



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO.182 OF 2003

IN THE MATTER OF THE ESTATE OF THE LATE KIPTUM ARAP NANIWET

KIMALIT ARAP.....1ST PETITIONER

MARY CHEMUTAI TUM.....2ND PETITIONER

VERSUS

RHODA CHEPKORIR NANIWET.....OBJECTOR

JUDGMENT

The subject matter of this Judgment is the Summons for Revocation and Annulment of the Grant of Letters of Administration dated 8th April 2005 taken out by **Rhoda Chepkorir Naniwet**, hereinafter referred to as the Objector. The objector relied on two main grounds namely:

First, that the grant was obtained fraudulently by the concealment of material facts from the court.

Secondly, that the grant was obtained by an untrue allegation of fact. **Kimalit Arap Tum** and **Mary Chemutai Tum**, hereinafter referred to as the 1st and 2nd Petitioners opposed the summons. When the summons came up for hearing, this court gave directions to have the same disposed of by oral evidence.

The Objector testified with the support of two independent witnesses. It is the evidence of the Objector (P.W.1) that she got married to the deceased in 1967 as the deceased's second wife under the Kipsigis Customary Law and rites. P.W.1 stated that she cohabited with the deceased until 1976 when she was chased away by the 1st Petitioner. She averred that she never went back to the deceased's homestead. She said she did not attend the deceased's funeral because she was not informed. P.W.1 summoned **Joseph Kipkirui Arap Mutai** (P.W.2) to testify in support of her case. P.W.2 claimed he was the deceased neighbour and he knew the deceased had two wives, the Objector being the second wife. P.W.2 alleged that the Objector got married to the deceased in 1966 despite the fact that she did not witness the wedding ceremony. He however, confirmed that the Objector cohabited with the deceased until 1987 when her house was demolished and chased away. P.W.2 further claimed he was the best man in the wedding ceremony between the Objector and another woman by the name Mary Chepkemoi, now deceased. The Objector also summoned **Joseph Kirui** (P.W.3) to testify in support of the summons. P.W.3 said, he was the Objector's and the deceased's grandson. P.W.3 also claimed the Objector was married to the deceased and that she was chased away in 1987. The sum total of the Objector's evidence is to the effect that she is the widow and that she is entitled to half the deceased's estate I.e half of L.R.no.Kericho/Sosiot/46.

Both the Petitioners and a third witness testified in support of the Petition and against the Objector's case. **Mary Tum** (D.W.1) denied knowledge of the Objector's marriage to the deceased. D.W.1 stated

that the Objector came with her four daughters and cohabited with the deceased from 1967 until 1977, when she left. She claimed that the Objector was initially married to another man called Arap Mitei. **James Arap Keino** (D.W.2) merely stated his name and denied knowledge of the Objector and the deceased when he testified. **Kimalit Arap Tum** (D.W.3), the deceased's son, the 2nd Petitioner herein claimed the Objector came to the deceased's home as a tea plucker in 1967. D.W.3 claimed she was given a place to reside with her children. He was categorical that the deceased never married the Objector. D.W.3 further stated that he is aware that the Objector was married to Arap Mitei of Masarian. Both D.W.1 and D.W.3 agree that the deceased did not maintain the Objector's four daughters during her stay. D.W.3 claimed that the Objector stayed in his mother's house for only a month and left after the circumcision of her daughters. D.W.3 denied chasing away the Objector. This witness i.e D.W.3 became ill immediately when his cross-examination started hence was stood down. Unfortunately, D.W.3 passed away before concluding his evidence in cross examination.

At the close of the evidence, learned counsels appearing in this dispute were invited to file written submissions which they did. I have considered the evidence and the rival submissions. From the pleadings, the evidence and the submissions, the following issues have arisen for my determination.

- i. **Whether or not the Objector was married to the deceased.**
- ii. **Whether or not the Objector is entitled to benefit from the deceased's estate and in what capacity?**
- iii. **Whether or not the grant should be revoked?**

On the first issue as to whether or not the Objector was married to the deceased, I think both the oral and affidavit evidence will provide the answer. In both her affidavit and oral evidence, Rhoda Chepkorir Naniwet, the Objector herein, states that she got married to Kiptum Arap Naniwet, deceased in 1967 under the Kipsigis Customary Law. In paragraph 6 of her affidavit she swore on 2nd April 2004, she claimed the deceased sired four children namely **Rusi Chepkoech, Emily Chepngetich, Mary Chepkirui** and **Catherine Chepwogen**. In paragraph 9 of the aforesaid affidavit, the objector stated that she was uprooted from her matrimonial home in 1985 by Kimalit Arap Tum, the 1st Petitioner herein. She claimed she was never divorced by her husband (deceased). However, when the Objector gave her oral testimony, she sort of contradicted part of her affidavit evidence in material respects. **First**, she stated she cohabited with the deceased until 1976 when she was chased away and never went back for fear of her life. **Secondly**, that her last born daughter namely Catherine Chepwogen was six (6) months old when she got married to the deceased. This means that the deceased never sired any child with the Objector. In her evidence in cross-examination, the Objector expressly stated that the deceased did not support her daughters. The Objector's second witness (P.W.2) stated that the Objector cohabited with the deceased from 1966 until 1987 when she was chased away. P.W.3's evidence was in agreement with that of P.W.2 that the Objector was chased away in 1987. I have already stated that the Petitioners vehemently denied knowledge of the marriage between the Objector and the deceased. Mary Tum (D.W.1) stated that the Objector cohabited with the deceased from 1967 until 1977 when she left upto date. D.W.1 further stated that the deceased did not maintain the Objector's children. Kimalit Arap Tum (D.W.3) expressly stated that the Objector was not married to the deceased. He claimed she was only given accommodation for a month which accommodation she required for the circumcision of her daughters. D.W.3 denied having chased the Objector from the deceased's homestead. The oral evidence of Kimalit Arap Tum (D.W.3) contradicted the affidavit averments he made on 3rd June 2004. In paragraph 3 of the aforesaid affidavit, the late Kimalit Arap Tum averred that the Objector cohabited with the deceased between 1967 and 1977. After a careful analysis of the evidence from both sides I have come to the conclusion that Rhoda Chepkorir Naniwet, actually moved in and cohabited with the late Kiptum Arap Naniwet from 1967 upto 1977 or thereabouts when she was chased away by the late Kimalit Arap Tum. There is no clear or cogent evidence to prove that a traditional Kipsigis marriage was conducted to solemnize the marriage. What is apparent is that the deceased and the Objector cohabited for over ten(10) years and held out themselves to the rest of the world as man and wife. That cohabitation was rudely interrupted by the acts of the late Kimalit Arap Tum who forcefully uprooted the Objector from the deceased's homestead. I am convinced by the evidence presented to me that an order of presumption of marriage should be made which I hereby make.

Having come to the conclusion that a presumption of marriage exists, let me now turn my attention to the second question as to whether or not the Objector is entitled to benefit from the deceased's estate! It is obvious that if the Objector is regarded as the deceased's widow then she is entitled to life interest pursuant to the provision of **Section 37** of the **Law of Succession Act**. What is clear is that the Objector's four daughters are not entitled to benefit from the deceased's estate because they are not the deceased's biological nor adopted children. It is clear from the evidence of the Objector, Mary Chemutai Tum, the 2nd Petitioner, that the Objector's daughters were not supported nor maintained by the deceased during his lifetime. They cannot therefore be categorised as dependants under the **Law of Succession Act**.

The determination of the second issue leads me to the third issue as to whether or not the grant given to the Petitioners' should be revoked. It is apparent from the evidence and submissions that the Objector has on a balance of probabilities proved that the Petitioner obtained the grant by failing to disclose the Objector's relationship with the deceased and the fact that she was entitled to life interest in the deceased's estate. The Petitioners are basically guilty of material non-disclosure.

In the end, and on the basis of the above grounds, I find the summons for revocation and or annulment of grant to be well founded. I hereby order that the grant issued to Kimalit Arap Tum (now deceased) and Mary Chemutai Tum on 24th February, 2004 revoked. A fresh grant be issued in the joint names of Mary Chemutai Tum and Rhoda Chepkorir Naniwet. The duo may jointly or separately apply for the grant to be confirmed notwithstanding that six months will not have lapsed from this date and taking into account the Objector's life interest while distributing the Estate. Since the protagonists are close family members, I direct that each meet his or her own costs.

Dated, Signed and delivered in open court this 30th day of May 2014.

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J.K.SERGON

JUDGE

In open court in the presence of:

Mr. Kirui for Petitioners

Mr. Mutai for Objector