



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 79 OF 2004

IN THE MATTER OF THE ESTATE OF KIPCHUMBA KURGOI NAIROTI (DECEASED)

BETWEEN

STANLEY K. CHUMBA 1ST PETITIONER

RAEL JEMAIYO KURGOI 2ND PETITIONER

AND

RAEL JESONDIN KURGOI OBJECTOR

JUDGMENT

The Petitioner filed the cause seeking a grant of representation on behalf of the estate of the deceased. On 7th April, 2006, Grant of Letters of Administration Intestate to both Petitioners was issued. The Petitioners thereafter filed Summons for Confirmation of the Grant dated 26th January, 2007. Although this Summons was filed on behalf of Petitioners, the Supporting Affidavit is sworn by the 2nd Petitioner, Stanley K. Chumba. A second application dated 16th February, 2007 was filed also seeking Confirmation of the Grant by the 2nd Administrator Rael K. Kurgoi.

The applications for Confirmation of the Grant sparked the dispute. The two Petitioners could not agree on the mode of distribution.

The court directed that the objection be heard by adduction of viva voce evidence. The Objector was testifying as Plaintiff while Petitioners were to present the defence case.

Objector's Case:

The Objector Rael Kurgoi testified as PW1. She said she was married to the deceased together with Maria who was the elder wife. It was her testimony that both had six children each. She said the deceased had four parcels of land and cars. The plots are made up as follows:

1. L.R No. 9376/75 measuring 32 acres.
2. Plot No. Kapsaret/Simat/Block 2/122 measuring 4 acres.
3. Plot No. Turbo/Lesen/Kosaji/149 measuring 3.5 acres, and
4. Plot No. Kapsaret/Simat/Block 2/197 measuring 0.5 acres.

According to PW1, the deceased originally owned the land marked No. 1 above and subsequently purchased Nos. 2, 3 and 4. She said the deceased wrote a Will allocating 18 acres to Maria and 16 acres to herself out of the first parcel No. 9376/75. Incidentally, the distribution of this land is not contested.

She told court that plot No. Kapsaret/Simat 2/122 was purchased by the deceased on her behalf and so the land should entirely go to her. Both herself and the deceased erected a fence around it and that after the deceased's death, she sold it. With respect to Plot No. Turbo/Lesen/Kosaji/149, she said that, although it belonged to the deceased, it was occupied by the deceased's uncle. As for Plot No. Kapsaret/Simat/Block 2/197 she said it was purchased jointly by herself and the deceased and she produced a Sale Agreement in this respect as P. Exhibit 3. She said the latter plot was purchased from one Kiprono Laman and was left for occupation to her grandson one Elisha Kiplagat Chumba.

In summary, PW1 said that the distribution should be done as follows:-

1. Plot 1/122 should be given to her entirely as it was given to her by her husband.

2. Plot No. 149 should be divided as follows:-

(a) One and a half (1 1/2) acres be given to her deceased uncle one Sambai who was allocated its occupation by her late husband.

(b) The remaining two (2) acres be distributed equally between the two households.

3. Plot No. 2/197 be given to her grandson Elisha.

PW2, Elisha Kiplagat Chumba stated that the deceased was his grandfather. He corroborated PW1's evidence that under Plot 1/122 the deceased had given the 1st wife Maria Kurgoi 18 acres and the 2nd wife Rael Kurgoi 16 acres. He said the deceased had purchased Plot No. 2/197 measuring 0.5 acre as per P. Exhibit 3. He said the deceased gave it to him while he was in Form III and that he had directed PW1 to transfer it into his name when he becomes an adult. He stated that he took over this plot in 2006 and sold it to one Prisca Maiyo.

PW2 further testified that Plot 1/122 was occupied by PW1 while Plot No. 149 was occupied by the deceased's uncle. He urged the court to distribute Plot No. 149 between the two households while plots 1/22 and 2/197 should be distributed to PW1 entirely.

PW3, Joseph Sambai Samoei stated that the deceased was his uncle and had married two wives. He said that the deceased gave him one and a half (1 1/2) acres out of the 3.5 acres comprising plot number 149. That out of the one and half

(1 1/2) acres, he bought a half (1/2) acre from the deceased at a cost of Kshs. 50,000/= while the 1 acre was given to him by the deceased as a gift. He said he has lived on this parcel of land since 1965 although the title is in the name of the deceased. He also confirmed that the deceased had another parcel of land out of which the 1st wife was allocated 18 acres and the 2nd wife 16 acres. He stated that PW2, Elisha, was the deceased's son.

Petitioner/Defendant's Case.

DW1, Stanley Kipsem Kipchumba testified that the deceased was his father and had two wives namely, Maria Chepkuto Kurgoi and Rael (PW1). He said the Objector was the second wife. He said the deceased had distributed parcel of land No. 9376/75 with the 1st house receiving 13 acres and the second house receiving 15 acres. He produced a copy of the title as D. Exhibit 1. He testified that the deceased had other parcels of land, namely No. 149 measuring 35 acres situated at Turbo, No. Simat 122 measuring 4 acres and No. 197 measuring 1/2 acre. He said that the deceased

was in the process of transferring parcel Nos 122 and 197 into his name but he died before completion of the same.

According to DW1, each family/house is entitled to an equal share of each of the properties. He denied that parcel No. 122 was given to PW1 by the deceased before he died. He said the Sale Agreement produced by PW1 as P. Ext 2 was between the deceased and one Kirwa. He also denied that Plot 197 was given to PW2 by the deceased. He disagreed with the mode of distribution suggested by PW1.

DW2, Eldat Kiplagat Kirui testified that he previously worked as the area chief and confirmed that the deceased had two wives. He said deceased owned both land and cattle. He said deceased had bought the Simat land from his relative one the late James Kirwa. That he had also bought 4 acres of land which he intended to distribute among his family. In this respect, he said the deceased had written a letter to him dated 17th August, 1997 (D.Exhibit 2) for purposes of taking it to the Lands registry. He said that the deceased would have distributed the four acres parcel of land according to the Nandi custom whereby the second wife would receive a lesser share.

I have accordingly considered the evidence on record and the written submissions filed on behalf of the respective parties. I am also alive to the fact that I did not take the evidence of any of the witnesses and that this file landed on me for purposes of writing the Judgment. The entire evidence was heard by Hon. Justice Karanja who subsequently was transferred from this station.

The contested distribution is only in respect of three parcels of land, namely:-

- Plot No. Kapsaret/Simat/Block 2/122 measuring 4 acres
- Plot No. Turbo/Lesen/Kosaji/149 measuring 3.5 acres
- Plot No. Kapsaret/Simat/Block 2/197 measuring 0.5 acres.

All the three parcels of land were owned by the deceased.

The parties appear to have agreed on how to share out the largest parcel of land measuring 32 acres. Interestingly, they say the deceased had distributed it by a Will, but no Will was annexed to the application for Grant. It seems then, the deceased left no "Will" with respect to the disputed plots.

On the part of the Objector, she contends that the deceased had expressed how he wished a larger portion of the three plots be distributed; that she should get the entire 4 acres parcel of land, her grandson should get the entire 0.5 acre parcel of land, whereas her deceased uncle should get one and half (1 1/2) acres out of the 3.5 acres parcel of land and the balance of 2 acres be distributed equally between the two houses. According to PW1, the deceased had bequeathed the entire Plot No. 197 to his grandson as a gift. That he had also bequeathed 1 acre out of Plot No. 149 to his uncle as a gift while the latter had bought a half (1/2) acre out of the same plot from the deceased. She insisted on getting the entire of plot 122 since that is where she had settled and that the deceased had in any event bought it on her behalf.

One thing is not disputed, that all these parcels are in the name of the deceased. PW1 appears to have produced a Sale Agreement (P Ext.2) to demonstrate that parcel No. 122 was bought by the deceased on her behalf. Unfortunately, the agreement is between the deceased and one James Kirwa and PW1 does not feature in it in any way. I have seen P. Exhibit 3 being an agreement to the effect that Plot No. 197 was purchased jointly by the deceased and PW1. However, this land was never transferred to PW1. Instead, the purchasers allocated it to their grandson (PW2). PW2 on the other hand said he had already sold it to a third party, namely Prisca Maiyo.

Having made the observations, it is my view that the deceased did advance as gifts plot 197 to PW2 and 1 acre out of Plot 149 to his uncle who also purportedly purchased 0.5 acre from the same plot, albeit without an agreement. Although the advanced gifts were not reduced into writing, and

were not made in contemplation of death as provided under Section 31 of the Law of Succession Act the court must exercise its power and be objective as to give meaning to the intention of the deceased against the African custom. This is in view of the fact that, although the deceased had not contemplated his death when he gifted PW2 and his own uncle the land referred to, he allowed his uncle to settle on Plot No. 149 for decades. The long occupation without interruption can be construed to imply that, either the deceased never intended his uncle to vacate the land for his lifetime or that he had sold to him (uncle) the portion he was occupying. And upon weighing the evidence on record, I have no reason to doubt that the deceased intended to advance as a gift to his uncle this one acre. I am therefore persuaded that the deceased's uncle should get the portion he is claiming was gifted to him. PW2 also occupied Plot No. 197 with the full knowledge of the entire deceased's family. He has now sold it out and the same may not be retrieved back for purposes of distribution. For these reasons, I also have no doubts in my mind that the deceased did in fact advance as gift 0.5 acre Plot No. 149 to his grandson. This leaves a balance of two and a half (2 1/2) acres from Plot 149 for distribution. I arrive at the two and half (2 1/2) acres based on the fact that no evidence was produced to prove that the deceased sold the 0.5 acre to his uncle.

As for Plot No. 122, it is the land PW1 has settled on for a good portion of her life. Whereas the deceased may have intended to entirely give her this land or may have bought it on her behalf no evidence in this regard was adduced. For this reason, this parcel of land should be subject of distribution.

But I take cognizance of the fact that PW1 (Objector) got two acres less from Plot No. 9376/75 and she did not complain. For economical distribution of the estate, it is prudent that each family gets one full parcel of land to itself. I am minded in doing so of the provision of Section 40 (1) of the law of succession Act which reads:

"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 estate 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."

Since each house has six children, the distribution should be on equal basis, meaning that no house should get a bigger share than the other. In the end, I make order that the distribution be as follows:-

(a) Plot No. Kapsaret/Simat/Block 2/122 measuring 4 acres - To be given to Rael Kurgoit entirely.

(b) Plot No. Turbo/Lesen/Kosji/149 measuring 3.5 acres - to be shared as follows:-

(i) 1 acre to Joseph Sambai Samoei - as gift from deceased.

(ii) 2 1/2 acres to the 1st house.

(c) Plot No. Kapsaret/Simat/Block 2/197 measuring 0.5 acres - To go to Elisha Kiplagat entirely as a gift from the deceased.

Each party shall bear its own costs of these objection proceedings.

DATED and DELIVERED at ELDORET this 6th day of March, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Rop for the Petitioner

Mr. Kiboi for the Objector