



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 151 OF 2007

IN THE MATTER OF THE ESTATE OF KIPKEMEI ARAP KOGO – DECEASED

MARY CHESANG SAMOEI.....APPLICANT

VERSUS

CHESANG KOGO.....RESPONDENT

J U D G M E N T

1. The deceased herein died on 14th February 1992 intestate. The petitioner Chesang Kogo applied for the grant . The same was objected to by the Respondent Mary Chesang Samoei who claimed that she was the deceased d's 1st widow having married him sometimes in 1944 and had 2 children namely Rosa Chemutai and Samson Tirop Kipkemei.

2. This court then ordered that the matter do proceed by way of viva voce evidence. Both parties called their witnesses and their evidence can be summarised as follows:-

3. **PW1 Rosa Chemutai Ngososei** testified that she was the deceased daughter and her mother was his wife. That the petitioner was her step mother. She said she was born in 1947 and her parents married in the year 1944. Her mother, the objector was too ill to testify.

4. She produced the area list of Kimoson farm which showed that the deceased owned parcel no. 61 measuring 37 acres. According to her, her mother was to be given 2 acres out of the deceased parcel of land. She said that by the time the deceased died her mother had left and were not staying together. She said that the petitioner, her step mother, took care of her till she got married.

5. **PW2 Samson Tirop Kemei** was the brother to PW1 who testified that he was born in 1966. On cross-examination he said that he stayed with PW1 who brought him up.

6. **PW3 John Kipyego Kirwa** testified that he knew the deceased while at Mosoriot in 1951 and by then was married with 2 wives. He said that PW1 was deceased child but he did not know PW2. He however did not know also the deceased 2nd wife. He had no idea also of the deceased land at Kimoson. According to him the deceased married the objector' customarily.

7. **PW4 Elias Parklea** a court clerk from this court produced file No. 6/2008 – Land case at Chief Magistrate's court. The same contained the decree of the court granting the objector some parcel of land No. 95.

8. **DW1 Musa Kiptabut Mungony** testified that they purchased the suit land together with the deceased. He said that he knew the petitioner as the only wife of the deceased. On cross-examination he said that he knew the deceased from 1964. He did not get to know whether he had another wife while in Nandi.

8. **DW2 David Kipsang Bundotich** testified that the deceased was a member of the farm since 1972 and the petitioner was his wife. On cross-examination he said that he only got to know PW1 when she went for the farm area list In February 2017. She told him that she was the deceased daughter.

9. **DW3 Chesang Kogo**, the petitioner testified that she was married to the deceased and were blessed with 11 children 7 girls and 4 boys. She said that she did not get to meet the Respondent. She said that she contributed to purchase of the land using proceeds of her girls dowry.

10. She denied that she lived with PW1 and PW2. She said that the deceased renounced the two . She said that PW1 is married and is in her home. According to her the land was registered in the name of her husband although she contributed to its purchase As the custom was that it was the man's name to appear on the records.

Analysis and Determination

11. The court has perused the submissions by the parties herein. The only issue to be determined is whether the objector Mary Chesang Samoei was the deceased wife or not. If the answer is on the affirmative then she shall qualify to inherit from the estate pursuant to the provisions of Section 29 of the Succession Act.
12. The objector apparently did not testify for the reasons of ill healthy. PW1 and PW2 are her children. PW3 claimed to have stayed together with the objector and the deceased at Mososriot before migrating to where he died and was buried. This appeared to be in the 1960's or thereabouts.
13. Clearly, there was no evidence produced by the objectors to show that there was any form of customary marriage or otherwise between the deceased and the objector. Neither was produced any evidence of dowry paid by the deceased to the parents of the objector as the situation is in the ordinary African customs.
14. In the absence of the same the court will therefore strive to determine whether by any implication it can be deduced that indeed there was such union. PW1 of course by the time there was any alleged marriage had not been born. PW2 born in 1966 did not offer any useful information.
15. PW1 herein stated that she was brought up by the petitioner herein. Infact she testified that she was brought up together with PW2, her brother. PW4 the objector denied the same. She said that PW1 attempted to come but the deceased denied that she was her child.
16. There was no evidence on the other hand that the objector stayed with the deceased. PW1 and PW2 as well as PW3 stated that the deceased and the objector had separated but not divorced. There was no evidence that the deceased ever stayed with the objector as husband and wife leave alone having the two children with the deceased.
17. Consequently, in the absence of any customary marriage ceremony, the appropriate recourse was to find whether by conduct (repute and cohabitation) it was possible for one to determine that the deceased lived with the objector as husband and wife.
18. Nothing was demonstrated at all. There was no evidence that the deceased lived or even build a home for the objector. As at the date of this petition, there was no demonstration that the objector lived in the deceased parcel of land.
19. Neither was any evidence shown to suggest that PW1 and PW2 were deceased children. Infact PW2 stated that he was taken care of by PW1 something which PW1 contradicted. There were no eye witnesses to testify that indeed the petitioner took care of PW1 and PW2 or that the deceased provided for them in any way.
20. In the absence of any concrete evidence it would not therefore be farfetched to conclude that the objector was never a widow /wife of the deceased. Neither can one conclude that PW1 and Pw2 were his children. Nothing was exhibited to this court.
21. Looking at the decree pursuant to the land case No. 54/2007, even if one was to go by it, the tribunal did not as a matter of fact have any requisite jurisdiction to determine the question of whether the objector was the deceased wife. That was the preserve of this court. At any rate by the time the decision was pronounced, the deceased had died and there were no succession proceedings in respect to his estate. The court obviously cannot close its eye on these legal principles.
22. Even if one was to agree with the tribunal, the land in question was not parcel No. 61 as per the area list supplied to this court. Needless to say, the tribunal had exceeded their mandate and jurisdiction.
23. In the premises I think, I have stated enough to show that based on the evidence tendered, there is no sufficient proof that the objector was the deceased wife. If she was and separated, nothing was shown to that effect. The deceased did not settle her anywhere. Actually, nobody came forward to demonstrate any iota of marriage or payment of pride (dowry) or such.
24. With the above finding, it is this court's conclusion that the two witnesses PW1 and PW2 are not deceased children. Nothing was shown to exhibit any support they received from the deceased or at all.
25. The objection proceedings dated 22nd June 2015 is hereby dismissed with no order as to costs.

Delivered, signed and dated at Kitale this 22nd day of January, 2019.

H.K. CHEMITEI

JUDGE

22/1/2019

In the presence of:

Munialo for Objector

No appearance for the Petitioner

Court Assistant – Kirong

Judgment read in open court.