



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 434 OF 1996

IN THE MATTER OF THE ESATE OF THE LATE KIPNGENY ARAP CHEPKWONY (DECEASED)

MARY K. KIPNGENY.....APPLICANT

RULING

1. By a Summons for Rectification of Grant dated 8th June, 2021, the Applicant herein, who is a widow and an administrator of the estate of the deceased, seeks that the Certificate of Grant made to them on 7th December, 2007 be rectified as follows;

(a) Spent

(b) THAT 30% portion of Kericho/Kipsonoi/658 in Bomet County be subdivided equally between MARY KERUBO KIPNGENY, CHEBET MONGINA EUNICE and ERICK SIELE as follows;

(i) ERICK SIELE gets 2.0 acres in Kericho/Kipsonoi/ 658 where tea bushes have been planted.

(ii) MARY KERUBO KIPNGENY gets 2.0 acres in Kericho/Kipsonoi/658 where cypress and eucalyptus trees have been planted, next to the portion of CHEBET MONGINA EUNICE.

(iii) Erick Siele to get whole share of plot No. 19 and 30, Kipsonoi Market.

(iv) CHEBET MONGINA EUNICE to get whole share of the 30% of Kericho/Kipsonoi/633.

(v) CHEBET MONGINA EUNICE to get whole share of the 30% of Nakuru Municipality 29/156.

(c) THAT the costs of this Application be provided for.

2. The Application is premised on the grounds that the Applicant is sickly and elderly and wishes to distribute her share of what she inherited from her husband's estate to her children who are also beneficiaries of the estate of the deceased.

3. The Application is supported by an Affidavit sworn by the Applicant, MARY KERUBO KIPNGENY on 8th June, 2021.

4. She deposed that the properties of the deceased were distributed on 7th December 2007 by then *Martha Koome J (as she then was)* and in that distribution she got 30% of the parcels KERICHO/KIPSONOI/658, 30% of the parcels KERICHO/KIPDONOI/633, a whole share of PLOT NO.19 KIPSONOI MARKET and the ratios of 30% PLOT NO.30 KIPSONOI MARKET. She reiterated the above grounds on mode of distribution.

5. CHEBET MONGINA EUNICE and ERICK SIELE are her children.

6. Erick Siele, has opposed this mode of distribution as proposed by the Applicant through his Replying Affidavit sworn on 11th August, 2021.

7. He deposed that the mode of distribution proposed is unfair as it allocates him meager properties whilst allocating to his sister the prime and high valued properties.

8. He deposed that as per the valuation report of 2007 and which was summarized in the Ruling dated 7th December, 2007 the properties that

the Applicant proposes to allocate to him were valued as follows;

- a) Plot 19 Kipsonoi Market Kshs. 250, 000/=
- b) Plot No. 30 Kipsonoi Market Kshs. 220, 000/=

Whilst those that the applicant wishes to allocate to his sister were valued as follows;

- (a) Kericho/Kipsonoi/633 Kshs.1,600,000/=
- (b) Nakuru Municipality Block 29/156 Kshs.3, 500,000/=

9. He averred that it is only fair that all the properties allocated to the first house be shared equally amongst the three of them as was directed by the court in the Judgment of 14th July, 2006.

10. He prayed that the court do proceed in that regard and order that all the shares in the five properties be allocated equally to three of them.

11. The Applicant swore a Further Affidavit on 19th August, 2021 justifying her proposed mode of distribution. With regard to her son's share, the Applicant deposed that Plot No.19 in Sotik, Kipsonoi Trading Centre in Bomet County is well developed with permanent structures as it contains a house and a big shop and that it is situated in a very progressive town.

12. That the developments in the said property are rented out and at the moment her son Erick Siele is the one collecting rent and benefiting from the proceeds of the said property and he should thus continue enjoying the same.

13. That Plot No. 30 in Sotik has rental houses, a petrol station and a Posho Mill and her son Erick Siele has been collecting the proceeds of the said property should have it.

She averred that that it is untrue that Plot 19 Kipsonoi Market is valued at Kshs. 250,000/= and Plot No.30 Kipsonoi market is valued at Kshs. 220,000/= as those valuations are based on a 2007 valuation. That both Plots No. 19 and 30 have enough spaces that her son if he so desires in future can develop the same and make further good use of the said properties.

14. That Plot No. 633 measuring approximately 0.74 acres is in a remote area, it is property she inherited and wants her daughter Chebet Mongina Eunice to have it as she is the one who has been taking care of her during her illness.

15. With respect to NAKURU MUNICIPALITY BLOCK 29/156 she proposed it should go to her daughter since she has developed it.

16. That their portion of KERICHO/KIPSONOI 658 measuring 2.22 Hectares should be shared equally among the three of them.

ISSUE FOR DETERMINATION.

- *Whether this Court should grant the orders sought herein.*

ANALYSIS AND DETERMINATION

17. The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified.

18. The court in its judgment of 14th July 2006 held;

“Since the properties have not been valued and it is not clear whether some of them are capable of being subdivided I hereby direct that the parties do conduct a valuation of the properties and present a report by a valuer on how the properties can be distributed at the ration of 70:30. Upon indication of the values or portions each widow shall hold their respective properties for life and thereafter to all their respective children in equal shares.”

19. On 7th December 2007 upon receipt of the valuation and surveyor's report, the court distributed the properties in the manner indicated in the applicant's affidavit, effectively distributing the estate of the deceased herein. The widows got a **life interest** in the portion they inherited from their husband's estate.

20. The powers of a spouse during a life interest are set out under **Section 37 of the Law of Succession Act**;

“Powers of spouse during life interest A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance: Provided that, in the case of immovable property the exercise of that power shall always be subject to the consent of the court.

21. Under **Section 35** the surviving spouse also has certain powers;

“(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date. (emphasis is added).”

22. The applicant can enjoy the proceeds of the estate, can sell subject to the law if she needs to but cannot purport to redistribute the estate as her share was not bequeathed to her absolutely but as a life interest.

23. Clearly therefore there is no room for redistribution of the estate as envisioned by the applicant. Once the court determined the succession matter and distributed the deceased’s estate among the beneficiaries, it became *functus officio*. The court completed its work and its decision has not been faulted. The holding of *Musyoka, J* in **In re Estate of Ernest Kerry Komo (Deceased) [2016] eKLR** illuminates this position; that:

“Once a grant is confirmed and the property is distributed, as is the case here, the probate court becomes *functus officio*. The property in question is no longer estate property. It no longer vests in the administrators. It is no longer subject to the Law of Succession Act, Cap 160, Laws of Kenya, from which the probate court draws its authority and jurisdiction.”

24. I find that the application is untenable, the orders sought by the applicant are not available to her and the same is dismissed.

25. This being a family matter there are no orders as to costs.

Dated, signed and delivered virtually this 5th day of November, 2021.

Mumbua T Matheka

Judge

In the Presence of:

Edna Court Assistant

For the Applicant: Ms. Wangari

For the Respondent: Ms. Daye holding brief for Ms. Cheloti