



**In re Estate of Walter Kipchamdany Ngetich alias Kipchamdany Arap Ngetich (Deceased)
(Succession Cause 102 of 2012) [2023] KEHC 789 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 789 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 102 OF 2012
AN ONGERI, J
FEBRUARY 10, 2023**

**IN THE MATTER OF THE ESTATE OF WALTER KIPCHAMDANY
NGETICH ALIAS KIPCHAMDANY ARAP NGETICH (DECEASED)**

BETWEEN

SIMON KIPKURUI LABOSO 1ST PETITIONER

GEOFFREY LABOSO NGETICH 2ND PETITIONER

AND

FAUNA CHEPKIRUI NGETICH OBJECTOR

JUDGMENT

1. The Objector Fauna Chepkirui Ngetich filed this Objection to the Petition on the grounds that she was a wife to the Deceased.
2. The Deceased herein Walter Kipchamdany Ngetich alias Walter Kipchamdany Arap Ngetich died on 10/5/2012.
3. The two Petitioners in this case, Simon Kipkurui Laboso and Geoffrey Laboso Ngetich petitioned for grant of Letters of Administration Intestate.
4. The Objector Fauna Chepkirui Ngetich filed an Objection to making of the grant dated 9/11/2012 which is coming for hearing in this Judgment.
5. The hearing of the case proceeded by viva voce evidence. The Objector said she lives at Olenguruoni. She filed several Affidavits which she asked the Court to rely on. She also filed a witness statement dated 19/4/2013.
6. The Objector in her witness statement stated that the deceased herein was her husband. She stated he married her in 1982 in accordance with Kipsigis Customary Law.



7. The Objector said the deceased paid dowry for her, traditional marriage ceremony rites were performed and they established their matrimonial home at Chepseon and were blessed with children.
8. The Objector in her witness statement stated that the petitioners herein were her step sons and that during the lifetime of her late husband there was no dispute of any nature between her and her step sons.
9. The Objector in her witness statement stated that the law of succession gives her priority to apply and obtain letters of administration of the estate herein over the applicants as she is the sole surviving spouse of the deceased.
10. The Objector said she started staying with the deceased at Kedowa and they moved to Chepseon. She said they were blessed with children.
11. The Objector said she was the 2nd wife. The deceased had another wife. She said she had two children when the deceased married her.
12. The deceased knew she had two children and he accepted her with the children. She said she got three other children with the deceased – a girl and two boys.
13. The Objector said the deceased's first wife Summary Ngetich died in 1995. She said Summary was still alive when the deceased married her and they had a good relationship with Summary.
14. The Objector said when the deceased died, the two Petitioners who are the sons of the deceased rejected her. She said her name was left out on the funeral programme of the deceased since differences had started to show.
15. The Objector said she changed her name from Rosebella since her sister was also called Rosebella. She changed her name to Fauna Ngetich.
16. On cross-examination, the Objector said she was jailed because she had two identity cards.
17. The Petitioner called two witnesses Geoffrey Laboso Ngetich and Recho Sang.
18. Geoffrey Laboso Ngetich a son of the deceased, in his witness statement stated that the objector never visited their home, she only appeared on the burial day, she was repulsed by the clan as she was not recognized as a relative of the deceased in the year 2011, she therefore did not take part in funeral rites.
19. Geoffrey Laboso Ngetich further stated that during his father's lifetime, their father never disclosed to him of the existence of any kind of relationship between him and Fauna, he and his father had enjoyed a close relationship, he was therefore the custodian of all the title deeds and other necessary documents concerning his father's properties and the estate.
20. Geoffrey Laboso Ngetich further stated that on 17/7/2014 following a resolution by clan members, he was given the mandate to pursue succession proceedings for the estate herein.
21. Recho Sang a sister to Walter Kipchamdany Ngetich (deceased), in her witness statement stated that she knew the deceased's family, he had one wife by the name Summary who pre-deceased him, she was therefore not aware of the existence of another wife in her brother's lifetime and neither did her brother express the intention of marrying another wife.
22. The parties filed written submissions which I have considered.
23. The Objector submitted that on 17/7/2012, the chief identified the petitioners and their siblings together with the objector and her five children as beneficiaries of the estate and it was mutually agreed



- that the objector and her son would be co-petitioners together with two representatives of the 1st house and further that in all prior meetings she was recognized as the 2nd wife of the deceased.
24. The Objector submitted that the deceased married the objector as his 2nd wife in the year 1982 as per the customs of the Kipsigis tribe, which was not well received by the petitioners' family and reiterated that dowry was paid soon thereafter.
 25. The Objector conceded to the fact that she had two children prior to the marriage.
 26. The Objector in her submissions sought to have the court take cognizance of the presumption of marriage as a presumption of fact and taking into consideration the cumulative set of circumstances in the case urged the court to conclude that the couple was widely considered and held themselves as husband and wife. The Objector cited the case of *Mary Wanjiru Gitbiru v Esther Wanjiru Kiarie* [2010] eKLR, *Phyllis Njoki Karanja & Others v Rosemary Mueni Karanja* [2009] eKLR & the *Estate of Francis Kambo Ndirangu (deceased)* [2012] eKLR.
 27. The Objector having laid a basis to conclude that she was a widow of the deceased, she urged the court to distribute the estate of the deceased in accordance to the law. Furthermore, the deceased had two households, therefore, the provisions of section 40 of the *Law of Succession Act* would apply. The Objector proposed that two administrators be appointed to represent both houses.
 28. The Petitioners cited section 107 (1) and (2) of the *Evidence Act*, which states that it is incumbent upon the one who alleges the existence of a fact, to prove the same. The Petitioner contended that there were material inconsistencies, gaps and glaring contradictions in the objector's claims to have been married to the deceased under Kipsigis customary law, the objector did not avail any witnesses in support of her case.
 29. The Petitioners cited rule 64 of the *Probate and Administration Rules* which states that any party desirous of providing evidence as to the application of or the effect of the African Customary Law may do so by production of oral evidence or by reference to any recognized treatises. The Petitioners reiterated that the evidence of the objector was not credible, therefore, there was no Kipsigis customary marriage between the objector and the deceased.
 30. The Petitioners contended that the objector failed to lead sufficient evidence of long cohabitation and repute to warrant the court to make a finding of the presumption of marriage in favour of the objector. Additionally, there was no corroborative evidence from neighbours, the objector's family, the deceased's family or the deceased's business associates of the alleged long cohabitation. The Petitioners cited the case of *Phyllis Njoki Kaaranja & 2 Ors v Rosemary Mueni Karanja & Anor* [2009] eKLR.
 31. The Petitioners cited section 29 of The *Law of Succession Act*, contended that there was no evidence that the deceased had adopted the two children or accepted them as his own by supporting them, whereas, with respect to the three children there was no cogent evidence that the deceased was their biological father. The objector did not produce proof of possible paternity or maintenance of the children. The Petitioners cited the case. The Petitioners cited the case *Re Estate of the Late Symon Kipngeny Koima (Deceased)* [2021] eKLR, *Hannah Njeri Makuru v Bethel Mbuthia Kutu* [2017] eKLR, *E.M.M v IGM & Another* [2014] eKLR.
 32. The Petitioners therefore urged the court to dismiss the objector's claim in toto and to order the confirmation of the grant of letter of administration.
 33. The issues for determination are as follows;
 - i. Whether the Objector was married to the deceased.



- ii. Whether the Objector’s children were dependants of the deceased.
 - iii. How should the Estate be shared?
34. On the issue as to whether the Objector was married to the deceased, I find that there is evidence that she lived with the deceased.
35. There is evidence that they had children. Long cohabitation entitles the Objector to presumption of marriage.
36. In *MNM v DNMK & 13 Others* [2017] eKLR, the court observed as follows; “As we understand it and contrary to what some of the respondents submitted, the presumption of marriage is not dependent on the parties who seek to be presumed husband and wife having first performed marriage rites and ceremonies, otherwise there would be no need for the presumption because performance of rites and ceremonies would possibly result in a customary, Mohammedan or statutory marriage. In the *Hortensia Wanjiku Yawe v. Public Trustee (supra)*, Wambuzi, P. noted that the presumption of marriage has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary and that the presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. He emphasized that it may even be shown that the parties were not married under any system.”
37. On the issue whether the objector’s children were dependants of the deceased, I find that the answer is in the affirmative.
38. The Deceased started cohabiting with the objector when she had two children of her own.
39. She said he accepted her two children and supported them. They got two other children.
40. The Law states as follows on the issue of dependents. What amounts to a dependent is encapsulated in terms of Section 29 of the *Law of Succession Act* which provides that:
- “For the purposes of this Part, “dependent” means –
- (a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - (b) Such of the deceased’s parents, step-parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;”
41. On the issue as to how the Estate should be shared, section 40 of the *Law of Succession Act* is applicable in this case, section 40 of the Law of Succession provides as follows;
- “Where the intestate was polygamous
- i. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.



- ii. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

42. In *Scholastic Ndululu Sura v Agnes Nthenya Sura* [2019] eKLR, the Court of Appeal weighed in to that position when it held as follows; “It is therefore evident, that, although section 40 of the *Law of Succession Act* provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”
43. I direct that the grant be issued to the two Petitioners and the Objector.
44. The three Administrators to apply for confirmation of grant within 30 days and to share the property in accordance with Section 40 of the *Law of succession Act*.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 10TH DAY OF FEBRUARY, 2023.

A. N. ONGERI

JUDGE

