



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE AND ADMINISTRATION CAUSE NO. 220 OF 2004

IN THE MATTER OF THE ESTATE OF KIPKEMEI ARAP BUSIENEI

SALOME JERUTO BUSIENEI.....1ST PETITIONER

CLARA JERUTO BUSIENEI.....2ND PETITIONER

SELA JEPBWANBOK.....3RD PETITIONER

MICHAEL KIPKURGAT MASWAI.....4TH PETITIONER

VERSUS

JULIUS KIPKIYENY KEMEI.....OBJECTOR

RULING:

1. The petitioners filed a summons for confirmation of grant under Section 71 of the Law of Succession Act and rule 40 of the Probate and Administration Rules. A grant of letters of Administration intestate was issued on the 22nd May 2006. An affidavit in support of a summons was sworn by Clara Jemutai Busienei and Michael Kipkurgat Maswai, the 2nd and 4th Petitioners herein. They proposed a mode of distribution of the estate of the deceased.

2. The application was opposed by the objector by deposing that he was the 1st born son of the 1st house. The proposed mode of distribution that the 1st, 2nd and 3rd petitioners do hold the properties in trust for the beneficiaries who are all above 18 years was misconceived. Some of the land of the deceased had already been sold and not all the properties had been listed. He further stated that he was raised by the deceased as his son, educated by him and his dowry was paid by him.

3. The matter had proceeded to hearing on the mode of distribution when the 3rd petitioner averred that the objector was not a beneficiary to the estate of the deceased.

4. The matter proceeded on 19/10/2020 for the objectors' case.

5. Julius Kipkiyeny Kemei (OW1) testified and urged that his statement dated 14/10/2020 be adopted by this Court as his evidence-in-chief. He testified that Kipkemei Arap Busienei was his father and he was raised by him. He showed his identity card. He has lived on his fathers' land parcel No. LR No. Nandi/Mutwot 183 measuring 22.26 hectares. On cross-examination by Mrs. Chelashaw for the 1st and 3rd petitioners he testified that he did not have any document to show his father paid his school fees. His identity card did not read Kipkemei. He was circumcised at home. He had never lived with his grandmother. On cross-examination by Mr. Kandie for the 2nd and 4th petitioners he stated that his father had two wives. Salome Jeruto was the 1st wife and the 2nd was Clara Busienei. Salome Jeruto was living in Mosoriot on land No. Nandi/Mutwot 183 where he lived with Joseph Kiprop and Michael Maswai. His father had parcels of land in Chemalal farm, and Kitale farm but he was not aware of the Cheptarit Centre.

6. Milton Kimutai Birech (OW2) testified that Kipkemei Arap Busienei was neighbor to his father. He knew the objector for more than 50 years, as the son of Kipkemei Arap Busienei. On cross examination by Miss Chelashaw he stated that Salome Jeruto had two daughters. Julius was 10 years older than him. On further cross examination by Mr. Kandie he testified that Julius was brought up in the family of Kipkemei and Salome Jeruto was his mother.

1st and 3rd petitioner's case:

7. Sella Bwambok (PW1) testified and urged that his statement dated 27/9/2019 be adopted as evidence in-chief. Julius the objector was

born by Salome and he was the 1st born son to Kipkemei Arap Busienei. He was also a son to Salome Kipkemei Arap Busienei. Julius was adopted by his grandmother Kobot Sambai since he was born out of wedlock by their mother. He never shared a meal with him and his father never paid school fees for him. He wished the estate of the deceased be shared equally to all the rightful beneficiaries.

8. On cross examination by Mr. Kandie he testified that he was born in 1951. He resided in Kipkaren Saliyet which was not his father's home. Julius lived at his father's home after his demise. He testified that he had never seen the objector as a child. Michael, Julius and Clara lived in Nandi/Mutwot 183. Michael recognized Julius as a beneficiary of the estate of the deceased. He was aware of the Chemalal farm and the Transzoia farms, and he objected to Julius being apportioned a piece of land, since he lived with his grandmother in Tinderet. He further testified that Julius was a child born out of wedlock. He was the objector's brother by sharing the same mother but he was told two children passed on before he was born. On re-examination by Mrs. Chelashaw, he testified that he had never lived with Julius though he had moved onto his land in 2000.

9. Cheruiyot Arap Songok (PW3) urged that her statement be adopted by the Court as evidence-in-chief. She testified that the objector was raised by his grandmother. She could not identify Salome's children yet Salome was her sister. The objector was raised and circumcised in Tinderet. On cross examination by Mr. Kandie she stated that after circumcision the objector was not called Arap Kemei. She knew the objector as Arap Gogo. Further that Salome got married to Arap Busienei but they did not sire any child. On cross examination by Miss Keter she stated that her sister had told her that Julius was not a son of the deceased.

Submissions:

Objector's Submissions:

10. This Court was urged to find that he was the deceased's and the 1st petitioner's son. He was educated, sheltered and maintained by the deceased. The evidence of the 3rd petitioner should be disregarded as it was hearsay and as per **section 63(1) & (2) of the Evidence Act** oral evidence must be direct. This Court was referred to Article 2(4) of the Constitution that state as follows: ***"any law including customary law that is inconsistent with the constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid."***

11. Further, the 3rd petitioner's evidence is contradictory and the same should be disregarded. The objector is the deceased biological son and he knew of no other family. The Court was referred to ***Succession cause No. 2 of 2007, in the matter of the Estate of Justus Mugo Chomba (deceased)***, where the petitioner had been adopted by the deceased as his own. The Court was urged to find the objector has proved his case on a balance of probabilities and that he is a rightful beneficiary to the estate.

1st and 3rd Petitioner's submission:

12. The issues for determination by the Court are: Whether the objector was a dependant of the deceased; whether the objector was being maintained by the deceased immediately prior to his death and whether the objector is entitled to inherit from the estate of the deceased.

13. The objector had not met the criteria of being a dependent as per section 29 of the Succession Act, also as was held in ***Re-estate of the late Annelies Ann Graff (2019) eklr.*** The objector has failed to prove that he had depended on the deceased prior to his death as was held in ***Re-estate of Patrick Mwangi Wathiga (2015)eklr.***

14. Section 3 of the Law of Succession Act, defines who a child is. The objector however had not produced any proof that he was the deceased's child. There was no birth certificate. He had to prove the same as was held in ***Re estate of Ndongu Kabugua (deceased) 2019 eklr.***

15. Further the objector has failed to prove that he was being supported by the deceased prior to his death. The objector had been adopted by his grandmother and he could not claim that he was the deceased's child.

16. The Court was finally urged to dismiss the objector's claim and confirm the summons dated 29th January 2009.

2nd and 4th petitioner's submission:

17. The Court was urged to find that the objector was the deceased's son as supported by the evidence of PW2, who stated that the 1st petitioner got him when she got married to the deceased.

18. Further the distribution of the estate should be equal between the two houses; the Court was referred to ***Re estate of John Musambayi Katumanga (deceased) (2017) eklr.***

Analysis and determination:

19. The Court has weighed the evidence on record, the submissions and authorities referred to. The issue that arise for determination is:

- i. Whether the objector was the deceased's child or his dependent.

20. The 1st petitioner in this summons is the 1st wife to the deceased Kipkemei Arap Busienei. It is clear from the proceedings herein and the evidence that was tendered that the objector is the biological son to the 1st petitioner. The dispute is on whether he was the deceased's son.

The objector in his evidence stated that he was the biological son to the deceased Kipkemei Arap Busieni. He was being taken care of by him, had lived with him, he had even paid dowry for him and educated him as well as his children. This was disputed by the 3rd petitioner who testified that the objector lived with their grandmother in Tinderet and that they were born of the same mother but the objector was not sired by the deceased. This was corroborated by the evidence of PW2 who stated that she was the sister to the 1st petitioner. The 1st petitioner got the objector out of wedlock and he was given to the grandmother to take care of him. The 3rd petitioner further stated that the objector only moved their land when her father passed on in 2000.

21. The objector had the onus to prove that he is the deceased child. **Section 107 of the Succession Act provides that:-**

“(1) whoever desire any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

“(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lie on that person.”

22. The objector did produce his identity card which shows his name to include Kemei. His witness Pw2 testified that he knew objector by virtue of their land neighboring theirs. On cross-examination he stated that the objector was brought up in the family of Kipkemei and Salome Jeruto who is the objector's mother. The Court was urged by the objector to refer to ***Wilfred Koinange Gathiomi Vs. Joyce Wambui Mutura & another (2016 ekr,*** where the Court took Judicial notice that before independence in 1963, there was no formal registration processes, it was a tall order to obtain one if born in 1950.

23. The petitioners avers that the objector was not sired by the deceased Kipkemei Arap Busieni. The Court cannot rely on the alleged customary tradition that the objector being an illegitimate child was supposed to be suffocated to death and is not therefore a beneficiary of the deceased's estate. Such is repugnant to justice and actually if it were to happen, would amount to a serious crime.

He was sired by the 1st petitioner (now deceased) who is the wife to the deceased (Kipkemei Arap Busieni). **Section 2 of the Law of Succession Act provides** as follows:

“(3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.”

24. The above brings us to the question whether the objector was a dependant to the deceased. Section 29 of the Act provides that:

“(b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death” (Emphasis mine).

25. The objector has established on a balance of probabilities that he was raised by the deceased (Kipkemei Arap Busieni) and was being maintained by him immediately prior to his death. There is no dispute that he lived in the deceased's land LR. No Nandi/Mutiro 183. He is therefore a beneficiary of the deceased's estate by virtue of provision of Section 29 of the Law of Succession Act.

26. The petitioners should therefore include him as a beneficiary and he be considered in line with the other beneficiaries in the mode of distribution of which need be adjusted to cater for his fair share of the estate. This Court so directs.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 8th day of March, 2021.

In the absence of:-

Mr. Lemayian holding brief for Ms. Chelashaw for the 1st and 3rd petitioner

Mr. Kandie for the 2nd and 4th petitioner – (absent).

Ms. Lugure holding brief for Mr. Cheptinga for the objector

Gladys - Court Assistant

Mr. Lemayian -We pray for a copy of the proceedings and the ruling.

Court: Application is granted.

S. M GITHINJI -JUDGE

8TH MARCH, 2021