



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Succession Cause 254 of 2002
IN THE MATTER OF THE ESTATE OF BENTHAM CHUCHUNEY (DECEASED)
AND
EVELYN J. CHUCHUNEY 1ST PETITIONER
SHEILA JEPTANUI 2ND PETITIONER

JUDGMENT

Bentham Kipleting Chuchuney died on 23/8/2002 at the age of 47 years. Evelyn J. Chuchuney and Sheila Jeptanui who claimed to be his wife and daughter respectively, petitioned this court for the Grant of Letters of Administration of his Estate on 23/12/2002 and they named Sharon Jeptum and Stella Jebet as his other survivors.

Susan Wangare and Carol Muthoni, objected to the proceedings on 3/2/2003. They also filed a cross-petition on 27/3/2003 on the basis of the grounds that while Susan was Chuchuney's wife, Carol was his daughter; that though they were not consulted prior to the petitioning, they had a right to participate in the administration of his estate, and that Virginia Wanjiku, Bill Kipkemboi, Sharon Cherotich and Bernard Kipkosgei who were the issues of the union between Chuchuney and Susan should be included amongst the list of his survivors and beneficiaries.

The matter proceeded to a full trial and as I discern it, the issues for determination are who between the parties would be the rightful heirs of Chuchuney's Estate and who would be entitled to administer the Estate.

Evelyn Chepkemboi Chuchuney, claims to have married Chuchuney on 23/3/1984 at a civil ceremony at the Attorney General's Chambers in Nairobi and with whom she claims to have had four children, namely Sheila Jeptanui now aged 24 years, Sharon Jeptum now aged 22 years, Stella Chebet, now aged 17 years and Brian Kibiwot now aged 13½ years old testified that they lived harmoniously until 1989 when they had some misunderstandings, as a result of which she decided to file for divorce 1990, but that they mended fences and started living together again after which she abandoned the divorce proceedings. It was also her testimony that the only property which they acquired was land at Kipkabus Settlement Scheme in 1989, namely Kipkabus Plot No. 679.

Though he did not attend their wedding in Nairobi, Sylvester Kipsanga Bwaley, a brother to the deceased was aware that his brother married Evelyn in 1984; that they were blessed with four children, and though he was aware that the two had matrimonial problems, he was however not aware that Evelyn

had filed for divorce at one time. He conceded that he knows Susan Wangare, whom the deceased had taken to his home and introduced her only as a friend; that Susan attended his brother's burial; that they convened a family meeting with the intention of sorting out the issue of this objection and that he had traveled to Susan's home in Turbo on three occasions to invite her for the meetings; that though she confirmed that she would attend, she did not attend any of the meetings, and though he denied knowledge of any children that could have been born between Susan and his brother, he however conceded that Chuchuney, Susan and her children used to live together on Chuchuney's farm in Turbo just prior to his death. He also conceded that his brother was buried in the Turbo farm.

Chuchuney's other brother Nicholas Lelei Kosgei also confirmed the marriage between Chuchuney and Evelyn and also that there were four issues of that union; he was aware that Evelyn had filed for divorce proceedings, but did not know of the outcome. He knew Susan and was aware that she lived with Chuchuney in Turbo where Chuchuney was later buried. He was also aware that two of Susan's children were sired by Chuchuney.

Unfortunately Susan died on 1/9/2006, and Carol Muthoni, who had up to then been the 2nd objector herein opted not to substitute, but to proceed with the matter.

It was Susan's evidence that though she started living with Chuchuney in Nairobi on 1993, Chuchuney married her in a customary marriage on 5/12/1996, after payment of the dowry; which ceremony was attended by his brother Nicholas Lelei Kosgei; that Chuchuney took her to live in Turbo in the year 2002; that Everline never visited them in Turbo at all; that she had three children with Chuchuney namely, Bill Kipkemboi, born in February 1995, Sharon Cherotich born in July 1996 and Bernard Kipkosgei born in November 2000 and though the births were registered before Chuchuney's death she only managed to obtain the certificates after his death. It was also her evidence that Chuchuney supported all the children including Carol Muthoni and Virginia Wanjiku who had been born out of wedlock; that he had a five acre parcel in Kipkabus (No. 679); that in 1996, he exchanged the Kipkabus farm with Joseph Limo Kemboi who had a five acres farm at Turbo (No. 419), after which they moved to Turbo while Kemboi moved to Kipkabus where she decided to bury him and where she remained until her death.

Joseph Kemboi Limo testified that on 12/4/1996, which was soon after they learnt that they had been allocated with parcels of five acres of land, he agreed to exchange his farm in Turbo (Turbo Settlement Scheme No. 419) with Chuchuney, who allowed him to take his Kipkabus farm (Kipkabus Settlement Scheme No. 679), and they took occupation and started developing their respective parcels, and though they then exchanged the Letters of Allotment, they could not however register the transfers because Chuchuney had misplaced the title to the Kipkabus property; that though Everline went to him during the year 2005, declared him a trespasser, and asked him to vacate the Kipkabus property, he had not heard of her before for he only knew of Susan and was not aware that Chuchuney had another wife. He confirmed that he visited Susan after Chuchuney's death and that they reduced the transaction into writing on 2/1/2004. He undertook to stand by his word on the exchange.

She maintains that she should have been included as one of the petitioners in this cause, and urged the court to allow her to inherit her late husband; that their children be provided for, and that Limo be allowed to occupy the Kipkabus farm and that they retain the farm in Turbo.

Though Evelyn denied any knowledge of Susan, she however conceded that she met Susan for the first time during Chuchuney's burial ceremony, but she nevertheless maintains that she is the only wife to the deceased and that in the circumstances only she can administer his Estate, and by virtue of which fact she is the only one who is entitled to benefit from his Estate, which also comprises of a sum of K.Shs. 293,312/65, being his benefits from the Civil Service and which sum is currently held by the Public Trustee. She was however not aware that he had held shares with Harambee Co-operative Sacco, during his lifetime, neither was she aware of his benefits from National Social Security Fund (NSSF).

But Susan claims that Chuchuney had informed her that Evelyn had divorced him and had married thereafter, and in support of this contention, she produced a copy of the obituaries of the Standard Newspaper of 11/9/2002 as her exhibit 10, in which one Evelyn Apindi had announced the death of her

husband, one Inspector Bernard Peter Apindi. It was Susan's evidence, which remained unchallenged that the children who were named in that announcement as Apidi's children, namely Sheila of Mombasa, Sharon and Stella of Moi High School Kabarak and Brian of Sea Side Academy Mombasa, were the same children who Evelyn had listed in her petition as Chuchuney's survivors.

I have taken the pleadings and the submissions by both counsel into account and I am convinced that Evelyn was married to Chuchuney on 23/3/1984, and that they had had three children. I am also convinced that Evelyn later left the matrimonial home and though she did not formally divorce Chuchuney and though she denied having married someone else, there is ample evidence on record to show that Evelyn who seems to have broken all norms actually got married to the aforementioned Apidi who died on 4/9/2002. By taking the said Apidi as her husband, and though that union is questionable in law as she might not have had the capacity to contract it, it however cannot be ignored in view of the fact that she now seeks an order to inherit and administer the Estate of Chuchuney. I form the opinion that having taken Apidi as her husband, she cannot inherit two men for she cannot have her cake and eat it. I would on that account find that her petition cannot be sustained.

I am convinced on a balance of probability that Susan who is now deceased, was the rightful widow of Chuchuney. I also find that though Carol Muthoni and Virginia Wanjiku were not Chuchuney's biological children, it was clear that he took them in when he married their mother Susan and that he provided for them and in which case they were his dependants who would fall within the provisions of section 29 of Law of Succession Act Cap 160, which provides 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, grandparents, 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."

I would however find that though Sheila Jeptanui was named as one of his survivors, evidence on record would tend to reveal that she was not, and I would not in the circumstances declare her as his child, or a beneficiary of his estate. There is however credible evidence on record that Sharon Jeptum and Stella Jebet were Chuchuney's born out of his union with Evelyn, and I would be very hesitant to disinherit the two. I do in the circumstances allow the cross petition, and would in the interests of justice invoke my discretionary powers and order that Carol Muthoni and Sharon Jeptum be appointed as the Administrators of the Estate.

Given that the exchange of the two parcels of land was not formalized but there is ample evidence on record that they both desired to exchange their parcels, which is further evidenced by the fact that each took possession of 'his' land soon after the informal exchange and that Limo does not intend to negate the agreement, and I am thus convinced that Limo is not a trespasser and would in the interest of justice order that the exchange be formalized with the Administrator of the Estate within the shortest time possible.

The Estate shall be held by the two on their own behalf and on trust for Stella Jebet, Virginia Wanjiku, Bill Kipkemboi, Sharon Cherotich, and Bernard Kipkosgei, until Bernard Kipkosgei attains the age of majority. The pension funds and final dues for Chuchuney's last employer as well as his benefits from NSSF shall be deposited in an interest earning account held in the joint names of both the administrators, and to be held until the last child attains the age of majority. They shall however be at liberty to withdraw the income earned there from on a quarterly basis for their use. Otherwise and subject to the above, each child shall be treated as an individual and the Estate shall be finally shared out in equal shares for each of the children, namely Carol Muthoni, Sharon Jeptum, Stella Jebet, Virginia Wanjiku, Bill Kipkemboi,

Sharon Cherotich, and Bernard Kipkosgei.

Dated and delivered at Eldoret this 28th day of November 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Shivaji holding brief for Mr. Chepkonga for the petitioner

Mr. Kendagor for the objector