



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

SUCCESSION CAUSE NO. 78 OF 2007

IN THE MATTER OF THE ESTATE OF KIPROP SAYORE PIWOT – DECEASED

SELINA NASIPWONDI KIPROP.....PETITIONER

VERSUS

JANECHEPTARUS KIPROP.....OBJECTOR

J U D G M E N T

1. The deceased herein **Kiprop Sayore Piwot** died on 29/6/2000 leaving behind two widows **Selina Nasipwondi Kiprop** and **Jane Cheptarus Kiprop**. He also left behind the following children from the first wife Janenamely Peter Kipyegon Kiprop, Joshua Keter Kiprop, Ben Kiplimo Kiprop and Daniel Kipruto Kiprop. From the second wife Selina, Anthony Kiprop.
2. He also left behind land parcel number **Trans Nzoia/ Sinyerere/826 measuring 2.79 Hectares** according to the surveyor's report commissioned by this court dated 6/3/2017.
3. The particulars of the beneficiaries as well as the properties are not contested. The only issue is the mode of distribution of the above property.
4. There are already written submissions on record by both the petitioner and the objector as ordered by the court. Considering the dispute, it was appropriate that this matter be settled by way of written submissions.
5. There are two competing documents relied on by the parties, namely the "Will" dated 28/1/2000 and the Elders decision rethead on 22/4/2000. The petitioner has strongly relied on the contents of the "Will" to advance her case while the objector has relied on the latter.
6. According to the "Will" the property was to be divided between Jane Cheptarus Kiprop who was to get 4 acres and Selina Nasipwondi Kiprop was to get 3.2 acres out of the suit parcel of land.
7. The Petitioner has conceded that the said document is not a Will strictly speaking as there were no witnesses as per the provisions of Section 11 of the Law of Succession Act. In essence it was the wishes of the deceased, which she urged this court to consider strongly.
8. The objector on the other hand has relied on elders decision which has distributed the parcel as hereunder.
 - 1) **Peter Kipyego Kiprop - 1.7 acres**
 - 2) **Joshua Keter Kiprop - 1.5 acres**
 - 3) **Ben Kiplimo Kiprop - 1.5 acres**
 - 4) **Anthony Kiprop - 1.5 acres**
 - 5) **Kiprop Arap Saroye and his two wives - 1 acre**
9. There were several parties who signed including the deceased as well as the beneficiaries. The two widows apparently signed the document.

10. It is worthy to note that the elders decision came later after the “Will” .

11. What then should this court follow? Clearly there was no Will. All that the deceased did was to express his desire on how the estate be distributed.

12. Section 40 of the Laws of Succession Act Cap 160 deals with such polygamus situation The same states that:-

40 (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 intestate 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.”

13. Reading the two documents relied on by the parties, and which essentially gave the wishes of the deceased, this court is inclined to rely on the second document which was a meeting called by the deceased I suppose and attended by all the beneficiaries as well as the widows and the deceased. This document is convincing for the reason that it was made after the “Will” and thus takes precedence.

14. More fundamentally, apart from being signed by the beneficiaries, a fact not contested, the two widows appended their signatures.

15. Significantly, the same in my view accords well with Section 40 of the Act aforesated. Each of the beneficiaries (sons) have been allocated their portions and the deceased and his two wives retained 1 acre. Ideally therefore the two widows after the demise of their husband retained half an acre each. Consequently, the question of unit envisaged by Section 40 (supra) was clearly satisfied.

16. As it were, the decision of the deceased to give for example, Peter Kipyego Kiprop 1.7 acres and the rest 1.5 acres was purely within his discretion. In any case if any of the widows (wives) was dissatisfied with the deceased wishes they should not have appended their signatures.

17. I did not find the decision by the elders repugnant or contrary to any law. Infact the same accords very well with Article 159 (2) (c) as it arbitrated over the deceased promptly before he died. The authority of **Grace Muthoni Ndilinye Vs Charles Gitonga Muriuki Nakuru Civil Application No. 137/2006**, is applicable in this matter as relied on by the objector.

18. The petitioner relied on the authority of **Apeli Vs Buluku Kisumu C.A. No 12/1979** which is equally reliable only to the extend that the wishes of the deceased ordinarily ought to be respected although the same was to do with a burial dispute.

19. In view of the surveyor's report dated 6/3/2017 it appears then that the land on the ground is less than what was in the title. The title shows the land to be 6.76 Ha and yet according to the surveyor the actual size on the ground is 2.383 Hactares which translates to about 5.72 Acres. There is therefore a short fall of about 1.5 acres.

20. In my view therefore there is need to re evaluate the division afresh to take into account the above findings. The proper equitable approach which I think shall somehow emeliorate the situation is to divide it as follows;

1) Jane Cheptarus Kiprop - ½ an Acre }

2) Selina Nasipwondi Kiprop - ½ an Acre } - Widows

3) Peter Kipyego kiprop - 1.175 acres

4) Joshua Keter Kiprop - 1.175 acres

5) Ben Kiplimo Kiprop - 1.175 acres

6) Anthony Kiprop - 1.175 Acres

Total - 5.7 acres

21. It is of course noted that Peter Kipyego Kiprop acreage has been reduced by some amount, but in view of the fact that all the parties have lost significantly, its necessary to have the portions equally distributed. In other words every beneficiary has lost ground and none has any advantage from the other.

22. Let the grant issued on 6//12/2007 be confirmed in the manner and style aforesated. This being a family feud, each party shall bear their respective costs.

Delivered, signed and dated at Kitale this 17th day of July 2018.

H.K. CHEMITEI

JUDGE

17/7/18

In the presence of:

Mfutu for Kiarie for Objector

Munialo for the Petitioner

Kirong – Court Assistant

Judgment read in open court.