



In re Estate of George Kiptoo Chebii (Deceased) (Miscellaneous Succession Cause E007 of 2022) [2024] KEHC 4045 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
MISCELLANEOUS SUCCESSION CAUSE E007 OF 2022**

RB NGETICH, J

APRIL 25, 2024

**IN THE MATTER OF THE ESTATE OF GEORGE KIPTOO CHEBII
(DECEASED)**

BETWEEN

GEOFFREY KIPROTICH KIPTOO PETITIONER

AND

ANGELINE SALVIC CHEBII 1ST PROTESTOR

DAVID KIPTIONY CHEBII 2ND PROTESTOR

JUDGMENT

1. The Petitioner/Administrator (Geoffrey Kiprotich Kiptoo) who is the son of the deceased from the first house, petitioned this court grant of letters of administration intestate of the Estate of his late father George Kiptoo Chebii (deceased) who died intestate on the 6th of December, 2011. Grant of letters of administration intestate was issued on the 5th August, 2019. The two protestors who are daughter and son of the deceased respectively from the first house filed protest in respect to mode of distribution.
2. They are opposed to the estate of the deceased devolving to the two wives of the deceased to hold in trust for their children.
3. The 1st Protestor Angeline Salvic Chebii denied consenting to the mode of distribution. She proposes that the entire estate of approximately 82.75 Acres be distributed to all beneficiaries being the two widows and their children in equal share.
4. The 2nd Protestor David K. Chebii opposed the proposed mode of distribution of the estate as proposed by the petitioner. He avers that the consent dated 4th January, 2022 filed by the firm of Kiptoon



and company Advocates on behalf of the petitioner has not been signed by two of the beneficiaries confirming that they did not consent to the mode of distribution.

5. The 2nd Protestor however says he is not opposed to the proposed mode of distribution entirely as he agrees with the proposed apportionment to the two houses in terms of 52.75 acres to the first house and 30 acres to the second house respectively. He says he is opposed to their individual shares being held in trust for them by their mothers Martha Kobilo Chebii and Rose Tungo as none of the beneficiaries is a minor, of unsound mind or incapacitated in any way from legally owning property and the said proposal borders on insult to some of the beneficiaries. He however clarifies that he is opposed to the share of first house being held in trust for children of the first house by his mother but as concern the second house, he is not opposed to how they wish to have the property administered.

Petitioner's response

6. The Petitioner Geoffrey Kiprotich Kiptoo in response filed an affidavit 7th June 2023. In response to averments by the 1st and 2nd protestors he avers that upon demise of their father in the year 2011, their mothers from the 1st and 2nd house convened a meeting at home on the 28th July 2018 to discuss the estate of their father and the 1st and 2nd protestors were also present in the meeting.
7. The Petitioner states that it was discussed and agreed unanimously that he shall petition court for letters of administration on behalf of the family. That they agreed that the estate of the deceased being Baringo/Sabatia-103/171 measuring 82.75 acres shall be shared in two portions with the first house getting 52.75 acres and the 2nd house 30 acres and further that the said portions shall be held and registered in the names of their respective mothers.
8. He avers that following the meeting, he petitioned court for Grant of letters of administration which was granted without any objection and as the administrator of the estate, he has been performing his duty of collecting and preservation of the estate of the deceased.
9. He denied the allegation that the 1st petitioner has been denied to cultivate the land and said he has been cultivating the said parcel 10 years as alleged by the 1st protestor and said activities that are carried on in the land is small scale farming by their respective mothers for their subsistence as they chip in to assist whenever they need their help.
10. He denied allegation that the deceased had a plot in Solian that forms part of the deceased estate and stated that the Plot was purchased by his brother Moses Kipkorir Kiptoo from a Mr. Magon who passed on and his late father used to keep watch over it on his behalf as he was away for work; further that their father left nine(9) dairy cows left and were shared by their mothers with the first house taking five(5) cows and 2nd house four(4) cows; and from the five cows for the 1st house the 1st and 2nd protestor took one each leaves 3 less productive which were disposed to off-set expenditure accrued out of their maintenance and for their mother's upkeep. Further Kshs 38,000/- which was due from KCC at the time of their father's demise was released to their mothers with Martha Kobilo Chebii getting Kshs. 26,000/= and Rose Tungo Chebii Kshs. 12,000/=.
11. The petitioner further avers that before the demise of his father and sometimes in 2011, he informed him that he had charged the land Baringo/Sabatia-103/171 to AFC to secure loan of Kshs. 110,000/= Entry number 5 in the encumbrances section and the deceased together with his mother tasked the petitioner to settle the loan which had accrued interest making a total sum of Kshs. 125,000/= which he settled and the charge was discharged *vide* entry no. 6 in the encumbrances section and out of his good gesture, his parents promised to reward him but there was nothing specific that was mentioned as his reward.



12. He further stated that since the property he discharged from the loan encumbrance is now due for distribution, he will be asking court to consider his contribution towards the same and treat the payments he made to settle the loan as a liability and take note of the value of Kenya shilling then and now to reach an appropriate compensation, that is if the family agreement of 28th July 2018 is disregarded.
13. The Petitioner further stated that his mother informed him that he contributed to the estate of the deceased and she should be allocated half of the parcel before distribution as her matrimonial property right and further a share of the other half as a beneficiary of the estate and urged this court to consider that the protestors have each benefited from the estate by taking a cow each while the other beneficiaries have not received anything. Further that there are legal charges yet to be paid from the estate. He urged this court to confirm the terms of the family agreement reached in the meeting held on 28th July 2018 and dismiss the protest.
14. The 1st Widow to the deceased and the mother to the petitioner and the protestors Martha Kobilo Chebii in response to the affidavit of protests confirmed that the deceased left parcel of land measuring approximately 33.1 Ha which translates to approximately 82.75 Acres, nine (9) Dairy cows and kshs 38,000/= being milk proceeds from KCC.
15. She said at time of deceased's demise, two of her children Vivian Jepkoech Kiptoo and Fredrick Kimutai Kiptoo were still in school and she took up the responsibility which was taken care of by her late husband. She confirmed that the 9 cows left were shared between her and her co-wife as stated by the petitioner. She said instead of her two elder children 1st and 2nd protestors assisting her take care of the cows, they pressurized her to share with them the cows for their own management and benefit; and they pressurized her until she yielded to their pressure and gave them one cow each so as to get peace of mind.
16. She further avers that due to accumulated salary arrears, she was forced to dispose of the cows at kshs 75,000 each due to old age and used the proceeds to settle the salary/wages arrears. She said she used part of the proceeds to maintain her children who were in school and pay for cattle dip arrears. That the 1st protestor who was in employment declined to assist in maintaining her siblings in college and she had to shoulder the responsibility.
17. She confirmed that they met as a family and agreed that Geoffrey Kiprotich Kiptoo will be the petitioner/administrator of the estate and further agreed that the Estate property Baringo/sabatia -103/171 shall be shared between two houses with the first getting 52.75 Acres and the second house getting 30 Acres and the said portions to be held by the widows of the deceased. She further stated that at the time of acquisition of the land Baringo/Sabatia -103/171, she directly and indirectly contributed towards the purchase of the same.
18. She states that if the protestors would insist going contrary to the family deliberations and decisions, it would be important for the court to consider that she is entitled to half the share of the 52.75 Acres for the 1st house before any distribution is made to her children so that the children claim their beneficial interest on the estate of their father. She further states that liabilities of the estate should be settled which include loan Agricultural Finance Corporation (A.F.C) which as at the May 2011 stood at Kshs. 125,000/=. she said at the time, her husband was sickly and unable to service the loan and so as a family, they tasked their son Geoffrey Kiprotich Kiptoo to settle the same and was to be compensated later but her husband passed on in December the same year and to date, he has not been compensated; she urged this court to consider compensation to Geoffrey Kiprotich Kiptoo in the interest of fairness.



19. She further urged this court to consider her children Vivian Jepkoech Kiptoo and Fredrick Kimutai Kiptoo for a bigger share considering that at the time their father died, they were still in college and so they did not receive similar treatment their elder siblings received when they were in school and when their father was alive.
20. She restated the petitioner's prayer for the court to consider the two cows taken by the two beneficiaries and legal fees and restated that the court confirm the terms of the family agreement entered into in the meeting held on the 28th July 2018 and dismiss the protestor's proposal.

1st Protestor's written submissions

21. The 1st Protestor filed her written submissions where he objects to the confirmation of the grant of letters of administration issued on 5th August, 2019 for the reasons that the proposed mode of distribution in the schedule thereto is manifestly unfair and not in line with clear provisions of the laws of Kenya.
22. The 1st Protestor submits that the Petitioner Geoffrey Kiptoo Chebii, the sole administrator to the estate of the late George Kiptoo Chebii delayed for 3 years after obtaining the grant of letters of Administration before finally filing Summons for confirmation of grant dated 5th January, 2023 with a proposal on how the estate should be distributed.
23. The 1st Protestor restated his averments and said she partially agrees to the mode of distribution only to the extent that the 1st family shall receive 52.7 Acres while the 2nd family receives 30 Acres out of the 82.75 Acres of distributable land and restated that the beneficiaries of first house have not agreed on mode of distribution of their share for reasons stated as captured above and urged this court to distribute the land according to the laws of succession in Kenya.
24. Her proposal is the have 52.75 Acres being share of the 1st family be shared equally among all the 7 beneficiaries of the first family being Martha Kobilo Chebii, Angeline Salvic Chebii, David Kaptiony Chebii, Geoffrey Kiprotich Kiptoo, Moses Kipkorir Kiptoo, Vivian Jepkoech Kiptoo and Fredrick Kimutai Kiptoo and relied on Section 40 of the Law of Succession Act and the case of in re Estate of Kimitei Cherop (Deceased) [2021] eKLR.
25. She submits that in the above case the Court of Appeal made it explicit that for the purposes of the law of succession, the children of a deceased are equal, irrespective of their gender or marital status and guided by the provisions of Section 40(1) of the Law of Succession Act, the estate herein ought to be distributed equally amongst the 6 children of the deceased and the surviving widow, thus making 7 units and this being a family matter, each party should bear their own costs in the case.

SUBMISSIONS BY PETITIONER

26. The petitioner submits that vide Summons for Confirmation of Grant dated 5th January 2023, he approached this court seeking confirmation of Grant of Letters of Administration intestate, in terms of distribution shown in supporting affidavit on 4th January 2023.
27. The Petitioner/Administrator listed the following as issues for determination: -
 - a) What extent does the Estate of the Deceased Constitute?
 - b) Who are the beneficiaries of the Estate of the Deceased?
 - c) Whether the rights of the Protestors/Objectors to succeed the deceased property have crystallized?



- d) Who should bear the costs?
28. The petitioner submits that he filed petition at Eldama Ravine court on 22nd August 2018 supported by affidavit dated 5th August 2018 and in paragraph 6 listed land Baringo/Sabatia -103 /171 as the only asset left by the deceased; and similarly in Summons for Confirmation of grant, he listed the same property Baringo/Sabatia -103/171 as the only asset that formed the deceased's estate; and he went ahead to propose mode of distribution. He submits that the 1st petitioner confirm that the entire estate is approximately 82 acres.
29. He further submits that the 2nd protestor on his part alleges that 5 dairy cows valued at Kshs. 500,000/= formed part of the Estate but the same were mismanaged by the administrator and further that proceeds from milk produce which include estate of the deceased have not been accounted for. Further that a plot in Solian formed part of the Estate of the deceased.
30. That the issue of the Dairy Cows left by the deceased and the milk proceeds from the said dairy cows were explained exhaustively by the 1st Widow of the deceased and the Administrator. That in any case, the 1st Widow who is the mother of the protestors has the right to enjoy net income generated from the estate of the deceased as stipulated under Section 35 of the *Law of Succession Act*; and was therefore entitled to the proceeds of milk generated from the estate of the deceased as she has life interest on the estate of the deceased spouse and should not therefore form part of the estate for purposes of distribution.
31. In respect to plot in Solian, the petitioner submits that the 2nd protestor did not avail any official search document or a copy of the title deed to prove his allegation but on the other hand, the administrator explained clearly the ownership of the plot by narrating how his brother acquired the said plot even before the demise of their father and submit that the said plot is not part of the deceased.
32. He submits that the protesters having failed to adduce sufficient evidence to prove and establish that the deceased had other assets apart from the ones included in this cause, it is their submissions that the only property which forms the estate of the deceased is the land at Eldama Ravine Known as Baringo/Sabatia-103 /171, measuring 33.1 Hectares which is approximately 82.75 Acres; and the 1st Protester in her Affidavit of protest dated 6th February 2023 acknowledged that there are two widows left by their deceased father and urged this court to distribute the estate of the deceased to the two widows and their respective children equally while the 2nd protester in his undated affidavit of protest at paragraph 4 concurs in principle for the distribution of the estate in terms of 52 acres to the 1st house and 30 acres to the 2nd house.
33. On who are the beneficiaries of the Estate of the Deceased, the petitioner submits that the petition for letters of administration that was filed in the subordinate court at Eldama Ravine before it was eventually transferred to this court because of pecuniary jurisdiction of the court at paragraph 4 of the Affidavit in support of the Petition listed all the beneficiaries of the Estate.
34. On whether the rights of the Protestors/Objectors to succeed the deceased's property have crystalized, the petitioner submits that the deceased was survived by the dependants as listed in the Affidavit in support of the Summons for confirmation of grant sworn on 4th January 2023 and submitted that it is only until when the surviving spouses die, when the children can now assert their rights. That where there is income generated from the estate, widows are entitled to the said income exclusive of their children and cannot be called on to account for the estate by their children and submit that the effect of Section 35 (1) of the *Law of Succession Act* Cap, 160, was further explained in the persuasive decision of, *Mercy Kagige Kamunde vs Eliphas Mugambi Kamunde & 3 Others* [2016] eKLR.



35. That in principle, the beneficiaries of the estate of the deceased herein have agreed on distribution on the terms above at paragraph 31 save that the protesters who are the children of the 1st house are demanding that the property be passed directly to them and to the other children surpassing the widow's contrary to the principles set-out under Section 35 of the Law of Succession Act.
36. Further that Section 40 of the Law of Succession Act provides thus, (4a). Where intestate was polygamous, his personal and household effects and the residue of the net intestate estate shall, 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 addition to unit to the number of children.
37. That what is important to note is that Section 40 (2) of the Law of Succession Act stipulates that the distribution of the net assets of the deceased estate shall eventually be distributed in accordance with Section 35 to 38 of Act, so by dint the distribution cannot be equal as submitted at this stage and discrimination cannot arise.
38. On who should bear the costs, the petitioner submits that costs follow the event and urged this court to dismiss the protests with costs and allow the administrator's summons for confirmation of grant dated 5th January 2022 in terms of the schedule of distribution in paragraph 4 of the Affidavit in support of summons sworn on 4th January 2023.

Analysis and determination

39. I have considered averments by the parties herein together with submissions filed. It is not disputed that the deceased was a polygamous man with two wives. The dependants making up of children of the deceased and the two widows are not disputed. It is also not disputed that of the land that is not disputed as having been left behind by the deceased being Baringo/Sabatia -103/171 measuring 33.1 Hectares which is approximately 82.75Acres, the first house is to be allocated 52.75 Acres and the 2nd House 30 acres. It is not also disputed that the second is satisfied with being allocated 30 acres and have not raised any issue concerning estate of the deceased.
40. Both Protestors are agreeable to the distribution of land between the two houses as proposed by the petitioner but argue that the land should not be held by their mother in trust for them. The 2nd protestant also argue that the deceased had property in Solian and the estate also had cows and proceeds from milk which form part of the estate. I wish to consider the following issues:-
 - a. What form the estate of the deceased?
 - b. How property entitled to the first house from the deceased's estate should be distributed
 - c. Who shall bear the costs of this petition?

(i) What form the estate of the deceased?

41. It is not disputed that parcel of land Baringo/Sabatia -103/171 measuring 82.75 Acres belonged to the deceased. It is not also disputed that the 1st house is to be allocated 52.75 Acres while the 2nd House is to be allocated 30 Acres from the property. In respect to the portion for the 1st house, the first wife stated that she contributed to acquisition of the land and if the protesters are opposed to her holding the portion in trust for her children, then half of the land should be given to her and the remaining to be shared equally between beneficiaries from the first house. The first wife of the deceased however failed to prove her contribution in acquisition of the property. In view of the above I find that the whole portion is available for distribution to all beneficiaries from the first house.



42. The 2nd protestor further alleged that the deceased had a plot in solian. He however did not avail any evidence to prove ownership of the plot by the deceased. In view of the above, there is no proof of deceased's plot in Solian available for distribution. In respect to cows left behind by the deceased, it is not disputed that the 9 cows were divided between the two widows with first wife getting 5 and second wife 3. the protestor's mother sufficiently explained that she gave two of the cows to the 2 protestors and proceeds from the remaining sale of 3 cows and milk was used meet family expenses as the widow of the deceased took up responsibilities of taking care of children who were still in school. The cows and milk proceeds are not therefore available for distribution.
43. The 2nd wife to the deceased Rose Tungo Chebii testified in court and confirmed that they were allocated 30 acres from parcel Baringo/Sabatia – 103/171 and they are satisfied with the allocation.

(ii) How property entitled to first house from deceased's estate should be distribute.

44. The deceased died intestate on the 6th December, 2011 intestate and was a polygamous man. Section 40 of the Law Succession Act Cap 160 L.O.K deals with the distribution of the estate of a polygamous family and provide as follows: -
- a. 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 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.
 - b. 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 sections 35 to 38.”
45. The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My understanding of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.
46. Equal distribution does not always work justice, especially in polygamous situations, where the older would generally have received education and has probably been settled in life by the deceased. There cannot be justice in equal distribution in such case. The fortunes of one child may be better than other. Ideally, equal distribution should be the principle, with some discretion left to the court to consider the circumstances of each case.
47. Having found that only one property namely Baringo/Sabatia-103/171 measuring 82.75 Acres remain for distribution and 30 acres will go to the 2nd widow Rose Tungo Chebii to hold for herself and her children as agreed, I will proceed to give directions on how the portion for first house being 52.75 Acres will be distributed between the first widow and her children.
48. I take note of the fact that the petitioner assisted his father in clearing debt owing to AFC. He said he paid Kshs 125,000 which was owing. There is no doubt the value of the shilling at the time was high than it is now and it would not be fair to compensate the petitioner with the exact amount. In my view, the petitioner should get One acre from first house's share of land. What remain for distribution in respect to the 1st house is therefore 51.75. From the evidence adduced, the 2 protestors and their other siblings are all adults. No justification has been given by the petitioners for shares of his siblings including himself to be held in trust for them by their mother. In my view the share of the first house



from the deceased's estate should be distributed to the beneficiaries as provided under section 40 of succession *Act*.

49. Final Orders: -

1. That the estate of the deceased is made up of one asset being Baringo/Sabatia-103/171.
2. The 1st house is allocated 52.75 acres and the second house 30 acres from LR Baringo/Sabatia – 103/171.
3. One acre from the 52.75 acres being share for the 1st house to go to the petitioner and the remaining 51.75 acre to be shared equally between all the children from the 1st house with the widow being additional unit.
4. Costs of this succession to be paid from the estate of the deceased.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 25TH DAY OF APRIL 2024.

.....
RACHEL NGETICH

JUDGE

In the presence of:

Elvis/Momanyi – Court Assistants.

Mr. Kiptoon for 1st Protestor Angeline present.

2nd Protestor David Chebii present.

