



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OMOLO, O’KUBASU & WAKI, JJ.A)

CIVIL APPEAL 66 OF 2002

BETWEEN

MARY RONOAPPELLANT

AND

JANE RONO)

WILLIAM RONO).....RESPONDENTS

(An appeal from the judgment and decree of the High Court of Kenya at Eldoret (Nambuye, J.) dated 12.06.1997

in

ELD. H.C.PROBATE & ADMIN. CAUSE NO. 40 OF 1988)

JUDGMENT OF WAKI, J.A

Background

This is a succession matter relating to the estate of **STEPHEN RONO RONGOEICHERONO** who died instate on 15th July, 1988 at the age of 64. He was a farmer in Uasin Gishu. At the time of his death he left a sizeable number of properties, both moveable and immovable. He was also survived by two wives and nine children (six daughters and three sons). In **Probate and Administration Cause No. 40/88**, the High Court in Eldoret granted Letters of Administration to the two widows and the eldest son without objection from other members of the family. Disputes however soon arose about the distribution of the assets and liabilities of the estate and *viva voce* evidence was recorded for determination of the distribution by the court. Ultimately on 12.06.97, Nambuye, J. delivered her judgment (dated 05.05.97) determining the distribution. The second widow however, together with her children, was dissatisfied with that judgment and so preferred an appeal to this Court.

Undisputed facts

From the record and findings of the superior court, the following facts are

common ground: -

1. The deceased had two wives Jane Toroitich Rono, (hereinafter “**Jane**”) the first widow, and Mary Toroitich Rono, (hereinafter “**Mary**”), the second widow.

2. The deceased had three sons and two daughters with Jane: -

- William Malakwen Rono (William)
- Samwel Bet Rono.
- John Toroitich Rono.
- Mary Kipsiro (Chebii) Rono.
- Lina Chepkemoi Rono.

3. Mary Kipsiro (Chebii) Rono, the eldest daughter, aged 42 years at the time of hearing in 1994, was married but divorced her husband and returned home with 4 children of the marriage.

4. Lina Rono, the second born daughter aged 40 in 1994, was unmarried but staying in a loose cohabitation with a man and had two children.

5. The deceased had four daughters with Mary: -

- Rose Cheruiyot Rono (Rose)
- Cherotich Rono
- Grace Rono
- Joan Jepkemboi (Kipkemoi) Rono

6. Rose aged 32 years in 1994 was married under custom (though no dowry was paid) and had four children.

7. Cherotich aged 30 in 1994 was unmarried with no children.

8. Grace aged 29 in 1994 was unmarried but a single parent of one child.

9. Joan Jepkemboi aged 20 years in 1994 was unmarried with no child.

10. The following assets were left unencumbered and available for distribution: -

(a) Land:

· 192 acres of freehold land LR NO. 9249

comprising approximately 303 acres.

· Farm house on LR NO. 9249.

· $\frac{3}{4}$ of an acre of undeveloped commercial plot No. 117, Iten township.

(b) Vehicles and machinery: -

M/V. Reg. No. KTX 951, Toyota Hilux.

Ford Tractor Reg. No. KLV 349.

Posho mill complete with a lister engine, water tank, mill and five stores.

Fodder chopper.

Maize sheller.

Tractor plough.

(c) Household furniture and effects: -

· 4 beds, 2 wardrobes, book shelf, 2 dining table and 6 dining chairs, 1 coffee table and 4 chairs, 1 sofa set, 4 stools, coffee table in the shape of map of Africa, 2 chest drawers, 3 pressure lamps, 2 hurricane lamps, sewing table, typewriter, record player, wall clock, milk separator, fixed washing basins, 2 lamp stands, water tank boiler, milk cans, 1 National radio, wall safe.

11. The following liabilities were left unsettled by the deceased: -

- Hospital bill Kshs. 220,884.50
- AFC loan Kshs. 31,366.70
- Iten County Council rates Kshs. 5,778.00
- Wareng County Council . rates Kshs. 5,518.10
- Income Tax Kshs. 103,760.00
- Settlement Fund Trustees Loan (unknown)

12. The deceased belonged to the Keiyo sub-tribe of the Kalenjin community.

13. The deceased lived with his two wives and children in one farmhouse and treated all of them equally.

The dispute

The dispute was highlighted in the *viva voce* evidence of William, supported by Jane, representing the first house, and by Rose, supported by Mary, representing the second house.

Both houses were agreed on the distribution relating to the Iten township plot, the Toyota vehicle, the tractor and its implements, the posho mill together with water tank and stores, the fodder-chopper and all the household furniture and effects except six items of minor significance. The major bone of contention related to the distribution of the 192 acres of land, and the liabilities of the estate.

The proposal put forward by the first house in respect of the land was that the first house would share 108 acres; 22 acres going to the three sons and 14 acres each, to Jane and her two daughters. The second house would share 70 acres; all five of them, including Mary, getting 14 acres each. The remaining 14 acres would comprise: - 11 acres for a market where each member of the family would be entitled to 1 acre; 2 acres for a communal cattle dip, and 1 acre for the farmhouse where all members of the family were entitled to reside. The rationale for giving a bigger share to the first house and to the male children was because the land was bought and improvements were made, before the second house came into existence, and because the girls of the family had an option of getting married and leaving the home. At all events, according to Keiyo traditions, girls have no right to inheritance of their father's estate.

The second house saw plain discrimination in that proposal and proposed a 50/50 share of the land, each house receiving 96 acres and deciding what to do with it. Nothing would be set aside for communal use except a cattle dip and the farmhouse which would be occupied by all but remain as part of the half share for each house. There was no evidence, they contended, that the first house worked harder on the

land than the second house and in any event the deceased treated and educated them all equally without discriminating between boys and girls in his lifetime. He had even given one of the sons of the first house, (Samwel) to the second house where there were no sons.

As for liabilities, the first house proposed that they settle the Aga Khan Hospital bill in the sum of Shs. 264,525/= while the second house settles the other bills relating to AFC, Income Tax, Lands Office and County Councils, all totaling Shs. 203,271.95. That would be in the ratio 60:40. On the other hand, the second house proposed an equal liability payment of all debts at the ratio of 50:50.

The High Court decision:

In arriving at what it called “its own independent distribution”, the superior court considered both customary and statutory laws on Succession. It made a finding that the deceased was **Marakwet**, although the evidence was that he was **Keiyo**. The Elgeyo sub tribe (also referred to as “Keiyo”) are listed in the same chapter as the “Marakwet” and the “Tugen” in Cotran’s “**Restatement of African Law**” Vol 2, which the superior court referred to for the proposition that the pattern of inheritance was patrilineal, and that in polygamous households distribution was by reference to the house of each wife irrespective of the number of children in it. Daughters receive no share of inheritance. The superior court also referred to the **Law of Succession Act sections 27, 28, 40(1) and (2)** relating to distribution to dependants and division to houses according to the number of units, adding the widow as an additional unit. In the end, the learned Judge took into consideration the wishes of the parties and of written law that the girls should also inherit. But she found that the possibility of the girls getting married and inheriting further property from their new families would give them an unfair advantage over the other family members. She held:

“The situation prevailing here is rather peculiar though not uncommon in that one house has sons while another has only daughters. Statute Law recognizes both sexes to be legible for inheritance. I also note that it is on record that the deceased treated his children equally. It follows that all the daughters will get equal shares and all the sons will get equal shares. However due to the fact that daughters have an option to marry the daughters will not get equal shares to boys. As for the widows if they were to get equal shares then the second widow will be disadvantaged as she does not have sons. Her share should be slightly more than that of the first widow whose sons will have bigger shares than daughters of the second house.”

The distribution of the land thus ended up as follows: -

(a) Widows

Jane Rono - 20 acres

Mary Rono - 50 acres

Total - 70 acres

(b) Daughters

Lina Rono - 5 acres

Mary Chebii - 5 acres

Cherutich Rono - 5 acres

Grace Rono - 5 acres

Chepkemboi Rono - 5 acres

Rose Rono - 5 acres

Total - 30 acres

(c) **Sons**

William Rono - 30 acres

Samuel Rono - 30 acres

John Rono - 30 acres

Total - 92 acres (sic)

The liabilities were distributed as follows: -

“FIRST HOUSE:

(a) Hospital Bill.....Kshs. 110,442.25

(b) AFC LoanKshs. 15,683.35

(c) Iten County Council Kshs. 2,889.00

(d) Wareng County Council rates ..Kshs. 1,759.05

(e) Income TaxKshs. 51,880.00

Total..... Kshs.182,653.65

(ii) **SECOND HOUSE:**

(a) Hospital bill Kshs. 110,442.25

(b) AFC LoanKshs. 15,683.35

(c) Iten County Council rates Kshs. 2,889.00

(d) Wareng Country Council rates.... Kshs. 1,759.05

(e) Income Tax Kshs. 51,880.00

TotalKsh. 182,653.65”

The other orders made by the superior court are contained in the decree issued on 21.03.02 and are not challenged save for the omission to provide that ½ share of plot No. 117, Iten township would go to the second widow, Mary Rono, which omission is conceded in this appeal.

The appeal and submissions of counsel.....

The decree of the superior court was challenged by Mary on 11 grounds but it is unnecessary to reproduce them since one ground was abandoned and the rest were condensed into three and were ably argued as such by learned counsel for the appellant Mr. P. Gicheru.

The main ground was that the superior court erred in taking into consideration the Marakwet

Customary law or any customary law, since the estate that fell for consideration was governed by the **Law of Succession Act, Cap 160** Laws of Kenya. **Section 3(2)** of that Act defines “*child*” without any discrimination on account of sex.

The Constitution of Kenya also in **section 82** outlaws discrimination on grounds, *inter alia*, of sex. Mr. Gicheru thus submitted that **section 40** of the Succession Act should have been applied in which case all the children and the widows would have been considered as units, entitling them to equal distribution of the land. It was erroneous therefore to entertain the consideration that the girls would have unfair advantage due to the possibility of their future marriage. On the evidence the girls in both houses were advanced in age in 1994 and were still unmarried or divorced 10 years later when this appeal was argued. The speculation that they would marry had therefore no basis. As there was no special inquiry made to determine whether any of the heirs deserved more land than the others, there was no basis for discriminating against the girls. It did no matter, he submitted, that the appellant received 50 acres, which is 30 acres more than her co-widow. Such distribution would still be contrary to the law and the purpose of the appeal was to enforce compliance with the law of succession.

For his part, learned counsel for the respondents Mr. P.K.K. Birech submitted on this issue that the superior court judge had a discretion to distribute the estate and she cannot be faulted. She considered and discarded the application of customary law. She then applied sections 27, 28 and 40 of the Succession Act. He conceded that the Act catered for all children including unmarried daughters but referred to **section 33** of the Act which exempts the application of the Act to agricultural land and livestock and subjects distribution of such property on intestacy to the law or custom applicable to the deceased’s community or tribe. The superior court was justified therefore in considering customary law and giving only nominal acreage of the land to the girls.

The second ground of appeal, which was readily conceded, was that there was no mention in the judgment or decree about the remaining half share of plot No. 117 in Iten township after the superior court distributed one half of it to the first widow, Jane. It was submitted and accepted, that the remaining half share should go to the appellant, Mary.

Finally on the third ground of appeal on distribution of liabilities, Mr. Gicheru submitted that it was inequitable for the learned judge, having dished out a large portion of the immovable property to the first house, to order payment of the sizeable liabilities on equal basis. The distribution of the liabilities should be proportionate to the distribution of assets. For his part Mr. Birech saw nothing wrong with ordering the girls to pay up the liabilities since they had shared in the assets of the estate.

The law.....

The manner in which courts apply the law in this country is spelt out in **section 3** of the **Judicature Act** Chapter 8, Laws of Kenya. The application of African Customary Laws takes pride of place in **section 3(2)** but it is circumscribed thus: -

“.....so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law,.....”

The Constitution, which takes hierarchical primacy in the mode of exercise of jurisdiction, outlaws any law that is discriminatory in itself or in effect. That is **section 82(1)**. In **section 82(3)**, it defines discrimination as follows: -

“affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed, or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

That provision has not always been the same with regard to discrimination on grounds of sex. “**Or sex**” was inserted in a relatively recent constitutional amendment by **Act No. 9 of 1997**. In the same section however, the protection is taken away by provisions in **section 82 (4)** which allow discriminatory laws, thus: -

“Subsection (1) shall not apply to any law so far as the law makes provision –

(a)

(b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or

(d) whereby persons of a description mentioned in subsection (3) may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons for any other description, is reasonably justifiable in a democratic society.”

Is international law relevant for consideration in this matter? As a member of the international community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the international Bill of Rights, which is the **Universal Declaration of Human Rights (1948)** and two international human rights covenants: **the Covenant on economic, social and cultural rights** and the **Covenant on civil and political Rights** (both adopted by the UN General Assembly in 1966). In 1984 it also ratified, without reservations, the **Convention on the Elimination of All Forms of Discrimination Against Women**, in short,

“CEDAW”. Article 1 thereof defines discrimination against women as: -

“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social cultural, civil or any other field.”

In the African context, Kenya subscribes to the **African Charter of Human and Peoples’ Rights**, otherwise known as the **Banjul Charter (1981)**, which it ratified in 1992 without reservations. In **Article 18**, the Charter enjoins member States, *inter alia*, to: -

“.....ensure the elimination of every discrimination against women and also ensure the protection of rights of the woman and the child as stipulated in international declarations and conventions.”

It is in the context of those international laws that the 1997 amendment to section 82 of the constitution becomes understandable. The country was moving in tandem with emerging global culture, particularly on gender issues. There has of course, for a long time, been raging debates in our jurisprudence about the application of international laws within our domestic context. Of the two theories on when international law should apply, Kenya subscribes to the Common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic law. However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation. Principle 7 of the Bangalore Principles on the **Domestic Application of International Human Rights Norms** states: -

“It is within the proper nature of the judicial process and well established functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or the common law.”

That principle, amongst others, has been reaffirmed, amplified, reinforced, and confirmed in various other international fora as reflecting the universality of human rights inherent in men and women. In **Longwe vs. International Hotels** 1993 (4 LRC 221), Justice Musumali stated: -

“.....ratification of such [instruments] by a nation state without reservations is a clear testimony of the willingness by the State to be bound by the provisions of such [instruments]. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that Treaty Convention in my resolution of the dispute.”

A clear pointer to the currency of that thinking in this country is in the draft Constitution where it is proposed that the Laws of Kenya comprise, amongst others: -

“Customary international law and international agreements applicable to Kenya.”

I have gone at some length into international law provisions to underscore the view I take in this matter that the central issue relating to discrimination which this appeal raises, cannot be fully addressed by reference to domestic legislation alone. The relevant international laws which Kenya has ratified, will also inform my decision.

Conclusion.....

The deceased in this matter died in 1988, while the Succession Act which was enacted in 1972, became operational by **Legal Notice No. 93/81**, published on **23.06.1981**. I must therefore hold, as the Act so directs, that the estate of the deceased falls for consideration under the Act. **Section 2(1)** provides: -

“2.(1) Except as otherwise expressly provided in the 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 deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

The application of Customary law, whether Marakwet, Keiyo or otherwise, is expressly excluded unless the Act itself makes provision for it. The Act indeed does so in **Sections 32** and **33** in respect of agricultural land and crops thereon or livestock where the law or custom applicable to the deceased's community or tribe should apply. But the application of the law or custom is only limited to “*such areas as the Minister may by Notice in the Gazette specify.*” By **Legal Notice No. 94/81**, made on **23.06.1981**, the Minister specified the various districts in which those provisions are not applicable. The list does not include Uasin Gishu district within which the deceased was domiciled. So that, the law applicable in the distribution of the agricultural land in issue in this matter is also written law. Does the Act provide for the manner of distribution? Partly, yes.

The superior court was of the view that **section 27** of the Act donates unfettered discretion to the court in the sharing of the estate considering the definition of “*dependant*” in **section 29** to include the “*wife and the children of the deceased*”. It is in exercise of that discretion that the learned Judge disregarded consideration of the sharing proposed by the parties altogether and made her “*own independent distribution*”. It was also pursuant to that discretion that she based her decision to allocate minimal shares to the daughters on the basis that they would get married.

While I do not doubt the discretion donated by the Act in matters where dependants seek a fair distribution of the deceased's net estate I think the discretion, like all discretions exercised by courts, must be made judicially or to put it another way, on sound legal and factual basis. The possibility that girls in any particular family may be married is only one factor among others that may be considered in exercising the court's discretion. It is not a determining factor. In this particular case however, I find no firm factual basis for making a finding that the daughters would be married. As shown by the undisputed facts above, all except one were unmarried or divorced in 1994 and were advanced in age. Eleven years later when this appeal was heard, there was no evidence that the situation had changed. It is also an undisputed fact that the deceased treated all his children equally and never discriminated between them on account of sex. It is a factor in my view that was not sufficiently considered although it resonates with the noble notions enunciated in our Constitution and international laws. The Respondents themselves clearly recognized and honoured the wishes of the deceased when they proposed to give 14 acres of the land to each daughter of the deceased. I find no justification for the superior court whittling that proposal down to 5 acres to each daughter. More importantly, **section 40** of the Act which applies to the estate makes provision for distribution of the net estate to the "*houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.*" A "house" in a polygamous setting is defined in **section 3** of the Act as a "*family unit comprising a wife ... and the children of that wife*". There is no discrimination of such children on account of their sex.

I think, in the circumstances of this case there is considerable force in the argument by Mr. Gicheru that the estate of the deceased ought to have been distributed more equitably taking into account all relevant factors and the available legal provisions. I now take all that into account, and come to the conclusion that the distribution of the land, which is the issue falling for determination, must be set aside and substituted with an order that the net estate of 192 acres of land be shared out as follows: -

- (a) Two (2) acres for the farm-house now commonly occupied by all members of the family to be held in trust by the joint administrators of the estate.
- (b) Thirty (30) acres to the first widow, Jane Toroitich Rono.
- (c) Thirty (30) acres to the second widow, Mary Toroitich Rono.
- (d) Fourteen decimal four four (14.44) acres to each of the nine (9) children of the deceased.

As for the liabilities, they should in reality have been paid off by the estate as a whole before distribution of the net intestate estate. The superior court however found it fit to distribute the liabilities equally between the two houses, and the only challenge on appeal was that the distribution of the land should have been similarly treated. As I have interfered with the distribution of the land, I find no other basis for disturbing the order made by the superior court in respect of liabilities.

In the result, I would allow the appeal to the extent stated above. A fresh decree would issue accordingly. As this is a family matter, each party shall bear its own costs.

Dated and delivered at Eldoret this 29th day of April, 2005.

P.N. WAKI

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JUDGE OF APPEAL

JUDGMENT OF OMOLO, JA

I had the advantage of reading in draft form the judgment prepared by WAKI, JA, and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the Law of Succession Act, **Cap 160** of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by **Mr. Gicheru**. I can find no such provision in the Act. Section **40 (1)** of the Act 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 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.”

My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.

Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied the Act does not provide for that kind of equality.

What I understand WAKI, JA, to be saying is that in the circumstances of this particular case, there was no reasonable factual basis for drawing a distinction between the sons on the one hand and the daughters on the other hand. Subject to what I have said herein, I agree with the judgment of WAKI, JA and the orders proposed by him. Those orders shall be the orders of the Court.

Dated and delivered at Eldoret this 29th day of April 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

JUDGMENT OF O’KUBASU, JA

Subject to what OMOLO, JA says in his judgment I agree with the judgment of WAKI, JA and the orders proposed by him.

Dated and delivered at Eldoret this 29th day of April, 2005.

E.O. O’KUBASU

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.

