



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 261 OF 2009

IN THE MATTER OF THE ESTATE OF JOEL CHEYWE KIGIRI (DECEASED)

IN THE MATTER OF AN OBJECTION TO THE MAKING OF GRANT

BETWEEN

LINET KHAKORY CHEYWE.....OBJECTOR

AND

LINAH MULAKA CHEYWE.....PETITIONER

JUDGMENT

[1] The deceased herein, **Joel Cheywe Kigiri**, died intestate on **25 August 2000** while domiciled in Kenya. He owned a farm at Kesses, being land parcel **No. Tulwet/Kesses Block 4 (Lelmokwo)58**, measuring 4.046 Ha. Accordingly, his widow, **Linah Mulaka Cheywe**, petitioned the Court on **20 September 2009** for Grant of Letters of Administration Intestate. The matter was duly processed and published vide Gazette Notice No. 261 of 2009, dated **13 November 2009**.

[2] Thereupon, the objector, **Linet Khakory Cheywe**, filed a Notice of Objection to the Making of Grant dated **30 November 2009**, contending that she is likewise a widow of the deceased with equal rights as the petitioner, not only to petition for grant, but also as a dependant and beneficiary along with her three children. The objector accordingly filed an Answer to the Petition along with her Petition by way of Cross Petition for Grant dated **10 December 2009**. Directions were subsequently given on **28 March 2011** that the Objection be canvassed by way of *viva voce* evidence and that the objector be deemed the plaintiff and the petitioner the defendant.

[3] The objector and her witness, **Musa Ogada Langat**, testified herein on **23 September 2013** and **11 November 2013**, respectively. The objector told the court that she got to know the deceased in **1990**; and that they started cohabiting as husband and wife in **1992**. She testified that the deceased visited her parents and asked for her hand in marriage as a second wife; and that with her parents' approval they cohabited as husband and wife at Huruma Estate in Eldoret Town and at the deceased's farm at Kesses; and that in the course of time, they had three children together, namely: **Juliet Agneta Melody, Medatrix Makhungu Grace** and **Newton Charles Magaya Cheywe**. She produced Birth Certificates for the 3 children as exhibits herein.

[4] The objector acknowledged that the deceased was already married to the petitioner; and that he had other children with her. Her prayer therefore was that she be appointed as a co-administrator with the petitioner; and that the estate be distributed equally amongst all the beneficiaries of the deceased; including her and her children. She added that, upon the demise of the deceased, she was accepted and treated as a widow by all, including the petitioner; and that it was in that capacity that she received a share of the deceased's N.S.S.F. benefits alongside the petitioner. To buttress her evidence, she produced a copy of the claim form as an exhibit along with family photographs taken during the deceased's lifetime as well as after his demise. She also produced a Burial Permit to prove that the body of the deceased was released to them jointly with the petitioner, to demonstrate that she was acknowledged as a widow upon the demise of the deceased.

[5] The objector called her brother in law, **Musa Ogada Langat (PW1)** herein) as a witness. **PW1** confirmed that the deceased was his older brother; and that he died on **25 August 2000**. He further confirmed that the deceased was married to both the petitioner and the objector; and that when the body of the deceased was removed from **Moi Teaching & Referral Hospital** for purposes of burial, it was first taken to the deceased's matrimonial home with the objector at Huruma in Eldoret for prayers before being transported to Kesses for interment. **PW1** explained that this was done in acknowledgement of the fact that the objector is a recognized widow of the deceased. He concluded his evidence by stating that it was wrong for the petitioner to exclude the objector and her children in this Petition, as they are rightful beneficiaries of the deceased's estate.

[6] As no evidence was adduced by the petitioner in rebuttal, directions were given on **10 December 2018** for the filing of closing

submissions by learned counsel. In the objector's written submissions filed on **13 March 2019**, **Mr. Keter** underscored the fact that, with the consent of the objector's parents, she cohabited with the deceased as husband and wife and that their union was blessed with three children between **1992** and **2000** when the deceased passed away; and that the objector would, from time to time, visit the deceased's farm at Kesses. He urged the Court to find that, by conduct and their long cohabitation, there arises a presumption of marriage between the deceased and the objector; and that the marriage was acknowledged by the deceased's family. **Mr. Keter** further submitted that, under the provisions of **Section 40** of the **Law of Succession Act**, the only asset left behind by the deceased, namely, land parcel **No. Tulwet/Kesses Block 4(Lelmokwo)/58** measuring 10 acres or thereabout, ought to be shared equally amongst the children of deceased and the two widows in the ratio of 6:4 as between the two houses.

[7] For his part, **Mr. Were** took the stance that the petitioner is the only widow and therefore entitled to be issued with Grant of Letters of Administration Intestate in respect of the deceased's estate for and on behalf of herself and her children. He accordingly urged the Court to dismiss the objection and the Cross-Petition with costs.

[8] I have given careful consideration to the evidence adduced herein in the light of the written submissions filed by learned counsel. There is no dispute that the deceased died intestate on **28 August 2000**. A copy of the Certificate of Death in proof thereof was filed along with the Petition. Another copy of the Certificate of Death was produced by **PW1** along with a Burial Permit No. 832128. There is similarly no dispute that the deceased was married to the petitioner; and that they were blessed with the following children:

[a] **Joylet Chebet Cheywe**-Daughter

[b] **Brenda Chepkoech Cheywe**-Daughter

[c] **Maureen Chepkemboi Cheywe**-Daughter

[d] **Boaz Kipkemei Cheywe**-Son

[e] **Deric Kirwa Cheywe**-Son

[f] **Mercy Cherotich Cheywe**-Daughter

[9] Accordingly, it was perfectly in order for the petitioner to seek to be issued with grant, for **Section 66** of the **Law of Succession Act** is explicit that:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors”

[10] The objector's complaint, however, is that, while she ranks in *pari passu* with the petitioner, the petitioner totally excluded her and her three children from these proceedings in a bid to disinherit them. Her stake is premised on her contention that she is a widow of the deceased; an allegation that was vehemently denied by the petitioner. In the premises the key issue for determination is whether the objector was indeed married to the deceased in his lifetime as his second wife. In this regard, the objector adduced uncontroverted evidence to show that the deceased was a Nandi by tribe; that he was married to the petitioner under Nandi customary laws of marriage; and therefore that the marriage was potentially polygamous. In the premises, it is my finding that the deceased had the capacity to contract a second marriage as alleged by the objector.

[11] The objector conceded that no particular rites or marriage ceremonies were performed to signify her marriage to the deceased. In effect, her evidence shows that, after the deceased obtained the consent of her parents to marry her as a second wife, they commenced cohabitation and lived together as husband and wife from May 1992 to the year 2000 when the deceased passed away. Accordingly, the question to pose is whether, in the circumstances, a presumption of marriage can be drawn.

[12] In ***Hortensiah Wanjiku Yawe vs. Public Trustee***, CA Civil Appeal No.13 of 1976 (UR), the Court of Appeal for East Africa took the view that a long period of cohabitation as man and wife may give rise to a presumption of marriage in favour of the party asserting it. Thus, **Mustafa JA.**, held thus:

“In my view, all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case, should not apply just because she was married according to Kikuyu customary law. It is a concept that is beneficial to the institution of marriage to the status of the parties involved and to the issue of their union, and in my view, is applicable to all marriages, however celebrated. The evidence concerning cohabitation was adduced at the hearing and formed part of the issue

concerning the fact of marriage ...”

[13] Similarly, in **Phylis Njoki Karanja & 2 others vs. Rosemary Mueni Karanja & Another** [2009] eKLR, the Court of Appeal recognized that a presumption of marriage can be drawn from long cohabitation and acts of general repute. Here is what the Court had to say:

“Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.”

[14] In the instant matter, the objector testified that during the 8 or so years that they cohabited with the deceased as husband and wife, they were blessed with 3 issues whose Certificates of Birth were produced herein and marked **Exhibits 8(a), (b) and (c)**. The Certificates give the respective dates of birth of the three children as **20 November 1994** for the twins and **17 May 1996** for **Newton Charles Morogo**. The Certificates bear the name of the deceased as the father of the children. In addition, the objector adduced evidence to show that their relationship was recognized by the deceased’s family as demonstrated by her brother in law, **PW1** whose evidence in that regard is on record. He also produced a letter, written by him on **16 December 2000**, urging the objector to make arrangements for the memorial of the deceased’s death. That letter was marked as the **Plaintiff’s Exhibit 4** herein.

[15] Further to the foregoing, the objector produced as her **Exhibit 1** a copy of the Burial Permit No. 832128 dated **25 August 2000**. It shows that the said permit was issued jointly to the petitioner and the objector. Thus, although quite a number of the documents that the objector proposed to rely on, such as the Burial Programme, Affidavit in Proof of Marriage, and family photographs taken before the deceased’s death and during his burial were objected to and merely marked for identification, there is sufficient evidence from which a presumption of marriage can be made. It must have been in recognition of this that the objector was paid the N.S.S.F. benefits per the document marked the Plaintiff’s **Exhibit 9**.

[16] Indeed, in **Kimani vs. Kimani** [2006] 2 KLR 292 the Court of Appeal took the view that, once a case for the applicability of the presumption of marriage has been made, the burden of proof shifts to the party disputing the marriage, in this case the petitioner, to rebut that presumption. The Court held thus:

...They included the long period of cohabitation in Kabati town and Gitura farm for 18 years; the undisputed fact that the deceased maintained and educated the appellant’s two children from a young age of one year and less up to completion of secondary school, and that they adopted the name of the deceased as their father throughout; the undisputed evidence relating to the appellant’s identity card which identified her as the wife of the deceased, and family photographs taken with the deceased; visits to the appellant’s parents’ home and the gifts given out, even if, as found by the judge, they did not amount to dowry or customary marriage negotiations; the evidence that the first wife, Wanjiru (deceased) and Joyce, 1st respondent, visited Beth when she was admitted at Thika maternity hospital; and the reluctance by the children of the 1st wife Wanjiru (deceased) to testify against the appellant as tacit acknowledgment that she was their father’s third wife. We think, with respect, that those were all weighty matters of fact which would have made all the difference if they were considered. The evidential burden of proof is not on the appellant, but on the respondents to show that the appellant was not the deceased’s wife or put another way, to rebut the presumption of marriage.

[17] As pointed out hereinabove, the petitioner opted to adduce no rebuttal evidence. I am therefore satisfied that the objector has proved, to the requisite standard that she is a widow of the deceased and therefore qualifies as a dependant along with her three children. **Section 29** of the **Law of Succession Act** is explicit that:

“For the purposes of this Part, “dependant” means—

- (a)The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**
- (b)Such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**
- (c)Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

[18] In the result therefore, I find merit in the objector’s Cross-Petition. The same is hereby allowed. The orders that commend themselves to me, which I hereby grant, are as follows, taking into account the age of this matter:

[a] That Grant of Letters of Administration Intestate in respect of the estate of **Joel Cheywe Kigiri** be issued forthwith, along with a Certificate of Confirmation of Grant, in the joint names of the petitioner, **Linah Mulaka Cheywe**, and the objector, **Linet Khakory Cheywe**.

[b] That the objector and her three children be included in the list of beneficiaries alongside the petitioner and her children and that the estate be distributed in accordance with **Section 40** of the **Law of Succession Act**;

[c] That costs be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF JUNE, 2021

OLGA SEWE

JUDGE