



REPUBLIC OF KENYA



**In re Estate of Kiprono Misoi (Deceased) (Probate & Administration  
E011 of 2021) [2024] KEHC 7279 (KLR) (18 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7279 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
PROBATE & ADMINISTRATION E011 OF 2021**

**JR KARANJA, J**

**JUNE 18, 2024**

**RULING**

1. The application vide the summons for revocation of the grant dated 10<sup>th</sup> May 2023 is in respect of the grant of letters of administration intestate which was made and issued on 24<sup>th</sup> May 2022 respecting the estate of the late Kiprono Misoi (Deceased) pursuant to the petition filed herein on 19<sup>th</sup> August 2021 by the Petitioners, Jepkinyor Misoi and Daniel Kipchirchir Sirwany in their capacities as widow and son of the deceased respectively.
2. The affidavit in support of the petition showed that the deceased was a polygamist married to two wives during his lifetime. The first Petitioner was the Deceased's Second Wife with whom they had eleven (11) children i.e. four (4) sons and seven (7) daughters.  
The late Teresa Chemeli David (Deceased) was the First Wife of the Deceased.  
The Second Petitioner is the sole surviving male child of the deceased. The other three sons of the deceased have since passed away.
3. The estate of the deceased was said to comprise four (4) parcels of land described as Nos. Nandi/Surungai/2, Nandi/Surungai/16, Nandi/Chepterwai/271 and Nandi/Chepterwai/292.  
The summons for the confirmation of the grant were dated the 4<sup>th</sup> August 2022, but the grant was confirmed much later on 17<sup>th</sup> April 2023 with the transmission of the aforementioned parcels of land to the First Petitioner as the surviving widow of the deceased.
4. Apparently, prior to the issuance of the grant, the Objector herein, Tecla Chepchumba, filed a citation respecting the deceased's estate in Miscellaneous Application No. E003 of 2021, in which the First Petitioner was the Citee. The Citor/ Objector also filed an application dated 19<sup>th</sup> January 2021 for a temporary injunction order against the Citee/ First Petitioner respecting a parcel of land described as Nandi/Surungai/1 measuring seven (7) acres.



5. The application was allowed by the court in its ruling made on 15<sup>th</sup> March 2021. However, the subject parcel of land was not among those listed in the petition for grant of Letter of Administration by both Petitioners either as an asset or liability of the estate.

Nonetheless, after the confirmation of the grant the Objector filed the present application dated 10<sup>th</sup> May, 2023, seeking the basic order that the grant and the certificate of confirmation of grant dated 17<sup>th</sup> April 2023 be revoked on grounds that the proceedings to obtain the grant were defective in substance and that the grant was fraudulently obtained by the making of false statement and concealment of material facts.

6. The other ground for the application was that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify it.

All the grounds are fortified by the objector's averments and annexures contained in her supporting affidavit dated 10<sup>th</sup> May 2023 and supplementary affidavit dated 8<sup>th</sup> May 2024. The Petitioners opposed the application vide the replying affidavit dated 26<sup>th</sup> June 2023.

7. Expecting that the application would be heard by oral or "viva-voce" evidence both parties filed their respective witness statements. However, the matter proceeded by way of affidavit evidence and written submissions which were filed on behalf of the Applicant/Objector by Bitok and Sambu Advocates and on behalf of the Respondent/ Petitioners by Cheruiyot, Melly and Associates Advocates.

8. Having considered the application on the basis of the supporting grounds and in the light of the rival submissions, it became apparent to this court that the basic issue which presented itself for determination was whether the Objector was a dependent of the deceased by virtue of her alleged woman to woman marriage with the deceased's departed First Wife, Teresa or Tereza Chemeli David. Whereas a positive answer would prove that the subject grant or its certificate of confirmation of grant or both were obtained by false statements and/or misrepresentation on the part of the Petitioners, a negative answer would disprove the fact and render this application lacking in merit and an abuse of the court process.

9. The Objector's case is founded on the unique African institution known as woman to woman marriage which involves a woman paying the bride price and marrying another woman as her husband. Such union is legally and socially recognized as a marriage with the expectation that a woman "husband" would provide for her woman "wife" who must bear children. This is a tradition practiced by several communities in Kenya including the Kalenjin community to which the deceased belonged and both the Objector and Petitioners belong. It is a cultural practice founded on Article 11(1) of *the Constitution* which provides that: -

"*the Constitution* recognizes culture as foundation of the nation and as the cumulative civilization of the Kenya people and nation."

10. Thus, customary marriages as understood and practiced within different communities, tribes or clans are recognized within the formal legal system so long as they do not contradict or are not inconsistent with constitutional norms pertaining to equality and human rights.

All marriages in Kenya must therefore comply with and be in accordance with the provisions of the *Marriage Act*, 2013.

The evidence availed herein indicated that the deceased and both the Petitioners and Objector belong to the Nandi Sub-tribe of the Kalenjin Community of Kenya for which a woman to woman marriage is a tradition.



11. 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.

12. 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.

13. 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”.

In *Monica Jesang Katam Vs. Jackson Chepkwony and Another* (2011) eKLR, the court stated that once a woman to woman customary marriage has been conducted with all requirements fulfilled and in accordance to customary laws that are not inconsistent with *the constitution*, then the subjects of such marriages become beneficiaries of the estate of the female husband upon her demise. Their rights are covered under Section 29 of the Succession Act.

14. Rule 14 of the *Probate and Administration Rules* provides for application of African Customary Law in the following terms:-

“where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African Customary Law he may do so by the production of oral evidence or by reference to any recognized treatise or other publication dealing with the subject notwithstanding that the author or writer thereof shall be living and shall not be available for cross-examination.”

In the present case, the contention by the Petitioners was that there has never been a customary woman to woman marriage between the deceased’s first wife, Tereza Jemeli David and the Objector even though the said First Wife was childless. As such, the Objector was neither a dependent of the deceased nor a beneficiary of his estate.

15. The affidavit evidence availed herein by both parties does not raise any dispute with regard to the fact that the deceased was married to the first Petitioner and the Late Teresa Jemeli David as his Second and First wives respectively. It was also not disputed that the marriage between the deceased and his first wife was never blessed with any child and that in such circumstances the Nandi Customary Law allowed a party to contract a woman to woman marriage for purposes of child bearing or as it were, “rekindle the womanhood” of the affected woman.



16. The bone of contention was whether the deceased's First Wife took and lived with the objector so that the Objector may bear children for her or that she (First Wife) traditionally married her (Objector) for that purpose.

In her supporting affidavit, the Objector averred that in the year 2006 the deceased's First Wife approached her with the intention of them contracting a woman to woman marriage under customary law. She accepted the arrangement thereby prompting the deceased who was then alive to direct that a house be constructed for her and his First Wife on a portion of land described as No. Nandi/Surungai/1 in which he held a purchaser's interest.

17. The Objector averred that a house and a cowshed were constructed on the aforementioned portion of land measuring seven (7) acres after which she and the deceased's First Wife moved in. The deceased also gave her (Objector) selected cows from his herd and by the time he passed away in the year 2009, she and his first wife were fully in occupation of the portion of land.

18. The Objector averred that the First Wife of the deceased visited her parents and negotiated for dowry which was fully paid. She was therefore brought into the deceased's family as a wife to his First Wife and in the process she bore four children but the last one, born in the year 2016, passed away three days after birth and was buried by the deceased's First Wife in her homestead.

19. The objector also averred that the deceased's First Wife passed away in July 2019, after having lived with her for over fourteen (14) years.

That, thereafter, the First Petitioner and her children threatened her with eviction from the parcel of land she was occupying. That, this led to several meetings being called by the local administration with a view to resolving the dispute arising between her and the First Petitioner.

20. In the supplementary affidavit dated 8<sup>th</sup> May 2024 the Objector exhibited a bundle of documents to demonstrate that the dispute between her and the First Petitioner commenced soon after the death of her female husband (the deceased's First Wife) and was deliberated and resolved by the local administration.

The Objector indicated that the First Petitioner attended the meetings but reneged on the resolution reached and ended up with the application for grant of Letters of Administration without including her in the succession cause.

21. The annexures to the Objector's supplementary Affidavit were never disputed by the Petitioners. In essence, the annexures demonstrated and established on a balance of probabilities that indeed the Objector and the deceased's First Wife had contracted a valid woman to woman marriage which was formally effected on the 18<sup>th</sup> June 2011 with the payment of bride price (dowry) in the form of four (4) cows and a sheep to the Objector's parents.

22. The annexed minutes of the deceased's family meeting under the auspices of the local administration held on 14<sup>th</sup> July 2020 and involving the community elders showed that the marriage between the deceased's First Wife and the Objector was confirmed and endorsed as having passed the traditional rites that went with it.

23. For all the reasons foregoing, it is the finding of this court that the Objector was a dependent of the deceased by dint of the customary woman to woman marriage between herself and the departed First Wife of the deceased. It would therefore follow that the Petitioners in excluding the Objector and by extension her children who are regarded as the dependents and beneficiaries of the deceased's departed First Wife, obtained the impugned grant and indeed the impugned certificate of confirmation of grant



by misrepresentations, making of false statements and concealment of material facts in relation to the Objectors relationship with the deceased through his departed First Wife.

24. Consequently, the present application is merited and is allowed to the extent that the grant of letters of administration dated 24<sup>th</sup> May 2022 together with the certificate of confirmation of grant dated 17<sup>th</sup> April 2023 are hereby revoked with orders that a fresh grant do issue forthwith in the joint names of the two Petitioners, Jepkinyor Misoi and Daniel Kipchirchir Sirwaniy and the Objector, Tecla Chepchumba.
25. The three shall engage and take out summons for confirmation of grant after agreeing on the mode of distribution at least within the next four (4) months from this date hereof. The matter shall be given a mention date on the progress thereof and/or further orders.

Dated and delivered this 18<sup>th</sup> day of June, 2024

**J. R. KARANJAH,**

**JUDGE**

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