



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
SUCCESSION CAUSE NO 11 OF 2001
IN RE ESTATE OF FREDRICK CLAVENCE KITTANY
JUDGMENT

The proceedings herein relate to the estate of Fredrick Clavence Kittany. A perusal of the record shows that one Sally Kittany claiming to be a widow of the deceased filed P & A cause No 175/2000 at Nakuru High Court seeking the letters of representation to the estate of the deceased in her capacity as the widow of the deceased on her own account and on account of her two children namely Allan Kibet Kittany a son aged 4 years and Joel Jelagat Kittany a daughter aged 2 years and Norah Chomber mother of the deceased. The cause was advertised vide Gazette Notice No 6300 of 29.9.2000.

On 28.10.2000 one Rhoda Chepkoech Kittany filed notice of objection to the Registrar High Court Nakuru on the grounds that she Rhoda is the sole widow and beneficiary of the estate of the deceased, that the petitioner has failed to disclose the true heirs to the estate of the deceased and that she has on her own filed Kisumu HCCC Cause No 253/2000 which had been Gazetted in the Kenya Gazette Notice of 19.5.2000.

This file was transferred to Eldoret High Court where it was allocated file No 11 of 2001.

The Kisumu file being Kisumu HCCC No 253 of 2000 was filed by Rhoda Chepkoech Kittany in her capacity as the widow of the deceased. It was filed on her own account and on account of other beneficiaries named as

1. Mariane Jabet
2. Alfred Kiptoo Ngetich
3. Dorothy Jepkrui Kittany
4. Felix Kiprotich Ngetich
5. Pamela Cherono Kittany
6. Collins Kipchumba Ngetich and
7. Julius Kipkemboi

Being children born between her and the deceased. The cause was advertised vide Gazette Notice No 3039 of 19.5.2000, one Sally Kittany and Nora Tigoi alias Bot Rhoda filed objection to the making of the grant to Rhoda on the ground that the petitioner intends to use the said grant to deny some of the rightful beneficiaries their entitlement, the petitioner is a former wife of the deceased and separated with him long

before he died that there is already Nakuru HCCC Succession Cause No 175 of 2000 filed by the objector.

The two causes were consolidated and heard together. Directions were taken and parties proceeded by way of *viva voce* evidence.

Evidence was given in great detail and at length but this court will only go for the recent points. Rhoda Kittany gave her evidence as PW 1 and the salient points of her evidence gave that she and the deceased at first married under customary law. It was later solemnized in church on 22.12.1979 as per exhibit 1. The deceased used to work with Kenya Power and Lighting Company Limited. They cohabited and resided together in Kisumu. In the same year of 1979 they jointly purchased land in Nandi and set up a home there. She moved to reside on the land while the deceased continued working in Kisumu, then moved to Nairobi, and then Nakuru. As at the time of his death he was working at Nakuru. They had seven children between them as enumerated by her. PW1's evidence touched on her stay with the deceased, who are the lawful and legal dependants of the deceased. The list of properties and how she would like that property to be distributed. An overview of her evidence on the above aspects shows that they lived happily with the deceased for quite some time and when they established a home in Nandi she settled on the land and transferred her services to a nearby school as she was a teacher by profession. She looked after the farm and the family. They took loans with the deceased and established tea on their farm parcel Nos Nandi/Kiboi/888, 889 and 1068. The deceased was away working in Kisumu, Nairobi and eventually Nakuru which was his last station but he used to frequent the home to see her and the children. The stay was not however a harmonious one and she started having problems in her marriage with the deceased. She gave a detailed account of this but a summary of the same is that trouble started between her and her mother in law who did not like her and by reason of that the deceased took it to himself that she did not like his mother and complained about that a fact she denied and instead she said it was the mother in law who did not like her and incited her son the deceased against her. The situation resulted into wife beating. The deceased would pass through the mother's place and then go to drink and then come to beat her up with the children. She added that if the deceased just came home from work and he did not pass through his mother's place then there would be no beating but if he passed through the mother's place beating was inevitable. A second contribution of wife beating was drinking habits of the deceased so that when he did no drink there would be no beating.

The beatings became unbearable and she went back to her home and reported to her people who advised her to stay out as they sort out that issue. She moved out of the home a few occasions and on one occasion she transferred her services from Nandi to Kericho. The separation was however not long as the deceased initiated reconciliation measures whereby elders from both sides sat down and reconciled her with mother in law and the deceased. Even while working away in Kericho the deceased used to visit her and they would go together to visit their children in school. Following reconciliation measures she transferred her services back to Nandi and settled back in the home and started taking care of the home again. As at the time the deceased died she was back in the home.

Besides the instances of wife beating and disharmony she worked closely with the deceased and they acquired properties together. She supported him in looking after his parents, brothers and sisters one of whom a brother was educated in India and both of them paid his fees, they educated a sister in law upto form four. She denied allegations that she detested his people and never liked them and cited an incident where the father in law stayed with her and took care of him before he died. She adds that her father in law was her protector and warned the son not to beat her up and when he died is when she ran into trouble. They assisted other relatives she enumerated.

Turning to her own children she says the deceased was a great supporter and he loved his children and took care of their needs inclusive of their education and general welfare accounting for their excelling to higher institutions of learning as outlined by her in her evidence and whenever they ran short of funds they called for a *Harambee* just like any other family.

Concerning the evidence of who is a rightful beneficiary she sated that it is only her, her children and the mother in law. She maintains that Sally was not a wife she was not aware of her and the deceased never

mentioned her to her. She first saw Sally during the funeral and that is when her inlaws roughed her (PW1) up and even threatened to take away the body for burial elsewhere and the local administration had to intervene. They even took away most of the documents relating to the deceased's property among them a motor vehicle, tile deeds and other important documents. She denied the suggestion that Sally was a wife who was married because she was having problems with the deceased and was away from the home for a long time. It is her stand that Sally and her children are strangers to the deceased's estate.

Concerning the properties comprising the estate she listed the following

Land

5 acres at has rural home where the mother in law and younger brother in law reside.

1. Nandi Kaboi/887 on which they have established a home
2. Nandi Kaboi/888 on which there is an established tea plantation with a portion of the land being used for growing maize.
3. Nandi Kaboi/880 on which there are tea bushes.
4. Nandi Kaboi/882 on which they have established tea and a portion of it is used to grow maize.
5. Nandi Kaboi/1068 on which she is to establish tea plants in line with the deceased's wish.

Plots

1. LR 7830/174 which is to be shared out with one Kogo who gave them money to pay fees for a brother in law in India. It is undeveloped.
2. A plot in Kiamunyi in Nakuru whose title deed is among documents taken from her on which the deceased had building materials and intended to establish a residential house on it.
3. A plot in Mombasa which was allotted to the deceased and another person whom she knows is staying in Nandi. It comprises two acres. She has no documents for it.
4. An undeveloped plot in Kericho purchased from Ahammed Kibirgen being a 50x100ft plot on which the deceased wanted to put up commercial buildings.
5. Plot No EMC 17195/208 which is undeveloped and it is near the old air strip.

Bank Accounts

The deceased operated bank account No 6016 – 0304 – 5200 – 1165 at Nakuru and a loan account No 345- 031-35101-8-4 which has an outstanding loan.

There were two other bank accounts with Standard Chartered bank No 01-0-01-54505-90-0 with nothing on it. And then No 015-015-545059-00 which had 40,000/- on it and the District Commissioner Nandi withdrew the same and gave her to pay school fees for the children.

Debts owed by the estate as known to her are

1. James Kosgei Kshs.9,000.00
2. Eric Lagat Kshs.68,000.00
3. John Koech Kshs.69,000.00

4. Wilson Lagat Kshs.17,000.00

5. Bank loan

Debts owed to the estate

From Kitur Arap Kosgei Kshs.37,000.00

Motor vehicle

Registration No KAB 233 X which disappeared during the funeral but she has the log book for the same.

Employment benefits

1. NSSF Benefits Kshs.154,040.00

2. Sitima Sacco Kshs.108,975.00

3. Death gratuity Kshs.1,805,204.80

4. Refund of Employers surrender value Kshs.496,695.00

5. Widows and children's pension Kshs.46,000/- per month till death.

6. Chemomi Tea Factory has Kshs.243,348.60.

PW1 was cross examined at length but the salient features to the cross examination are:

1. She is the only widow of the deceased and beneficiary to the estate of the deceased with her children. She agrees that the mother in law can get something small from the estate and that she will continue taking care of her.

2. That the separation from the deceased due to wife beating was for short periods and on each occasion it happened reconciliation steps were taken and they reconciled and then they continued living together.

3. She denied the suggestion that disagreements and long separation between her and the deceased forced the deceased to marry Sally.

4. She maintained that the deceased never brought Sally home to introduce her and if he had married he would have said so and she would have known and Sally also would have been seen in family.

5. She denied the allegation that she disliked her mother in law and the deceased's relatives and she asserted that it is the mother in law and some of the relatives of the deceased who did not like her and that is why they are siding with Sally.

6. She denied the suggestion that she started trouble during the funeral of the deceased and threatened to set the house on fire where the members of the family were meeting. It is her stand that it is the relatives of the deceased who beat her up, snatched documents from her and even wanted to take away the body for burial in Kipkelion.

7. That the father in law was on good terms with her and he even blessed her because she had taken good care of him and when he died is when the deceased started beating her and the children.

8. She denied the suggestion that at one time the deceased was treated for food poisoning at her instance and thereafter he instructed a lawyer to file a case for divorce.

9. She did not participate in any family meetings concerning the deceased's estate.

10. The properties were acquired jointly by her and the deceased through loans from the bank and from the employers. The deceased kept all the documents for these transactions and when he died they were taken away by her in laws as two brief cases full of documents were taken away from her and she has never seen them.

11. She still maintains that she is opposed to Sally and her children getting a share of the deceased's estate.

12. That her marriage to the deceased was valid as dowry was paid and it was later on converted into a statutory marriage.

13. The proceeds of the estate will go into maintaining the family and the property of the estate.

She also called witnesses PW2 a neighbour in Nandi Hills who stated that after settling in Nandi hills the deceased and Rhoda had a harmonious life until the late 1980's when the quarrels started. At one time the mother in law came to live with Rhoda and there was a quarrel between Rhoda and the mother in law but the elders were called and this was resolved. He concedes there were marital problems between Rhoda and the deceased which could have forced the deceased to take on another woman but there was no reason to hide. PW2's name was Ann Ruto.

PW3 is John Arap Tabon. His evidence touched on a marriage as constituted under Kipsigis Customary Law. He knew the family of the deceased's father but he was not involved in the ceremonies of the marriage between Rhoda and the deceased.

PW4 Joseph Kipkemboi. He went to Nakuru and signed papers before a lawyer on behalf of the mother of the deceased signifying that he has known he family since the time they were residing together in Belgut.

PW5 William Kipkering is a step brother to the deceased. He comes from the first house while the deceased comes from the third wife. His evidence is to the effect that the official names his father gave to his sons during initiation are:-

1. Arap Chepkwony

2. Arap Lelel

3. Arap Kittany

It is his evidence that during the life time of the deceased he knew he had only one wife but during the funeral is when he was told that there is another one. It is his evidence that the family was not aware of the second marriage and that if the deceased had married then the family would have been involved. He concedes that after burial of the deceased the family attempted to hold a meeting in Kipkelion but the meeting ended in disarray.

PW5 William Kipkering Arap Chepkwony was recalled for further evidence and he denied the suggestion that they had a conclusion as a family that Rhoda brought problems and the deceased was allowed to marry another wife. He agreed in cross examination that the deceased used to take care of the mother and that it is correct that Rhoda did not get along with her mother in law.

PW6 Andrew Kimutai Chepkwony another brother of the deceased testified that the first time he saw Sally in their home was after the death of the deceased when they were preparing to go to Nairobi to bring the body. He also recalled that at one time when Rhoda was away from the home he attended a

circumcision ceremony for one of the sons of the deceased when the deceased came alone. He complained about the problems he was having with Rhoda and when he was advised to marry another wife he declined.

When cross-examined he agreed that the mother of the deceased and her children recognized Sally as a wife of the deceased but him and the entire family were not aware of the marriage to Sally.

PW7 Zablon Kiprotich Cheruyot is a brother of Rhodah and an old time friend of the deceased. It is through him that the deceased came to know Rhoda and eventually married her. He recalls the father of the deceased came to his home in 1974 for engagement of Rhodah which they accepted and dowry was eventually paid. The two lived happily and had children and it is only in 1989 that marital problems cropped up between Rhodah and the deceased and then Rhodah and the mother in law and these were sorted out.

When the deceased fell ill he informed Rhodah who traveled to Nakuru and then Nairobi. After his death they made arrangements to travel to Nandi with the body and that is when he saw Sally for the first time. He says he was close with the deceased to an extent that the deceased used to tell him about his girlfriends. He knew one called Anne who had a child called Kibet and another one known as mother of Gakweria. But at no time did the deceased mention Sally or come to his home with her. He saw Sally for the first time during the funeral of the deceased.

When cross-examined he stated that 2 heads of cattle are still outstanding or remaining from the Chomber family to his family. He conceded that his brother in law had extra marital affairs. The first one was with Alice Kibet who bore him a son called Kibet and the second one was mother Gakweria but he never heard of Sally and her children. He denied having any complaint from the deceased that Rhodah was not faithful to him and that two of the children are not his. Although he was aware of the unfaithfulness of the deceased he never mentioned it to his sister as he did not want to strain their relationship or break their marriage.

PW8 a land registrar produced a letter he had written concerning correct registration numbers of the deceased's *shamba*.

In defence to the foregoing DW1 Sally gave evidence to the effect that she knew the deceased way back in 1987 when he was working in her home area in Chepkorio as a surveyor for Kenya Power and Lighting Company. He was a friend of her father. When she finished Kenya Polytechnic she joined Power and Lighting Company as a clerk and after some time the deceased asked her father if he could marry her and the father agreed. She had one child before and the deceased agreed to take care of the child. She asked him why he wanted to marry a second wife and he said it is because they were not on good terms with Rhoda and that he wanted somebody to look after his mother who was not on good terms with Rhodah. They resided together as man and wife in Eastleigh Nairobi. On 14.4.1994 they celebrated a customary marriage in the home of the late Senior Chief Samuel at Naivasha.

It is her testimony that the relatives did not attend the ceremony but they sent their blessing. They have two children between them Allan Kibet and Joel Jelagat. It is her testimony that the deceased paid all the electricity bills, fees for the children and also send her money for upkeep but when he was hard up she could assist him. They both assisted each other. She had introduced herself to Rhodah in 1996 over the phone at U9 Memorial hospital where the deceased was admitted. In Nakuru she avoided meeting Rhoda on the instructions of the deceased and while at Nairobi hospital ICU Rhodah was informed about Sally by the daughter Mary Ann who had known Sally as they had both looked after the deceased in 1996 when he was sick and nursed him when Rhoda had run away.

It is her evidence that the deceased and her used to assist each other. His relatives know her and they used to come to her house. A few days before he died he stayed with her and when she heard he had been admitted in hospital she visited him in Nakuru. When he died a few of his relatives inclusive of the mother came to her house. She took leave and applied for a vehicle to transport her and children to the funeral. She had two children with the deceased.

When cross examined she stated that she was a friend of the deceased for 7 years before they finally married at Moi Ndabibi on 14.4.1994. It was a customary marriage. Few relatives were present and their immediate family members gave their blessings to go ahead with the ceremony. A further ceremony was to follow in April 2000 but the deceased died before it was done. That the sole reason for marrying was that the deceased wanted to take another wife to take care of his mother. She maintains the deceased paid all electricity bills, hospital bills and school fees for the children. She has no proof of financial assistance they gave to each other with the deceased.

She concedes the deceased never put up a house for her at his rural home or in Nandi and that there is no time the deceased introduced her to Rhodah. She knew Rhoda and just used to by pass her. The deceased never wanted them to meet as there would have been tension. That at one time she visited the home in Nandi hills but Rhodah was not there. She denied she had been married before to any other person but she agreed that she has had another child since the death of the deceased whose father is not the deceased.

Other witnesses were called by the defence in support of Sally's case. DW2 Isaya Kipketer Arap Tesot a neighbour of Rhoda and the deceased at Nandi hills. He was aware there were marital problems between Rhodah and the deceased forcing Rhoda to run away from home now and then.

He recalls the deceased mentioning that he had married another wife but he never came home with her. He only saw her during the funeral when cross examined he conceded that when Rhoda left the home became unattended and the mother of the deceased is the one who came to stay there.

DW3 Joseph Arap Kosgei also a neighbour of the deceased confirmed that there were differences between Rhoda and the deceased and when she went away they advised him to take on another wife and he told them he already had one. This was 2 years before he died but she never came home and he only saw her during the funeral. When cross examined he stated that the first wife was away for 5 years and the mother was called to come and look after the home. He confirms during the funeral there was a fracas as the power people wanted to go and bury the deceased in the mother's place.

DW4 Norah Tigoi Chomber was the mother of the deceased whose testimony is that she is not aware of any traditional marriage ceremony that was performed for Rhodah and she is not aware of any other marriage ceremony between her and the deceased. She confirmed they used to quarrel with Rhodah and even as at the time of trial they were not greeting each other. She agrees that Rhodah can never look after her. The deceased used to support her when he was alive. The rural home is 10 acres shared out equally between her two sons the deceased and Jameson. She resides on the *shamba* of Jameson. She wishes to administer her sons estate in order to ensure fairness. She concedes there were problems between the deceased and Rhodah spanning over a period of time and she advised the son to get married to somebody else. He later brought Sally home and introduced her to the family as his second wife. She DW4 used to visit Sally and took traditional herbs when she delivered. To her all the children of Rhoda and Sally are the children of the deceased, both Sally and Rhodah are wives of the deceased and are entitled to inherit. On cross examination she stated that it is Rhodah who does not like her and when her son died Rhodah locked her in the house wanting to set it on fire. She concedes there was an incident where Rhodah claimed she had put on her underpant (Rhoda) and elders were called and the issue was resolved. She maintains she has been to the home of the parents of Sally thrice but she cannot recall the dates. She is aware Rhodah has children outside marriage but all of them are for Fredrick and those of Sally should be no exception.

DW5 Kosogin Chepkwony Arap Kiket a neighbour of the deceased family in Kipkelion confirmed the difference between the deceased and Rhodah and he was aware the deceased married Sally and he met them together occasionally when he came home to Kipkelion before he died. The deceased married because Rhodah had run away to her home and was teaching in Kericho and the deceased's house was vacant. He attended the funeral of the deceased and saw Sally and her children introduced as family members.

When cross examined he denied the signature on the surety forms for Sally to be his although the names appearing thereon are his.

DW6 Salina Martim a sister of the deceased from DW4 she confirmed her brother the deceased had two wives. She knew Sally seven years to death of deceased and Sally was married because of the problems the deceased had with Rhodah. When cross-examined she conceded that Rhodah and Fredrick were not getting on well together but by the time he died Rhodah had come back to the home.

DW7 Michael Chepkwony Tapnywet an uncle to the deceased as he PW7 is a brother to his mother DW4. He is aware that the deceased had one wife Rhoda but later on he DW7 came to learn that the deceased had married a second wife and whenever he went to Nairobi, he saw the deceased and Sally living together as man and wife. At one time Sally gave DW7 50,000/- to take to the deceased when their first daughter was getting married. He deceased also sent him to Sally to get money to buy a plot, she gave him Kshs. 10,000.00

During the funeral Sally was introduced as a second wife of the deceased and that the children were introduced as the children of the deceased.

When cross-examined he said that he knows Sally as a co-wife to Rhodah. He denied the suggestion that he had told PW1 at one time that he does not know Sally. He was not an employee of the deceased but the deceased used to sent him to Sally to get money.

At the close of the entire proceedings both counsels filed written submissions and the points relied upon by the petitioner's counsel Rhoda are that she Rhoda PW1 is the legal wife of the deceased, that after celebrating a customary law marriage they celebrated a statutory marriage under Cap 150 Laws of Kenya and they have issues between them as enumerated in the papers filed and the proceedings. That the first objector Sally is an alleged second wife while the second objector is mother of the deceased. That the alleged second wife was introduced to the family after the death of the deceased

2. That it is their submission that Rhoda Kittany is the only legal wife of the deceased proved by production of a marriage certificate exhibit 1 which is evidence of proof of marriage as provided for under section 34 of the Marriage Act Cap 150 Laws of Kenya. There are 7 issues between them and according to the evidence the deceased and PW1 were never divorced to enable the deceased conduct a second marriage to any other woman at all or to the first objector herein. That section 50 of the Marriage Act Cap 150 Laws of Kenya restricts subsequent marriages unless by valid judgment of a divorce and that if either of them before the death of the other should illegally contract another marriage while their marriage remains undissolved the offender would be guilty of bigamy and liable for punishment for that offence. That it is obvious that marriage under the Act is monogamous in nature and neither spouse can legally remarry during the life time of the other spouse without obtaining a decree of divorce from a court of competent jurisdiction. Since the deceased had not divorced Rhoda despite the problems they had between them he had no capacity to marry another wife and so the alleged subsequent marriage to Sally is illegal.

3. That if there was any marriage which they deny then the same did not comply with the requirements of section 37 of the Marriage Act Cap 150 Laws of Kenya, neither does it qualify for a presumption of a marriage as was in the case of the cited cases on presumption of marriage where it was held that marriage would be presumed once a party establishes long cohabitation and acts showing general repute. Long cohabitation was not defined but 9 years is taken to be a long cohabitation.

4. That the 1st objector who claims to be a widow of the deceased married under customary law is not a widow as shown by the law and the legal principles cited to the court. She lacks capacity to marry a man whilst his marriage under the Act subsist. Even if there was a marriage which they still deny Sally was not properly married according to Kipsigis Customary Law as no dowry was paid and no ceremony conducted and if any ceremony was conducted they object to the same as the same was not proved and was not conducted in accordance with the laid down procedures and so it did not meet the required standards. None of the family members from either side attended the ceremony and none of the witnesses who allegedly attended the same came to give evidence to prove this fact.

5. That presence of Sally at the deceased's funeral is no surprise as during a funerals both friends and

enemies attend the funeral to console the family and it is their submission that Sally and her children came to the home of the deceased like any other mourner this fact is confirmed by the evidence from the witnesses who testified that they saw Sally for the first time during the funeral. Some of these witnesses were half brothers of the deceased. If indeed Sally was a wife and had been married as claimed by her there was no reason as to why the deceased could have failed to introduce her to the family members and close neighbours and to Rhodah as a co-wife neither did she frequent the deceased home during functions or ceremonies.

6. That there is nowhere where Sally the first objector has sought a declaration that she was married to the deceased by way of long cohabitation that is by presumption of marriage. It is their stand that a declaration has to be made before a marriage can be presumed. It is their stand that the objector's situation falls short of a cohabitee and had there been acts of general repute and payment of dowry she would have been qualified a wife.

7. As regards the acquisition of the assets the evidence of Rhoda is unchallenged to the effect that she alone and the deceased contributed to the acquisition of those assets sought to be administered. She PW1 contributed both financially and in kind to purchase the various parcels of lands and their developments and even assisted the deceased with the bringing up and education of their children and has continued to do the same even after the deceased's death. She educates the children and she maintains the tea plantations at home. This is evidence of her positive attitude towards the estate. It is counsel's submission and stand that PW1 Rhoda Kittany has established a case to warrant this court to grant her the sole administration of the estate.

8. What the court is dealing with is a case of total intestacy where the deceased did not make any effective disposition of any property and so the law is called into play to determine who is the rightful person to administer the estate. It is their stand that the law recognizes the widow as the person with the first priority to administer the estate and courts of this land have held so. Section 66 of the Succession Act Cap 160 Laws of Kenya is also very explicit on this. It lists those who are entitled to take out the grant on priority. The objectors cannot be considered as administrators as at the close of the case they did not have the support of their sureties and so in this ground alone the objection fails. It is their stand that the second objector was brought in for purposes of convenience and to try and give due weight to the case of the first objector. They ask the court to dismiss the same.

9. That as regards the children of Sally claimed to be the children of the deceased by the first objector this was not proved as no baptismal cards or birth notification cards were produced to show that the deceased was their father. The birth certificate produced in court were obtained after the death of the deceased and so the deceased did not consent to be registered as the father of the children and it is their submissions that the certificates were not obtained in good faith. They were obtained long after the deceased's death and no explanation was given for the long delay and this can be clearly concluded that the move was taken to enable the objector snatch that which was not hers.

10. In the certificates the father's name is given as Chepkwony while in the proceedings he is shown as Kittany which is evidence of bad faith on the part of the objector. The counsel urges the court to believe the evidence of PW5 who said that boys in the family upon initiation were given the names of Arap Chepkwony, Arap Lelei and Arap Kittany and no child could be given more than one name. It follows that the deceased herein could not have been given the name of Arap Kittany and Chepkwony at the same time. PW5 was not challenged on this evidence during cross examination and this means that the first objector is either not sure of their father's names or that they were fathered by another man Chepkwony.

11. The morals of the first objector are questionable as she admitted in evidence that she had one child before the alleged marriage to the deceased and that during the pendency of these proceedings. This moral conduct on her part shows that she had no relationship with the deceased as she could not have forgotten him so soon after his death and then start another relationship with another person and given birth hardly a year after the death of the deceased. They urge this court to disallow the birth certificates produced by the first objector as they were not obtained in good faith and they should be declared null and void.

12. That records produced from Kenya Power & Lighting company which are supposed to be provided by employees as regards details of their nest of kin these records only show the name of Rhoda and her children and this court should be guided by them to show that Sally was not the deceased's wife. She has made her objection maliciously and it is their submission that she is only looking for something to maintain herself and the children however remotely obtained.

13. Concerning the evidence on entitlement to a share of the estate.

1. (i) The first objector Sally is not a wife in accordance to section 3(5) of the Act and so she is not entitled to inheritance as a wife.

(ii) She has not proved that she was a dependant of the deceased in terms of section 29 of the law of Succession Act which defines a dependant as a 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. Such of the deceased's parents, step parents, grandparents, grand children, step children whom the deceased had taken into his family as his own brother and sister and half brother and by the deceased immediately prior to his death.

2. The children of the first objector are not children of the deceased for purposes of the Act in terms of what they have submitted and so they are strangers to the estate and so they cannot inherit the deceased's estate. This is because the birth certificates as the only documents produced to prove paternity were obtained irregularly, unprocedurally and are faulty, erroneous and should be held to be null and void. They urge the court to follow the law to the letter and they urge, the court to follow the provisions of Cap 149 Laws of Kenya.

(ii) There is nothing to show that the said children were maintained by the deceased during his lifetime. Neither is there evidence to show that the deceased had taken them into his family as his own and paid fees for them and generally maintained them as his own.

(iii) The evidence of the first objector goes to show that she did most of the things herself which means she maintained herself and the children.

(iv) No documents were produced to show that it is either the deceased or herself who paid rent, school fees, and electricity bills etc.

(v) Also no evidence was adduced to show that the 1st objector assisted the deceased financially as alleged as no documentary proof was produced to that effect.

On the basis of the foregoing the petitioner's counsel urged the court to disallow the inheritance of the first objector and her children.

The defence put in very brief submissions, it is to the effect that the petitioner Sally Kittany and Nora Tigoi filed Nakuru P & A 175/2000 seeking letters of representation to the estate of the deceased. That the objector to that cause Rhoda Kittany gave evidence to the effect that she first cohabited with the deceased and had one child and then later on they celebrated a marriage under Kipsigis customary law which they later on converted to a statutory marriage under Cap 150 of the Laws of Kenya and she produced a certificate to that effect.

2. That the evidence on record goes to show that the marriage between Rhoda and the deceased was not a happy one despite the several issues of the marriage and this led the deceased to marry a second wife Sally with whom they had two children and they lived and maintained them in Nairobi. That the mother of the deceased, some family members and clan members and neighbours were aware of the second marriage, which was also under Kipsigis customary law.

3. That from the evidence of both sides there is no dispute that the deceased was a dependant of the deceased.

4. It is their submission that since Rhoda from her cross-examination did not undergo complete Kipsigis customary law, and the dowry was not fully paid nor were the attendant ceremonies performed it means that the statutory marriage on 22.12.1979 under Cap 150 of the Laws of Kenya was illegal null and void as under section 11(1)(d) of the said Act, parties to a statutory marriage should not have been married *inter alia* under native law and custom. It can only be issued to a spinster and a bachelor. The objector Rhoda and the deceased ought to have converted the marriage under the provisions of Cap 151 of the laws of Kenya. The certificate produced by the objector Rhoda is therefore invalid and carries no legal ramification. In any case the objector Rhoda did not give evidence that the marriage complied with the statutory process. That if the foregoing is accepted, it means that the marriage between the deceased and Rhoda was not monogamous and so the second marriage by the deceased to Sally was legal and valid and regular. That being the case both Rhoda and Sally are wives of the deceased and both them and their children are entitled to inherit the estate of the deceased as they all qualify to be dependents under section 29 of the law of Succession Act Cap 60 laws of Kenya.

5. That without prejudice to the foregoing the children of the deceased with Sally were dependants of the deceased and his estate without necessarily attaching it to the marriage of their mother to the deceased.

6. That as regards the distribution of the estate of the deceased section 40 and 41 of the Act binds the court and the same should be followed. Counsel for the first petitioner, Sally referred the court to an authority he did not annex. Counsel for the second petitioner, PW1 Rhoda referred the court to a number of authorities. The case of *Re Ruenjis estate* [1977] KLR 2 where it was held that in the absence of a decree of divorce the claims could not be allowed as section 37 of the Marriage Act provided any person whose marriage was regarded as valid under that Act (as the deceased's Christian marriage was) from contracting a valid marriage under the native law or custom during the subsistence of that marriage.

The case of *Re ogolas estate* [1978] KLR 18 where it was held that the deceased was incapable under the Marriage Act section 37 of contracting any valid marriage so long as his original marriage subsisted accordingly and did not become his wife and could not in such capacity inherit on his intestate.

The case of *Ayoob versus Ayoob* [1968] EA 72 where it was held *inter alia* that a ceremony purporting to be a marriage according to Islamic or customary law following a Christian or civil marriage between the same parties is not a marriage and cannot as such replace the actual marriage.

That reliefs under customary law apart the consequences of a marriage and the reliefs available to the parties depend in Kenya upon the form of the marriage ceremony and not on the faiths held by the parties. Therefore a change of faith does not effect these consequences or reliefs. The case of *Re Kibiego* [1972] EA 17A where it was held that a widow of whatever race is the proper person to obtain representation to her husband's estate particularly where the children are under age.

The case of *In the Matter of the Estate of Chesaina Lemiso Kipkuto (deceased)* Eldoret P & A 161 of 1996 a decision of this court in a similar situation where this court made finding on page 6 of the judgment that;

“Turning to the applicant's case I find that there is no marriage certificate no marriage agreement showing the existence of a valid marriage. There is no payment of dowry, construction of a house for her by the deceased which are essentials of marriage under customary law.

In the absence of a validly constituted customary marriage a party has no alternative but to rely on long cohabitation and presumption of marriage. Further that a declaration has to be made before a marriage can be presumed to exist.

2. That it was correct that the birth certificates of the children were taken after the death of the deceased for both the children of the first wife and the applicant who claimed to be the second wife but the baptismal cards were issued as soon as the children were born and they all bore the name of the deceased as their father. There is no evidence that they were forged. The birth certificates and the cards as well as correspondences show that the deceased recognized the

applicant's children as his. He was their father and he maintained.”

One authority of the *Estate of Reuben Nzioa Mutua* was not annexed while the other last two were not commented as in the submissions but a perusal of the same show that they relay the same message as those cited earlier on that once married under statutory law, there is incapacity to marry another person under any other system of law during the subsistence of the statutory marriage in the absence of a valid divorce from a competent court of law.

I was also referred to the amendment to section 3 of the Law of Succession Act Cap 160 laws of Kenya where section 3(5) was introduced and whose wordings are;

“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 nonetheless a wife for the purposes of this Act and the particular sections 79 and 40 thereof and her children are accordingly children within the marriage of this Act’.

As submitted by the petitioner's counsel [for Rhoda], this section was interpreted by my sister Judge in the case of *In the Matter of the Estate of Reuben Nzioka Mutua P & A* cause No 843 of 1986 to mean that a woman married under customary law is protected by that section for purposes of maintenance in the event the husband contracts a subsequent statutory marriage to another woman. That decision is from a court of concurrent jurisdiction and it is therefore of persuasive authority to this court. In this court's view the operative words “where her husband has contracted a previous or subsequent monogamous marriage to another woman.”

This court's interpretation of that amendment is that where it is proved that the deceased had previously contracted a valid customary law marriage and then subsequently contracted a subsequently statutory marriage both wives will inherit his estate. Likewise where the deceased contracted a previous statutory marriage and then subsequently contracted a customary marriage for purposes of the Succession Act only both women are wives. There is no doubt that that section is in direct conflict with the authorities cited herein and section 37 of the Marriage Act. The breath and purport of that section will be gone into later when determining who are the heirs to the estate subject of these proceedings.

I have considered the totality of the evidence adduced by both sides, considered the submissions of both counsels and the legal provisions and authorities referred to me and this court's findings are as hereunder:-

(1) Legal Status of the parties disputing herein

(i) Nora Tigoi, the mother of the deceased is an undisputed dependant. Even Rhoda agreed that the deceased maintained his mother. It is only the two of them who do not get on along well. Each accuses the other of disliking the other and not wanting to see her. Both fear that if the other is granted the letters of representation alone, she will not cater for their interests well. Each want to be an administrator. It is the finding of this court that if the parties do not get on along well as has been displayed in this case as between Nora Tigoi, the mother of the deceased and Rhoda Kittany, it is only proper that both be appointed joint administrators in order for each to safeguard her interest. It is also the finding of this court that Rhoda Tigoi, the mother of the deceased qualifies both to inherit the estate of her deceased son and also to administer the same jointly with the wife or wives as the case may be.

(2) Rhoda Kittany and her children:-

The evidence on record shows that Rhoda's marriage to the deceased is not in dispute. At first it was customary. The brother came and confirmed payment of part of the dowry and the court believed him as there was no contrary evidence. The counsel for the first objector to Rhoda's petition (Sally) tried to fault that marriage on two fronts:

(i) Not all customary prerequisites as per customary law of marriage of the Kipsigis was gone into and so the customary marriage was not valid. This court's finding on this is that no authority was produced to that effect and no evidence was produced to that effect to show that this was the position under Kipsigis/Nandi customary law. Secondly the issue was not raised in cross-examination of witnesses but in counsel's submission, I find the same is displaced.

(b) Issue was also raised about the statutory marriage of Rhoda and her deceased husband, also by the counsel for the first objector to Rhoda's petition on the ground that the same cannot stand as a customary marriage cannot be converted to a statutory marriage under the Marriage Act but under the African Christian Marriage Act Cap 151 Laws of Kenya. This court's finding on this argument is that if the customary marriage of Rhoda and deceased was not valid as submitted by counsel, then the deceased and Rhoda were at liberty to marry under statute. Secondly a marriage cannot be declared null and void through a counsel's submissions. The court should have been moved substantively to declare the same null and void. Having failed to so move, the court, it means that that marriage stands to date and it is valid and recognized by law and this court does recognize the same for purposes of these proceedings. It is therefore the finding of this court that Rhoda Kittany is a legal wife of the deceased and she is entitled to administer the estate of the deceased either alone or jointly with others as this court shall rule.

(ii) Rhoda's children It was alleged that two of Rhoda's children were disputed by the deceased but no documentary proof was shown to that effect that the deceased complained so. No witness came forward to confirm that the deceased raised that complaint. His own mother Norah Tigo recognized all of them for purposes of inheritance even Sally. It is therefore the finding of this court that all the children of Rhoda and the deceased are entitled to inherit the estate of the deceased.

3. Sally Kittany and her two children

(i) Sally:

Sally claims to have married the deceased as a second wife because the deceased was having problems in his marriage with Rhoda and secondly he wanted someone to take care of his mother. It is on record and it was even admitted by Rhoda herself and her witnesses that there was trouble in their marriage but each time it arose elders from both sides and relatives sat and resolved the issue and they became reconciled. Even the disagreements by the mother in law was sorted out by the elders and settled. She, Rhoda agreed at one time she moved to Kericho and stayed there briefly but they reconciled and during her absence the mother in law came, stayed in the home and looked after the home and the children.

There is also evidence that the family advised him to marry another wife and that is how Sally came into the picture of the deceased's life. The mother of the deceased and some of her witnesses recognize Sally and her children. Rhoda and her witnesses do not. Sally herself says that she was married under customary law at Ndabibi in Naivasha in a home of a person, who is now deceased.

(ii) None of the family members from either side were present although they send their blessings.

(iii) None of those who witnessed or conducted the same came to testify.

(iv) It was admitted no dowry was paid.

It is the finding of this court that the foregoing circumstances go to show that though the deceased's marriage to Rhoda was troubled no steps were taken by the deceased to bring it to an end. It subsisted upto the time of his death. It meant that he had no capacity to marry under customary law or by law required and any ceremony if any were gone into by the deceased and Sally, the same did not constitute a marriage and were null and void. Likewise even if there were such ceremonies the same did not constitute a marriage as not all the prerequisites were gone into and no house put up for Sally.

The next question is whether Sally can fall onto the presumption of marriage through long cohabitation and repute. This court has held before in another case with similar circumstances that before a man or

woman is to be presumed to have been married by virtue of long cohabitation and repute there has to be a declaratory order from a court of competent jurisdiction declaring. There is no such a declaratory order exhibited herein. It is the finding of this court that Sally Kittany is not a wife of the deceased and she does not come within the ambit of the provisions of the amendment in section 3(5) of the Law of Succession Act and so she will not inherit the estate of the deceased. She cannot also administer the same save for purposes of safeguarding the interests of her children if they are found to be eligible to inherit the estate of the deceased.

(ii) The Children of Sally

Sally herself and mother of the deceased recognize them and are willing to have them inherit the estate of the deceased. Rhoda and her counsel have put up a hard fight to lock out of the estate both the mother and the children. The counsel for the first objector Sally has submitted that the children can inherit even in the absence of a marriage between their mother and the deceased. The disqualification points put forward by the counsel of PW1 are:-

(i) The birth certificates were obtained after the death of the deceased and no baptismal cards and birth notification documents were produced to show that the deceased had been indicated as their father before death.

(iii) That there is nothing to show that the deceased consented to be registered as their father.

(iv) There is nothing to show that the deceased maintained them and had accepted them as his own children.

(v) That the deceased was given his surname as Kittany while the children bear the name of Chepkwony and they could have been for any other Chepkwony.

I have considered those points in the light of the evidence adduced and I find that:

(i) It is the mother Sally who can positively swear and say who is the father of each of her children.

(ii) If she were dishonest as portrayed by PW1 and her counsel then why did she not include the first and last child.

(iii) Evidence of maintenance between people who live together as man and wife though they are not so legally married is sometimes hard to prove as in normal circumstances no records are kept of the day to day activities in such a house or home. It is therefore only the deceased who could positively controvert what Sally said but unfortunately he is not here to say that.

(iv) The mother of the deceased said that whenever children were born the deceased informed her and she took traditional herbs to Sally, stayed with her during that time shortly after birth in accordance with their custom. This evidence was not commented on by the counsel of PW1 and I believe the testimony of the mother of the deceased Norah Tigo DW4. This was a sign of recognition of the paternity of the children by the deceased.

(v) As regards the name of Chepkwony it is in evidence that the father of the deceased gave to his sons upon initiation either the name of Arap Lelel, Arap Chepkwony or Arap Kittany. The name appearing as Arap Chepkwony is therefore a family name of the deceased's family.

It is on record from the evidence of the brother of PW1, that he has knowledge that the deceased used to have extra marital affairs with other women besides Rhoda. The deceased went as far as going with these women to his house and he named them as mother Kibet and mother Gakweria who have not come forward to claim part of the estate. The said brother said that at no time did the deceased mention Sally to him neither did he bring her to his house. Evidence that deceased had extra marital affairs is enough. It

does not rule out Sally to have been one of those women. The deceased was not obligated to disclose each and every association to the brother of PW1. The failure to disclose to him does not rule out Sally's association to the deceased as he the deceased was not obligated to disclose it to anybody although he disclosed the same to his mother and some relatives.

It is on record that he never wanted the two women to meet and that accounts for the secrecy.

Further the fact that no other women came forward to claim part of the estate except Sally does not bar her claim for her children.

It is therefore the finding of this court that the two children of Sally fall within the ambit of the amendment in section 3(5) of the Law of Succession Act and are eligible to inherit the estate of the deceased independent of their mother Sally.

Having so held, I now come to determine the administrator of the deceased's estate and two (2) the distribution of the estate:-

ADMINISTRATOR

In view of the hostilities displayed in these proceedings this court appoints the following as administrators of the estate of the deceased.

(1) Rhoda Kittany to represent her own interest and those of her children.

(2) Norah Tigoi to represent her own interest and act as a joint trustee for the children of Sally born to Sally and the deceased.

(3) Sally Chebiwot Maina to represent the interests of her two minor children and also to Act as trustee for them jointly with the mother of the deceased Norah Tigoi:-

Distribution of the Estate

In doing so the court will be guided by the fact that Norah lived longest with the deceased and contributed substantially to the developments of the deceased's estate.

The court will also be guided by the principles set out in the Succession Act Cap 160 laws of Kenya section 28 thereof and these are:

(a) The nature and amount of the deceased's property.

(b) Any past, present or future capital or income from any source of the dependant.

(c) The existing and future means and needs of the dependant.

(d) Whether the deceased had made any advancement or other gift to the dependant during his lifetime.

(e) The conduct of the dependant.

(f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will.

(g) The general circumstances of the case including so far as can be ascertained the testator's reasons for not making provision for the dependant.

The estate of the deceased comprises the properties set out at page 7-10 of this judgment. I have

considered all the relevant factors in this case and doing the best I can distribute the estate of the deceased as hereunder:-

1. To Norah Tigoi the mother of the deceased
(i) NSSF benefits of Kshs.154, 040/-. Whole share together with any accrued interest. (ii) And undeveloped plot at Kericho measuring 50 feet by 100 feet.

2. Rhoda Kittany with all her children
(a) NANDI KAIBOI/887
(b) NANDI KAIBOI/888
(c) NANDI/KAIBOI/880
(d) NANDI KAIBOI/882
(e) NANDI KAIBOI/1068
(f) LR 78830/174 TO BE SHARED WITH ONE KOGO
(g) A PLOT IN Mombasa allotted to the deceased and another.
(h) Motor vehicle registration No KAB 233X. (i) Death gratuity Kshs.1,805,204/80.
(j) Widows and children pension Kshs.46,000/- per month from the date of death to date together with any accrued interest.
(k) All proceeds from Chemoni Tea factory of Kshs.243,348/60 as at the time of trial and any other additional sums since then together with any accrued interest thereto.
(l) To get all debts owed to the estate of the deceased, which she will recover herself.
(m) Rhoda Kittany who has taken the lions share of the estate will also pay the debts owed to the bank and 3rd parties by the estate.

3. The children of Sally Chebiwot Maina namely
(1) Allan Kibet Chepkwony Kittany.
(2) Jael Jelangat Chepkwony Kittany.
(a) Sitima SACCO benefits Kshs.108,975/- together with any accrued interest if any.
(b) Refund of employers surrender value Kshs.496,695/ - together with any accrued interest if any.
(c) A plot in Kiamunyi belonging to the deceased.
(d) Plot No ELDORET EMC 17195/208.
(e) 5 acres of land given to the deceased in Kipkelion as his share of the ancestral land.

4. Each party will bear her own costs of the proceedings.

5. The money given to the children of Sally are to be deposited in an interest earning account in the joint names of Norah Tigoi and Sally Chebiwot Maina to hold as trustees for the said minors.

6. The amount so invested for Sally's children is not to be withdrawn without prior authority from this court and the same to be distributed to the minors when they all attain the age of majority.

7. Interest earned and/or accrued on the said amount to be withdrawn by the trustees from time to time with leave of the court whenever need arises and the same to be used towards the educational and general maintenance of the said minors.

8. The money due to Norah Tigoi to be paid out to her forthwith. (ii) The plot to her also to be transferred to her forthwith.

9. The money given to Rhoda Kittany and her children to be paid out to her forthwith. (ii) The lands and plots given out to Rhoda and her children to be transferred to her.

10. The plots and land given out to Sally's children are to be transferred into the names of the trustees Norah Tigoi and Sally Chebiwot Maina. (ii) The said properties are not to be sold, mortgaged or transferred to any other 3rd party without prior authority from this court. (iii) The said properties to be transferred to the minors when they all attain the Age of majority

11. There will be liberty to apply for the sake of Sally's children who are still minors.

Dated and delivered at Eldoret this 22nd day of November, 2002

R.N NAMBUYE

JUDGE