REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 277 OF 2001

IN THE MATTER OF THE ESTATE OF SALINA CHEBOLEM (DECEASED)

IN THE MATTER OF AN OBJECTION TO THE MAKING OF A GRANT

EVALINE CHEMELI TUWEI.....PETITIONER

-VERSUS-

FLORENTINA JEPKUTWO KOGO.....OBJECTOR

JUDGMENT

[1] This petition was filed herein on **24 September 2001** by **Evaline Chemeli Tuwei,** the petitioner, seeking that a Grant of Letters of Administration Intestate in respect of the estate of the deceased, **Salina Chebolem,** be made to her. She filed the petition in her capacity as the daughter of the deceased, who died intestate on **24 July 1999**. The petitioner disclosed, in the Affidavit in Support of Petition, that the deceased left behind one piece of property, known as **Eldoret Municipality/Block 21(King'ong'o)170.**

[2] A perusal of the court record reveals that the Petition was duly processed and a Grant of Letters of Administration Intestate issued on **8 August 2002** to the petitioner. The petitioner thereafter, on **15 September 2005,** applied for Confirmation of Grant; but before that application could be heard and determined, the objector moved the Court for extension of time within which she could file her Notice of Objection. The summons in that regard, dated **4 October 2005**, was heard and determined on **14 December 2005** by **Hon. Dulu, J**. The learned judge held that:

> **"This court has discretion in terms of section 68(1) of the Law of Succession Act to extend the time for filing objections. Counsel for the intended objector has argued that the intended objector is a beneficiary/dependant and that she was ignorant of the fact that the petitioner had applied for letters of administration. Counsel for the petitioner has argued that the intended objector has not shown that she is a dependant and secondly, that she has taken long to apply for leave to file objections outside the 30 days' notice period…However, the applicant has claimed ignorance of the probate and administration proceedings herein. I observe that she was not included in the list of survivors, so she could as well be ignorant. Secondly, the issue as to whether she is a dependant can only be determined on evidence. That can only be done if she is allowed to file objection proceedings.**
>
> **Considering the circumstances of this case, I am of the view that this is a situation that warrants my granting the extension of time within which to file objection. I will therefore allow the application and grant prayer (1) of the application…"**

[3] The court record further confirms that the objector proceeded to file a Notice of Objection on **22 December 2005** through the law firm of **M/s Ngala & Co. Advocates**. She thereafter filed an Answer to the Petition and a Petition by way of Cross-Application for a Grant; and in her Affidavit in Support of the Petition by way of Cross-Application for Grant, the objector averred that the deceased was her co-wife and therefore that she has a right to inherit a portion of the suit property, which the deceased, **Salina Chebolem**, inherited from their husband, **Tuwei Arap Barno**. She further averred that the petitioner intentionally excluded her and her son, **Kiplagat Tuwei**, from this Petition with the sole intention of depriving them of what is their right. She accordingly sought to be appointed as an administrator of the estate of **Salina Chebolem** and averred that she will render a just and true account of the estate whenever required to do so.

[4] Vide the application dated **28 February 2007,** the matter was fixed for directions, pursuant to **Rules 17(6), 72 and 73** of the **Probate and Administration Rules**; whereupon it was directed that the objection proceedings be taken by way of *viva voce* evidence. The objector testified on **7 April 2008** and reiterated her stance that the deceased, **Salina Chebolem**, was her co-wife, as they were both the wives of **Tuwei Arap Barno** (now deceased). She further testified that she had one son with the deceased, namely **Cleophas Kiplagat**; but that **Salina Chebolem** had no children.

[5] The objector further testified that **Tuwei Arap Barno** was the owner of the suit property known as **Parcel No. Eldoret Municipality/Block 21(King'ong'o)170** measuring 14 acres; and that after **Tuwei** died, the land was registered in the name of **Salina Chebolem**. She explained that she had differed with **Tuwei** as a result of which they separated; and that it was thereafter that **Tuwei** got married to **Salina Chebolem**. She also explained that although she left the matrimonial home with her son named **Cleophas**, **Cleophas** returned to his father's home after some time, and has since been residing on part of the suit property.

[6] With regard to the petitioner, the objector explained that, because **Salina Chebolem** had no children of her own, she got married to the petitioner in a woman-to-woman marriage arrangement to the end that the petitioner would take care of **Salina** and perpetuate her lineage. The objector accordingly denied that the petitioner is a biological daughter of **Salina** as alleged in the Petition. She further refuted the assertion by the petitioner that she is the only one entitled to the suit property. The objector made reference to certain proceedings that were conducted before the elders as well as an application to the Land Control Board, Uasin Gishu, in which it was resolved that the subject property be divided into three portions as follows:

> **[a]** 7 acres for **Salina Chebolem;**
>
> **[b]** 7 acres for the objector, out of which the objector donated 2.5 acres to one **Malakwen Rono**, the brother of the deceased **Tuwei Arap Barno**; who **Tuwei** recognized as his dependant.

[7] The objector produced the Minutes of the meetings as exhibits herein, to demonstrate that the subdivision was approved at the instance of **Salina Chebolem** herself; and therefore that **Salina** acknowledged her as a co-wife as well as her right to half share of the estate of their deceased husband, **Tuwei Arap Barno**. She added that the subdivisions were not implemented simply because **Salina** died before the titles were issued. Thus, the objector concluded her testimony by praying that she be awarded her rightful share of the suit property as well as **Salina's** 7 acres because the petitioner has no right to inherit the same. She denied the suggestion by the petitioner that after her separation from **Tuwei Arap Barno** she got married to one **Richard Kogo.**

[8] The objector called her son, **Cleophas Kiplagat Rono** as **PW2**. He told the Court that he lives at **King'ong'o** on the suit property **No. 170**; and that he has lived on the said property from **1993. PW2** confirmed that the petitioner, **Evaline Tuwei**, was married to the deceased, **Salina Chebolem,** in a woman-to-woman marriage arrangement; and that **Salina Chebolem** was his step-mother. He testified that **Salina** and his mother had a dispute over the deceased's estate, after the death of his deceased father, **Tuwei Arap Barno**, which they resolved before elders and had the suit property subdivided into three portions. **PW2** mentioned that both the petitioner and the objector were present when the dispute was presented before the elders by **Salina Chebolem**; and that it was understood that he would benefit from his mother's portion of the suit land; while the petitioner would ultimately receive only the portion that was due to **Salina**. In conclusion, **PW2** told the Court that it was on that basis that he has continued to occupy and cultivate his mother's portion of the suit property without any hindrance.

[9] Elizabeth Leting (PW3) told the Court that the deceased, **Tuwei Arap Barno**, was her brother, as was **Malakwen Arap Rono**, who is also deceased. She is therefore the sister-in-law of the objector. **PW3** confirmed that her brother was also married under customary law to another wife, namely, **Salina Chebolem,** the deceased herein. **PW3** acknowledged **PW2** as the son of her late brother **Tuwei Arap Barno** and added that **Salina** had no child of her own. According to her, the King'ong'o land was jointly owned by his two brothers **Tuwei** and **Malakwen**; and that it was for this reason that the said property, measuring 14 acres, was subdivided amongst **Salina** (7 acres), the objector (4.5 acres) and **Malakwen** (2.5 acres).

[10] It was further the evidence of **PW3** that it was within her knowledge that a difference arose between **Tuwei** and the objector which caused **Tuwei** to chase her away, without divorcing her. She also mentioned that, under Nandi Customary Law, there existed the practice of woman-to-woman marriages in situations where a woman was barren and had no children of her own. She explained that a woman who is married under such an arrangement would be treated as a daughter to the "husband". She however stated she did not know the petitioner, **Evaline Tuwei.**

[11] The objector's 4th witness was **Willy Kiprop Too (PW4).** His testimony was that he got to know **Salina Chebolem** in **1984** when they attended a Land Disputes Tribunal meeting. He stated that, after the meeting, **Salina** gave him instructions, jointly with one **Onyango,** to undertake a survey of her land **Parcel No. Eldoret Municipality/Block 21(King'ong'o)/170** and have it subdivided into three portions. **PW4** further stated that he proceeded accordingly and surveyed and subdivided the land and thereafter prepared a mutation form for implementation. He produced the Letter of Consent for the sub-division as **the Plaintiff's Exhibit 1**, and the mutation form as the **Plaintiff's Exhibit 5**. He further stated that **Salina** duly signed the mutation form indicating her approval for the proposed subdivision. He explained that, since **Salina** had not fully paid his survey fees, the matter was left pending for a while; and that about 3 or 4 years later, he got to learn of the demise of **Salina.**

[12] On her part, the petitioner testified on **25 June 2018** as **DW1.** She adopted her witness statement dated **3 February 2011** as part of her evidence in this matter. She stated that she knew **Salina Chebolem**; and that **Salina** married her in **1986** because she needed somebody to inherit her property. She added that **Salina** was then an old and childless widow. She further stated that she found **Salina** living on the suit property with her brother-in-law, **Malakwen Arap Rono**; and that the suit property, which was initially 42 acres in measurement, was subdivided in 1993; whereupon **Salina** obtained a title deed for her share of 14 acres.

[13] The petitioner further stated that it was not until mid-1993 that the objector went to the property claiming a portion of **Salina's** property on the basis that she was **Salina's** co-wife. According to her, **Salina** had no co-wife and therefore she resisted the objector's assertions. She added that the matter was taken to the area chief for adjudication; and that it emerged during the proceedings that the objector was in fact the wife of one **Richard Kogo**; and that the said **Richard Kogo** confirmed at the elders' meeting that he had provided the objector with 10 acres of land at **Selia** for her use. On that account her claim was dismissed; which decision was upheld by the District Officer.

[14] The petitioner concluded her evidence by stating that, after **Salina** died in **July 1999**, she filed this Petition for Grant of Letters of Administration Intestate; and added that before the Grant could be confirmed, the objector filed her Notice of Objection. She conceded that **Cleophas (PW2)** is presently occupying a portion of the suit land but added that she did not consent to it. She explained that **Salina** was

duped into signing some documents before the elders by which she acknowledged the objector as a co-wife and agreed to subdivide the land and give her 4.5 acres. She accordingly urged the Court to find that **Salina Chebolem** was the *bona fide* and beneficial owner of the suit property; and that she had no co-wife at all.

[15] Barnaba Mutai (DW2), one of the neighbours of the petitioner, testified on **17 June 2019** and adopted his witness statement dated **3 February 2011**. His evidence was that he personally knew the late **Salina Chebolem** and her husband, the late **Barno Tuwei**; and that he came to know them in **1965** as they were members of a land buying society known as **King'ong'o Block 21,** to which he belonged. He further testified that the late **Tuwei** together with **William Choge** jointly bought one share of land measuring 42 acres of the society's 3200 acres. He added that of the 42 acres, **William Choge's** portion was 28 acres, while **Barno Tuwei** remained with 14 acres.

[16] DW2 testified that **Barno Tuwei** was a personal friend; and that he had only one wife, namely, **Salina Chebolem,** until his demise in **1974**. He also confirmed that **Salina** did not have children of her own; and that was why she took in the petitioner under her charge in **1986** to oversee her affairs with the object of inheriting her estate. He also mentioned that, on **Salina's** property, there lived a man known as **Malakwen Rono**, who was a brother to the late **Tuwei Barno**. He however denied any knowledge of the objector, **Florentina Kogo** and added that she cannot claim to be the widow of **Tuwei Barno**. **DW2** pointed out that he got to know her for the first time in **1993** when she went to the property alleging that she was **Salina's** co-wife and therefore entitled to a share of the suit property.

[17] Philip Kipsang Barno (DW3), a retired chief, testified that while serving as the area chief, the objector reported a dispute between her and **Salina Chebolem**; and that he listened to the parties with the assistance of elders and made his decision in **February 1988.** He produced the decision he made as the **Defendant's Exhibit 9**. He also testified that, after the dispute was resolved, **Salina** willingly transferred her land to the petitioner *vide* an agreement dated **12 April 1999**; which was made in his presence. He produced it as the **Defendant's Exhibit 11,** along with a letter he wrote to the Court in connection with the ownership of the suit property (**Defendant's Exhibit 12).**

[18] The widow of the late **William Choge, Ruth Chelimo (DW4),** was the petitioner's 4th witness. She adopted her witness statement dated **1 March 2012**. She confirmed that her late husband bought land **Parcel No. King'ong'o Block 170,** measuring 42 acres, jointly with the late **Tuwei Barno**; and that the whole piece was registered in the name of **Salina Chebolem,** until a subdivision was done to give **William Choge** his portion of 28 acres. **DW4** added that the remaining 14 acres in **Salina's** name was entrusted to the petitioner, not only for purposes of oversight but also inheritance, in the event of the death of **Salina**, who had grown old and frail. **DW4** stated that she was surprised when, in **1993**, the objector visited the suit property claiming to be **Salina's** co-wife. She was categorical that for the period she knew **Salina,** she never saw the objector visit the **Tuwei** family; and that, to the best of her knowledge **Salina** never had a co-wife.

[19] The last witness for the petitioner was **Fiona Nelima Kakai**, the Assistant County Commissioner for Turbo Division. She testified on **8 March 2021** to confirm that one of her predecessors, **Mr. Ekidor**, the then District Officer for Turbo Division, chaired a meeting on **14 May 1998** to deliberate on whether one **Florentina** was married to **Mzee Tuwei.** She relied on the Minutes of the meeting to confirm that one of the witnesses was a man named **Kogo**; and that he claimed to have married **Florentina**. She was however unable to find the Minutes in their records and surmised that the records must have been taken to their regional office in Nakuru for archiving.

[20] In her written submissions filed herein on **24 March 2021, Ms. Cherono** for the objector reiterated her stance that the objector was the 1st wife to **Tuwei Arap Barno** (now deceased) and that together they were blessed with one son, **Cleophas Kiplagat**. She conceded that the said **Tuwei Arap Barno** also married a second wife, **Salina Chebolem** (the deceased herein); and that since **Salina** had no children of her own, she married the petitioner in a woman-to-woman marriage arrangement under Nandi customary law. Counsel accordingly urged the Court to find that the estate of **Salina** originally belonged to **Tuwei Arap Barno**; and therefore that the objector and her son **Cleophas** have a better right to the estate of **Salina Chebolem** than the petitioner. Accordingly, **Ms. Cherono** proposed the following issues for determination:

> **[a]** Whether the petitioner qualifies as a dependant of the deceased;
>
> **[b]** Whether the objector and her son are qualified as heirs to the suit

[21] It was the submission of **Ms. Cherono** that where a woman-to-woman marriage is alleged, as in this case, the same must be satisfactorily proved. She relied on **Eugine Cotran's The Law of Marriage and Divorce,** Vol. 1 at page 117 and the case of **Monica Jesang Katam vs. Jackson Chepkwony & Another** [2011] eKLR; among other authorities, to buttress her arguments. On whether the objector and her son are qualified as heirs to the deceased's estate, counsel made reference to **Section 29(a)** of the **Law of Succession Act,** wherein a dependant is defined to include the wife or former wives and children of the deceased, whether or not maintained by the deceased prior to her death. She also relied on **Loise Selenkia vs. Naneu Andrew & Another** [2017] eKLR and **Mary Rono vs. Jane Rono & Another** [2005] eKLR in support of her submissions.

[22] Thus, counsel urged the Court to treat the objector and her son as a separate unit of the family of **Tuwei** and to allocate her a share for purposes of **Sections 3(5) and 40** of the **Law of Succession Act**. In the alternative, she prayed that the suit property be divided as per the initial agreement dated **9 September 1993** (marked the **Plaintiff's Exhibit No. 4** herein); and that the 2.5 acres that were to be given to **Malakwen Rono** who has since died, be given to the objector. Counsel also prayed that the petitioner be condemned to pay the costs of the petition, for the reason that she willfully excluded her and her son from the list of dependants.

[23] Mr. Okara for the petitioner relied on his written submissions dated **1 April 2021**. He urged the Court to find that the petitioner was indeed married by **Salina Chebolem** (deceased) in a traditional rite that recognizes woman-to-woman marriages; and that credible evidence was adduced by the petitioner as well as by her witnesses, notably **DW2, DW3** and **DW4** to demonstrate that the petitioner started living with the deceased as a child with the object of later inheriting her property. According to **Mr. Okara**, the objector is a complete stranger to the deceased's estate.

[24] Lastly, it was the submission of **Mr. Okara** that the objector's claim ought to have been litigated before the Environment and Land Court, which is the court with jurisdiction to determine disputes touching on title to, use and occupation of land. He relied on **Muriuki Musa**

Hassan vs. Rose Kinyua Musa & 4 Others [2014] eKLR; **Alexander Mbaka vs. Royford Muriuki Rauni & 7 Others** [2016] eKLR and **Re Estate of Mbai Wainaina (Deceased)** [2015] eKLR, to underscore the submission that a probate court is not the correct forum for ascertaining whether or not one has a right to an estate of the deceased where such right has not yet crystallized.

[25] I have given careful consideration to the substantive petition as well as the petition for cross-application for Grant in the light of the averments in the Supporting Affidavits. I have also keenly considered the *viva voce* evidence adduced by the parties and their respective witnesses as well as the documents they relied on. It is common ground that the deceased herein, **Salina Chebolem**, died intestate on **24 July 1999**. It is also common ground that the deceased died childless; and that she was the registered owner of the suit property, known as land **Parcel No. Eldoret Municipality Block 21 (King'ong'o)/170**, measuring 5.50 Ha. A copy of the Title Deed for the property was produced herein by the objector and marked **the Plaintiff's Exhibit 2.**

[26] A perusal of the court record also confirms that, by the time the objector filed her application dated **14 October 2005** for extension of time within which to file an objection, the petitioner had already been issued with a Grant of Letters of Administration Intestate in respect of the estate of the deceased, **Salina Chebolem**. The grant was issued on **8 August 2002** to the petitioner, **Evaline Chemeli Tuwei**. Thereafter, an application for confirmation was filed herein by the petitioner on **15 September 2005**. It is manifest then that the objection, the Answer to Petition as well as the Petition by way of Cross-Application for Grant are, in that sense, superfluous. What the objector ought to have done was to either file an application for revocation of grant pursuant to **Section 76** of the **Law of Succession Act**, or an affidavit of protest for purposes of **Rule 40(6)** of the **Probate and Administration Rules**.

[27] I have nevertheless proceeded to consider the objection application with a view of determining the following issues:

> **[a]** Whether the petitioner qualifies as a dependant of the deceased; and therefore entitled to administer and inherit the deceased's estate;
>
> **[b]** Whether the objector and her son, **Cleophas Kiplagat**, are dependants of the deceased, **Salina Chebolem**; and whether they are entitled to a share of her estate.

[28] For purposes of determining who is qualified as an administrator of the estate of an intestate, **Section 66** of the **Law of Succession Act** is pertinent. It provides as follows in terms of the order of preference:

> **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**

[29] As has been pointed out herein above, there is no dispute that the petitioner got married to the deceased under an arrangement known as woman-to-woman marriage, as practiced by the Nandi communities. Regarding this arrangement, **Eugine Cotran** in his book, **Restatement of African Law, Volume 1, The Law of Marriage and Divorce,** proffered the following opinion:

> **"A woman past the age of child-bearing and who has no sons, may enter into a form of marriage with another woman. This may be done during the lifetime of her husband, but is more usual after his death. Marriage consideration is paid, as in regular marriage, and a man from the woman's husband's clan has sexual intercourse with the girl in respect of whom marriage consideration has been paid. Any children born to the girl are regarded as the children of the woman who paid marriage consideration and her husband."**

[30] Thus, in **Monica Jesang Katam vs. Jackson Chepkwony & Another** (supra) **Hon. Ojwang, J**. (as he then was) acknowledged the validity of such arrangements and held that:

> **"I have concluded that the consistency in the testimonies of the petitioner's witnesses shows the evidence to be truthful. The research-material referred to shows this to have been the typical condition in which a woman-to-woman marriage takes place; and the testimonies show such a marriage to have taken place on 16th October, 2006. It is therefore, not true as the objectors say, that the petitioner was only a servant; on the contrary, she was a "wife", and, by the operative customary law, she and her sons belonged to the household of the deceased, and were entitled to inheritance rights, prior to anyone else. This custom, I hold, is to be read into the scheme of s. 29 of the Law of Succession Act (Cap 160), placing the petitioner and her children in the first line of inheritance; the petitioner herself being "wife of the deceased", and her children for being the children of the deceased. The conclusion to be drawn is that the petitioner is entitled to the grant of letters of representation."**

[31] Although counsel for the objector made submissions to the effect that the existence of the woman-to-woman marriage between the petitioner and the deceased was not proved; and that no proof of dowry payment was availed, credible and uncontroverted evidence was adduced herein by close neighbours to the deceased, such as **DW2, DW3** and **DW4,** to demonstrate that the deceased had no children of her own; and that it was on that account that she invited the petitioner to live with her for the sole purpose of perpetuating her lineage and

inheriting her property. The objector also conceded as much in her evidence and stated that:

> **"...This petition was filed by EVALINE CHEMELI TUWEI. SALINA married EVALINE TUWEI as she had no children of her own. It was a customary marriage – woman to woman marriage. I heard a ceremony was done..."**

[32] In the face of that admission, the petitioner cannot be faulted for not availing specific proof that dowry was paid by **Salina**. Then there are documents that were exhibited by the petitioner, notably the document marked **Defence Exhibit 15,** to demonstrate that the deceased had expressed the wish to transfer the suit property to the petitioner as a gift before her demise. More importantly, the petitioner has availed irrefutable proof that the suit property is not in the name of **Tuwei Arap Barno.** Indeed, the petition is not in respect of the estate of **Tuwei Arap Barno** for the objector to claim priority in terms of ranking for purposes of **Section 29(1)** and **Section 40** of the **Law of Succession Act**. Thus, while she might have been a co-wife to the deceased, that of itself does not bestow upon her the right to inherit the property already registered in the name of her deceased co-wife, **Salina Chebolem**. It is plain therefore that, as the deceased's "widow", the petitioner ranks in priority over the objector and is entitled not only to appointment as the administrator of the estate of the deceased, **Salina Chebolem**, but also to inherit the deceased's estate.

[33] That said, the next question to pose is whether the objector and her son are entitled to a share of the deceased's estate. Again, there is credible evidence on the record to the effect that, although the objector was the 1st wife of **Tuwei Arap Barno**, they parted ways quite early into their marriage. The objector conceded that the parting of ways occurred before **Tuwei Arap Barno** got married to **Salina Chebolem.** One of the objector's witnesses, **Elizabeth Leting (PW3),** who is also a sister to **Tuwei Arap Barno,** had the following to tell the Court in this connection:

> **"Tuwei was my brother. He married Florentina long ago. By the time Tuwei died he was not living with Florentina. He had chased her away."**

[34] Thus counsel for the objector relied on **Section 3(5)** of the **Law of Succession Act** to support her argument that as a former wife of **Tuwei Arap Barno,** the objector ought to be given a share of the suit property. That provision states thus:

> **Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.**

[35] It is noteworthy however that in this instance, there is no evidence that **Tuwei Arap Barno** contracted a subsequent monogamous marriage. Moreover, and has been pointed out herein above, the estate in issue is not that of **Tuwei Arap Barno**, but is the estate of **Salina Chebolem.** It is of little relevance therefore that the objector was the 1st wife of **Tuwei Arap Barno;** hence the above provision is inapplicable.

[36] Of significance too, is the assertion by the petitioner that the objector moved on after her separation from **Tuwei Arap Barno** and got married to one **Richard Kogo**. Although the objector denied these allegations, her own **Exhibit No. 7**, a copy of the Minutes of an elders meeting called to resolve the dispute between her and the deceased, **Salina Chebolem**, shows that the elders found as a fact that the objector was married to **Richard Kogo.** Thus the petitioner adduced credible evidence to prove that indeed the objector remarried after separating from **Tuwei Arap Barno**.

[37] The same finding was arrived at a meeting chaired by the District Officer, Turbo Division over the same dispute. The Minutes of the said meeting were produced herein by consent and marked **the Plaintiff's Exhibit 7.** The said Minutes indicate that **Richard Kogo** was present at the meeting and that he confirmed that the objector, **Florentina Chepkutwa Kogo,** was his wife. The area chief also testified herein as **DW3** and confirmed as much. He produced a letter dated **14 December 2005** (the **Plaintiff's Exhibit 12)** by which he confirmed that **Florentina** re-married and is the wife of **Richard Kogo**. It is no wonder then that she has adopted **Kogo** as her last name.

[38] In the circumstances, the objector's interest in the estate of **Tuwei Arap Barno** if any, was determined upon her remarriage pursuant to the proviso to **Section 35** of the **Law of Succession Act;** and therefore, though a former wife of **Tuwei Arap Barno**, the objector would not have been entitled to a share of the estate of **Tuwei Arap Barno.** It is plain therefore that the objector's claim to a share of the estate of **Salina Chebolem** is baseless and therefore untenable.

[39] As for her son, **Cleophas Kiplagat**, there has been a bit of controversy as to whether or not he was sired by **Tuwei Arap Barno**. In her evidence, the objector testified that she got married to **Tuwei** in **1957** and that they cohabited as husband and wife for four years, during which they were blessed with a son, **Cleophas Kiplagat**. It was her evidence that **Cleophas** was born in **1960**; and therefore that he is the son of **Tuwei**. She further told the Court that although she left with him when she was chased away by **Tuwei,** she later released him to go and stay on his father's property; and that **Cleophas** has been living on the suit property ever since.

[40] Cleophas Kiplagat also testified herein as **PW2.** His evidence was that he is the son of the late **Francis Tuwei Barno**; and that after the death of his father, he moved to the suit property and has been living on it since **1992**. Although in the minutes produced herein, such as the **Plaintiff's Exhibit 7** and **the Defence's Exhibit 9**, the elders were of the view that **PW2** is not the son of **Tuwei Arap Barno**, there is no evidence to dispute the fact that he was born during coverture. Hence, **PW2** is for all intents and purposes the son of **Tuwei Arap Barno**. However, as has been pointed herein above, this estate is not that of **Tuwei Arap Barno**; and the question that arises is whether **PW2** ought to be treated as a beneficiary of the deceased **Salina Chebolem.**

[41] The general position is that it is not appropriate for a probate court to delve into contested issues as to who has the right to inherit a deceased person's estate. I therefore agree fully with the expressions of **Hon. Musyoka, J.** in **Re Estate of Mbai Wainaina (Deceased)** (supra) that:

> **"...The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being competent to deal with such issues but rather the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court..."**

[42] Similarly, in **Alexander Mbaka vs. Royford Muriuki** (supra) it was held that:

> **"It is only where one has established a claim against the estate that has already crystalized that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystalized. The right must be shown to have crystalized before the family court can entertain it."**

[43] In this matter, the question as to whether **Cleophas** was entitled to a share of the suit property was handled during the lifetime of the deceased. Indeed, in the **Plaintiff's Exhibits 4**, it is evident that **Salina Chebolem,** out of her own volition agreed that the property be shared to accommodate **Cleophas**, through **Florentina**, as well as her brother in law, **Kiplagat Arap Rono.** In that arrangement, **Salina** would retain 7 acres; while **Kiplagat Arap Rono** and **Florentina** would receive 2.5 acres and 4.5 acres, respectively. The agreement dated **9 September 1993**, was made before the area assistant chief. It was witnessed by the petitioner, among others.

[44] In furtherance of that agreement**, Salina Chebolem** commissioned a surveyor, **Willy Kiprop Too (PW4),** to subdivide the suit property into three portions. It was the evidence of **PW4** that he proceeded to carry out the survey jointly with a colleague, subdivided the land and prepared mutation forms which he produced as **the Plaintiff's Exhibit 5. PW4** explained that the exercise was however not undertaken to completion because his fees had not been fully paid by the time **Salina Chebolem** passed away.

[45] Hence, although the petitioner attempted to discredit the agreement and the survey exercise, alleging that the deceased was duped into signing the agreement dated **9 September 1993**, it is plain that the deceased had acknowledged the right of **Cleophas** to receive 4.5 acres of the suit property, in his capacity as a son of **Tuwei Arap Barno**. It is on that basis that **Cleophas** has been residing on the suit property all this while. I therefore take the view that his right to a share of the deceased's estate is a right that has crystalized and can therefore be accommodated in these proceedings.

[46] In the result, except to the extent aforestated, I find no merit in the objection by **Florentina Chepkutwa Kogo** to the issuance of Grant of Letters of Administration Intestate in respect of the estate of **Salina Chebolem** (Deceased) to the petitioner, **Evaline Chelimo Tuwei**. Indeed, as has been pointed out herein above, a Grant of Letters of Administration Intestate has already been issued herein to the petitioner which is yet to be revoked. Hence, the orders that commend themselves to me, which I hereby make, are as hereunder:

[a] That the Objection and the Petition by way of Cross-Application for Grant filed herein by the objector, be and are hereby dismissed.

[b] That the Grant of Letters of Administration Intestate issued herein on **8 August 2002** to **Evaline Chemeli Tuwei** be and is hereby confirmed.

[c] That the estate of the deceased herein be distributed in accordance with the agreement dated **9 September 1993**, save that the portion measuring 4.5 acres intended for **Florentina Chepkutwa Kogo** be transmitted to her son **Cleophas Kiplagat.**

[d] That the costs of the application be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 9TH DAY OF AUGUST 2021

OLGA SEWE

JUDGE