Koech & another v Chemutai & 2 others (Civil Appeal 438 of 2019)
[2022] KECA 1309 (KLR) (2 December 2022) (Judgment)

Neutral citation: [2022] KECA 1309 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 438 OF 2019

HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA

DECEMBER 2, 2022

BETWEEN

PHILEMON KIPRONO KOECH ..... 1ST APPELLANT

GEORGE KIPKURUI KOECH ..... 2ND APPELLANT

AND

RACHEL CHEMUTAI ..... 1ST RESPONDENT

JACKSON KIPROTICH KETER ..... 2ND RESPONDENT

ERIC KETER ..... 3RD RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court of Kenya at Nairobi, (J N Onyiego, J) delivered on 27th July 2018 in High Court Succession Case No 401 of 1999)

JUDGMENT

1. Elijah Kipketer Misoi, in his lifetime, had two families. The first wife, Taplelei Misoi, was blessed with one son, Joshua Kipkoech Arap Keter, and she predeceased him. The second wife, Rachel Chemutai Misoi, was blessed with nine children. The late Elijah Kipketer Misoi (the deceased), died on the 18th of April, 1996.

2. The deceased must have lived a modest life since, at the time of his death in 1996, he only had one property, a parcel of land no Kericho/Kipchimchim/1940 measuring 18 acres but had no liabilities. A person who lived such a modest life should rest peacefully, but this succession dispute has been in court since the year 1999. Undeniably, the law of succession, whether customary or statutory, is meant to guide in the sharing and distribution of the estate of a deceased person. However, as the litany of cases that are filed in our courts will show, the dependents have used the statutes and customary norms as spears for battle.

3. On February 24, 1999, the second wife Rachel Chemutai and two of her sons, Jackson Kipkoech, Keter and Erik Keter, petitioned for letters of administration and listed the following as the beneficiaries:

    1. Rachel Chemutai Misoi (widow)
    2. Leah Cherono Misoi (daughter)
    3. Jackson Kiprotich Keter – son
    4. Eric Keter – son
    5. Joyce Chengetich – daughter
    6. Lonah Chepkemoi – daughter
    7. Florence Chepkoech – daughter
    8. Elvis Cheruiyot Keter – son
    9. Tecla Kiplangat Keter – son
    10. Edison Kipyegon Keter – son

4. The appellant's father, Joshua Kipkoech Keter, moved the court on June 4, 1999 and sought to have the grant revoked on grounds that he was a son of the deceased. The main ground for the objection was that he was not notified of the succession cause by his stepmother, the 1st respondent. On November 29, 1999, the objector, Joshua Kipkoech Keter was recognized as a beneficiary of the estate by consent, and his name was added under paragraph 4 of the affidavit in support of the petition. The administrators then sought for confirmation of the grant and proposed to share the estate equally amongst the eleven beneficiaries at the ratio of 9.09% each.

5. Joshua Kipkoech Keter died before the grant could be confirmed and was survived by his children who are now the appellants. The appellants, being aggrieved by the mode of distribution, filed an affidavit of protest dated March 11, 2016. It was their contention that their grandfather, the late Elijah Kipketer Misoi had two wives (two houses), namely: Taplelei Misoi (1st house) mother to the late Kipketer Misoi, their late father) and Rachel Chemutai Misoi (2nd house) mother to the rest of the beneficiaries. They claimed half share of the estate, being the entitlement of the first house, that is, the house of their deceased grandmother, Taplelei Misoi, who was the mother to their late father, Joshua Kipkoech Keter.

6. In response to the protest by the appellants, the respondents objected to the proposed mode of distribution based on houses. They relied on section 40 of the *Law of Succession Act* as the operative statute. They asserted that the deceased was polygamous, and that the estate was to be divided among 11 units, being all the children of both wives and the 1st respondent as the additional unit in accordance with the *Law of Succession Act*, and not in terms of houses as claimed by the appellants.

7. In view of the disputed manner of distribution, the application for confirmation of the grant was heard by way of oral evidence. The 1st appellant testified and prayed that the estate be shared equally between the deceased's two wives, whose beneficiaries would in turn share their portion equally in accordance with the Kipsigis Customary Law. Two witnesses, who were nephews to the deceased, testified and supported the 1st appellant's testimony.

8. The 1st respondent, a widow to the deceased, testified that her deceased husband had two wives, and that she was the second wife; and that the first wife predeceased their husband leaving one son, Jackson Kipketer Misoi, who also died leaving the protestors and another son from a second wife. She urged the

court to grant orders that the estate to be shared equally amongst the 10 children, and not as between the two houses in equal shares. On cross examination, she admitted that the land had been divided according to the Kipsigis customs with Jackson Kipketer Misoi getting 3 acres, and the rest left to her and her children.

9. The 1st respondent's daughter was the next witness, who corroborated the testimony of her mother. She added that, before her father died, he had shown Joshua Kipkoech, Keter, the father to the appellants, his three acres of land on which he was cultivating and living on; and that the rest were not shown their share because they were school going.

10. Upon hearing the parties, the High Court held that the effect of section 2(1) of the *Law of Succession Act* was to oust the application of African customary laws, and that, from the wording of section 2(1) of the Act and case law, it was clear that the law applicable was the Succession Act, and not Kalenjin customary law. The court held as follows:

> 27. "There are several authorities in our legal system including Rono v Rono (supra) in which courts have authoritatively held that section 40(1) does not mean equal distribution amongst the houses. The clear position is that the estate of a deceased person who dies while married under polygamous marriage, shall be divided amongst the children with the surviving spouse as an additional unit. This does not contravene article 27 of the Constitution as alluded by Mr Arusei. To the contrary, to share the estate in accordance to houses will even be more offending to article 27 of the Constitution in that there will be inequality and discrimination amongst the children.
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> 28. Although there are various dissenting views with regard to interpretation of this section as to being unfair to the first wives who would have contributed a great deal towards the acquisition of the estate vis a vis other wives who join the marriage later, it is incumbent upon the legislature to amend the law and make a provision similar to that of the matrimonial property where each wife as a beneficiary benefits to the extent of her contribution towards acquisition of the property in question during the subsistence of the marriage. Equally, the section does not expressly require or provide special treatment to young beneficiaries who may be disadvantaged struggling with life as compared to their elder brothers and sisters who could be stable in life after the deceased's death.
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> 29. As it stands now, the law applicable is section 40(1) which means that we lump up the deceased's children from the first house being one unit to those of the second house being 9 units plus the spouse as additional unit making a total of 11 units hence a ratio of 1:11. That means 1/11 x 18 acres = 1.65 for 1st house and 10/11 x 18 acres = 16.35 to be shared equally amongst the 2nd house giving rise 1.635 each and in accordance with section 35 of the Act their mother to hold life interest. It then follows that the property shall be shared in the mode proposed by the petitioner in the application for confirmation.
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> 30. Since there was no claim of gifts intervivos, despite Leah (DW2) saying that some children were shown where to cultivate, none of them claimed any specific share implying that the property had not been distributed or shared by the deceased during his lifetime.

31. Accordingly, the protest is hereby dismissed and the application for confirmation herein allowed, and grant issued on April 22, 1996 confirmed and estate shared out equally between the 11 beneficiaries with the 1st petitioner having a life interest on the shares given to her children in respect of her house. The protestors together with their stepbrother Lawrence Kipkurui shall share their father's share equally. This being a family matter each party shall bear his or her costs."

11. The court found that the application of customary law was subject to statutory provision, which in this case took precedence under section 3 of the *Judicature Act*. The court noted that both parties agreed on section 40 of the *Law of Succession Act* being the relevant statute but differed on the interpretation. The appellants' position was that section 40 provided for division of the estate according to houses, implying that it be shared equally between the two houses; and that, therefore, each house would have received 9 acres regardless of the number of children.

12. In contrast, the respondents' position was that section 40 provides that the division of the estate is divided among the houses according to the number of children in each house, plus a surviving spouse as an additional unit, and then shared equally. According to the respondents, each child will be counted as a unit while the surviving spouses will be included as additional units to the estate, making a total of 11 units, each unit being equal to 1.635 acres.

13. The High Court held that the applicable law in section 40 of the *Law of Succession Act* is in accordance with the second analogy. Consequently, it lumped together all the children as units and added the 1st respondent, the surviving spouse, as an additional unit, making a total of 11 units. The court then proceeded to apply the ratio of 1:11 in the distribution of the estate, and this is the bone of contention in this appeal.

14. Aggrieved by the decision of the High Court, the appellants filed the appeal that is now before us raising 11 grounds, which we need not set out in full, but which may be summarized as follows, namely that the learned judge erred in law and fact: in failing to distribute the estate according to the houses , but instead treated each child and the surviving spouse as a unit ;in failing to divide the estate among the two houses ; in failing to take into account the number of children in each house to the disadvantage of the first house; in failing to recognize the deceased 1st wife as a unit, thus depriving the first house of its entitlement of "two units"; in including Lawrence Kipkurui as a dependent, and yet no evidence was led to ascertain his status; and in holding that Kipsigis customary law was not applicable.

15. This appeal was listed for hearing on September 20, 2022 through the GoTo Meeting virtual platform. The court noted that, although the parties were duly served, the respondents did not appear. However, the appellants filed written submissions and opted to adopt them.

16. Although the appellants raised 11 grounds, in our view the issues that arise for determination are: what is the correct interpretation of section 40 of the *Law of Succession Act*; whether the distribution should have been done in terms of houses or units; what is the extent of the applicability of Kipsigis customary law in the context of section 40 of the *Law of Succession Act*; was the step – son entitled to inherit as per the holding of the superior court; and whether the judge failed to consider the evidence tendered, the relevant authorities and submissions filed by the appellants.

17. This being a first appeal, we are required to analyze the evidence afresh and reach our own conclusions, but also warning ourselves that we did not have the advantage of seeing the witnesses. This approach

was adopted in *Selle vs Associated Motor Boat Co* [1968] EA 123, and the principle was expressed as follows:

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs Ali Mohamed Sholan (1955), 22 EACA 270."

18. It is not in dispute that the deceased was polygamous and died intestate. The deceased having died intestate, his estate should have been administered in accordance with section 40 of the *Law of Succession Act*. But the question that begs our answer is: what is the correct interpretation of section 40 of the *Law of Succession Act*?

19. The appellants submitted that the learned judge failed to give the full effect of section 3 of the *Law of Succession Act* as read together with section 40(1). They relied on the case of *Mary Rono vs Jane Rono & another* (2005) eKLR where this court observed that it did not see any provision in the Act that stipulated that each child had to receive the same or equal portion, as this would work an injustice particularly in the case of a young child who still required to be maintained, educated and generally be seen through life.

20. Section 40 of the *Law of Succession Act*, which has been the subject of many judicial pronouncements states as follows:

> 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 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.
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> 2. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in section 35 to 38."

21. In demystifying the correct interpretation, the secondary issue, intertwined with this, is whether the distribution of the estate should have been in accordance with the number of houses or units. At this point, the interpretation of section 40 of the *Law of Succession Act* comes into play. The history of section 40 of the Succession Act can be deduced from the *Report of the Commission on the Law of Succession* 1968 as cited by Lenaola, J (as he then was) *In re Estate of John Muia Kalii- (Deceased)* [2008] eKLR:

> " In customary law, on the other hand, the matter is complicated by the rules of division amongst the "house" by which there is an equal division amongst the "houses" irrespective of the number of children in each "house". We believe this rule to be highly unfair and discriminatory... We think that is necessary, for the purpose of determining beneficial interests, to make a division of the net estate between the "houses". This accords with customary law and will work out well in practice since the property of each "house" is

> normally treated as independent and separate from the other. As to the mode of division, we have already stressed that the present system of equal division irrespective of the number of children in each "house" is inequitable. We believe that the fairest division would be one based on the number of children in each "house" but also adding to the number of children, the wife as an additional dependent especially to cater for the wife who has no children."

22. According to the appellants, the court in *Mary Rono vs Jane Rono & another* (2005) eKLR observed that section 40 did not provide for equality between houses, or that each child must receive the same or equal portions; that where an intestate was polygamous, the estate in the first instance should be divided among the houses according to the number of children in each house adding a surviving spouse as an additional unit, taking into account any previous benefit to any house. Thereafter, the estate devolving into any house is subject to her life interest distributed by the surviving spouse in exercise of her power of apportionment to each beneficiary.

23. In addition, it was submitted that the judge fell into grave error because he treated each child as a "unit" and in the end distributed the estate according to the number of children instead of "houses"; that in the instant case there are "only two houses" which translated to "two units"; that the judge treated the children of the second wife and herself to the disadvantage of the first house; that justice must not only be done but must be seen to be done. Hence, the fact that the second house acquired more than 90% of the estate while the first house got less than 10% was neither fair nor equitable.

24. This court in *Grace Samson Komen vs William Kiprop Komen & 2 others* [2015] eKLR, held as follows when dealing with a similar matter where the issue of equality of houses was in question:

> " The first widow of the deceased Magdalina Tapsiarkai Komen has five children. The second widow of the deceased, Sota Komen has one child for consideration. The third widow Rachel Chepng'eno Komen has 5 children. Therefore, Sote Komen and her son constitute two units for purposes of section 40 of the Law of Succession Act. By reason of that provision the allocation between the houses cannot therefore be equal as between the second house on the one part and the first and third houses which have more units.".

The court endorsed the position that an estate cannot be shared equally amongst the houses in a polygamous marriage and upheld the division of the estate in accordance with the number of units in each house.

25. We agree with the sentiments expressed by the learned judge on the question as to whether there should be equality between the houses. The learned judge pronounced himself as follows:

> "There are several authorities in our legal system including Rono v Rono (supra) in which courts have authoritatively held that section 40(1) does not mean equal distribution amongst the houses. The clear position is that the estate of a deceased person who dies while married under polygamous marriage, shall be divided amongst the children with the surviving spouse as an additional unit. This does not contravene article 27 of the Constitution as alluded by Mr Arusei. To the contrary, to share the estate in accordance with houses will even be more offending to article 27 of the Constitution in that there will be inequality and discrimination amongst the children."

26. On whether Kipsigis customary law was applicable, it is instructive to note that customary law is applied by dint of Section 3 (2) of the *Judicature Act*, which provides that:

> " The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

27. It was the appellants position that the judge did not illustrate how Kipsigis customary laws were repugnant to justice, and hence not applicable. The appellants submit that they adduced *viva voce* evidence to demonstrate that: Kipsigis Customary law was applicable; that nothing in the said customary practice was said to be repugnant to justice and morality; and that, under Kipsigis customary law, the estate of the deceased in a polygamous set up is firstly divided among the wives and each wife to share it among her children. According to them, Kipsigis Customary law is part of African Customary Law, and there is nothing to show that it is inconsistent with the *Constitution*, or that it is repugnant to justice and morality.

28. A cursory look at Section 2 of the *Law of Succession Act* provides as follows:

> " 2(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of persons dying after the commencement of this Act and to the administration of estates of those persons.
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> (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act."

29. A plain reading of the above text reveals that, if a person died after the commencement of the *Law of Succession Act*, the applicable laws would be the *Law of Succession Act* and, even where one died before the laws came into place, customary laws would be applicable but, in so far as possible, in accordance with the Act. Concomitantly, the *Judicature Act* stipulates that customary law is applicable only if it is not repugnant to justice and morality, or inconsistent with any written law. If, for a moment, we agreed with the appellants, it would mean that the first house that had only one child would inherit half the estate and the second house which has nine children would inherit the remaining half. Nothing would be more repugnant to justice than such a proposition. In such a case, the mode of distribution proposed by the appellants in accordance with Kipsigis customs would fly in the face of section 40 of the *Law of Succession Act* and is certainly repugnant to justice.

Furthermore, the suit property in contention is situated in Kericho which is not among the excluded property provided under section 32 of the *Law of Succession Act*. It is our view that no child should suffer such injustice on the basis that their mother got more children than the stepmother. No child chooses whether to be born in a polygamous family and, when it happens, it cannot be a basis for discrimination in inheritance as the appellants would want us to believe.

30. Article 10 of the *2010 Constitution* provides for national values and principles of governance. They include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, among others. The national values and principles of governance bind all State

organs, State officers, public officers, and all persons whenever any of them applies or interprets the *Constitution*, enacts, applies, or interprets any law or makes or implements public policy decisions.

31. The *2010 Constitution*, the Law of Succession and judicial precedent on the subject matter provide clear guidelines towards the interpretation of section 40 of the *Law of Succession Act*: The first principle is equality and non- discrimination. The right to equal treatment requires that all persons be treated equally before the law, and without discrimination. It guarantees that those in equal circumstances are dealt with equally in law and practice.

32. The second principle relates to the limited applicability of African customary law in succession. Retrogressive customary practices that discriminate against women and children should be shunned away. Such backward customs are repugnant to justice and morality. They go against the *2010 Constitution* and, in particular, article 27. It is time they are buried.

33. The third principle is the applicability of equitable principles. Equity will aid to put right injustice to which the law is otherwise blind. In the distribution of property among units under section 40 of the *Law of Succession Act*, equity demands that judges take into account that not every difference in treatment will amount to discrimination. Unique circumstances should be taken into account. For example, in cases where a unit in a household is a person with disability or a minor. In both circumstances, there is need for reasonable accommodation and care.

34. The baseline on the above principles is that section 40 of the *Law of Succession Act* should be interpreted in a manner that promotes equality and non- discrimination, non-applicability of customary law repugnant to justice and morality, and the appropriate application of equitable principles. We are of the view that equal distribution of the estate among the beneficiaries as directed by the trial judge is fair and in accordance with the law and the principles set out above.

35. On whether the learned judge erred in including Lawrence Kipkurui Koech, the step son from the second house as a beneficiary of the estate, it was the appellants' position that the trial judge delved into issues that were not before him, and without any evidential documents, hearing and evidence adduced to confirm that one Lawrence Kipkurui was a son to the appellant father and, in effect, made orders on distribution of the estate not before him; and that the judge ordered that the appellants herein do share their share equally with the said Lawrence Kipkurui. They urged the court to allow the appeal, set aside the decree of the High Court and substitute therefore an exercise of a limited residual discretion and share the estate in a manner equitable, to wit 50:50% to each house.

36. A reading of the record shows that Eric Keter, the 3rd respondent, filed a replying affidavit sworn on March 18, 2016 and deposed that the late Joshua Kipkoech Keter, the appellants' father was polygamous, and that the protestors seem to have omitted a son from the second house, namely Lawrence Kipkurui Koech. Neither in their pleadings or testimony did the appellants attempt to rebut that assertion by the 3rd respondents despite having the opportunity to do so. The same remained unassailed, and the court correctly relied on the evidence that had been adduced to hold that Lawrence Kipkurui Koech was a beneficiary being a stepbrother to the appellants. The appellants have not demonstrated how the learned judge misdirected himself on these issues.

    Accordingly, we are not persuaded that there is any basis for us to disturb that holding.

37. As to whether the learned judge failed to consider the evidence tendered, the relevant authorities and submissions filed by the appellant, we find that this ground was not substantiated and must fail. We have analyzed the judgment of the High Court and taken into account that the trial court heard

evidence of two witnesses for the appellants and the two witnesses for the respondent. It was stated in *Jabane vs Olenja*, [1986] KLR 661, 664:

> "This court will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs Kenya Bus Services (1982-88) 1 KAR 870."

38. The learned judge in his holding stated that the objectors urged the court to share the estate according to Kalenjin Customary Law in which the property should be shared equally between the two houses (wives) and went on to explain the rationale for his holding by quoting several cases and by relying on section 2(1) of the *Law of Succession Act*. in this regard he held that from the wording of section 2(1) of the *Law of Succession* and case law quoted above, it is clear that the law applicable in this case is the *Succession Act* and not Kipsigis customary law. We are of the view that the learned judge was right in assessing the evidence on record in the matter before him and that he considered all the issues.

39. The upshot of the above is that we uphold the judgment of the High Court and hereby order and direct that:

    1. The appellant's appeal be and is hereby dismissed;

    2. The judgement and decree of the High Court at Nairobi (JN Onyiego) dated July 28, 2018 be and is hereby upheld; and

    3. This being a family dispute, each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR