



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
SUCCESSION CAUSE NO. 243 OF 2008

IN THE MATTER OF THE ESTATE OF MOSI CHEBET (DECEASED)

BETWEEN

SOTI MOSI PETITIONER

VERSUS

TOIYOI MOSI OBJECTOR

JUDGMENT

The Grant of Administration herein was issued to both Toiyoi Mosi and Soti Mosi on 9th April, 2009. Both administrators are the widows of the deceased Mosi Chebet who died intestate on 10th March, 2002.

Although Summons for Confirmation of Grant were drawn, parties failed to agree on the mode of distribution. Toiyoi Mosi who is the first widow of the deceased placed her objection vide an affidavit sworn and filed on 10th August, 2011. She deponed that the 2nd wife failed to list two other dependants of the estate, namely, Alex Kimutai aged 25 years and Bernard Kiplagat aged 22 years both of whom were staying with her and were being supported by the deceased. She has listed her other children as;

1. Stella Chebingei of ID. No. [Particulars withheld]
2. Joan Kangogo of ID. No. [Particulars withheld]
3. Pamela Cheronno of ID. No.[particulars withheld]

She further deponed that the Rongai Plot and Growel Farm did not belong to the deceased. That further, Plot No. 822 measures 7 acres and Plot No. 637 measures 24 acres. She urged the court to sub-divide the property between the two houses. Finally, she deponed that one Moses Mosi is trying to take up all the estate to himself and to the exclusion of others.

The hearing was accordingly to proceed for determination only on the distribution of the estate by adduction of viva voce evidence. Mr. Limo advocate represented the Objector, Mr. Misoi advocate acted for one of the beneficiaries one Moses Soti while one of the Petitioners Soti Mosi made no appearance despite being served with various hearing notices.

The Objector called three witnesses. She testified as PW1. She said she was the eldest wife of the deceased while the Petitioner was the second wife of the deceased. She named her children as;

- (a) Stella Sambulei
- (b) Joan Chebet
- (c) Pamela Cheronno

She said her co-wife has seven children. She emphasized that, except the 3 children named in her evidence, she had no other children. She named her deceased husband's properties as, plots number 773, 673 and 882 measuring 23, 2 and 7 acres respectively. She produced official searches for Plots 773 and 822 as P. Exhibit 1 & 2 respectively. She said that the Rongai Plot measuring seven (7) acres belongs to one a Ms. Joan while the Growel Farm belongs to one Pamela although it is registered in the deceased's name. She said that Pamela lives on this Growel Farm.

PW1 urged the court to distribute the properties equally between the two houses. She further testified that one Musa from the second house cut three acres of trees from Plot No. 773, sold the trees but did not share the proceeds with the first house.

In cross-examination, PW1 said that she did not have the title deed to the Rongai Plot. She confirmed that the Growel Farm is in the name of the deceased. She also said that she had no evidence that Musa cut down any trees.

PW2 Joan Kangogo said that the deceased was her father and she belongs to the first house. She said the deceased had three parcels of land, namely Plot numbers 773, 822 and 673 measuring 23, 7 and 2 acres respectively. She said that the land in Rongai, Plot 127 is her land. She produced its title deed as P. Exhibit 3.

PW2 further testified that Soti Mosi and Musa Mosi belong to the second house. She said that the children of the first house were all girls and that is why the second house wants to disinherit them. She said that Musa Mosi from the second house cut down trees worth about Ksh. 500,000/= from 773 and burnt charcoal from the trees. She urged the court to distribute the properties between the two houses.

PW3, Pamela Cheronno testified that she was a daughter of the deceased. She said the deceased had two wives and that she belonged to the first house. She said that the second wife Soti Mosi had seven children while her mother had three daughters.

It was her testimony that the deceased had three parcels of land namely, Plot No. 773, 822 and 673 measuring 23, 7 and 3 acres respectively. She said that she lives at the Growel Farm which is land bought by a group of people. She said she gave her father money who then bought it on her behalf. She asked the court to distribute the properties between the two houses.

On cross-examination, PW3 said that she did not have any documents to show that the deceased bought the Growel Farm on her behalf but insisted it belonged to her.

The 1st Petitioner, Soti Mosi who would have testified as Defendant failed to attend court and so no evidence was tendered on her behalf.

Counsel for the Objector filed written submissions on 3rd May, 2013. He submitted that Moses Mosi Chebet, a son of Soti Mosi (referred to as the Petitioner) has been cutting down trees on one of the parcels of land. That for this reason he should be given two (2) acres less than other beneficiaries. He submitted that the entire estate should be distributed equally between the two houses or widows pursuant to Section 41 of the Law of Succession Act.

In considering the entire Petition and the testimonies of the witnesses who testified, the following facts are undisputed.

(a) That the deceased had two wives.

(b) That the first house consists of a widow Toiyoi Mosi and 3 daughters – making a total of four dependants.

(c) The second house consists of a widow Soti Mosi, 3 boys and 4 girls – making a total of eight (8) dependants.

(d) That the following parcels of land belonged to the deceased;

- Mosop/Mosop/773
- Mosop/Metekei/673
- Mosop/Metekei/822

The following facts are disputed;

- That Plot at Rongai is owned by Joan Kangogo of the first house.
- That Plot at Growel Farm is owned by Pamela Cheronno from the first house.

It is therefore important to first determine the disputed facts so that the court may arrive at exactly which assets ought to be distributed among the dependants.

PW2, Joan Kangogo produced as P. Exhibit 3 the title deed to L. R. No. Rongai/Lengenet Block 2/127 (Mawe) in the name of Joan Chebet Kangogo. There is no evidence to controvert that the same belongs to her or that it was bequeathed to her by the deceased. This then rules out the said land as property of the deceased. It cannot therefore be subject of distribution among the deceased's dependants.

As regards the Growel Farm, all the three Objector's witnesses said that it belonged to PW3. PW3 on the other hand said that she gave her father (deceased) money to buy the farm on her behalf.

While the Objector had closed her case and filed submissions, I realized that it would be extremely difficult to make a determination on who would be entitled to the said land referred to as the Growel Farm whereas from the onset no copy of title or Certificate of Search had been filed.

I also noted that the measurements of the other parcels of land had been given in hectares which made it difficult for court to apportion specific acreage of the parcels. Further, no acreage had been given for the Growel Farm. In the case of the latter farm, it had been indicated that it was bought through shares, yet not even a share certificate had been produced or filed in court.

In this regard, I thought it prudent to request the counsel for the Objector to shed light on the above issues. I issued summons to the counsel. On 25th March, 2014, learned counsel, Mr. Kibii was in attendance and I directed him to file a further affidavit and attach to it a document (either a copy of title, or share certificate, or as the case may be) in prove that the deceased owned the said Growel Farm. The said Further Affidavit would also disclose which party occupies which land. The counsel would also, as far as was practically possible, get a conversion in acres of the hectares of each of the land.

Mr. Kibii did inform the court that the land registry was in the process of registering the Growel Farm in the name of the deceased and requested for time to avail prove of the same. Court did not find any problem with this request because, as noted above, from the onset, it had been disclosed that the land was registered in the deceased's name.

On 12/5/2014, Mr. Limo, learned Counsel for the Objector informed court that the Growel Farm was registered as **L. R. KIPLOMBE/KIPLOMBE BLOCK 10 (GROWEL) 223**. He also informed court that the measurements of each of the parcels of the land in acres had been provided.

The above information is contained in the Further Affidavit of the Objector sworn on 9th May, 2014. Annexed to it (Annexure TM1) is a copy of Certificate of Search dated 8th May, 2014 of **L. R. KIPLOMBE/KIPLOMBE BLOCK 10 (GROWEL) 223** measuring 0.37 hectares registered in the name of Mosi Chebet (deceased). Annexure TM2 is a letter to counsel for the Objector (M/s. Limo & Co. Advocates) dated 29th April, 2014 by the Uasin Gishu District Land Surveyor giving the conversions of the acreages from hectares of each of the parcels of land.

Back to the ownership of the Growel Farm, as I had noted, none of the Objector's witnesses produced prove that the land was bought by the deceased on behalf of PW3. Even PW3 herself did not convince the court by any form of evidence that the land was bought on her behalf by her deceased father. As such, this land must be subject of distribution among the beneficiaries.

In view of the foregoing, I find that there are four parcels of land available for distribution among the beneficiaries. They are:-

1. Mosop/Metkei 773 measuring 9.6 Hectares (23.718 acres) – occupied by Soti Mosi (Petitioner)
2. Mosop/Metkei 673 measuring 0.8 Hectares (1.9765 acres) – utilized by Toiyoi Mosi (Objector)
3. Mosop/Metkei 822 measuring 3.0 Hectares (7.412 acres) – occupied by (Objector)
4. Kiplombe/Kiplombe Block 10 (Growel) 222 measuring 0.37 Hectares (0.914 acres).

In the Form P&A 5, the following are listed as the beneficiaries of the deceased:-

1. Toiyoi Soti - Widow
2. Soti Mosi - Widow
3. Stella Chelemigei - Daughter
4. Joan Jepkoech - Daughter
5. Salina Jerono - Daughter
6. Sophia Koitie - Daughter
7. Esther Kosgei - Daughter
8. Moses Chebet - Son
9. Jebichi Mosi - Daughter
10. Lawrence Chebet - Son
11. Jackline Mosi (daughter) – deceased
12. Jackson Mosi - Son

According to PW1 who is the elder widow, she has three children, namely;

1. Stella Chebingei
2. Joan Kangogo
3. Pamela Cherono

She said he raised an objection to the distribution because the 2nd widow (Soti Mosi) failed to disclose that the deceased was also supporting two other dependants namely, Alex Kimutai aged 25 and Bernard Kiplagat aged 22. She said she was staying with the two persons.

Therefore, apart from Stella, Joan and Pamela, all the other children belonged to the 2nd house. Therefore, the 1st house has four persons including the Objector while the 2nd house has 8 persons (dependants) including the Petitioner.

The distribution of an estate of an intestate polygamous is governed by Section 40 of the Law of Succession Act. S. 40 (1) provides that;

“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 estate shall in the first instance, be divided among 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.”

In effect, the 2nd house which has a larger family ought to get a larger share than the 1st house whose family is smaller.

May I add that, PW1 did not shed light on how the two persons, namely Alex Kimutai and Bernard Kiplagat were dependants of the deceased. For instance, she ought to have expounded on whether they were adopted children of the deceased and how the deceased maintained them in terms of food and other amenities. For this reason, I am unable to find that they were dependants of the deceased. The Objector will be at liberty to bequeath to them her share if she so wishes.

The total acreage of all the parcels of land is 34.0205. Out of this, the petitioner is in occupation of 23.718. The balance of the land measures 10.3025 which is below half of what the Petitioner is occupying.

In the spirit of Section 40 (1) of the Law of Succession Act, the Objector should take all that land that does not comprise Mosop Metkei/773 and in addition get a portion of at least four (4) acres out of L. R. Mosop/Metkei/773. She will therefore in total get 14.3025 acres while the Petitioner gets 19.718 acres.

In the upshot, the estate of the deceased be and is hereby distributed as follows:-

1. The Objector shall get the following;
 - (a) All that parcel of land comprising Mosop/Metkei/673 measuring 0.8 Ha.
 - (b) All that parcel of land known as Mosop/Metkei/822 measuring 3.0 Ha.
 - (c) All that parcel of land Known as Kiplombe/Kiplombe Block 10 (Growel) 223 measuring 0.37 Ha.
 - (d) Four (4) acres of land to be hived off from L. R. No.Mosop/Metkei 773.
2. The Petitioner Soti Mosi will get the balance of Parcel No. Mosop/Metkei/773 after hiving off 4 acres which have been apportioned to the Objector – Toiyoi Mosi.

3. A Certificate of Confirmation of Grant shall issue in terms of orders 1 and 2 above.
4. Each party shall bear its own costs of these objection proceedings.

DATED and DELIVERED at ELDORET this 12th day of June, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Misoi Advocate for the Petitioner

Mr. Chemoyai holding brief for Limo for the Objector