



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 340 OF 2014

IN THE MATTER OF THE ESTATE OF KIMITEI CHEROP (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR CONFIRMATION OF GRANT

BETWEEN

SAMMY KIPRONO CHEROP.....1ST ADMINISTRATOR

AND

DAVID KIPKOGEI KIMITEI.....2ND ADMINISTRATOR

RULING

[1] By a Petition for Grant of Letters of Administration Intestate filed herein on **15 September 2014**, **Sammy Kiprono Cherop** (hereinafter, the 1st Administrator) sought to be appointed as the administrator in respect of the estate of his deceased father, **Kimitei Cherop**. The deceased died intestate on **5 November 2001**, leaving behind his widow **Tabtuei Mitei** and several sons and daughters, including the 1st Administrator, who is the eldest of them all. In the Affidavit filed in support of the Petition, the 1st Administrator averred that the only asset comprising the estate of the deceased is a piece of land, more particularly known as **Parcel No. Uasin Gishu/Kaptagat Settlement Scheme/186**, measuring 40.2 Hectares.

[2] The matter was accordingly processed and a Grant of Letters of Administration Intestate was issued herein on **21 January 2015** to the 1st Administrator. Thereafter, on **21 May 2015**, the 1st Administrator filed the instant Summons for Confirmation of Grant, pursuant to **Section 71** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya** and **Rule 40** of the **Probate and Administration Rules**. That is the application that is the subject of this ruling. It was resisted by one of the other sons of the deceased, **Thomas Kimitei**, who also approached the Court vide his own application dated **3 December 2015**, seeking revocation of the Grant issued to the 1st Administrator. His contention was that the said Grant was obtained fraudulently.

[3] The revocation application was compromised and a Consent Order recorded herein on **3 December 2018** thus:

“1. By consent the Grant issued on 21/1/2015 be and is hereby annulled.

2. That the following be appointed as joint administrators:

a) The Petitioner Sammy Kiprono Cherop, and

b) David Kimitei.

3. A Grant be issued forthwith to the 2 administrators.

4. Parties are at liberty to agree on the mode of distribution.

5. Mention on 25/2/2019 for further orders.”

[4] As the parties thereafter failed to agree on the Mode of Distribution, directions were given on **25 February 2019** for the parties to file their proposed Mode of Distribution to enable the Court make a determination thereon. Thus, the 1st Administrator, **Sammy Kiprono Cherop**, filed an affidavit detailing his proposed Mode of Distribution on **4 June 2019** thus:

[a] That the beneficiaries in the 1st House be given their share thus:

- **Sammy Kiprono Cherop.....17.5 Acres**
- **Hellen Kimitei.....2.0 Acres**

[b] That the Beneficiaries in the 2nd House be given their share as follows:

- **Tabsimei Mitei.....4.875 Acres**
- **Joseph Kimitei.....4.875 Acres**
- **Thomas Kimitei.....4.875 Acres**
- **David Kimitei.....4.875 Acres**

[5] The 2nd Administrator’s affidavit on the proposed Mode of Distribution was filed on **8 February 2021**. He denied that the 1st Administrator’s proposal was the outcome of a family meeting as was averred by the 1st Administrator. On his part, he averred that the deceased was survived by, not just 6, but the following 10 dependants:

[a] **Tapsimei Kimitei (widow)**

[b] **Sammy Kimitei (son)**

[c] **Joseph Kimitei (son)**

[d] **Christine Kimitei (daughter)**

[e] **Thomas Kimitei (son)**

[f] **Esther Kimitei (daughter, deceased, survived by son Hillary Kipkoech Tum)**

[g] **Sarah Kimitei (daughter)**

[h] **Hellen Kimitei (daughter)**

[i] **Mary Kimitei (daughter)**

[j] **David Kimitei (son)**

[6] The 2nd Administrator further averred that the estate asset measures only 15.5 Hectares or 38.285 Acres; and not 40.2 Hectares as stated by the 1st Administrator in his affidavit. He annexed a Certificate of Search dated **5 September 2014** to back up his assertion (marked **Annexure DK 2**). He added that, as at the time of his demise, the deceased had subdivided his land and settled each family member in their respective portions. He therefore rooted for equality in distribution and for all the 10 dependants of the deceased to be provided for; in which event, each beneficiary would receive 3.8 Acres.

[7] Further directions were made on **5 October 2020** for the filing of written submissions by learned counsel for the parties, restricted to the issue of distribution. Thus, **Mr. Kandie** for the 1st Administrator, acknowledged that the deceased was polygamous and therefore that the applicable provision of the law is **Section 40** of the **Law of Succession Act**. Counsel also relied on the cases of **Rono vs. Rono** [2005] 1 EA 363, **Francis Njoroge Mungai & Others vs. John Njoroge Mungai**, High Court Civil Appeal No. 18 of 2001, **John Musambayi Katumanga (deceased)** [2014] eKLR, among others, for the proposition that, where the deceased was polygamous, his net estate should 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.

[8] In his written submissions filed herein on **8 February 2021**, **Mr. Korir**, for the 2nd Administrator, urged the Court to note that in his proposal, the 1st administrator omitted the names of the five daughters of the deceased, namely: **Christine, Esther, Sarah, Hellen** and **Mary**. He drew the attention of the Court to the chief’s letter, annexed to the 2nd administrator’s affidavit, and urged the Court to find that all the beneficiaries of the deceased, including his daughters are entitled to an equal share of his estate. He relied on **Section 38** of the **Law of**

Succession Act and the cases of **Rono vs. Rono** (supra); **Ikubu Kinyungu (Deceased)** [2017] eKLR; **Paul Ngambua Kyatu & Another vs. Peter Matheka Kyatu & 15 Others** [2014] eKLR; **Re Estate of John Musambayi Katumanga (Deceased)** [2014] eKLR and **Re Estate of Andrea Songoro Chepngom** [2010] eKLR, to support his submissions.

[9] Counsel further submitted that, in the case of **Esther Kimitei**, who is since deceased, her share ought to be given to her son, **Hillary Kipkoech Tum**. He relied on **Christine Wangari Gachenge vs. Elizabeth Wanjiru Evans & 11 Others** [2014] eKLR to augment his posturing, which **Mr. Kandie** did not agree with. According to **Mr. Kandie**, **Hillary Kipkoech Tum** is neither a beneficiary within the context of **Section 36** of the **Law of Succession Act**, nor a dependant for purposes of **Section 29** of the Act. He urged the Court to note that it is conceded that **Hillary** is the son of **David Too Tum** and **Esther Kimitei**, who is now deceased; and that he currently resides on his father's land in Nandi County. In the circumstances, it was the submission of **Mr. Kandie** that **Hillary Kipkoech Tum** is not entitled to a share of the deceased's estate.

[10] From the foregoing, it is manifest that most of the facts are not in dispute; and those facts include the fact that the only asset comprising the estate of the deceased, **Kimitei Cherop** is a piece of land, known as **Uasin Gishu/Kaptagat Settlement Scheme/186**. It is further not in dispute that the deceased died intestate on **5 November 2001** or that, in his lifetime, he was married to two wives, one of whom predeceased him. The parties are also in agreement that the deceased was survived by one of his wives, namely **Tapsimei Kimitei** and several children.

[11] From a careful perusal of the proposals filed by the two administrators, it is manifest that the 1st administrator is rooting for a 50:50 mode of distribution between the two houses; which would see him receive 17.5 acres; and his sister **Hellen Kimitei** would receive 2.0 acres. His assertion was premised on the basis that the estate asset measures 40.2 Hectares, as stated in Form P&A 5, filed with the Petition. He further proposed that, in the 2nd House of **Tapsimei**, each of the three sons therein would receive 4.875 acres, as would **Tapsimei** herself. As opposed to this, the 2nd administrator urged for equality; equality not only amongst the sons, but all the children of the deceased, including the daughters. He was of the view therefore that their deceased sister, **Esther Kimitei**, should also be taken into account by giving her share to her son **Hillary Kipkoech Tum**.

[12] In the premises, the issues for determination are: who, exactly are the beneficiaries of the deceased; what is the proper approach towards determining the mode of distribution, and the exact acreage of the estate asset. The record shows that, in the initial documents filed by the 1st administrator, only the following were named as beneficiaries:

[a] **Tabtuei Mitei (widow, deceased)**

[b] **Sammy Cherop (son)**

[c] **Hellen Kimitei (daughter)**

[d] **Tapsimei Mitei (widow)**

[e] **Joseph Kimitei (son)**

[f] **Thomas Kimitei (son)**

[g] **David Kimitei (son)**

[13] The 1st administrator also filed a letter from the office of the assistant chief, dated **28 July 2014**, in which the names of the five children above-mentioned were set out. The name of the surviving widow was, however, omitted. Hence, one of the grounds raised by **Thomas Kimitei** in support of his application for revocation, dated **3 December 2015**, was that the 1st administrator had commenced these proceedings in secret, having never involved any of the other family members, or obtained their consent as by law required. He further asserted that the 1st administrator had, for fraudulent purposes, concealed crucial information about the estate from the Court.

[14] The 2nd administrator was more explicit in his Affidavit on the Proposed Mode of Distribution filed on **8 February 2021**. He averred that the deceased was survived by 10 dependants including his widow, **Tapsimei Kimitei**. He set out the list at paragraph 5 of the said affidavit, which list includes the 5 daughters of the deceased. To augment that averment, the 2nd administrator annexed a copy of a letter written by the chief of Kaptagat Location, dated **8 December 2015**, wherein the names of the 10 dependants of the deceased, including **Esther Kimitei**, were furnished. That assertion by the 2nd administrator was never refuted; and therefore it is my finding that the deceased was survived by one widow, **Tapsimei Kimitei**; four sons and five daughters (including **Esther Kimitei**, now deceased).

[15] There appears to be no controversy herein as to whether the deceased's daughters are entitled to an inheritance along with their brothers. Indeed, the 1st administrator included his sister **Hellen Kimitei** in his initial list as a deserving beneficiary. There is absolutely no reason, therefore, why the 4 daughters of **Tapsimei Kimitei** (the 2nd house) should be left out, as that would be discriminatory. In **Stephen Gitonga M'murithi vs. Faith Ngira Murithi** (supra) the Court of Appeal made it explicit that, for the purposes of the law of succession, the children of a deceased are equal, irrespective of their gender or marital status. It accordingly held that:

“...Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children irrespective of gender and whether married and comfortable in their marriage or unmarried. Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each household of a polygamous deceased. Applying the above principles ... it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of the section 38 of the Law of Succession Act by discriminating against the married daughters of the deceased...”

[16] A similar posturing was taken by **Hon. Lesiit, J.** in **Eliseus Mbura M’Thara vs. Harriet Ciambaka and Another** [2012] eKLR, thus:

“The Law of Succession Act does not discriminate between gender in matters of succession or inheritance. Under the Law of Succession Act and indeed under the Constitution a child is a child and every person has equal rights under the law irrespective of gender. The Law of Succession Act does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person.”

[17] **Hon. Kimaru, J.** in **Peter Karumbi Keingati & 4 Others vs. Dr. Ann Nyokabi Nguithi** [2014] eKLR likewise held thus:

“...The decision by a daughter or a son to get married has no bearing at all to whether or not such a son or daughter is entitled to inherit the property that comprise the estate of their deceased parents...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. This ghost has long cast its shadow in our legal system despite 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 these discriminative cultural practices against women to be buried in history.”

[18] Having found that the daughters of the deceased are entitled to a share of his estate, the next question to pose is whether **Hillary Kipkoech Tum**, being a grandson to the deceased, **Kimitei Cherop**, is entitled to a share of the deceased’s estate. This question was well answered in **Christine Wangari Gachenge vs. Elizabeth Wanjiru Evans & 11 Others** (supra) thus:

“Although Section 35 and 38 of the Law of Succession Act is silent on the fate of surviving grandchildren whose parents predeceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law is on section 41. If a child of the intestate has predeceased the intestate then that child’s issue alive or *en ventre sa mere* on that date of the intestate’s death will take in equal share *per stirpes* contingent on attaining the age of majority. *Per stirpes* means that the issue of a deceased child of the intestate take between them the share their parents would have taken had the parent been alive at the intestate’s death.”

[19] Similarly, in **Re Estate of Veronica Njoki Wakagoto** (Deceased) [2013] eKLR, it was held that:

“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

[20] Clearly therefore, **Hillary Kipkoech Tum** is entitled to step into the shoes of his deceased mother, **Esther Kimitei**, and to receive a share of the estate along with his uncles and aunts; not as a dependant within the ambit of **Section 29** of the Law of Succession Act or a beneficiary for purposes of **Section 36** of the Act, but based on the principle of representation aforementioned. It is therefore immaterial that **Hillary Kipkoech Tum** is currently residing on his father’s land in Nandi; or even that he did not file any affidavit claiming a share of the estate of the deceased herein.

[21] I now turn my attention to the final issue, whether the estate should be divided equally between the two houses or equally amongst the 9 children and the surviving widow. Granted that the deceased died on 5 **November 2001**, the applicable law, by dint of **Section 2(1)** of the **Laws of Succession Act**, is **Section 40** of the Act. **Section 2(1)** provides that:

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

[22] On the other hand, **Section 40** of the **Law of Succession Act** stipulates that:

(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 estate 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.”

[23] It is manifest therefore that, guided by the provisions of **Section 40(1)** of the **Law of Succession Act**, the estate herein ought to be distributed equally amongst the 9 children of the deceased and the surviving widow, thus making 10 units. I note that there is conflicting evidence herein as to the exact acreage of the estate asset in that, whereas in the 1st administrator’s affidavit in support of Petition the asset was said to measure 40.2 Hectares, the 2nd administrator’s averment was that it measures only 15.5 Hectares. I agree with the position taken by the 2nd administrator because it is borne out of the Certificate of Search dated 5 **September 2014**, annexed to the 2nd administrator’s affidavit on his proposed mode of distribution. Indeed, the original copy of the same document was filed along with the Petition by the 1st Administrator. There is therefore no Title document or Certificate of Search supporting the 1st administrator’s contention that the asset

measures 40.2 Hectares. That being the case, it is the 15.5 Hectares that must then be shared equally among the 10 units aforementioned.

[24] Lastly, counsel for the 1st administrator raised the concern that the 1st House would be unduly disadvantaged, granted that the 1st administrator's mother, **Tapsimei Kimitei** predeceased the deceased herein; and has therefore been excluded from the list of beneficiaries. On the basis of **Rono vs. Rono** (supra) counsel urged the Court to heed the caution by **Hon. Omollo, JA**, that equal distribution principle can at times work injustice; in instances such as the present one, where there are two houses but only one surviving widow. The perfect response to this concern is to be found in the words of **Hon. Omollo, JA** in **Rono vs. Rono** (supra) that:

“...I do not understand the learned Judge to be laying down any principle of law that the Law of Succession Act, Cap 160 of the Laws of Kenya, lays down a requirement that heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality...If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section [section 40(1)] that the number of children in each house be taken into account...”

[25] Thus, in the application of **Section 40(1)** of the **Law of Succession Act**, it is to be expected that some houses in a polygamous setting would receive more than the other houses, depending on the number of the units under consideration.

[26] In the result, and in the light of the foregoing observations, I find and hold that the deceased, **Kimitei Cherop**, was survived by one widow and 9 children; and that, it is in the interest of justice and fair play that all the 10 units be given an equal share of the deceased's estate, including **Esther Kimitei**, who is now deceased. Accordingly, it is hereby ordered that:

[a] The estate of **Kimitei Cherop** (deceased) comprising of the piece of land known as **Uasin Gishu/Kaptagat Settlement Scheme/186** measuring 15.5 Hectares be divided and shared out in equal portions amongst his 9 children and surviving widow, **Tapsimei Kimitei**;

[b] That the portion of the estate asset due to **Esther Kimitei** (deceased) be transmitted to **Esther Kimitei's** son, **Hillary Kipkoech Tum**;

[c] That there be no order as to costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF MARCH 2021

OLGA SEWE

JUDGE