



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPENGURIA

FAMILY DIVISION

SUCCESSION CAUSE NO 9 OF 2018

(Formerly Kitale High Court P&A number 172 of 2015)

IN THE MATTER OF THE ESTATE OF CHEPLEKE CHEMUSANY (DECEASED)

BETWEEN

SHEILA CHEMUTAI CHEMUSANY.....PETITIONER/RESPONDENT

AND

KATTON CHEMUSANY KERKER.....1ST OBJECTOR

GIBSON NIWAI CHEMUSANY.....2ND OBJECTOR

PATRICK JUMAMOSI CHEMUSANY.....3RD OBJECTOR

JACKSON LOMERI.....4TH OBJECTOR

SELINA CHEPKEMOI CHEMUSANY.....5TH OBJECTOR

JUDGMENT

Introduction

1. Chepleke Chemusany (the deceased) died on 15.6.2014 aged 80 years. Before her death, she was a farmer and owned land parcel number WEST POKOT/KERINGET "A"/401, which measures 11.8HA. From the proprietorship section of the title deed, the deceased became the registered proprietor of the said land on 4.2.2013 upon transfer and the title deed in her name was duly issued on the said date.

2. From the documents on the file and in particular, the Mnagei Location, Chief's letter dated 8.7.2015, the deceased was survived by the following persons: -

- a. Gibson Niwai Chemusany – Son
- b. Katton Chemusany Kerker – Son
- c. Jackson Lomeri – Son
- d. Patrick Jumamosi Chemusany – Son
- e. Lilian Cherop Chemusany – Daughter
- f. Sheillah Chemutai Chemusany – Daughter

- g. Selina Chepkemoui Chemusany – Daughter
- h. Loise Cheruto – Daughter
- i. William Makokha – Beneficiary

3. All the eight children of the deceased were alive as at the date of hearing the objection proceedings.

The Petition for Grant

4. The Petitioner applied for and was issued with Grant of Letters of Administration Intestate – form P&A 41 – on 10.8.2016. The petition was supported by the affidavit - form P&A 5 - in which the Petitioner listed all the deceased's children as per the chief's letter. By the summons for confirmation of grant dated 20.1.2017, the petitioner sought to have the grant issued to her on 10.8.2016 confirmed. Consent to confirm the grant was given by Lilian Cherop Chemusany and Loise Cheruto. The same is dated 20.1.2017. According to the summons for confirmation, the whole of the deceased's estate being WEST POKOT KERINGET "A"/401 measuring 11.8HA was to devolve to the petitioner. There is no indication in the papers to show whether the said estate was to devolve to the petitioner absolutely or whether she was to hold the same in trust for herself and her seven siblings. The summons for confirmation of grant was drawn and filed by Teti & Company Advocates. Before then, the petitioner had acted through Risper Arunga & Co. Advocates and after that she hired the services of Chebii Cherop & Co. Advocates.

The Objection

5. Being dissatisfied with the manner in which the petitioner was conducting the affairs of the deceased's estate, five of the petitioner's siblings namely Katton Chemusany, Gibson Chemusany, Patrick Jumamosi, Jackson Lumeri and Selina Chepkemoui filed an objection to the summons for confirmation of grant on the following grounds: -

- a. **THAT the petitioner is not fit/proper person to whom the grant of representation can issue.**
- b. **THAT the petitioner petitioned for letters of administration intestate without informing or obtaining consent from all the dependants with equal rights.**
- c. **THAT despite the objectors organizing several family meeting[s] for them to agree and appoint or propose administrators to act in the administration of the estate of the deceased, the petitioner in bad faith or ignorance attended none of the meeting[s] despite being summon[ed] to attend. Attached herewith is a copy of the letters dated 22nd June 2017, 23rd June 2017 and 26th June 2017 and marked "CC-1, CC – 2 and CC – 3" respectively.**
- d. **THAT during the family meeting GIBSON NIWAI CHEMUSANY was proposed as the administrator of the deceased estate.**
- e. **THAT the petition herein and the distribution of the deceased property falls under section 32 and 33 of The Law of Succession Act and thus Pokot Customary law is applicable here.**
- f. **THAT under Pokot customs a daughter of the deceased should not take over the representation of the family unless none of the elder son[s] is willing or incapable of obtaining the letters of administration due to incapacity.**
- g. **THAT the objectors are not only dependants in the estate of the deceased but also equally qualified to be administrators of the estate and they have neither renounced their rights nor have they been cited therein.**
- h. **THAT the petitioner is married and thus the estate would be properly administered by her elder brothers.**
- i. **THAT the petition was made in total violation of rule 7(7) of the Probate and Administration Rules.**

6. In a nutshell, the objectors allege that the grant of letters of administration intestate were issued contrary to the provisions of the Law of Succession Act. In particular, the objectors rely on *sections 32 and 33 of the Law of Succession Act* which provide: -

"32. The provisions of this part [on INTESTACY] shall not apply to: -

- a) Agricultural land and crops thereon; or*
- b) Livestock*

in various districts set out in the schedule.

SCHEDULE

West Pokot

Wajir

<i>Turkana</i>	<i>Garissa</i>
<i>Marsabit</i>	<i>Tana River</i>
<i>Samburu</i>	<i>Lamu</i>
<i>Isiolo</i>	<i>Kajiado</i>
<i>Mandera</i>	<i>Narok</i>

33. The Law applicable to the distribution on intestacy of the categories or property specified in section 32 shall be the law or custom applicable to the deceased's community or tribe, as the case may be."

7. The objectors also rely on **Rule 7(7) of the Probate and Administration Rules**. **Rule 7** falls under PART III of the **P&A Rules** which deals with APPLICATIONS FOR GRANTS OF REPRESENTATION. **Rule 7(7)** reads: -

"Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate, he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

- a) renounced his right generally to apply for a grant; or**
- b) consented in writing to the making of grant to the applicant; or**
- c) been issued with a citation calling upon him either to renounce such right or to apply for a grant."**

8. The objectors cited the above provisions in support of their contention that as a woman, the petitioner is not a fit/proper person to whom the grant of representation can issue. The objectors also contend that because of the said provisions, and in particular **sections 32 and 33 of the Law of Succession Act**, the deceased's property can only be distributed under Pokot Customary Law, which does not allow a daughter to take over the representation of the family unless none of the elder sons is not willing or incapable of obtaining the letters of administration due to incapacity.

9. **Section 66 of the Law of Succession Act** is also mentioned by **rule 7(7) of the P&A Rules**. The section makes provision for preference to be given to certain persons to administer where a deceased has died intestate, and in this regard, the section gives the court the final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made. The provision to the section states that where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

Other Disputes

10. From the pleadings the deceased and her sons, and in particular Katton Chemusany, had what I call running battles in court. There was **Kapenguria Land Disputes Tribunal Case no. 18 of 1990** in which the deceased was the claimant and Katton Chemusany (Katton) was the respondent. The deceased's claim arose out of Katton's alleged fraudulent registration of land parcel **West Pokot/Keringet "A"/401** into his own name following the demise of the deceased's husband. During the hearing of those proceedings, Katton showed the court the original title deed in his name.

11. However, in 2007, the deceased filed **Land Case no. 100 of 2007** in the Chief Magistrate's Court at Kitale against Katton and by the court's judgment dated 23.10.2007, KATTON was ordered to **"transfer the parcel of land registration number WEST POKOT/KERINGET "A"/401 to CHEPLEKE CHEMUSANY who is the legal administrator."** The land case in Kitale was filed after the Kapenguria Land Disputes Tribunal found in favour of the deceased.

Consent

12. On 30.5.2019, the parties who were by then represented by Mr. Chebii of Chebii Cherop & Company Advocates and Mr. Changorok of Changorok & Co. Advocates respectively agreed to have a fresh Grant of Letters of Administration intestate to the estate of the deceased issued in the joint names of Sheila Chemtai Chemusany and Gibson Chemusany Niwai. A fresh P&A 41 was accordingly issued in accordance with the said consent. This consent put to rest the issue of whether or not the petitioner was a fit person to take out the grant of Letters of Administration.

13. On the same 30.5.2019 the parties agreed that the joint administrators would file, either jointly or otherwise the summons for confirmation of grant. The matter was slated for mention on 25.7.2019 for further orders. For whatever reason, neither of the parties filed the summons for confirmation despite the advocate's undertaking to do so. They were granted a further 30 days from 25.7.2019 to do so, but by the time the matter came up again on 19.9.2019 the firm of Chebii Cherop & Co. Advocates had been sacked by the petitioner. Mr. Changorok advocate also withdrew from acting for objectors on grounds that his clients were not being cooperative. Thereafter the parties who appeared in person gave oral evidence.

The Objectors Case

14. The objectors called Katton Chemusany Kerker and Gibson Niwai Chemusany as PW1 and PW2. Their evidence centered around the fact that the petitioner should not be the one to administer, the deceased's estate. Samwel Krop Tusanai testified as PW3 in support of the objector's case.

The Petitioners Case

15. The Petitioner testified as DW1 and called Patrick Jumamosi Chemusany as DW2. The Petitioner's case is that she was the rightful person to apply for grant of letters of Administration intestate to the estate because the deceased gave her a power of attorney to do so, and further because the objectors had troubled the deceased in her lifetime and had not looked after her. She produced many exhibits to support her case.

16. What I can say about the testimonies of both the objectors and the petitioners is that the evidence was irrelevant following the consent entered into and recorded in court on 30.5.2019. The issue of who is the rightful person to apply for the grant was thus resolved. The two warring sides are equally represented by the joint grant. I allowed the parties to testify simply to allow them vent their pent-up emotions stored up in their chests over a long period of time since their mother's death on 15/6/2014.

Issues for Determination

17. The only issue for determination is one of distribution. Since the parties failed to file their respective mode of distribution, it falls upon this court to carry out that assignment. And that now brings me to the provisions of the law of **Succession Act, Cap 160 of the Laws of Kenya** which look at the children of a deceased as children and not whether they are boys or girls. Like the apostle Paul says throughout his epistles to the various churches he addressed, in salvation there is neither Jew nor gentile. In matters succession, there is neither man nor woman, regardless of one's custom.

18. **Section 38 of the Law of Succession Act** provides as follows: -

“38. Where an intestate has left a surviving child or children but no spouse the net intestate estate shall subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one or be equally divided among the surviving children.”

19. **Section 41 of the Law of Succession Act** provides that property devolving upon a child is to be held in trust until such child gets to the age of eighteen years. On the other hand, **section 42** provides that previous benefits paid, given or settled of any property to or for the benefit of a child, grandchild or house, or the property has been appointed or awarded to any child or grandchild under the provisions of **section 26 or section 35**, that property shall be taken into account in determining the share of the net intestate Estate finally accruing to the child, grandchild or house. From the papers on the file and the testimonies in court, these provisions do not apply to this case.

20. Before I get into the actual distribution of the 11.8HA estate of the deceased, I will make a few other comments. Under the African Customary Law of Succession, an issue that has been raised by the objectors, distribution upon intestacy was to the male children of a deceased, and daughters were not usually considered except in some communities where the unmarried daughters were provided for. See **W. M. Musyoka in a CASEBOOK ON THE LAW OF SUCCESSION – Law Africa at page 679**. For Customary African Law to apply, the intestate must have died before 1st July 1981. This is in accordance with the provisions of **section 2(2) of the Law of Succession Act** which provides: -

“The estates of persons dying before commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or prevail as far as possible in accordance with this Act.”

The Law

21. There is no doubt that **section 27 of the Law of Succession Act** gives the courts complete discretion to order a specific share of the estate to be given to the dependants of a deceased, or to make such other provisions for him by way of periodical payments at a lump sum, and to impose such conditions, as it thinks fit. **Section 28** of the same Act provides a list of circumstances to be taken into account by the court in making the order. **Section 29** of the Act defines dependant to mean wife/wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his(her) death. Other dependants of a deceased are set out in **section 29(b) and (c)**. On the issue of distribution, the courts are also under a duty to consider the provisions of **section 26** of the Act in ensuring reasonableness in the distribution of the deceased's estate.

22. The **Constitution of Kenya, 2010 by Article 27** provides for equality and freedom from discrimination. The Article reads: -

27 (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2)

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

- (5)
- (6)
- (7)
- (8)

23. Further, by dint of **Article 2(4) and 2(5) the Constitution of Kenya 2010**, any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid; and further the general rules of international law, shall form part of the Law of Kenya. In this regard, **Article 18 of the African Charter on Human and People’s Rights** which is referred to as the **Banjul Charter of 1981**, and ratified by Kenya in 1992 is part of the law of this country. Article 18 cited above requires State parties, among other things to:-

“Ensure the elimination of every discrimination against women and also ensure the protection of rights of the woman and girl child as stipulated in international declarations and conventions.”

24. It is thus clear that international conventions which have been duly ratified by the county became part of the law of Kenya with the promulgation of the Constitution of Kenya 2010. Even before then courts were already proactive in ensuring that the principle of equality reigns supreme in matters of succession under the **Law of Succession Act**. In **Rono versus Rono [2005] eKLR**, the Court of Appeal citing Justice Musumali in **Longwe versus International Hotels 1993 (4 LRC 234)** noted that Kenya having ratified the **Banjul Charter (1981)** without reservations was **“a clear testimony of the willingness by the state to be bound by the provisions of such [instruments]. Since there is that willingness, if an issue comes before this court, which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that Treaty Convection in my resolution of the dispute.”**

25. From the above provisions it is as clear as daylight that the **Constitution of Kenya 2010** does not countenance discrimination in any form on grounds of gender. The law is also clear that where the deceased dies without will and leaves no spouse, the surviving children shall equally share the deceased’s estate regardless of whether they are male or female. In any event, the objectors did not call any expert evidence on Pokot Customary land rights, whose evidence would dislodge the Petitioner’s claim to an inheritance from the deceased’s estate.

Distribution

26. The parties in this case were given an opportunity to indicate how the deceased’s estate should be distributed. They did not do so. That being the case, this court takes into account the provisions of sections 27, 28 and 29 of the Law of Succession Act. The court also notes that the sons of the deceased were not particularly kind or helpful to the deceased. In fact, the deceased fought battles with them, and especially Katton Kerker Chemsany. Some of the daughters have also remained on the fence as the deceased fought with her sons whose aim was to wrestle the land from her.

27. In the circumstances of this case, my considered view is that the 11.8HA of the deceased’s estate namely WEST POKOT/KERINGET “A”/401 shall be distributed equally among her eight children. If any of them has already intermeddled with his/her share, he/she shall receive only the balance of what he/she would have received. The joint administrators, Gibson Chemsany and Sheila Chemtai Chemsany shall take the necessary steps, including survey work to actualize this distribution. For fairness, all beneficiaries shall contribute in equal share the cost of effecting the distribution.

28. Since the dispute herein involves siblings, they shall each bear their own costs.

29. It is so ordered

Judgment delivered, dated and signed in open court at Kapenguria on this 13th day of February, 2020.

RUTH N. SITATI

JUDGE

In the Presence of

Objectors – present in person

Respondents – present in person

W. Juma – Court Assistant