



REPUBLIC OF KENYA



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In re Estate of Chelule Arap Nyige alias Chelule Nyige (Deceased) (Succession Cause E036 of 2021) [2025] KEHC 1240 (KLR) (3 March 2025) (Ruling)

Neutral citation: [2025] KEHC 1240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
SUCCESSION CAUSE E036 OF 2021
JK NG'ARNG'AR, J
MARCH 3, 2025**

**IN THE MATTER OF THE ESTATE OF CHELULE
ARAP NYIGE ALIAS CHELULE NYIGE (DECEASED)**

BETWEEN

EMILY CHEPKIRUI KENDUIYWA OBJECTOR

AND

VERONICA CHEPCHIRCHIR KENDUIYWA 1ST PETITIONER

JOHANA KOECH CHERUIYOT 2ND PETITIONER

GILBERT KIPRONO CHERUIYOT 3RD PETITIONER

RULING

1. The Petitioners petitioned this court for Letters of Administration Intestate for the estate of Chelule arap Nyige alias Chelule Nyige (deceased) on 8th September 2021. The Petitioners were issued with the Grant in their names on 15th March 2022 and the Grant was later confirmed and a Certificate of Confirmation of Grant issued on 31st May 2023.
2. The Certificate of Grant contained a distribution schedule of the suit property which was Kericho/Silibwet/774. The suit property was divided among Gilbert Kiprono Cheruiyot (3rd Petitioner), Veronica Chepchirchir (1st Petitioner), Regina Chepkirui Sang, Alice Cheronon Birir, Johana Kipkoech Cheruiyot (2nd Petitioner), Edna Chemutai, Geoffrey Kipkemoi Chelule, Paul Kipkemoi Koskei, Evaline Chepngetich Kirui, Eric Kiplangat Bett, Beatrice Cherotich Langat, Benard Kipkorir Kosgey, Sammy Kibet Langat, Leonard Kibet Koskei, Ann Kisaka Nangulu, Rebecca Chelangat Sang, Reuben Kipngeno Rutoh and John Kipngetich Bii.



3. The Objector, Emily Chepkirui Kenduiywa filed Summons for Revocation of the Grant dated 3rd August 2023. The Objector also sought for an order that any resultant titles emanating from Kericho/Silibwet/774 be restored for proper distribution by this court.

The Objector's case

4. The Objector stated that the Grant was issued fraudulently as the Petitioners concealed material facts from the court. That she was the wife of Veronica Kenduiwo (1st Petitioner) in a woman to woman marriage under the Kipsigis culture. The Objector further stated that the 1st Petitioner was unable to sire children and she (Objector) agreed to sire children on her behalf.
5. It was the Objector's case that after the death of the deceased, the 1st Petitioner became violent and hostile towards her and her children and this made her seek refuge at her relatives' homes. That her relatives bought land and resettled her and she had lived separately from the 1st Respondent since then (2012).
6. The Objector stated that she had excluded from the succession proceedings and she was in danger of being disinherited.
7. In her submissions dated 24th January 2025, the Objector submitted that the Chief's Letter dated 2nd August 2023 acknowledged that she was married to the 1st Objector. That the woman to woman marriage was a cultural practice that was accepted and acknowledged among the Kalenjin community in which the Objector and 1st Petitioner were members.
8. The Objector submitted that in the woman to woman marriage as in the present case, the children she sired belonged to the 1st Petitioner and the deceased and consequently, the children were beneficiaries of the estate of the deceased. That as the mother of the children she was therefore entitled to be a beneficiary of the deceased's estate. The Objector further submitted that the 1st Petitioner filed the current succession proceedings without her knowledge and had left her out in the list of beneficiaries. She relied on section 51 (2) (g) and section 76 of the *Law of Succession Act*.
9. It was the Objector's submission that she had been taken into the family of the deceased and was provided for.

The Response.

10. The 1st Petitioner filed a Replying Affidavit dated 30th October 2023. She stated that she could not sire children and therefore she adopted Gilbert Kiprono Cheruiyot (3rd Petitioner) and his sister as the son and daughter of the deceased.
11. It was the 1st Petitioner's case that the Objector deserted their matrimonial home without any justifiable reason. That the Objector had a claim of 0.3 acres of the deceased's estate which she wanted to dispose of. It was the 1st Petitioner's case that she did not include intermeddlers as beneficiaries of the deceased's estate.
12. The 1st Petitioner stated that there was no fraud in obtaining the Grant as the Objector gave consent to her son to dispose of her share of 0.3 acres. That during the lifetime of the deceased, they (deceased and 1st Petitioner) set aside part of the estate to be sold and another to be shared among the Objector and her heirs.
13. In her submissions dated 12th November 2024, the 1st Petitioner submitted that she was married to the Objector in a woman to woman marriage but were divorced in the year 1994. That the Objector was not married to Chelule Nyige (deceased) and she was not provided for by the deceased during his



lifetime and was thus not entitled to the estate of the deceased. She relied on section 29 of the Law of Succession Act and re Estate of M'Muthania Mwendwa (Deceased).

14. It was the 1st Petitioner's submission that the Objector did not provide evidence that she was maintained by the deceased prior to his death. That the instant succession suit was in relation to Chelule Nyige (deceased) and not the 1st Petitioner and the proper redress for the Objector was to file a matrimonial suit and have the property they jointly acquired be subdivided amongst themselves.
15. The 1st Petitioner submitted that part of the deceased's estate had been given to the Objector and her family. That the said share was disposed of to a purchaser who was listed in the confirmed Grant. It was her further submission that the Objection was frivolous and ought to be dismissed.
16. I have considered the Summons for Revocation of Grant dated 3rd August 2023, the 1st Petitioner's Replying Affidavit 30th October 2023 and the parties' respective written submissions. The only issue for my determination was whether the Grant issued on 15th March 2022 and confirmed on 31st May 2023 should be revoked.
17. Section 76 of the Law of Succession Act provides:-

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
 - (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
 - (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
 - (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
 - (e) that the grant has become useless and inoperative through subsequent circumstances.
18. The sole issue raised by the Objector was that she was a beneficiary of the estate of the deceased by virtue of being in a woman to woman marriage with the 1st Objector, who was the deceased's wife. When discussing Customary Law, the Court of Appeal in Agnes Kwamboka Ombuna v Birisira Kerubo Ombuna [2014] KECA 392 (KLR) held:-

“.....Customary Law, as we understand it, consists of rules of law derived from the customs and usages of any particular community. They are customs or usages practiced by a



particular community for over a long period of time and have consequently acquired the binding force of law within the particular community as they have been accepted within that community. To demonstrate that such customs or usages have acquired the binding force of law a party relying on the same must lead evidence in that regard. So, the issue of whether a particular custom or usage is binding on any particular community is one of fact.”

19. Jurisprudence from our courts are to the effect that woman to woman marriages are accepted and practiced in some communities in Kenya. Karanjah J. *in re Estate of Kiprono Miso (Deceased)* [2024] KEHC 7279 (KLR) held:-

“Eugene Cotron, the Learned Author states in his publication “*the Law of Marriage and Divorce* (1968)” that in a woman to woman marriage (“Kilum chi toloch”) among the Nandi and Kipsigis Sub-tribes, a woman past the age of child bearing and who has no sons, may enter into a form of marriage with another woman. This may be done during the lifetime of her husband, but is more usual after his death.

Marriage consideration is paid as in regular marriage, and a man from the woman’s husband’s clan has sexual intercourse with the woman in respect of whom marriage consideration has been paid. Any children born to the woman are regarded as the children of the woman who paid marriage consideration and her husband.

The foregoing clearly indicate that the woman “wife” and her children would be regarded as the dependents of the woman “husband” and also of her husband. It is also indicated that payment of dowry is a requirement precedent for a valid woman to woman marriage.

Other requirements would include that the woman husband must be childless and as a matter of course, such marriages must not be repugnant to justice and morality.

It is generally accepted in both law and fact that in a woman to woman marriage where all the requirements have been duly met, the *Law of Succession Act* is applicable thereby placing the woman “wife” and her children in the first line of inheritance under succession of the estate of the woman “husband”

20. Similarly in *Ezekiel Kiptarus Mutai v Esther Chepkurui Tapkile* [2015] KEHC 714 (KLR), Ong’udi J. held:-

“Woman to woman marriage is recognized in some communities in Kenya. The Nandi & Kipsigis being among them. For such a marriage to be proved there must be evidence adduced to show its existence. In the case of *Monica Jesang Katan v. Jackson Chepkwony & Another (supra)* J.B. Ojwang J (as he then was) found the existence of such a marriage under Nandi Customary Law following the consistent evidence that was adduced before the court. He held that the petitioner was a wife of the deceased within the meaning of Section 29 of *Law of Succession Act*. In the case of *Eliud Maina Mwangi v Margaret Wanjiru Gachangi NRB Court of Appeal NO.281 (A) of 2003 R Nambuye J.A* found that the Kikuyu woman to woman marriage had not been proved by the alleged “widow”.

Upon analysis of the evidence before this Court I find the evidence of the Applicant to be consistent, and reliable as opposed to that of the Respondent and his witnesses. I consequently find that the Applicant Esther Chepkirui Tapkile was a wife of the deceased as per the operative customary Law, which was Kipsigis Customary Law. She therefore qualifies as a wife under Section 29 of the *Law of Succession Act*.”



21. In the present case, it was not disputed that the Objector and the 1st Petitioner were in a woman to woman marriage. The 1st Petitioner however stated that the Objector was not entitled to be a beneficiary of the deceased's estate as she had divorced the Objector in the year 1994 and that the Objector did not prove that the deceased provided for her during his lifetime.
22. On the issue of divorcing the Objector, the 1st Petitioner did not provide any evidence of a divorce absolute or divorce proceedings between. She cited a Kericho Civil Suit Number 145 of 1994 as the Divorce Cause. To the mind of this court, the cited case as drafted was civil in nature and was not a divorce cause. In any event, the 1st Petitioner cited the case (Kericho Civil Suit Number 145 of 1994 as the Divorce Cause.) in her submissions and not in her Replying Affidavit. The place of submissions was stated by the Court of Appeal in *Daniel Toroitich Arap Moi v. Mwangi Stephen Muriithi & Another* (2014) eKLR where it held:-
- “Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.” (Emphasis mine)
23. Flowing from the above, it is my finding that the Objector and the 1st Petitioner's marriage had not been dissolved.
24. That said, it is my further finding that the Objector was the 1st Petitioner's and deceased's wife and was a beneficiary as contemplated under Section 29 of the *Law of Succession Act* which lists dependants or beneficiaries as follows:-
- (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.
25. *In re Estate of JPN VG (Deceased)* [2021] KEHC 3972 (KLR), Onyiego J. held:-
- “From the reading of Section 29 above quoted, the category of dependants under paragraph (a) is special and automatic in nature. They do not need to prove that they were under the maintenance of the deceased immediately prior to his death.....”
26. From the above, it is clear to me that the Grant was defectively procured as the Objector was not included as a beneficiary of the estate of the deceased and as such the said Grant can only be classified as defective as contemplated under section 76 of the *Law of Succession Act*.
27. In the end, the Grant issued on March 15, 2022 and confirmed on May 31, 2023 is revoked.
- Orders accordingly



RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 3RD DAY OF MARCH, 2025.

HON. JULIUS K. NG'ARNG'AR

JUDGE

Ruling delivered in the absence of the Objector, Koech for the Petitioners and Siele/Susan (Court Assistants).

