



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

SUCCESSION CAUSE NO.153 OF 2014

IN THE MATTER OF THE ESTATE OF CHEPKWONY

ARAPROTICH ALIAS CHEPKWONY ARAP MOSONG

JOEL KIPNGENO CHEPKWONY.....1ST PETITIONER

TITUS KIPLANGT MELLY.....2ND PETITIONER

VERSUS

WESLEY LELEI CHEPKWONY.....PROTESTER/APPLICANT

JUDGMENT

1. These proceedings relate to the estate of the late Chepkwony Arap Rotich *alias* Kipsiele Korir who died intestate on 28<sup>th</sup> May 1990.

2. The deceased was survived by the following beneficiaries:

i. Grace Chelangat Mosos (widow) 68 years

ii. Rael Chepkirui Rotich (widow)

iii. Joel Kipngeno Chepkwony, son, 65 years

iv. Joseph Kiprono Chepkwony, son, 64 years

v. John Kibet Melly, son, 60 years

vi. Isaac K. Melly (son, deceased)

Ann Cherotich Meli Daughter in law

vii. Rebecca Chelimo Yebei, daughter, 65 years

viii. Martha Chelangat Rotich, daughter, 55 years

ix. Dinah Chepkoech Ngeno, daughter, 50 years

x. David Kipkorir Chepkwony, son, 47 years

xi. Titus Kiplangat Melly, son, 41 years

xii. James Kiprotich Melly (son, deceased)

Nancy C. Melly daughter in law

**xiii. Philip Kipkemoi Melly (Son deceased)**

Leah Chebet Chepkwony, daughter in law

**xiv. Wesley Lelei Chepkwony, son**

**xv. Lily Chepngetich, daughter**

**xvi. Daniel Kiplangat Chepkwony, son**

**xvii. Samuel Kipkemoi Chepkwony, son**

**xviii. Monicah Chelimo, daughter**

3. From the pleadings on record, the deceased had 11 children from his 1<sup>st</sup> house, 8 sons and 3 daughters, and 5 children from the 2<sup>nd</sup> house, 3 sons and 2 daughters.

4. An application for grant of letters of administration intestate to the estate of the deceased was made on 22<sup>nd</sup> July 2014 by Joel Kipngeno Chepkwony and Titus Kiplangat Melly. In Form P & A 5 dated 22<sup>nd</sup> July 2015, Mr. Chepkwony and Mr. Melly set out the beneficiaries as above save for the fact that the name of one of the daughters of the deceased, Dinah Chepkoech Ngeno, has been left out.

5. The estate of the deceased comprised the following assets which were set out in Form P&A5:

**i. Kericho/Kiptugumo/69 measuring 2.6 ha or 6.42 acres**

**ii. Kericho/Ngomwet/83 measuring 18 ha or 44.479 acres**

**iii. Kericho/Ngomwet/144 measuring 12.2 ha or 30.14 acres**

6. Letters of administration intestate were issued to the applicants, Joel Kipngeno Chepkwony and Titus Kiplangat Melly, on 11<sup>th</sup> December 2014. Thereafter, the applicants filed an application for confirmation of grant dated 27<sup>th</sup> October 2015 in which they proposed that the estate of the deceased be distributed as follows:

**1. Kericho/Kiptugumo/69 4 acres- Nancy C. Melly (to hold in trust for the 1<sup>st</sup> House)**

**2. Kericho/Ngomwet/83 45 acres-Rael Chepkirui Rotich (to hold in trust for the 2<sup>nd</sup> house)**

**3. Kericho/Ngomwet/144 32 acres –Joel Kipngeno Chepkwony and Titus Kiplangat Melly (to hold in trust for the 1<sup>st</sup> House)**

7. However, Wesley Lelei Chepkwony, a son of the deceased from the 2<sup>nd</sup> house (hereafter ‘the protestor’) filed an affidavit of protest dated 4<sup>th</sup> November 2016. He deposed in the said affidavit that the deceased had made gifts of the following properties in his lifetime to his sons from the 1<sup>st</sup> house who had attained the age of majority:

**1. David Kipkorir Chepkowny-Kericho/Kiptugumo/440-7.6 ha**

**2. Titus Meli-Kericho/Kiptigumo/101-1.1 ha**

**3. Isaac Kimutai Meli-Kericho/Kiptigumo/102-3.0 ha**

**4. John K. Melly- Kericho/Kiptigumo/441-6.2 ha**

**5. Joseph Kiprono Chepkwony-Kericho/Kiptigumo/103-3.6 ha**

**6. Paul Cheruiyot Meli-Kericho/Kiptugumo/419-6.2 ha**

**7. Joel K. Chepkwony-Kericho/Kiptugumo/100-1. 8 ha**

8. The protestor further deposes that the matrimonial house of the 1<sup>st</sup> house is located on property title number Kericho/Kiptigumo/69 measuring 2.6 ha and the property is therefore meant for the first house. The 2<sup>nd</sup> house has its matrimonial house on Keicho/Ngomwet/83 measuring 18 ha, which is slightly less than the total acreage given to the 1<sup>st</sup> house. He deposes that the deceased intended to give the said property to the children of the 2<sup>nd</sup> house, and he therefore proposes that the estate of the deceased be distributed as follows:

1. Kericho/Kiptugumo/69 for the 1<sup>st</sup> house as this is where it has the matrimonial home;

2. Kericho/Kiptugumo/83 for the second house as this is where it has the matrimonial home;

3. Kericho/Ngomwet/144 be divided amongst the 1<sup>st</sup> and 2<sup>nd</sup> house as follows:

i. 1<sup>st</sup> house -12 acres

ii. 2<sup>nd</sup> house- 20 acres.

9. The protestor avers that the property due to the 2<sup>nd</sup> house should be divided among the sons of the deceased from the 2<sup>nd</sup> house as they had not been given any property by the deceased in his lifetime. He relies on section 42 of the Law of Succession Act to urge the court to give due consideration to the property that had been distributed by the deceased during his lifetime. He does not mention what should become of the daughters of the deceased from the 2<sup>nd</sup> house, or indeed those from the 1<sup>st</sup> house, who also have a right of inheritance in accordance with section 38 of the Law of Succession Act. There is thus a glaring omission of the daughters of the deceased by the protestor in the proposal for distribution.

10. It appears from the pleadings that the protestor and the petitioners are in agreement on the distribution of the estate of the deceased, save for Kericho/Ngomwet/144.

11. The parties presented their respective arguments on the distribution of this land parcel by way of oral evidence and written submissions.

#### **The Protestor's Case**

12. In his statement and oral evidence before the court, the protestor reiterated the averments in his affidavit of protest which I have summarized above. He also filed submissions dated 27<sup>th</sup> September 2017. His case is that the deceased had given his sons from the 1<sup>st</sup> house gifts in his lifetime, and so the estate of the deceased should be distributed in accordance with his proposal. He contends that the deceased had given the said sons property which had been registered in their names in 1976. In his view, it is only fair that the 2<sup>nd</sup> house should get a larger share of property title No. Kericho/Ngomwet/144, and the distribution should be 12 acres to the 1<sup>st</sup> house and 20 acres to the 2<sup>nd</sup> house.

13. The protestor urges the court to consider that the children of the deceased's 2<sup>nd</sup> family had been living on the suit land without any interruption, and they therefore have a beneficial interest in the said land. He argues, however, that the gifts to the 1<sup>st</sup> house notwithstanding, they also have an interest in property title number Kericho/Ngomwet/144 in accordance with section 40 of the law of Succession Act. He refers the court to the decision in **M'Mugambi Mmaingi vs Maingi M'iuthinji [2014] eKLR** in support and urges the court to direct that the property of the deceased be distributed in accordance with his proposal.

#### **The Case for the Petitioners**

14. The petitioners respond that they were not given the land parcel numbers registered in their names in 1976 by the deceased. Their case, as it emerges from their pleadings, oral evidence and submissions, is that the land was being allocated by the government, and the deceased had given their names for allocation of the land.

15. In their submissions dated 27<sup>th</sup> October 2017, the petitioners submit that the protestor has failed to prove that some of the beneficiaries from the first house were ever given gifts in the lifetime of the deceased. They refer to the statement of the 2<sup>nd</sup> petitioner in which he asserts that the deceased did not give them any gifts of parcels of land but merely gave out their names to the area chief for them to be allocated the said parcels of land. Their contention is that the said properties did not at any time belong to the deceased. He was therefore not in a position to give them to the sons from the 1<sup>st</sup> house. The property belonged to the government and not their father before it was transferred to them.

16. The petitioners referred to the decision of Nyamweya J in **Re Estate of the Late Gedion Manthi Nzioka Succession Cause No. 122 of 2010** in support of their assertion. They further rely on the case of **Leah Ngima Muriithi & Another vs Susan Wanjiru Muriithi [2016] eKLR** and submit that the copies of the green cards produced by the protestor indicate that the 6 sons from the 1<sup>st</sup> house were the first registered owners.

17. It is the petitioners' case that title number Kericho/Ngomwet/144 should be inherited entirely by the 1<sup>st</sup> house. The petitioners give two reasons for this assertion. First, that the mode of distribution that they propose will have seen the 1<sup>st</sup> house receive 36 acres while the 2<sup>nd</sup> house receives 45 acres. It is their argument, secondly, that the said property was purchased from the dowry paid following the marriage of Rebecca Chelimo Yebei, a daughter of the deceased from the 1<sup>st</sup> house. Their contention is that the mode of distribution they propose accords with the way the deceased had indicated his property should be sub-divided.

#### **Determination**

18. The protest before me revolves around the distribution of one asset of the deceased, Kericho/Ngomwet/144. The determination of the manner in which this property will be distributed will depend on the answer to the question whether the deceased had distributed some of his properties to some of his beneficiaries *inter vivos* as alleged by the protestor. As correctly submitted by the protestor, if the deceased had indeed made such gifts *inter vivos*, then they must be taken into account when the estate is being distributed. Section 42 of the Law of

Succession Act provides that:

**42. Where-**

**(a) an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate.**

**That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.**

19. I have considered the evidence before me and the submissions of the parties. From the evidence, the deceased was not the registered owner of the property that was registered in the names of the sons from the 1<sup>st</sup> house in 1976. The evidence indicates that the government was allocating land, and the Chief asked for names of persons to be allocated land. The deceased gave the names of his sons from the 1<sup>st</sup> house, and the land was registered in their names. The question is whether this amounts to the deceased giving his sons “*gifts inter vivos*”. As I understand it, the deceased in essence, some 14 years prior to his demise, facilitated the registration of several parcels of land in the names of his children. Some were of age, but others were not. However, the land parcels in question did not belong to the deceased.

20. What does the law require with respect to a gift *inter vivos*? In her decision in **Re Estate of The Late Gedion Manthi Nzioka (Deceased) [2015]eKLR** relied on by the petitioners, Nyamweya J stated as follows:

**“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death:**

**...For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”**

21. As observed by the court in the above case, “*a person cannot gift that which he or she does not own.*” It appears to me that the deceased in this case, not being the registered owner of the lands at issue, was not in a position to give them as gifts to his children from the 1<sup>st</sup> house. The correct position seems to me to be as presented by the petitioners-that the deceased gave out the names of his sons from the 1<sup>st</sup> house when the government was allocating land to residents of the area. This did not emerge from the evidence but it may well be that the sons from the 2<sup>nd</sup> house were not yet born.

22. The green cards produced by the protestor bear out this position. The sons of the deceased from the 1<sup>st</sup> house are the first registered owners of the properties, and there is nothing to indicate that the land ever belonged to the deceased. He was therefore not in a position to make a gift of it *inter vivos*. That being the case, in my view, and as recognised by the protestor, all the beneficiaries of the deceased are entitled to a share in Kericho/Ngomwet/144.

23. I have come to this conclusion for one further reason. A consideration of the properties allegedly gifted to the sons of the 1<sup>st</sup> house shows a very wide disparity in the size of the properties that each son has. One son has 7.6 ha or 18.78 acres, while another has 2.7 acres. The Law of Succession Act requires that the property of a deceased person be distributed equally between the beneficiaries of a deceased person. There should thus not be such wide disparity in the distribution that would work an injustice on some beneficiaries, which is what would result from the mode of distribution proposed by the protestor.

24. The parties are in agreement on the distribution of two properties-Kericho/Kiptugumo/69 measuring 2.7 ha to go to the 1<sup>st</sup> house while Kericho/Ngomwet/83 measuring 18 ha or 44.47 acres goes to the 2<sup>nd</sup> house. From these two properties, the 2<sup>nd</sup> house gets a larger share-44.43 acres among 5 children-three sons and two daughters, plus their mother, which makes six units. The 1<sup>st</sup> house has 12 units, 8 sons (or where the son is deceased, his widow) and 3 daughters plus their mother, making a total of 12 units.

25. The protestor argues that his house should get a larger share, 20 acres, while the 1<sup>st</sup> house gets 12 acres. Given that his proposed mode of distribution was premised on the alleged gift *inter vivos*, and having found that no such gift had been made, and even had it been made, was not fair, then it follows that the mode of distribution that he proposes would not be fair.

26. I am satisfied that the mode of distribution proposed by the petitioners is the fairest in the circumstances. I accordingly direct that the estate of the deceased shall be distributed as follows:

**i. Kericho/Kiptugumo/69-2.6 ha-Nancy C. Melly (to hold in trust for the 1<sup>st</sup> House)**

**ii. Kericho/Ngomwet/83 18 ha-Rael Chepkirui Rotich- 45 acres (to hold in trust for the 2<sup>nd</sup> house)**

**iii. Kericho/Ngomwet/144 32 acres –Joel Kipngeno Chepkwony and Titus Kiplangat Melly (to hold in trust for the 1<sup>st</sup> House)**

27. In closing, I observe that the petitioners and the protestor have proceeded with the distribution of the deceased’s estate as though the daughters of the deceased are not entitled to a share. Section 38 of the Law of Succession Act is clear that the estate must be distributed

equally between all the children of the deceased, regardless of their gender or marital status. Further, Article 27 expressly prohibits discrimination on the basis of gender or marital status. Consequently, I direct that the properties to be held in trust for the two houses must be understood to be held in trust for all the beneficiaries of the respective houses, including the daughters of the deceased, unless they expressly renounce their interest in the estate.

28. There shall be no order as to costs.

**Dated Delivered and Signed at Kericho this 3<sup>rd</sup> day of July 2018.**

**MUMBI NGUGI**

**JUDGE**