REPUBLIC OF KENYA

IN THE HIGH COURT

AT KITALE

SUCCESSION CAUSE.102 OF 2004

(IN THE MATTER OF THE ESTATE OF BENJAMIN KIPYEGO KIPSABIT –(DECEASED)

A N D

LEAH CHEPKEMEI KIPYEGO ==========APPLICANT

V E R S U S

MARY CHESENGE KIPYEOG ==========RESPONDENT

J U D G M E N T

The deceased, **BENJAMINKIPYEGO KIPSABIT**, was survived by two widows, namely **LEAH CHEPKEMEI KIPYEGO** and **MARY CHESENGE KIPYEGO.**

It is common ground that the estate of the deceased is comprised of a parcel of ***Land L.R. NO.WEST POKOT/SIYOI/2650***, which measures 28.6 Acres.

The sole issue for determination is the mode of distribution of the estate. On the one hand, the petitioner asks the court to have the land divided into two equal shares, so that each of the houses gets an equal size of land. On the other hand, the objector asks that the land should be divided in such a manner as to give to each of the beneficiaries, an equal share.

The petitioner has two girls and three boys, whilst the objector has two girls and six boys.

The objector's reason for asking that the land be divided equally between the beneficiaries is that it would equitable, as opposed to a situation where the property was divided between the two houses.

Obviously, if the property was split into two equal parts, the children of the objector would each end up getting much smaller shares compared to the shares that the children of the petitioner would get.

During her cross-examination, the objector confirmed that she had earlier sworn an affidavit on 11/11/2005, in which she had asked that the girls be excluded from the distribution. However, the objector insisted that she now wished to have every child getting a share of the estate.

In support of her case, the objector said that the deceased was a Sengwer, which is one of the sub-tribes of the Kalenjin. According to her, in Kalenjin customs, shambas were not divided amongst the widows.

On the other hand, the petitioner insisted, in her evidence, that amongst all Kalenjin communities, properties of deceased persons were always divided equally between their widows.

Regrettably, however, neither of the parties led any further evidence to support their respective assertions as to what the Kalenjin Customary Law was.

Secondly, whilst the objector testified that she and her children were living on 18 acres, whilst the petitioner was living on 10 acres; the petitioner insisted that she was living on 14.5 acres. In other words, the parties were unable to agree on even that simple issue as to the exact size of land which each of them is in occupation of.

Thirdly, the petitioner testified that during the lifetime of their late husband, he had already subdivided the land into two equal portions, to each of the two widows. Although the objector did not concede that contention, she submitted that even if that had been the position, this court ought not to perfect the alleged gift, because it was not finalized during the lifetime of the deceased.

In the case of ***ARUSEI, IN RE [2003] KLR 76,*** the Hon. Nambuye J. held inter alia, that an incomplete gift cannot be perfected. In arriving at that conclusion, the learned judge did make a finding to the effect that it had not been established that there existed a wish by the deceased to share out the property according to the physical occupation of his wives. The learned judge also held that there having been no move on the part of the deceased, to finalise the gift during his lifetime, that wish, if ever it was made, amounted to an incomplete gift.

I am wholly in agreement with those views expressed by my learned sister, and only wish to add that they apply to the facts of this case too. In other words, whether the parties are currently occupying equal or unequal portions of the property, the gift of such portion as the deceased intended to give to them, was incomplete. Therefore, such gift, if any, cannot be perfected.

The Law of Succession Act came into operation on 1/7/1981. Therefore, as the deceased herein died on 17/1/1999, that Act is applicable to the administration of his estate.

By virtue of section 40 of the Law of Succession Act, the deceased who was polygamous, would have his estate divided, in the first instance;

"among the houses according to the number of children in each house, but also adding any wife surviving him as an additional until to the number of children."

As the objector has 8 children whilst the petitioner has 5 children, that adds up to 13 units. And as both widows are alive, the total number of units will increase to 15.

Applying the provisions of section 40 to the facts herein, that would give to the objector 9 units, and to the petitioner 6 units.

By my calculations, the petitioner should get a total of 11.44 acres, whilst the objector should get a total of 17.16 acres. Those two portions will, together, add up to 28.6 acres.

I direct that each of the parties shall retain their respective houses within their portions.

If the parties are unable to sub-divide the land in the manner set out above, the District Surveyor, West Pokot is directed to conduct the exercise. In the event that the District Surveyor has to undertake the exercise, the costs thereof, and also the costs necessary for the procurement of the two resultant titles, shall be borne equally by the parties herein.

Finally, each party shall bear her own costs of these proceedings. I believe that there is the only reasonable manner of dispensing the justice of this case.

Dated and Delivered at Kitale this 1st day of November, 2007.

FRED A. OCHIENG

JUDGE