



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

SUCCESSION CAUSE NO.52 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE TAPKIGEN

BEGMWEI alias TAPKIGEN W/O MWEI (DECEASED)

RAEL CHERONO MWEI.....PETITIONER

VERSUS

JOHN KIPKEMOI CHERUIYOT.....PROTESTOR

JUDGMENT

1. The petitioner and the protestor are brother and sister. They are beneficiaries of the estate of the deceased, who died intestate on 25th September 2007, leaving the following beneficiaries:

i. Sarah Tabutany, daughter, 77, married

ii. Rael Cheron Mwei, daughter, 73, unmarried

iii. Sarah Cheruto Murbi, daughter, 70, married

iv. John Kipkemoi Cheruyoit, 54, son

2. The sole asset of the deceased composed property number Kericho/Kipchimchim/873 measuring 2.4 hectares or 5.93 acres.

3. Rael Cheron Mwei applied for letters of administration intestate by an application dated 6th January 2014 and filed in court on 31st March 2014. Letters of administration intestate were issued to her on 30th July 2014.

4. The petitioner then filed an application dated 16th October, 2015 for the confirmation of the grant. She proposed at paragraph 5 of the affidavit in support of the application sworn on 16th October 2015 that the property of the deceased be distributed equally between herself and the protestor, each getting 3 acres. A consent to this mode of distribution was signed by the other beneficiaries of the estate, except the protestor, and filed in court.

5. The protestor thereafter filed an affidavit of protest dated 15th November 2016. He averred that the grant should be revoked as the petitioner had failed to obtain consent from all the beneficiaries and had failed to furnish the court with full agreement on the mode of distribution. He averred further that the deceased had, before she died, said that the petitioner should be given a half acre (1/2 acre) of land and not 3 acres.

6. He also contended that he has seven children, three daughters and four sons; that the petitioner has two children; a daughter who is married and a son who is unmarried, and he should therefore get a larger share of the estate because he has a larger number of children.

7. It was his contention further that since he is the only son of his deceased mother, he is entitled to 5 acres and his sister should be given 1 acre.

8. In her affidavit in response to the protest sworn on 20th March 2017, the petitioner avers that the deceased died on 25th September 2007 but her brother, the protestor, failed to petition for the grant, prompting her to petition as she has an equal right to petition. Her sisters had

consented to her petitioning and were also agreeable to the mode of distribution she proposed.

9. She avers further that the law does not discriminate against women on matters of succession, and the protestor's claim to a larger share is unjustified.

10. The protestor filed submissions through his Learned Counsel, Mr. Motanya (though they carry the wrong name in the title, Jackson K. A. Koske) dated 8th December 2017. The protestor reiterates his averments and the history of the present matter. He submits that the petitioner conspired with their married sisters to apply for the letters of administration without his consent.

11. With respect to the mode of distribution proposed by the petitioner, he contends that the petitioner has proposed a mode of distribution that goes against the wishes of the deceased. He argues that the family had unanimously agreed that the petitioner would get 1 acre while he gets 5 acres, and the other two beneficiaries had renounced their interest in the estate as they are married.

12. In response, the petitioner submits that she followed due process in applying for the letters of administration, which she had an equal right with the petitioner to apply for. She maintains that as a daughter of the deceased, she has an equal right to inherit the property of the deceased in accordance with section 35 of the Law of succession Act. She relies in support on the decision in **Rono vs Rono (2005) 1 EA 363** and **In the matter of the Estate of Dorcas Njeri Kithuku (Deceased) Nairobi Succession Cause No. 1968 of 2002**. She also cites section 38 of the Law of Succession Act which provides for equal distribution of the estate of the deceased where only children survive a deceased person.

13. On the protestor's claim that he should get a larger share because he is a son and has 7 children, her response is that he is not entitled to a larger share because he is a son. To hold otherwise would be contrary to Article 27 (3) of the Constitution, and sections 35, 38 and 40 of the Law of Succession Act.

14. As for his children, her submission is that they are entitled to inherit his share, not from their grandmother, and the number of children he has is not a determining factor in distribution of the estate of the deceased. She urged the court to dismiss the protest and direct that the estate of the deceased be distributed in accordance with her affidavit in support of the application for confirmation of grant as it accords with the Constitution and the Law of Succession Act.

15. I have considered the protest and the submissions in support. I have also considered the petitioner's affidavit in response to the protest. The petitioner and the protestor are children of the deceased. They, with their sisters, are the beneficiaries of the estate of the deceased.

16. Section 38 of the Law of Succession Act provides as follows:

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 shall be equally divided among the surviving children.

17. The deceased in this case left 4 children surviving her. Two have indicated, by signing the consent to the mode of distribution proposed by the petitioner, that they have no interest in the estate of the deceased. Which means that in accordance with section 38, the estate should be distributed equally between the two remaining children of the deceased, the petitioner and the protestor.

18. This is what the petitioner proposes. However, the protestor takes the view that he is entitled to a larger share. This is on the basis, first, that he is a son of the deceased. However, there is nothing in the Law of Succession Act that gives a son a greater right to inherit, solely because he is male. On the contrary, the law is clear that the children shall share equally the estate of the deceased in circumstances such as are before me. Further, the Constitution is clear at Article 27 that there can be no discrimination on the basis of gender. A distribution of the estate on the basis proposed by the protestor would be in violation of the Constitution.

19. The second reason the protestor advances for claiming a larger share of the deceased's estate is that he has seven children, while his sister, the petitioner, has 2. Again, there is nothing in the law that entitles a child of the deceased to a larger share of his or her parent's estate because he has a large number of children. Those are his children, his responsibility. They are only entitled to what they can inherit from him, and in respect of their grandmother's estate, only what their father is entitled to.

20. In the circumstances, I find no merit in the protest, and it is hereby dismissed. The estate of the deceased shall be distributed as proposed by the petitioner, that is equally between the petitioner and the protestor.

21. There shall be no order as to costs.

Dated Delivered and Signed at Kericho this 3rd day of October 2018.

MUMBI NGUGI

JUDGE