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Judge:	Cecilia Wathaiya Githua
Citation:	Toiyoi Tabarno Kamar & 3 others v Charles Kibiwott Kamar [2015] eKLR
Advocates:	Mrs. Khayo hoiding brief for Mr. Rioba Omboto for the 3rd Respondent
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE AND ADMINISTRATION CAUSE NO. 59 OF 1997

IN THE MATTER OF THE ESTATE OF THE LATE KIPKOSGEI KIPLAGAT KAMAR

AND

IN THE MATTER OF TOIYOI TABARNO KAMAR, TAPYOTIN KIMOI KAMAR, JOSEPH KIPKOSGEI KAMAR AND DR. KIMITEI KIPKOSGEI KAMAR..... ADMINISTRATORS

AND

IN THE MATTER OF CHARLES KIBIWOTT KAMAR OBJECTOR

JUDGMENT

1. The deceased *Kipkosgei Kiplagat Kamar* died intestate on 20th October, 1993. He was polygamous. He was survived by two widows namely *Toiyoi Kabarno Kamar* and *Kimoi Tapyotin* and a total of sixteen children.

On 24th December, 1997, a grant of letters of administration to his Estate was issued to his surviving widows aforementioned together with *Joseph Kipkosgei Kamar* and *Dr. Kimitey Kipkosgei Kamar*, his sons from each house.

2. On 2nd December, 2014, three of the administrators namely *Joseph Kipkosgei Kamar*, *Toiyoi Tabarno Kamar* and *Tapyotin Kimoi Kamar* filed a summons dated 30th July, 2014 seeking confirmation of the grant issued on 24th December, 1997 as *Dr. Kimitei* had by then passed away. In the affidavit sworn in support of the summons, the administrators gave an inventory of the deceased's free property which was available for distribution and their proposal regarding how they wished the court would distribute the property among the deceased's beneficiaries.

3. The objector *Charles Kibiwott Kamar*, one of the sons of the deceased objected to the proposed mode of distribution through an affidavit of protest sworn on 11th February 2015. In the affidavit, he averred *inter alia* that the Estate could not be distributed as one of the administrators *Dr. Kimitei Kipkosgei Kamar* had died on 8th March, 2014 and had not been replaced; that the deceased's share of Eldoret Municipality/Block 7/26 had not been ascertained as the property was co- owned by the deceased and one *Joseph Cheron*.

4. The court record shows that on two occasions, that is, on 16th December, 2015 and 23rd March, 2015, all the parties appeared before the court and sought time to negotiate an out of court settlement on the issue of distribution of the Estate. Regrettably, they were only able to reach settlement on some of the assets but there was disagreement on distribution of a few assets. In the circumstances, following a consent by the parties, the court directed that the summons for confirmation of grant be disposed off by way of written submissions in which the parties would indicate their preferred mode of distribution.

5. From the foregoing, it is clear that the only task left for this court to do is to distribute the assets comprising the deceased's Estate taking into account the written submissions filed by the parties. But

before embarking on this exercise, i wish to quickly dispose of the objector's claim that distribution of the Estate cannot be done as one of its administrators *Dr. Kimitei Kamar* is now deceased and no substitution has been done to replace him.

6. It is my finding that this ground of objection is totally without merit. **Section 81** of the **Law of Succession Act** Chapter 160 Laws of Kenya (hereinafter referred to as the Act) clearly provides that where there are more than one executor or administrator, in the event of the death of one or several of them, the surviving executor(s) or administrator (s) should continue performing their duties and obligations under the grant meaning that it was not necessary for the dead executor or administrator to be replaced. In order to buttress this point and to remove any doubt regarding the true import of this section, I will reproduce it in full. The section states as follows:-

“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them: Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or more persons jointly with him”.

In view of the above, there is no doubt that the omission of the Estate's surviving administrators to cause the substitution of the late *Dr. Kimitei Kamar* does not bar this court from distributing the deceased's Estate.

7. I have read and considered the three sets of written submissions filed by the firm of *Miyiinda & Company Advocates* for the objector, the firm of *Birech, Ruto and Company Advocates* for the 1st house and the firm of *Rioba Omboto & Company Advocates* for the 2nd house. (Referred to as House A and House B respectively in the submissions filed by *Ms Rioba Omboto & Company Advocates*).

I wish to start by pointing out that it is common ground that the deceased died intestate on 20th October 1993 and therefore, his Estate is subject to distribution in accordance with the provisions of the Law of succession Act.

From the parties' submissions, the Estate comprised of the following assets;

1. LR No. 7439/Sigowo – 846 acres
2. Eldoret/Municipality Block 7/26
3. Mosop/chepkorio/21 – 16 acres
4. Mosop Cherorget/326 - 18 acres
5. Uasin Gishu/Munyenwet – 80 acres
6. Chepkorio plot No. 14
8. The persons to benefit from the proposed distribution, that is, the heirs to the Estate are the following ;-

The first 1st house

i. Toiyoi Tabarno Kamar – widow

ii. Mary Jepkemoi Kiboso

iii. Dr. Kimitei Kipkosgei Kamar

iv. Lilian Kigen Seroney

v. Esther Toroitich Rotich

vi. John Kibet Kamar

vii. Nerisa Jepkorir Kamar

viii. Christopher Kimutai Kamar

The 2nd house

i. Tapyotin Kimoi Kamar – widow

ii. Joseph Kipkosgei Kamar

iii. Ruth Jemutai Kamar

iv. Prof. Margaret Jepkoech kamar

v. Everlyne Jeruiyot Kipksogei

vi. Jane Jesanoi Nakodony

vii. Elizabeth Jepyego Kamar

viii. Helen Jesire Kipkemoi

9. The submissions looked at in their entirety reveal that the administrators and the beneficiaries are largely in agreement with regard to the mode of distribution of all the above mentioned assets except the distribution of land known as LR 7439/Sigowo measuring 846 acres. I also notice a slight disagreement in the mode of distribution suggested in respect of plot No. Chepkorio/14. While as the objector proposes that the same be inherited by *Toiyoi Tabarno Kamar* and one of the daughters in the first house namely *Nerisa Jepkorir Kamar* and that one acre of that land be donated to International Fellowship church as per the deceased's wishes, the representatives of the 1st and 2nd house have on their part proposed that the entire plot be given to the 1st widow *Toiyoi Kamar* and the Ebenezer church.

10. However, no evidence was availed by the parties to prove that the deceased had expressed his wish to have Chepkorio plot No. 14 either in its entirety or part thereof donated to either the Ebenezer church or the International Fellowship church. Even if there was such proof unless the expression was contained in a valid Will, the same would not have any place in an intestate succession. It is obvious that neither of the two churches qualify to be a beneficiary of the Estate and there is no justification for the proposal that either of them should share in the Estate.

11. But it is clear from the submissions that the 1st and 2nd house was in agreement with the objector that the 1st widow should inherit the land together with Ebenezer church. The objector had proposed that the 1st widow and one of her daughters *Nerisa Jepkorir* should inherit the land but have one acre donated to the International Fellowship church. It is not clear why only one child was picked from the 1st house to share in this plot while there are other six children in the said house.

Now that the two churches have fallen out of the equation, and it is apparent that there was a common understanding that only the first house should benefit from the property, it is my finding that in the interest of justice and fairness Plot No. Chepkorio 14 should be inherited by the 1st widow under life interest and in trust for her children. The property is hereby distributed on those terms.

12. As stated earlier, the parties are all in agreement on the proposed mode of distribution of Mosop Chepkorio/21, Chepkorio/Choroget/236; Uasin Gishu/Munyenwet (Kabao), Chepkorio plot 11 and Eldoret Municipality Block 7/26. In the premises, I uphold the proposed mode of distribution by the parties except for Eldoret municipality Block 7/26 for reasons I will state later in this judgment.

13. Turning now to LR 7439/Sigowo, there is consensus that the property measures 846 acres. The parties proposed that 23 acres of this land should be shared equally by the two widows to establish their homestead; that a further 23 acres of the same property be given to the objector as compensation for debts the deceased owed him prior to his death; that the remainder of the property is what would be available for distribution to all the beneficiaries.

14. For the remaining 800 acres, the objector proposed that the property be distributed as follows:-

That all the deceased's daughters should inherit a total of 165 acres with each getting a share of 15 acres; that each of the widows should inherit 40 acres and the sons should get a share of 111 acres each.

15. On behalf of the 1st house, it was proposed that *Toiyoi T. Kamar* (1st widow) / *Joseph Kibet* should get a share of 50 acres.; *Tapyotin K. Kamar* 2nd widow / *Joseph Kamar* should also get a share of 50 acres; that all the deceased's sons should inherit 130 acres each while the daughters should jointly share a block of 165 acres.

16. Lastly, on behalf of the 2nd house, it was proposed that the 2nd widow should get an extra 40 acres in addition to the 11.5 acres for the homestead while the first widow was to inherit only the 11.5 acres for the homestead; the daughters in the 1st house were to get a share of 20 acres each while those in the 2nd house were to get a share of 35 acres each. It was also proposed that *Joseph Kipkosgei Kamar* from the 2nd house should inherit 140 acres while the sons in the 1st house were to share 75 acres each with the exception of *Charles Kibiwott* (objector) who was to get 98 acres. No reason was given to explain why the beneficiaries in the 2nd house felt that some beneficiaries were entitled to a bigger or smaller share than the others.

17. The **Law of Succession Act** is very clear with regard to how assets of an Estate in which the deceased was polygamous should be distributed. **Section 40** thereof provides that ;

(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 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.

(2) The distribution of the personal and household effects and the residue of the net estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

From the above provisions of the law, it is clear that the net intestate Estate in a polygamous setting should be divided among the houses in the Estate taking into account the number of children in each house with a surviving widow being added to the number of children. Once this division is done, the children and the surviving widow would then share equally the assets allocated to their household. A house for purposes of the law of succession is defined in **Section 3 of the Act** as a family unit comprising a wife, whether alive or dead at the date of the death of the husband and the children of that wife.

18. Having said that, it is important to note that under the Act, all children of a deceased person enjoy equal rights to inherit their deceased parent's Estate irrespective of their gender. The law does not discriminate between sons and daughters whether single or married or their stations in life. Each child is entitled to an equal share of the Estate as enacted in section 38 of the Act subject to any gifts given by the deceased in his life time: See: **Stephen Gitonga M'murithi V Faith Ngira Murithi Civil Appeal No. 3 of 2015 [2015]eKLR; Francis Mwangi Thiong'o & 4 Others V Joseph Mwangi Thiong'o Civil Appeal No. 8 of 2015 [2015] e KLR.**

It is clear from the above that the law does not envisage distribution based on gender which is what appears to have informed the distribution proposed by the parties. The proposed skewed distribution in which the sons were to inherit big chunks of the parcel of land in question as compared to the daughters who were to share a small portion of the same is to say the least, an affront to the law and is thus unacceptable. The proposal that each of the widows should share 11.5 acres and the objector 23 acres over and above the share of the other beneficiaries also flies in the face of the principle of equality enshrined in section 38 of the Act. I say so because the widows did not need an extra share of the property in order to establish their homesteads. They could do so in the portion of land that would be allocated to them after distribution and if the objector was owed money by the Estate, the debt amounted to a liability on the Estate which could be satisfied by other means other than in the share of the Estate's capital assets.

19. That said, I will now proceed to distribute the property guided by the principles set out above. As noted earlier, the deceased's estate has two houses. The first house has 10 units while the 2nd house has eight units. The land should therefore be divided in the ratio of 10: 8 with 470 acres going to the 1st house and the remainder of 376 acres going to the 2nd house. Each unit should inherit 47 acres. For better clarity, LR 7439/Sigowo is distributed as follows;

First House

470 acres to be shared equally between the 1st widow *Toiyoi Tabarno Kamar*, her children *Mary Jepkemoi Kiboss*, the Estate of *Dr. Kimitei Kipkosgei Kamar* (deceased's son); *Lillian Kigen Seroney*, *Esther Toroitich Rotich*, *John Kibet Kamar*, *Nerisa Jepkorir Kamar* and *Christopher Kimutai Kamau*.

Second House.

376 acres to be shared equally by the 2nd widow *Tapyotin Kimoi Kamar*, her children *Joseph Kipkosgei Kamar*, *Ruth Jemutai Kamar*, *Prof. Margaret Jepkoech Kamar*, *Evelyne Jeruiyot Kipkosgei*, *Jane Jesanoi Nakodony*, *Elizabeth Jepyego Kamar* and *Hellen Jesire Kipkemoi*.

Considering the provisions of **Section 35** of the Act, all the shares of the land comprising the Estate that

will be inherited by the deceased's widows shall be held by each of them under life interest.

20. Lastly, I now wish to revisit the proposed distribution of land described as Eldoret Municipality Block 7/26. It is important to note that no proposal was made on behalf of the 1st house for distribution of this property. It is apparent from the depositions in the affidavit of protest filed by *Charles Kibiwott*, his submissions and the submissions filed by the 2nd house that an allegation was being made that this property was co-owned by the deceased and one *Joseph Cherono*. There is also a claim by the objector that his sister one *Mary Jepkemboi Kamar* had contributed some money to assist the deceased purchase the land and that therefore she should get an extra share from the property to offset her alleged contribution.

21. There is however no iota of evidence availed by either the objector or the administrators to prove that this land did not exclusively belong to the deceased. In the petition for grant of letters of administration, this property is listed in the inventory of assets in the deceased's Estate. It was not indicated then that it was co-owned with any other person. In addition, in the summons for confirmation of grant, the property is listed as an asset belonging to the Estate and the administrators had proposed that the same be shared equally by the two houses. If there was any truth to the claim that one *Joseph Cherono* owned a part of this property, the objector or the 2nd administrator would have availed evidence to this effect and the said *Joseph Cherono* would naturally have come forward to stake his alleged claim to the property and object to its distribution. Nothing barred him from registering his interest in the said property if any existed since these proceedings started in 1997 and I find it rather strange that it is the objector who was purporting to do so on his behalf.

22. Given that this property was listed in the inventory of assets comprising the deceased's Estate in the petition for grant of letters of administration and in the affidavit supporting the summons for confirmation of grant, in the absence of evidence to prove that it was co-owned by the deceased and *Joseph Cherono*, the only conclusion which the court can make is that it is part of the deceased's Estate which is available for distribution among his beneficiaries.

23. In view of the fact that this appears to be a commercial property on which an undisclosed number of rental units have been erected, it is my opinion that because it cannot be physically subdivided into different parts to be shared by the beneficiaries and in order to avoid the logistical hussles of rent collection; the foreseeable difficulties in the actual sharing of rental proceeds taking into account the number of the beneficiaries and the attendant conflicts in the family in the event that the administrators or their representatives fail to in future properly account for the rental income, it is my finding that the most equitable and fair mode of distribution for this property is that the same be sold and the sale proceeds be shared on terms this court shall order.

24. Consequently, i order that the surviving administrators should move with speed and cause the property to be valued by a qualified registered land valuer not later than 60 days from the date of this judgment. Thereafter, this property will be sold at the market rates prevailing at the time of sale. The proceeds of sale shall then be distributed as follows:

(i) As the administrators and the beneficiaries were all in agreement that the Estate was indebted to the objector and that 23 acres of LR. NO. 7439 / Sigowo was sufficient to pay off his debt, the cash equivalent of the value of the 23 acres will be paid to the objector to liquidate the debt owed to him by the Estate.

(ii) The balance of the sale proceeds will thereafter be shared by all the beneficiaries in equal shares.

25. I believe I have now completed the task of distributing the assets of the deceased's Estate. A certificate of confirmation of the grant of letters of administration issued by this court on 24th December 1997 shall issue in terms of this judgment.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 22nd day of December 2015

In the presence of:

Mrs. Khayo hoiding brief for Mr. Rioba Omboto for the 3rd Respondent

No appearance for the 1st and 2nd Respondent though duly notified.

Mr. Lobolio Court Clerk.



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