In re Esttae of the Late Cheratasi Kigen Jonathan - Deceased (Succession Cause 48 of 2002) [2024] KEHC 12310 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12310 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 48 OF 2002

RN NYAKUNDI, J

OCTOBER 11, 2024

IN THE MATTER OF THE ESTATE OF THE LATE CHERATSI KIGEN JONATHAN – DECEASED

BETWEEN

SARAH JEMUTAI CHUMBA ..... 1ST PETITIONER

ANTHONY K CHUMBA ..... 2ND PETITIONER

AND

MARIA KOMEN KANDIE ..... OBJECTOR

RULING

1. The matter herein relates to the estate of the Late Cheratsi Kigen Jonathan who died on 16th March, 2003 and through a petition dated April 12, 2002, Sarah Jemutai Chumba approached this court seeking a Grant for Letters of Administration intestate as the widow of the deceased. The Grant of Letters of Administration was issued on 13th December, 2002 and later confirmed on 10th July, 2003 where two properties known as Title No. UG/Kaptagat/130 and UG/Kaptagat/287 were divided equally among the Petitioner Sarah Jemutai Chumba and one son Anthony Chumba.

2. The Objector was aggrieved by the said proceedings and as a result filed summons for revocation of grant dated 5th July, 2006 stating that she and her two sons Daniel Kipkemboi Chumba and Mathew Kimutai Chumba were beneficiaries to the deceased estate in their capacity as widow and children respectively and had been left out by the Petitioner whom they accused of concealing material facts.

3. In response to the summons, the Petitioner denied the fact that the Objector was married to the deceased and stated that the Objector had come to the deceased's home sometimes in 1999 which she alleged was some few months before the death of the deceased.

4. Fast forward, the Petitioner who had been solely issued with the Letters of Administration died on 23rd March, 2008 and an application for her substitution dated 13th January, 2009 was filed in court on 13th March, 2009 and allowed by consent on 25th May, 2009.

The petitioner's case

5. The Objection was opposed by the Petitioners who called three witnesses to buttress their case.

6. PW1 was Anthony Chumba who told the court that he was the deceased's son and that the Petitioner was her step-sister. He stated that he knew the 2nd Objector whom he acknowledged they got circumcised together in a group of 23 boys. He denied the fact that he schooled with the 2nd Objector and stated that the 2nd Objector went to school in Kerio Valley.

7. Caroline Chumba testified as PW2 and adopted her witness statement dated 9th December, 2015 and stated that she does not know any existing relationship between the objector Maria Komen Kandie with the deceased. She also stated that the sons to the Objector are also strangers.

8. PW3 was Erick Chekobei. He testified that he did not know the marriage between the Objector and the deceased. He stated that during the lifetime of the deceased, there is no time that the deceased or the family at large conducted an engagement under any system even in Keiyo Customary law.

Objector's case

9. In support of their case, the Objectors marshalled five witnesses.

10. Maria Komen Kadie testified as OW1 and stated that she was the third wife of the deceased and that they had been blessed with two issues namely Mathew Chumba and Daniel Chumba. It was her testimony that they started living with the deceased in 1968 and that the deceased took care of her and her children during his lifetime. She told the court that she and the deceased did not perform any marriage ceremony because the deceased got sick but confirmed that she had lived with the deceased during his lifetime at the deceased's farm in Tendwa location, Kaptagat on the Hills after he took her from her home in Nandi which farm is where the deceased was buried a place she continues to stay to date.

11. PW2 was Mathew Kimutai Chumba, the 2nd Objector. He adopted his statement dated 6th January, 2016 and stated that he was born in 1979 and moved to the deceased's farm in Kaptagat in the year 1988. That he was schooled by the deceased and that he had stayed with him until he died. He stated that he had a brother named Daniel Chumba and that the deceased had three wives. That like him, his brother, his step brothers and step sisters they used the surname chumba. He further stated that they lived harmoniously with the other families until after the death of the deceased when his uncle Eric Chekobei came to the farm, caused it to be sub divided into two portions which he purported to allocate to the first two houses and told them to leave.

12. He also testified that he was taken through the rite of circumcision by the deceased in his capacity as his father in the year 1994 together with his step brother Anthony chumba (PW1) and that the deceased had built a house for them in the land where the other families resided and that he and his brother had also built their houses on the same parcel.

13. In addition, the witness told the court that the deceased had attended his brother's wedding ceremony together with his two step-mothers as could be seen from the photographs produced in court, further he knew the whole family of the deceased and easily identified them by name.

14. Samuel Kiprotich Lagat testified as OW3 and stated that he was a retired chief of Kaptagat location where the deceased was domiciled in his lifetime. He produced his statement fled on 6th January, 2017. He stated that he had known the deceased and that he had three wives when he assumed office in the year 1994. He told the court that the deceased had lived with the 1st Objector since the year 1988 and that the deceased had built matrimonial homes for all his three wives according to Keiyo customs and that the arrangement on how the deceased's wives lived in the land remains so to date.

15. He stated that upon receipt of the Objectors complainant, he investigated the matter and confirmed that the Objectors were the deceased's wife and son. He also wrote to his boss, D.O Lesota who went to the deceased's home to confirm how the families were living and they both wrote letters confirming that the 1st Objector and her two children were beneficiaries to the deceased's estate.

16. On cross examination, he faulted his assistant chief at the time for not consulting him while writing the letter which indeed left out other beneficiaries. He denied the Petitioner's assertions that the 1st Objector only came during the funeral and stayed on.

17. Daniel Chumba testified as OW4 and adopted his witness statement filed on 6th January, 2017. He stated that he stayed at Kaptagat and that the deceased was his father. That they settled in the deceased's farm in the year 1988. He stated that the deceased paid his school fees and driver's licence. He further stated that in accordance with Keiyo customs, the deceased presented him for circumcision and attended his marriage ceremony in the year 1996.

18. The last witness was James Malakwen who testified as OW-5 who testified as a neighbour to the deceased and business partner. He told the court that the 1st Objector was the deceased's third wife and that they had been blessed with the two children. He further stated that the deceased used to take care of the of the Objectors and that he had built a house for the 1st Objector on the far end of the farm next to the river in accordance with Keiyo customs.

19. The Objectors also filed their submission dated 25th February, 2023. Learned Counsel Mr. Langat identified four issues for determination as hereunder:

    a. Whether the proceedings used to obtain the Grant and Certificate of Grant were defective in substance.

    b. Whether the Grant and certificate of confirmation of Grant were obtained fraudulently by making of a false statement and/or by concealment of a material fact.

    c. Whether the 1st Objector Maria Komen Kandie and her children Mathwe Kimutai Chumba and Daniel Kipkemoi Chumba are beneficiaries and/or dependants to the deceased's estate.

    d. Whether the Plaintiff is entitled to the reliefs sought in the Plaint.

20. On the first issue, it was submitted for the Objectors that the failure of the petitioner to sign, commission and date the Petition and the Affidavit in support rendered the Affidavit in support rendered the entire cause fatally defective that no Grant and Certificate of confirmation of Grant could be issued based on the said documents. On this he cited the decision in Gideon Sitelu Konchellah v. Julius Lekakeny Ole Sonkuli & 2 others (2018) eKLR.

21. Mr. Langat further argued that even after being granted leave to sign and file a fresh petition and Affidavit in support thereof on 5th November, 2007, the Petitioner on 23rd November, 2007 again filed undated petition (form P&A 80) and dishonestly and deliberately chose to mislead the court by filing

a document (Form P&A 5) that had been backdated to show that it was sworn on 12th April, 2002 which date in five years before the court granted the Petitioner leave to swear a new affidavit.

22. It was submitted for the Objectors that the petitioner having failed to rectify the error she admitted on the unsigned and undated documents, the petition itself was fatally defective in substance and a nullity in law and that the Grant of Letters of administration and certificate of confirmation of Grant issued on its basis cannot stand and ought to be revoked. On this he relied on the case of Republic versus The Business Premises Rent Tribunal Respondent Lenco Investments Limited Interested Party and Samina Investments Limited exparte Applicant Nairobi Misc Application Number 562 of 2007.

23. As to whether the Grant and certificate of confirmation of Grant were obtained fraudulently, it was submitted for the Objectors that Rule 26(1) and 2 of the Probate and Administration Rules makes it mandatory for the Petitioner to avail written consent in terms of Form 38 or form 39. That the Petitioner was obligated to comply with this procedure by ensuring all beneficiaries consented to her Petition and therefore here failure constitutes a concealment of a material fact.

24. Learned Counsel submitted that the failure to out rightly disclose the true beneficiaries assets of the estate your lordship was fraudulent and constituted a material non-disclosure that entitles the court to revoke the Grant as no explanation was rendered as to why an additional asset that was not disclosed during the filing of the Petition was sneaked into the proceedings when the petitioner was seeking confirmation of the Grant which confirmation proceedings were also done in secret as the other beneficiaries were not asked to consent or called to court during confirmation hearing to confirm if they had no objection to the proposed mode of distribution.

25. It was submitted for the Objectors that the act of moving the court for confirmation of the grant without notice to all other beneficiaries and without filing the requisite consent to confirm was a flagrant violation of the provisions of Rule 26 Rule 26(1) and 2 of the Probate and Administration Rules. Counsel pointed out that from the chief's no any other beneficiary was mentioned apart from the Petitioner and as such, and as such the court was misled into believing that the four beneficiaries disclosed were the only beneficiaries to the deceased's estate when indeed there were more beneficiaries as confirmed by the chief and the District Officer. Counsel cited the decisions in Re Estate of Ambutu Mbogori (2018) eKLR, Re Estate of Julius Ndubi Javan (deceased) (2018) eKLR and Re Estate of Joseph Kilonzo Musyoka (deceased) (2018) eKLR.

26. On whether the Objectors are beneficiaries of the estate, learned counsel submitted that the 1st Objector proved through evidence tendered that she lived with the deceased since 1988 and sired two children with him, which proves her dependency under Section 29 as a wife. He further submitted that from the evidence, the objectors are not strangers and that the deceased brought them into his farm and built a house for them on the far end next to the river.

27. It was submitted for the Objectors that even though a marriage ceremony was never conducted between the deceased and the 1st Objector, the conduct of the 1st Objector and the deceased involving long cohabitation and the siring of children met the threshold for a presumption of a marriage to be invoked. On this, he relied on the case of Beth Nyandwa Kimani versus Joyce Nyakinywa Kimani & others (2006) eKLR.

28. Counsel concluded by submitting that the Objectors' case met the threshold for grant of the orders sought as the grant was obtained through proceedings that were defective in substance and through fraudulent non-disclosure of material facts. He therefore urged this court to find favour in the summons for revocation dated 12th March, 2017.

Decision

29. What the court is being asked to do is to establish whether the objectors fall under the provisions of section 29 of the *Law of Succession Act*. Section 29(a)provides that a dependant means wife (s), former wife(s) and children whether or not they were being maintained by the deceased prior to death. Section 29(b) further provides that dependants include, 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. Section (c) provides that where the deceased was a woman, the husband if he was being maintained by her prior to her death. Section 29 illustrates that only the wife/wives and children of the deceased are out rightly entitled to the deceased's estate. All other relations (Section 29b and C) need to prove that they were being maintained by the deceased. Upon proving that you are dependant, you are required to apply to court for provision out of the net estate.

30. The said section has been subject of litigation as in the following decided cases:

31. In re-Estate of MMuthania Mwendwa (Deceased) (2016) eKLR the petitioner (son of the deceased) sought to include his children as dependants of the deceased estate. However, he did not provide any evidence that his children, the deceased's grandchildren were being maintained by him prior to his death. Consequently, the court held that it is not the mere relationship that matters but proof of dependency".

32. In the case of Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others [2016] eKLR, it was observed that "a dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts."

33. To make dependency claim as a spouse, the Objector must first be eligible under the criteria set out in Section 29 of the *Law of Succession Act* and if there is a dispute as to the validity of a marriage, then the *Marriage Act* shall be reverted to as to the specifics of the type of union which existed during the survivorship of the deceased. It is notable from the evidence by the 1st Objector that her relation with the deceased was for all intents and purposes a valid union despite the fact the fact that the union was never crystallized within the specifics of the *marriage Act*. In the same breadth, the totality of the affidavit evidence by the Objectors points more to the general test of them having been maintained by the deceased during his lifetime and on this emphasis this court should bring their claim within the provisions of Section 29(a) of the *Law of Succession Act*

34. A determination of the existence or non-existence of any system of marriage must satisfy the criteria set out under Section 43 of the *marriage Act* which provides that "A marriage under this part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended or celebrated marriage." Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage. On the part of the 1st Objector, the standard of proof of existence of a customary marriage with the deceased is on the balance of probabilities. This means the events which precede and succeed the validity of a customary marriage must be satisfied by the claimant in this case the objector in order to secure judgment in her favor. In evaluating the evidence by the 1st Objector in this particular case, it is evident that the events which ought to qualify their marriage as having satisfied section 43 of the *Marriage Act*, 2014 are lacking when tested on the burden and standard of proof on the balance of probabilities. As a matter of fact, customary marriage alleged to have been solemnized and celebrated within the context of the customs and culture of a particular community of either of the parties must be

accurately and definitely established by way of cogent evidence. In my considered view, this threshold has not been met by the first objector. Turning also to section 45 of the *Marriage Act*, it provides expressly as follows:

> " That any celebrated customary marriage which on completion of all the necessary steps required by the customs and culture of that particular community must notify the registrar of marriages, the solemnization of that marriage." There must be a written declaration by the parties that the necessary customary requirements to prove marriage have been undertaken and signatures or personal marks of two other witnesses each of whom must have played a key role in the celebration of marriage. I reckon that any purported customary marriage as between the 1st Objector and the deceased if it ever happened, it was contracted before the commencement of the current *Marriage Act*. However, under Section 96 of the Act, that marriage is mandatorily required to be registered within three years of the coming into force of this act. Essentially therefore, if the facts of this case were to be given legality of existence of a customary marriage. The Objector was required to have registered it by May, 2017.

35. In this instant case, there is no such evidence of a customary marriage celebrated in compliance with the provisions of the Law of Succession. In my considered view, the recourse by the 1st Objector to place her reliance on a marriage based on Keiyo customary law to vindicate her rights of inheritance under the Succession Act are untenable. For emphasis purposes, notably no evidence was adduced by the 1st Objector to prove that the formalities of a customary marriage conducted with the deceased.

36. My appreciation of the evidence in this case raises some profound questions about proof of dependency under Section 29 of the Law of Succession where the parties to the dispute provide inconclusive evidence as to the consanguinity of the Objectors on inheritance rights of the deceased.

37. The essential facts set out demonstrate that the 1st Objector cohabited with the deceased. As to whether this was a valid marriage is a moot question. In contrast with the position taken by the Objector the Petitioner confined herself to the fact that though there was a short stint of the 1st Objector with the deceased, it was during his last moments.

38. In effect, the power to order rectification is limited to particular situations, and therefore the power given to the court by these provisions is not general. That conduct did not Qualify her to acquire any inheritance rights. It is helpful to state at this stage whether the Objectors to the same extent walk out of this court without a remedy. Inheritance is an extremely familial, social and legal phenomenon due to his significance in guaranteeing and protecting social economic rights under Art. 43 and the right to property under Art. 40 of *the Constitution*. But inheritance is not only about property and wealth. It infuses aspects about relations particularly family relations of the testator or intestate estate. Central to this succession, is the context whether indeed the 1st Objector was a spouse to the deceased and was followed with the birth of the 2nd and 3rd Objector as direct heirs to the intestate estate of the deceased. In this court, Affidavit evidence and submissions have been received from the Objectors asserting their claim based on the conceptual framework of the existence of a marriage between the 1st Objector with the deceased. This fact is vehemently contested by the Petitioner that the whole of that assertion is false, tailored to grant the objectors direct access to the estate of the deceased which they have no color of right to inherit.

39. There can be no doubt from the perspective of the petitioner there is no blood relationship between the 2nd, 3rd Objector and the deceased in this case. Which means, they are not entitled to the constitutional and statutory protection of their rights to inheritance. On that aspect, the Petitioner's affidavit does manifest that in absence of a valid marriage as between the 1st Objector and the deceased, it is not

justiciable for this court to enforce any inheritance rights as against the Objectors. Notwithstanding that position taken by the Petitioner, she acknowledges some kind of cohabitation of the 1st Objector with the deceased during his lifetime. It is against this background the Objectors assert their rights to inheritance of the intestate estate of the deceased. It is therefore incumbent upon this court to underscore the need to protect not only the rights of women to inheritance but also the children who may be discriminated by an adverse party or by an opposing party to inheritance within the prescriptive provisions of Section 3(2) and (3) which provide as follows:

> 2. References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.
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> 3. A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock."

40. Thus Art. 27(4) of *the Constitution* prohibits unfair discrimination that the state or any other person directly or indirectly against anyone on grounds which include race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. *The Constitution* also provides in Art. 28 that everyone has inherent dignity and the right to have that dignity protected. The Constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society or community. This constitutional value brings in interpretive approaches such as to the right to equality, equity, inclusivity or human rights etc. The foundation of any society is on the promotion of the welfare and the best interest of the child as envisioned in Art. 53(2) of *the Constitution*. It is worth mentioning that *the Constitution* appropriately in Art 2(5) and (6) provided an anchor of International Law to underscore the various human rights instruments as part of sources of law. I have in mind the aspects of this case and its relevance with the provisions of International law in safeguarding and protecting the rights of the child. The key international multilateral treaties of importance on these rights include the Convention on the rights of the child which states that regardless of race, color, sex, language, religion, ethnic or social origin, disability, birth or other status, a child shall not be discriminated by the state or any other person. The African Charter on the rights and welfare of the child, similarly the international covenant of international and political rights in Art. 24(1) provides expressly that every child shall have without any discrimination as to race, color, sex, language, religion, national, social origin, property or birth, the right to such measures as required by his status as a child on the part of his family society and the estate. This court in construing these plethora of rights purposively holds the view that in consonant with section 3(2) and (3) of the Succession Act, treating extra marital children differently to those born within a marriage constitutes a suspect ground of differentiation in terms of Art. 27(4) of *the Constitution*.

41. Therefore, if we were to take the position held by the petitioner in her evidence and rule that there was no marriage between the 1st Objector and the deceased but their short cohabitation to the 2nd and 3rd Objector, discriminating them on grounds of illegitimacy is illogical and unjust. The implications of the deeply rooted stigma of children born out wedlock must have given rise to the provisions of Section 3(2) and (3) of the Succession Act. I think this obsession of illegitimate or extra marital children is more of a characterization of common law than African culture and customs. As far as it is possible within the bounds of the customary scheme, the effect of the African system is tailored in such a way to ensure that an extra marital child's position is not compromised by the circumstances of his/her birth.

Thus in Art 27(4) of *the Constitution* prohibits unfair discrimination of the ground of birth that is as between whether the children's parents were married at the time of conception. The arguments being advanced by the Petitioner in this case are fundamentally around this question that neither is the 1st Objector a spouse to the deceased or the 2nd and 3rd Objector being biological children for the deceased to guarantee any of them rights to inherit a share of the estate of the deceased.

42. It is clear from what is stated above that serious violations within the rubric of Art. 27(4) of *the Constitution* as read with Section 3(2) and (3) of the *Law of Succession Act* are likely to be threatened or infringed unless the court is convinced truly so that the 2nd and 3rd Objectors are indeed not children of the deceased. It is desirable that their right to inherit from the deceased father is not unfairly denied for reasons that the admissible evidence of both the Objector and the Petitioner is reconcilable on this factual frame to support the notion of heirship. They may well be dependents of the deceased who would lay claim to the rights of inheritance of the deceased estate but the rival submissions and affidavit evidence falls somehow short of the threshold. Perhaps the most difficult aspect of this case is the issue of the appropriate remedy. Here in one scenario, the Petitioner stated that the 1st Objector cohabited with the deceased though belatedly during his lifetime. This in essence imports the salutary principle of cohabitation. According to the Black's Law Dictionary, 9th Edition at page 296, 'cohabitation' is defined as follows: -

> " The fact or state of living together, esp. as partners in life, usu with the suggestion of sexual relations."

43. Central to considerations of the interests of justice in this particular case is that nor rightful beneficiary or dependent should be locked out of the distribution and sharing of the estate survived of the deceased. He or she should obtain the relief they seek. In principle also, the litigants in the class of the petitioners before the court should also be singled out for the grant of the same relief being in the same situation as the objectors but factors relevant to secure this judgment for the objectors comprise rays of some doubt when tested within the doctrine of the balance of probabilities. This alone should not make the court to shy away from forging an alternative or innovative remedy should the circumstances of the case so require. What needs to be determined is the nature and form of the wider consanguinity and affinity as between the second and third objector with the deceased. In appreciating this evidence the various courses of action present themselves. They are: whether the court should simply strike out the objection and leave it to the objectors to deal with the gaps which will result in filing another application as they deem fit, whether in accordance with the rules of succession and the *Evidence Act* this is a matter to call for scientific evidence in the form of a DNA profile with the spirit, purport and objectives of the Bill of Rights. These are complex issues which the court should accommodate in the interest of justice.

44. In the circumstances of this case it will not be proper to simply strike out the Objection and bring the objection to a halt as if there is no remedy available. In this respect, it is therefore necessary to formulate an order to the effect that the second and third objectors alongside the children from the first house to submit themselves before KEMRI Eldoret Branch located at Daima Towers for purposes of sample extraction to facilitate the institution to take appropriate measures to prepare a DNA report for admission before this court within 30 days from today's date. That would mean that the benefits of the estate to the other beneficiaries will continue to be held until the DNA profile report has been availed for internalization by this court. The costs of this application be in the cause.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF OCTOBER 2024

.....

R. NYAKUNDI

JUDGE

In the Presence of

Ms. Cherere, Advocate holding brief for Mr. Langat

Mr. Kiboi, Advocate for the Petitioners.