her household of this property. It is approximately 0.14 Ha.

Item 35 – Sharwa/Gicheha/Block 2 BE – 6 acres. It is allocated to the 1st wife but the 2nd wife requests for equal distribution to both of them.

21. **Item No.43 – Upper Hill Property L.R. NO.209/11842**.

This property was bought by the deceased in 1993. It was the 1st wife's Nairobi home with the deceased, but upon his retirement they relocated to Nakuru and the property was converted to a commercial property where the deceased used to collect rent. Upon his death, his son **DENNIS** with 1st wife continued to collect the rent.

On the 27th February 2020, the court directed, by consent of the parties that the property be sold and the net proceeds shared equally to the eleven beneficiaries being the two wives and their children. Further, that the rent collected from the property from 1st July 2007 shall be determined upon full hearing of the cause.

THE APPLICABLE LAW

22. **Section 40** of the Law of Succession Act provides for where intestate was polygamous that;

(1)Where an intestate has married more than once under any system of law permitting

(2) Polygamy, his personal and household effects and the residue of the net estate, shall in the first instance, 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.

23. **Section 3** of the Act defines a family unit to comprise of a wife and the children of that wife.

Section 6 given a meaning to **Matrimonial Property** as;

a)The Matrimonial home or homes.

b)Household goods and effects in the matrimonial home or homes.

c)Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

24. **Section 8 states** property rights in polygamous marriages thus;

(1) if the parties in a polygamous marriage, divorce or a polygamous marriage is otherwise dissolved -

(a) Matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only. If the property was acquired before man married another wife;

CASE LAW: PRINCIPLES OF DISTRIBUTION OF AN INTESTATE IN POLYGAMOUS MARRIAGES.

25. (1). Mary Rono Vs. William Rono (2005) eKLR (Court or Appeal civil Appeal No.66 of 2002).

(2) Succession Cause No.110 of 2020

In the matter of the Estate of Samuel Miriri (dcd) . MM M'M -Vs- AIM (2014) eKLR.

(3) In the Re Estate of the late George Cheriro Chepkosiom (deceased) (2017) eKLR.

(4) In Re Estate of Juma Shiro (deceased) (2016) eKLR.

26. ISSUES FOR DETERMINATION

(1) *Whether the 2nd wife and household is entitled to a share of the first wife's Matrimonial home (Items No.29 and 30).*

(2) *Whether the rent collected from Item No.43 LR No.209/11842 - Upper Hill – from 1st January 2007 should be shared by both the 1st and 2nd households.*

(3) *Whether the 2nd wife's protest on distribution of items 22, 26, 29, 30, 31, 35 and 43 has merit.*

27. As stated above, the deceased's estate has been substantially distributed among the beneficiaries including the two wives who are joint Administrators with their sons, of the deceased estate. **The contested distribution is in respect of seven properties as item 22, 26, 29, 30, 31, 35 and 43. I have stated the details and evidence of each house paragraph 16 above - (see Par. 16 above).**

28. THE MATRIMONIAL HOMES

The 1st wife was settled at Item No.29 – Kericho/Chemoiben/429 – (2.2. Ha) and has been utilizing Item No.31 – Kericho/Chemoiben (0.14Ha) – a total of 4.18 Ha upon marriage in 1965 wherein tea trees are planted. She does not demand a share from the 2nd wife's Matrimonial home of 40 acres at Belba – Rongai (Nakuru). These properties were acquired by the 1st wife and the deceased long before the 2nd wife was married in 1993.

29. **Section 6** of the Law of Succession Act defines what comprises of a Matrimonial homes being the homes and household goods and effects and other immovable property jointly owned and acquired during the subsistence of the marriage.

Section 8 is categorical that a Matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, more so if the property was acquired before the 2nd wife was married.

30. The above position is well captured in the case **Re Estate of the Late Cheriro Chepkosiom** (deceased) Supra, when **Makau J**, rendered:

“To equate the widow to children of the first widow to widows who enter the home decades later, who may be the age of the first widow's children and made no contribution to the acquisition of the estate registered in the name of the deceased, is to perpetrate an injustice against women that cannot be justified under any circumstances.”

Further **Section 40** gives the court unfettered discretion to distribute an intestate in a just manner. The Court of Appeal in **Rono Vs. Rono (Supra)** while discussing the import of **Section 40** reiterated that a Judge has discretion to distribute an estate not on the principle of equality but on fairness and justice a situation expressed and applied by family courts in numerous decisions, among them the following.

31. In the Matter of the **Estate of Samuel Miriti Vs. AIM** (Supra) when the Court expressed itself thus:

“It is further unfortunate when the first wife who sacrificed a lot of her energy and who participated in the acquisition of the greater party of the deceased estate and even in situation where the properties are solely acquired by the first wife but registered in the husbands have ended up being shared equally among all the wives not taking into account of less contribution by the younger wife who is married after acquisition of the bulk of the properties if not all and who has contributed very little or nothing towards the acquisition of the estate”

32. Thus, without a doubt, **Section 40** emphasizes the distribution of an intestate on equitable principles as opposed to equal distribution, even to those who may not have dropped a sweat in the acquisition of the deceased's estate. The above is the position taken by the first wife's household while the second wife's submissions is that, citing the same **Section 40**, that the deceased's estate ought to be distributed and shared between the units of each household, thus trying to equate the wives to the children, and lumping them together.

33. In my considered opinion, while the above may apply to the children from both wives, it may and should not apply to the wives married at different periods by the deceased, as well captured in the case cited above – **Re Estate of Late George Cheriro Chepkosiam (2017) eKLR**, where the principles of equity, fairness and discrimination were addressed in polygamous marriages, to the effect that the court ought to consider the contribution of each widow to the acquisition of the property. The first wife in most of the times labours with the husband and acquires the substantial assets before the other wife/wives come to the scene. There would be no justification whatsoever, that what she toiled to acquire should be shared equally with the subsequent wives. Her efforts and sacrifices ought to be recognized and

awarded separately.

34. **Section 8 of the Matrimonial Property Act No.49 of 2013** further clarifies that;

“(1) If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the

a) Matrimonial Property acquired by the man and the 1st wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and

b) Matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives”.

35. In the present cause, the second wife did not state by evidence or otherwise any contribution she may have made to the acquisition of the Kericho/Moiben properties that comprise of the first wife’s Matrimonial home, all having been acquired before her marriage, twenty eight years after. Most of the properties were thus acquired before the second wife was married.

To that extent, and there having no evidence at all that the second wife’s son was shown part of the Kericho/Moiben properties to build his house, I find that part claim out of the first wife’s Kericho Matrimonial properties to be unreasonable, unfair and without any basis at all. In any event, the second wife has more acreage at her matrimonial property at Belbur within Nakuru County, than what the first wife has been assigned at Kericho/Moiben.

36. Accordingly:

(a) The first wife SUSAN CHERONO RONO shall retain fully and exclusively items No.29, 30 & 31 as her matrimonial home.

(1) Kericho/Chemoiben/427 – 4.4 Ha

(2) Kericho/Chemoiben/429 – 2.2 Ha

(3) Kericho/Chemoiben/799 – 0.14 Ha

Total 6.74 Ha (approximately 16.6 Acres)

(b) The second wife JOYCE CHEPKORIR RONO shall retain exclusively as her Matrimonial home item No.26 – Belbur (Ex Kipsalat – Togan, Nakuru County – 40 acres

37. To answer **issue No.1** therefore, it is evident that the 2nd wife and her household are not entitled to a share from the 1st wife’s Matrimonial home/properties – Items No.29, 30 and 31, equivalent to 16.6 Acres. These shall be assigned exclusively to the 1st wife and her household. The 2nd wife and household have been adequately provided as her Matrimonial home in Item No.26 comprising of 40 acres.

THE REST OF THE CONTESTED PROPERTIES

38. **Item No.22** – Sharwa/Gicheha Block 1/69 – 1.24 Ha within Nakuru County and **Item No.35** – Shawa/Gicheha/ Block 2 BE formerly LR6980 – 6 Acres within Nakuru County.

The above properties were earmarked to JOYCE CHEPKORIR RONO (2nd wife). They are prime agricultural properties. The second wife has been farming on the two properties. It is her wish that the two be given to her to continue with farming thereon, but does not object if they are shared equally to both wives.

The first wife lays no claim over the two properties by her evidence. Likewise, the parties Advocates did not submit on their proposals on the two properties.

39. The court, in its discretion, by dint **Section 40 Cap.160**, finds it just, fair and in the interest of justice that the two wives/households share, one property to each as follows:

(a) **Item No.22 (3 acres)** - shall be shared to the first household (1st wife, SUSAN CHERONO RONO).

(b) **ITEM No.35 (6 acres)** – this shall be shared to the 2nd household (2nd wife) JOYCE CHEPKORIR RONO.

40. **Item No.43 – LR No.209/11842 – Upper Hill Property.**

By a Consent Court Order dated the 27th February 2020 (reproduced at Par.13 above). This property is earmarked for sale and the NET proceeds **shared equally** to the eleven beneficiaries – the two wives and their nine children.

41. On the matter of the rent collected from the said property, from 1st January 2007, after the death of the deceased, there is no dispute that the property was the Nairobi Matrimonial home of the deceased and the first wife upto 1993 when the deceased retired and relocated to Nakuru. It was at this time that the 2nd wife was married. Upon his death in 2005, the property was converted to a Commercial Property, and the 1st wife's children collected the rent.

42. The 2nd wife conceded that she received rent from the property only twice, while the children of the 1st wife continued to collect the rent.

43. The first wife submits that the said property having been her Nairobi Matrimonial home, and opted to convert it to a Commercial Property, the rent accruing therefrom ought to be solely hers and her households as opposed to the 2nd wife's contention that the rent ought to be shared equally.

I agree with the first wife's submission that her household was gracious to have agreed to share the sale proceeds of the property with the 2nd wife's household and therefore, contends that the matter of accrued rent from 2007, January should be left solely to the first wife's household.

44. Guided by the **Re Estate** of late **George Cherino (deceased)** [supra], the court ought to take into account each spouses contribution to the acquisition of the property.

The 2nd wife who was married in 1993 clearly contributed nothing to the acquisition of the subject property, and in almost all the other properties left behind by the deceased. No evidence was led to suggest otherwise.

45. It would be unjust and unfair to share every property equally to the two households as if both were present, and participated in their acquisition. The consent recorded by the parties on the sharing of the sale proceeds of the **Upper Hill Property**, in my view, is sufficient and the 2nd household should be satisfied with the share of the sale proceeds – **Section 40 Law of Succession Act** and **Rono Vs. Rono [Supra]**.

46. More importantly, I am bound by the holding. **In the Matter of the Estate of Samuel Miriti Vs. AIM [Supra], and Section 8 of the Matrimonial Property Act of 2013 (1) (b)** where it states that Matrimonial Property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives.

47. Having considered the entirety of evidence, the law and the justice of the circumstances, **I find and hold that the 2nd household (2nd wife) is not entitled to a share of the Rent proceeds from the Upper Hill Property. Suffice to hold that the sale proceeds, to be shared equally, is good enough to the 2nd household which contributed nothing to the acquisition of the said property.**

48. Thus the 2nd issue for determination is resolved in the above manner.

The items flagged for determination, in this judgment being items No.22, 26, 29, 30, 31, 35 and 43 have been determined as above.

49. **The matter of costs** to the respective parties advocates has been raised by the Advocates for the First household. This matter has been taking rounds in the courts for the last fourteen (14) years. The Advocates on record have no doubt done tremendous research and submissions including negotiating amicable solutions to most of the contentious issues. It would have been an uphill task for the court if such had not been done. I extend my gratitude to the said Advocates and the cooperation by the two wives and their children who substantively have made the court's work easier.

50. Having stated as such, and having taken into account the nature and magnitude of the estate at issue, I find hold and direct that each household to take care of it's Advocates legal fees.

51. Here below is a summary of the Court's distribution of the flagged items for determination:

	DESCRIPTION OF PROPERTY	BENEFICIARY	SHARES
1.	Item No.22 Sharwa/Gicheha/Block 1/69	Susan Cheronno Rono	Whole share
2.	Item No.26 Belbur (Ex Kipsalat – Togon Nakuru County	Joyce Chepkorir Rono	Whole share
3.	Item No.29 Kericho/Chemoiben/427	Susan Cheronno Rono	Whole share
4.	Item No.30	Susan Cheronno Rono	Whole

	Kericho/Chemoiben/429		share
5.	Item No.31 Kericho/Chemoiben/799	Susan Cherono Rono	Whole share
6.	Item No.35 Sharwa/Gicheha/Block BE	Joyce Chepkorir Rono	Whole share
7.	Item No.43 L.R. No.209/11842 Upper Hill Property	To be sold and proceeds to be shared equally amongst the two wives and their nine children	Whole share

(b) On the matter of rent from the Upper Hill Property (Item No.43), I find hold and determine that the 2nd household (2nd wife) is not entitled to a share of the rent proceeds from the said property.

52. Each household shall bear it's Advocates legal fees.

Dated at Kerugoya this 14th day of January 2021.

J. N. MULWA

JUDGE

Delivered at Nakuru this 8th day of February 2021

T. MUMBUA MATHEKA

JUDGE