



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
Probate & Admin Cause 243 of 1995

IN THE MATTER OF THE ESTATE OF KIPKOSGEI ARAP MAINA –Alias-

KIPKOSGEI KETER – DECEASED AND

TABARNO KOSKEI..... 1ST PETITIONER

DAVID MOSONIK 2ND PETITIONER

SABINA JEBORE INGOTE 3RD PETITIONER

CHERUIYOT KOSKEI4TH PETITIONER/OBJECTOR

RULING

This is a summons dated 18th February 2000 for confirmation of grant. The application proceeded by way of viva voce evidence tendered in court, because one of the survivors of the deceased, Cheruiyot Koskei, objected to the mode of distribution of the estate of the deceased, as proposed by the other survivors.

At the hearing of the summons, two witnesses testified on behalf of the other three petitioners. Cheruiyot Koskei (the objector) testified and called one witness. Mr. Ngala appeared for the other three petitioners, while Mr. Birir appeared for the objector.

The evidence of the 3rd petitioner, Sabina Jebore Ingote (PW1) was that the deceased was her father. He was married to Jelagat Tapratich Koskei. After the death of the deceased the court granted letters of administration to the four petitioners who were Jelagat Tapratich Koske, herself (Sabina Chebore Ingote), David Mosonik and Cheruiyot Koskei (the objector). That the said four petitioners, who were all beneficiaries of the deceased's estate, had not agreed on the mode of distribution of the estate.

She testified that the deceased left behind some land. He had a farm at Rock farm Sargoit in Uasin Gishu District measuring 20 acres. No title had been issued on the subject land by the time that he died. There was an extract of the Green Card from the Lands Office on the subject land. She produced the same as exhibit No.1. The deceased also had a farm at Manyatta measuring 12 acres. There was an extract from the Lands Office in the form of a Green Card on the subject land. She produced the same as exhibit No.2. The deceased also had another farm at Koitoto farm measuring 10 acres. That farm was already registered in the name of David Mosonik who was her elder brother. However, that farm used to belong to her late father. It was her mother who asked David Mosonik to be registered as owner of that farm.

There was no other farm or plot belonging to the deceased. A plot measuring 0.2 acres had been taken out of Rock farm to create a plot in a trading centre, which had not yet been given a name. The total acreage of the deceased's farms was 42 acres. In her view, the land should be divided according to how her mother (the widow) had suggested, that was, David Mosonik to get 10 acres of Koitoto farm for which he already had title; Tabarno Koskei to get 10 acres of Rock farm; Sabina Jebore Ingote to get 10 acres of Rock farm; Cheruiyot Koskie to get 10 acres at Manyatta farm; and Jelagat Koskei (the widow) to get 2

acres at Manyatta farm.

She stated that she was currently not married. She had earlier been married but was divorced and went back to her parents' home. Her marriage was dissolved through a Divorce Cause at Eldoret in 1983. Her husband was called D I K. When she was divorced, she was allowed to have custody of the children of the marriage. She should be allowed to inherit from her father's estate, as the law recognized all children.

She further testified that her sister Tabarno Koskei should get 10 acres from Rock farm. It was her evidence that Tabarno Koskei and David Mosonik were currently staying at Koitoto farm. The objector (Cheruiyot Koskei) had taken 32 acres of the land and did not want to divide and share the land with the other beneficiaries. The land at Eldoret Municipality plot No.144 was not part of the deceased's property. She was awarded that land by the court in the Divorce Cause. It was not true that her father gave her a plot.

In cross-examination she denied that she was given 5 acres of land by her late father before he died. She stated that the farm that she was currently living on measuring 20 acres was not given to her by her father. Nor was she given 5 acres by her late father to add on to 15 acres to make a total of 20 acres. She denied selling 10 cows and 50 sheep belonging to her father. She also denied withdrawing money from her father's account at Kenya Commercial Bank, Eldoret branch.

She stated that the objector was currently living at Rock farm, but that he had built on another farm. The son of the objector was currently staying at Manyatta farm. In her view, the objector should demolish his house at Rock farm and move to Manyatta farm. When the deceased was alive, the objector was saying at Koitoto farm. She testified that Tabarno Koskei had never been married, but had children. It was not true that before the deceased died, he gave two acres of land to Tabarno Koskei at Koitoto farm, where she was living. The 0.2 acres at the trading centre was part of the 42 acres of land and the beneficiaries who would get that particular farm, which had the proposed plot for the trading centre, would divide that land amongst themselves. It was her mother who had decided that title for 10 acres at Koitoto farm be issued in the name of David Mosonik. Her late father did not make any oral Will and therefore the objector should take 10 acres.

Sarah Jelagat K. Koskei (PW2), who was the widow of the deceased, testified that the objector was one of her children. She had three other children. When her late husband died, he had land at Koitoto measuring 10 acres; Rock farm measuring 20 acres, and Manyatta farm measuring 12 acres. She wanted the land to be divided to the children equally, that was 10 acres each. The remaining two acres would be hers. She wanted Cheruiyot Koskei (the objector) to get 10 acres at Manyatta farm; David Mosonik to get 10 acres at Koitoto farm; Tabarno Koskei to get 10 acres at Rock farm and Sabina Jebore Ingote to get 10 acres at Rock farm. Her late husband did not divide the land amongst the children. The male and female children should all benefit equally from the deceased's estate. She testified that in her view, the objector should demolish his house at Rock farm and move to Manyatta farm. He should demolish the house because he built the house without being given the land. That was the evidence on behalf of the three petitioners.

The objector, Cheruiyot Koskei (DW1) testified that his father was the late Kipkoskei Arap Maina. He knew all the children of the deceased. They were four, including himself. He knew that his father died and left three farms, that was Koitoto farm measuring 10 acres; the farm at Sergoit measuring 20 acres and the farm at Moiben measuring 12 acres. The Sergoit farm was also called Rock farm. There was no other plot. In his affidavit he had mentioned one acre was at Kenya Service in Eldoret which was taken by Sabina. The family had shares in that one acre of land with one Masai called Ingote, who was married to Sabina. The share was half of an acre. The family had not finalized the issue of the shares for the land at Kenya Service. Sabina left her husband and came home. Then she asked to live at the family's plot at Kenya Service. She stayed there for a while, but was beaten by thugs and she sold that plot at Kenya Service. That plot belonged to his father. She then went to Koitoto farm and built a house where she was currently living.

Sabina's land at Koitoto farm included 15 acres of her own. Their father later on gave Sabina 5 acres because she used to take care of his cattle. There was nothing in writing on that transaction. The deceased

gave her that land as gratitude for taking care of his property. The deceased told him about it.

His father also left some livestock. He was, however not sure about the number of livestock as he was illiterate. The said cows and goats were now not there, as they had just disappeared. There was also money in a bank account in Eldoret. It was a lot of money but he did not know how much it was.

In his view, Tabarno should be given only two acres of land as stated verbally by his late father. That should be at Koitoro farm and she should not get additional land. David Mosonik should get 10 acres at Moiben; Sabina had already been given 5 acres by his late father, which was enough. His mother should not get land as she came home and was living on the land. Though in his affidavit he had deponed that his mother should get 10 acres at Koitoro, she did not need that land any more.

At the time of swearing the affidavit his son was living with his mother and assisting her in planting maize. He incurred a lot of expenses and at one time he paid Kshs.10,000/= when the land was about to be sold because of AFC debts. He had receipts for the expenditure but he did not have them in court. He had deponed in an affidavit that he should get 17 acres. He had now increased the acreage that he was demanding because the other beneficiaries had harassed him so much. No grand child of the deceased was given land by his late father. He had lived at Rock farm for 13 years and had built 4 iron sheet houses and planted wattle trees in one acre of the land. His houses were permanent houses. He had also built a lavatory. He had also fenced the children's house.

The deceased had told him to go and live there and bring up his children there. He left his son with his mother at Koitoro farm. Initially he used to live at Koitoro farm. He was not willing to leave his house and shift to another farm as suggested by his mother. Sabina was the one who had brought hatred as she insulted him. Before Sabina came into the issue, they were living peacefully and had never disagreed with Mosonik and Jepkoskei.

He testified that Tabarno Jepkoskei was married to Kaptera. She disagreed with her husband's family when he died and she left that family and went to stay at Koitoro farm. She was currently living on his late father's farm. Sabina was the wife of Ingote. The family had received bride price for both of his sisters.

In cross-examination he maintained that the deceased's daughters should not inherit any land from the estate of the deceased, as he had not seen girls who were married being given a share of a deceased's land. He insisted that his mother should not get the proposed two acres of land. His contention was that only the two male children of the deceased should inherit the land.

The objector's witness was Martin Cheboi (DW2). He testified that he knew Kipkoskei Arap Maina. He also knew the deceased's wife and children. He knew that Sabina was married. He was a neighbour and had witnessed the marriage of Sabina. In crossexamination he stated that he did not know the deceased's children that well by appearance. He could not identify Sabina in court. He testified that male and female children were the same, as the law treated them equally. However, it should be the two male children of the deceased who should inherit the estate of the deceased. Grandchildren of the deceased were also not entitled to inherit anything from the estate of the deceased.

This is a dispute on the mode of distribution of the estate of the deceased Kipkoskei Arap Maina. The objector (who is also a petitioner) is of the view that only male children of the deceased should inherit the estate. His mother (the widow of the deceased) should also not inherit any part of the estate. He maintains that he should inherit much more land than his brother David Mosonik Maina because he had incurred a lot of expenses on the estate.

It is not in dispute that the deceased left three farms measuring 42 acres in total. The widow of the deceased and three of his children propose that each of the deceased's children should inherit 10 acres of the land, while the widow should get two acres. The objector has objected to the proposed mode of distribution. He maintains that the daughters of the deceased should not inherit any land from the estate of the deceased, mainly because they were women and married. He also maintains that his mother should

not inherit any land because she is living on the land. In his view, only the male children of the deceased should inherit the land.

The law on succession in Kenya is governed by the provisions of the Law of the Succession Act (Cap.160) (the Act). Succession on intestacy, where a deceased person has left a spouse and surviving children, is provided for under section 35(1) of the Act, which provides that –

“35 Subject to the provisions of section 40 where an intestate has left -

(1). One surviving spouse and a child or children, the surviving spouse should be entitled to –

(a) the personal effects and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate. Provided that if the surviving spouse is a widow, that interest shall determine upon her remarriage to any person.

It is obvious from the above provisions of the law that a surviving spouse takes all the personal effects of the deceased absolutely, but on the net residue of the estate, the surviving spouse has a life interest. If the surviving spouse is a widow, that life interest continues unless she remarries. The surviving spouse in our present case is a widow. There is no evidence that she has remarried. In my view therefore, the argument by the objector that his mother is not entitled to get a portion of the land is a fallacy. In fact she has a life interest in the whole of the 42 acres of land left by the deceased.

Succession cause has been filed in this matter. Letters of administration were issued to four petitioners who were all children of the deceased. The matter is now for confirmation of the grant. The objector wants to get a lion’s share of the land as between himself and his brother, and exclude all female children and the widow from inhering the land.

I have considered the arguments for and against the objection. I find no legal basis for sustaining the objections of the objector. Section 82(1), (2) and (3) of the Kenya Constitution prohibits discrimination. It provides as follows –

“82(1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsection (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public officer or a public authority.

(3) In this section “discriminatory” means affording different treatment to different persons attributably wholly or mainly to their respective description by race, tribe, place of origin, or residence, or other local connection, political opinions, colour, creed, or sex whereby persons of one of such descriptions are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not accorded to persons of another such description”.

From the above provisions of the Constitution, it is clear that the law prohibits discrimination on the basis of sex. The objector is primarily asking this court to discriminate on account of the fact that the other beneficiaries are females. In his view, only male descendants should inherit the property of a deceased person. He even wants his own mother, who has a statutory life interest in the residue of the estate of the deceased in terms of section 35 of the Law of Succession Act (Cap.160), not to get any share of the land. The law does not allow this. All children are taken to be equal, irrespective of whether they are male or female. This is what the Court of Appeal held in the case of **Mary Rono –vs- Jane Rono and Another Nakuru Civil Appeal No.66/2002 (unreported)**.

The widow has accepted to take only two acres. That is her choice. It has to be respected. The evidence on record is that the objector built houses on land, which he was not given to him by either the deceased, or the deceased's widow, who is his mother. His proposals definitely appear firstly to be an attempt to perpetuate discrimination on the basis of sex contrary to the law. Secondly, he wants to get the lion's share of the estate. He testified that he incurred expenses on the estate, but he produced no tangible evidence to support the same. I reject his allegation that he spent money to protect the estate.

I find the apportionment of the estate as proposed by the widow of the deceased, who is also the mother of the objector, to be fair and consonant with the provisions of the law. The other beneficiaries support the same. I therefore, find no merit in the objection raised by the objector. Consequently I confirm the letters of administration in this administration cause in the following terms: -

- 1. The widow of the deceased Sarah Jelagat Koskei to get two acres at Manyatta farm, registered as Moiben/Moiben Block 9 (Manyatta)/68.**
- 2. Cheruiyot Koskei to get 10 acres at Manyatta farm, registered as Moiben/Moiben Block 9 (Manyatta)/68.**
- 3. David Mosonik to get 10 acres at Koitoror farm, registered as Koitoror/Tuiyoluk Block 1 (Koitoror) /35.**
- 4. Tabarno Koskei to get 10 acres part of Sergoit/Koiwoptaoi Block 7(Sergoit)70.**
- 5. Sabina Chebore (Jebore) Ingote to get 10 acres part of Sergoit/Koiwoptaoi Block 7(Sergoit)70.**

I order that the objector Cheruiyot Koskei moves with immediate effect from **Sergoit/Koiwoptaoi Block 7(Sergoit)70 to Manyatta farm registered as Moiben/Moiben Block 9 (Manyatta)/68.**

Since he was not authorized to build at Rock farm registered as Sergoit/Koiwoptaoi Block 7(Sergoit)70, he cannot be compensated for the developments he made. Therefore he should demolish the houses that he built there without permission, at his own costs and move his materials to Manyatta farm.

Costs of the objection will be in the cause, as this is a family matter.

Dated and delivered at Eldoret this 4th Day of July 2005.

George Dulu

Ag. Judge

In the Presence of: Mr. Ngala for the 1st, 2nd and 3rd Petitioners.

Mr. Gumbo h/b for M. Birir for the 4th petitioner/objector