REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Succession Cause 81 of 1998

IN THE MATTER OF THE ESTATE OF THE LATE MARITIM TUWEI SAMITUI

AND

IN THE MATTER OF

MARY CHESANG AND BENJAMIN KARONEI ……..…… APPLICANTS

Versus

TABORUSEI CHESANG KETER……..RESPONDENT

J U D G M E N T

Maritim Tuwei Samitui died on 11/2/1998. I shall hereinafter refer to him as 'the deceased'. Taborusei Chesang Keter who claimed to his only wife obtained a Grant of Letters of Administration of his Estate on 19/1/1999.

Mary Chesang and Benjamin Kirwa Karonei, who also claim to be his wife and son respectively, have moved this court in an application, in which they seek the revocation of the aforementioned Grant on the grounds that Taborusei failed to disclose material particulars in her petition, these being that Mary Chesang was her co-wife, and that Benjamin Karonei was Samitui's son; that Mary Chesang and the late Samitui had eight children; that Taborusei did not include all the assets of the deceased, and as a result of which none disclosure, Taborusei disinherited Mary Chesang and Benjamin Karonei. It is also their ground that the Grant is null as it was issued by the Deputy Registrar.

As is expected, the application is opposed and the parties agreed that the matter do proceed by way of viva voce evidence.

I am well minded of the fact that section 47 of the Succession Act Cap 160 of the Laws of Kenya ('the Act') provides that "*the High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.*" Such an appointment which is personal is published in the Kenya Gazette.

The contentious Grant was issued by a Deputy Registrar who was not authorized to issue the same, which renders it null and void ab initio, whose total effect is to nullify all transactions pertaining to the

Estate of the deceased and which are subsequent thereto.

But I could be wrong in the above finding, and on the basis of which, I will now endeavor to determine the other issues which arise from this suit.

Mary Chesang and Benjamin Kirwa Karonei who I shall hereinafter refer to as "the 1st" and "the 2nd plaintiff" respectively, called three witnesses, while Taborusei Chesang Keter (hereinafter called "the defendant") called two witnesses.

Both parties made reference to proceedings which were conducted on 3/9/2002, by the Turbo Land Disputes Tribunal in Tribunal Case No. 54/2002, at these plaintiffs request, in relation to matters of succession and inheritance of the estate of the deceased, and which proceedings I shall also rely on.

It is trite that parties are bound by their pleadings, and having perused the affidavits and exhibits on record, and I must state from the outset that I find the defendant's evidence contradictory and highly unbelievable, as it tended to contradict her evidence before the Tribunal in the aforementioned matter, as well as facts which are contained in her replying affidavit whose deposition was made under oath.

I have taken the evidence on record and I am convinced that the 1st plaintiff was married to the deceased in 1966, at which time she already had the 2nd plaintiff, who had been born out of wedlock. This fact is admitted by the defendant, who actually confirmed that the 1st plaintiff was the deceased's third wife, and that by the time of the said marriage the 1st plaintiff already had a son. She however disputes the fact that there was any issue to the union between the 1st plaintiff and the deceased. It is also evident that the 1st plaintiff left the matrimonial home, leaving the 2nd plaintiff behind and that though she was never formally divorced, she however never went back.

I am made to understand that it is customary amongst the Nandis, a wife who leaves her matrimonial home but who is not divorced to actually inherit her husband. It is trite that courts may apply customary laws only so far as they are not repugnant to justice. In this particular case, the 1st plaintiff does not dispute the fact that after leaving the deceased, she got married to one David Kiprotich Cheruiyot of Masaita Location, with whom she has seven children. In my mind that is a clear indication that she got married to a second man from whom she is not divorced. It would be therefore be not only absurd, but illegal and immoral for a woman whose current husband is alive, to inherit another man under the guise that though she had left him she had not divorced him formally, unless of course the that first husband had specifically provided for her prior to his death, which is not the case in this particular circumstance. I am not therefore convinced that she should inherit the deceased.

The evidence on record reveals that when the 1st plaintiff left her matrimonial home, the 2nd plaintiff whom she left behind and who had been accepted as a son by the deceased stayed with the defendant, with whose children he had a cordial relationship. I am also convinced that he was accorded the status of a member of that family, and that the deceased whom he regarded as a father saw to his education up to Form 2, and that even after the completion of his studies he continued living with two of his step brothers, one of whom married in 1985, soon after which the 2nd plaintiff joined the Armed Forces.

Section 3 (2) of the Act provides "*a child"* or "*children" "shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility."*

Based on the above provisions of the law, and on the evidence on record, it can thus be safely assumed that all the seven children who are named in this application for revocation were not the children of the deceased, and on which account they would not be eligible to benefit from this estate.

It is however my humble opinion that the 2nd plaintiff was a son to the deceased and in the

circumstance he would be entitled to inherit him. There was sufficient reason to include the 2nd plaintiff as a beneficiary to the Estate.

Be that as it may, though they pleaded that the deceased had other farms in Tapsagoi and Kamagut, the plaintiffs did not adduce evidence in support of that contention, and I am left with no choice but to find that at the time of his death, Samitui was the registered proprietor of only one parcel of land, namely UASIN GISHU/TAPSAGOI/170 (the subject land). He also maintained an account with Standard Chartered Bank Limited. Unfortunately, the Grant, which was confirmed on 4/10/1999, did indicate the mode of distribution of the above assets. Taborusei however proceeded to subdivide the subject land and to transfer it to her sons, which action was in my view firstly null and void as it was based on a Grant which I have already found to be null and void, and secondly because she had no right to disinherit the 2nd plaintiff.

Having found as I do, I do order that the subdivision of the subject land and all subsequent transfers, which are null be cancelled forthwith and that the subject land do revert to the Estate. I do also order that pending the obtaining of a Grant in this matter, that there be no transactions or dealings of any nature with the subject land.

The sums that were originally held in the aforementioned bank account shall no be affected by this order.

Each party shall bear its costs of this suit.

Dated and delivered at Eldoret this 9th day of May 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Miyienda for the defendant/respondent

Mr. Keter for the plaintiffs/applicants/objectors