

REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 10 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE KIBUNE
RUSTAGE ALIAS KIBUNEI RUSTAGE ALIAS KIBUNEI ARAP
RUSTAGE (DECEASED)

ANNAH CHEMUTAI RUSTAGE1ST
PETITIONER
DAVID KIBORE KITUR2ND PETITIONER/PROTESTOR

JUDGMENT

1. The petitioner filed summons for confirmation of grant dated 22nd February, 2021 seeking the following orders;

(i) That the grant of letters of administration intestate made

to ANNAH CHEMUTAI RUSTAGE and DAVID KIBORE KITUR by

this Honourable Court on 30TH July, 2020 be confirmed.

(ii) That costs be in the cause.

2. The application is supported by the grounds stated on the face of it and facts deponed in the affidavit sworn in support of Summons for Confirmation of Grant by ***Annah Chemutai Rustage*** the petitioner herein.

3. The petitioner set out the dependents of the deceased and the proposed mode of distribution of the estate of the deceased and avers that there was no objection to the confirmation and subsequent distribution of the estate of the deceased.

4. **David Kibore Kitur** , the protestor herein filed an affidavit of protest to 1st petitioner's chamber summons application for the confirmation of grant dated 22nd February 2021.

5. The Protestor avers that he is the 2nd petitioner and that the 1st petitioner's mode of distribution is contrary to the wishes of all the other beneficiaries entitled to the estate he avers that the 1st petitioner has knowledge and was present at the time when land parcel **Kericho/Kapsaos/913** was being surveyed and caused to be subdivided into three (3) equal portions of 6 acres.

6. The Protester avers that together with the 1st petitioner has since the year 1991 to date been in use ,possession and occupation of their respective portions of 6 acres in land parcels **Kericho/Kapsaos /913** after a resurvey exercise was carried out in the year 2007.

7. The Protestor avers that after the demise of **Taplelei Rustage** a family meeting was convened on the 15th December 2007 and that it was unanimously resolved that **David Kibore Kitur, Annah Chemutai Rustage and Daniel Kimutai** were to cede an equivalent of 0.25 acres cumulatively out of their respective shares of 6 acres each to in land parcel **Kericho/Kapsaos/913** to **Esther Tabutany Ruto**.

8. The Protestor reiterated that they were apprehensive that the 1st Petitioner's intention was to disinherit the deceased's only daughter from the second house by the name Esther Tabutany Ruto.

9. The Protestor set out the dependents of the deceased, the properties constituting the estate of the deceased to wit KERICHO/KAPSAOS /913 and KERICHO/KAPSAOS/869 and the proposed mode of distribution of the estate of the deceased as follows;

a) **Kericho/Kapsaos/913**

Esther Tabutany Ruto.....0.25 ha
David Kibore Kitur2.316 ha
Annah Chemutai Rustage2.316 ha (to hold in trust for Jackline Cherop Ngeno, Cynthia Chepkemoi, Eda Chepkirui and Joyline Cheptoo)

b) **Kericho/Kapsaos/869**

Jane Cheborok Bunei0.23 ha
David Kibore Kitur0.23 ha
Annah Chemutai Rustage.....0.23 ha
Annah Chemutai Rustage2.316 ha (To hold in trust for Jackline Cherop Ngeno, Cynthia Chepkemoi , Eda Chepkirui and Joyline Cheptoo)

10. On 14th November, 2025, **Annah Chemutai Rustage**, the 1st petitioner filed a replying affidavit in response to the protest.

11. The 1st petitioner avers that she was married to woman -to - woman marriage to 1st wife of the deceased known as **Taplelei Rustage (now deceased)** and that the said wife had one daughter namely **Esther Taputany Twei (now deceased)** and that as a result of the said marriage she sired four daughters

namely **Jackline Cherop Cynthia Chepkemoi, Eddah Chepkirui, Joyline Cheptoo** .

12. The 1st petitioner avers that the said daughter of the deceased namely **Esther Tabutany Tuei** sired a son known as **Gideon Kiprono Chirchir** whom she has been maintaining together with the 1st wife of the deceased.

13. The 1st petitioner avers that the deceased was polygamous and had 2nd family unit and the said 2nd wife was known as **Taplule Rustage (also deceased)** and sired **Daniel Kimutai Bunei, Grace Yegon** and **Esther Mosonik**.

14. The 1st petitioner avers that the deceased herein died intestate and there was no written will.

15. The 1st Petitioner avers that if the 2nd Petitioner is not agreeable on her mode of distribution, the said estate be shared among the entire children and dependants of the deceased.

16. The 1st petitioner avers that the grant of letters of administration in the estate of the deceased was made to her and 2nd Petitioner on 22nd February, 2021.

17. The 1st petitioner set out the dependents of the deceased, the properties constituting the estate of the deceased to wit **KERICHO/KAPSAOS/913 AND KERICHO/KAPSAOS/869** and the proposed mode of distribution of the estate of the deceased.

18. The matter was disposed of by written submission. The parties filed and exchanged written submission.

19. The objector filed submissions in which he reiterated his protest, denies the factual basis of the woman to woman marriage and insist that the estate should be distributed according to actual ground acreage and the chief's letter of beneficiaries. He proposes a detailed distribution among all beneficiaries, including trusteeship arrangements.

20. The 1st petitioner filed submissions in which she maintained that she was married in woman to woman marriage by the deceased first wife for the purpose of raising children on behalf of the deceased house. She disputes the alleged subdivision of 1991 and 2007, arguing that the deceased never subdivided the estate and that any informal allocation was unlawful. She proposes equal distribution among all children and dependants of the deceased.

21. Having considered the pleadings, and submissions by the parties, I find that the issue for determination by this court is;

(i) Whether the woman- to -woman marriage under Kipsigis customary law entitles the 1st petitioner's children to inherit as children of the deceased.

(ii) Whether the estate was lawfully subdivided in 1991 and 2007 and if such subdivision should be recognized.

iii) The appropriate mode of distribution of the estate.

22. On Woman -to- woman marriage the court takes judicial notice of the recognition of woman -to- woman marriages under kipsigis customary law as affirmed in *Re Estate of Cherotich Kimurgor (Deceased) [2019]eKLR* and *Re Estate of Kipngeno Arap*

Ngeny (Deceased) [2016] eKLR. In such unions, the children born to the woman married are deemed children of the deceased husband for succession purposes. Therefore, the 1st petitioner's daughters and Gideon Kiprono Chirchir qualify as beneficiaries of the estate.

23. Section 38 of the law of succession Act provides that where an intestate has left children but no surviving spouse, the estate shall be equally divided among the children, given the polygamous nature of the deceased's family, section 40 applies, requiring distribution according to the number of children in each house, with each house treated as a unit. The 1st petitioner's proposal of equal division between the two houses aligns with Section 40, however her attempt to allocate herself disproportionately larger shares is inequitable. The 2nd petitioner's proposal, though detailed is based on informal subdivisions and excludes recognition of the woman-to-woman marriage beneficiaries.

24. The affidavit of protest against the summons for Confirmation of grant is hereby dismissed.

25. The grant be confirmed and the estate be distributed according to Section 40 of the Law of Succession Act as follows:-

Kericho/Kapsaos /913 (7.2 Ha /17.59 Acres) to be shared equally among the beneficiaries namely;

1. Jane Bunei

2. Grace Yegon

3. Esther Mosonik

- 4. David Kibore Kitur**
- 5. Gedion Kiprono Chirchir**
- 6. Annah Chemutai Rustage**
- 7. Jackline Cherop**
- 8. Cynthia Chepkemoi**
- 9. Eddah Chepkirui**
- 10. Joyline Cheptoo**

Kericho/Kapsaos/869 (0.7 ha /1.75 Acres) to be shared equally among the beneficiaries namely:-

- 1. Jane Bunei**
- 2. Grace Yegon**
- 3. Esther Mosonik**
- 4. David Kibore Kitur**
- 5. Gedion Kiprono Chirchir**
- 6. Annah Chemutai Rustage**
- 7. Jackline Cherop**
- 8. Cynthia Chepkemoi**
- 9. Eddah Chepkirui**
- 10. Joyline Cheptoo**

Dated, signed and delivered at Kericho this 31st day of March, 2026

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J. K. SERGON
JUDGE

In the presence of:
C/Assistant - Rutoh

No Appearance