



**In re Estate of Kiptanui Simatwa (Deceased) (Succession Cause  
28 of 2016) [2023] KEHC 22371 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22371 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 28 OF 2016  
RN NYAKUNDI, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**MARGARET JEPKURGAT SIMATWA ..... 1<sup>ST</sup> PETITIONER**

**CHRISTOPHER KIPRUGUT YEGO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**LEAH JERUBET KIPTANUI ..... 1<sup>ST</sup> OBJECTOR**

**REUBEN KIPTARBEI TANUI ..... 2<sup>ND</sup> OBJECTOR**

**JUDGMENT**

1. The Applicants approached these courts vide a Summons for Revocation of grant dated 24<sup>th</sup> January 2020 seeking the following orders;
  1. That the Grant of Letters of Administration Intestate over the estate of Kiptanui Simatwa (deceased) made and or issued to Margaret Jepkurgat Simatwa and Christopher Kiprugut (the petitioners) on 14/9/2016 but not confirmed be revoked or annulled.
  2. Costs of the application be borne by the petitioners/Respondents.
2. The application is expressed to be brought under Sections 76 and 47 of the *Law of Succession Act*, Cap. 160 Laws of Kenya, Rules 44 and 49 of *Probate and Administration Rules*, Section 1A, IB, 3, 3A, 63 (e) of the *civil Procedure Act*, Order 24 of the *Civil Procedure Rules* and all other enabling provisions of the law. The application is supported by the affidavit of Leah Jerubet Kiptanui.
3. The application was opposed by the 1<sup>st</sup> Respondent vide a replying affidavit dated 28<sup>th</sup> February 2020. The 2<sup>nd</sup> Petitioner also filed a replying affidavit dated 28<sup>th</sup> February 2020. The court directed that the matter proceed by way of viva voce evidence.



### **Applicant's evidence**

4. The Applicant had four witnesses who swore their witness statements and testified in court
5. PW1, the 1<sup>st</sup> objector, adopted her witness statement as her evidence in chief. It was her evidence that she was married to the deceased in 1964 and they bought land parcel no. Eldoret/Municipality/Block 23 (King'ong'o) 295 in 1965. They settled on that land and she still lives there to date. She testified that they had nine issues arising from the marriage. Further, that when her husband died, the 1<sup>st</sup> petitioner never came to the funeral to claim she was the wife to the deceased as is customarily done. She denied knowing the petitioners and stated that it was untrue that her husband had two wives. She maintained that the petitioners were impostors and urged that the grant of letters of administration issued on 14<sup>th</sup> September 2016 be nullified.
6. The 2<sup>nd</sup> objector testified as PW2 and adopted her witness statement dated 15<sup>th</sup> January 2021 as her evidence in chief. She denied any knowledge of the petitioner and maintained that they had never been on the estate. She urged the court to revoke the grant of letters of administration.
7. Bamaba Kipketer Mutai adopted his statement dated 11<sup>th</sup> May 2020 as his evidence in-chief. He denied ever having seen the 1<sup>st</sup> petitioner at the home of the deceased. Further, that he had never heard that she was married to the deceased.
8. Julia Jelagat Chepkwony testified as PW4. She adopted her statement dated 1<sup>st</sup> March 2021 as her evidence in-chief. It was her testimony that the petitioners were strangers to her. The objectors then closed their case.

### **Respondent's evidence**

9. The petitioner called two witnesses to testify in their defence.
10. The 1<sup>st</sup> Respondent adopted her witness statement dated 6<sup>th</sup> April 2021. DW1 testified that the deceased was her husband and the objector was a co-wife. She testified that upon being married to the deceased herein, she was given the name "bot Kiplelei", while her said co-wife was given the name "bot Ngelechei". It was her evidence that Arap Maina was her father-in-law, while her mother-in-law was called Chepkalum. She explained that the deceased's family went for her engagement and there was consent for her to be married. That dowry was paid and Nandi customs were observed as regards her marriage. She stated that when she wanted to discuss issues pertaining to the said estate, she was chased away by the objectors/Applicants which resulted in her seeking administration. She urged that the estate be divided equally between the two widows.
11. The 2<sup>nd</sup> Respondent adopted his witness statement dated 6<sup>th</sup> April 2021 and testified as DW2. He also adopted the replying affidavit dated 6<sup>th</sup> April 2021. It was his evidence that the 1<sup>st</sup> Petitioner was circumcised together with Jepkemei Mutai (DW4). Further, that there was consent before the 1<sup>st</sup> Petitioner was married by the deceased and the engagement ('koito'), was done. He stated that the dowry was paid to him as their father was deceased. That the 1<sup>st</sup> petitioner and the deceased lived as husband and wife.
12. Zipporah Tirop testified as DW3. She adopted her statement dated 6<sup>th</sup> April 2021 as evidence in chief. It was her evidence that PW3 married the 1<sup>st</sup> objector's sister. She also stated that the deceased did not have a tractor.
13. Jepkemei Sing'oei testified as DW4. She adopted her witness statement dated 6<sup>th</sup> April 2021. It was here evidence that she was circumcised on the same day as the 1<sup>st</sup> Petitioner. Further, she stated that



she shared a boundary with the petitioner who lived with the deceased as husband and wife. that there was a time when the 1st objector left the deceased for a long time and when she came back, she had three children. it was her evidence that dowry was paid for the 1<sup>st</sup> petitioner and she never divorced from the deceased.

14, The Respondents closed their case.

### **Respondent/Petitioner's submissions**

15. Learned counsel for the Respondent filed submissions dated 12<sup>th</sup> September 2023. It is the Respondent's case that the deceased belonged to the Nandi Sub-tribe of Kalenjin community. Similarly, the petitioners, their witnesses as well as the objectors and their witnesses belong to the said sub-tribe of Kalenjin community. He submitted that the governing laws as regards the marriage being contested is Nandi customary law.
16. Counsel for the Respondent submitted that a customary law marriage is a cultural marriage which is well protected under Article 11(1) of the Constitution of Kenya, 2010. Further, that that Nandi customary marriage and the requirements for such a marriage to be valid are notorious and also documented and our Courts of law have taken judicial notice of the same on several occasions. He relied on the judgement in Eldoret ELC Case No. 140 of 2017 where the parties in this suit were involved and submitted that the court identified the 1<sup>st</sup> petitioner as the wife to the deceased herein. He urged that by virtue of that judgement the issue of res judicata offended the doctrine of res judicata. He maintained that weighing the evidence of DW1, DW2, DW3 and DW4 against that of the objectors, DW1- DW4 were very impressive, reliable, trustworthy hence there evidence as to the marriage of the 1<sup>st</sup> petitioner to the deceased is credible. Counsel urged that the deceased married the 1<sup>st</sup> petitioner - she is the first widow of the deceased, while the 1<sup>st</sup> objector is the 2<sup>nd</sup> widow of the deceased.
17. It is the Respondent's case that the objectors had a burden to prove that the Grant of Letters of Administration Intestate were obtained by concealment of very pertinent and material facts and truth. They urged that the objectors never prove this and neither did they prove that the 1<sup>st</sup> petitioner was one of the widows of the deceased or that the 2<sup>nd</sup> petitioner was not a brother in-law to the deceased. Counsel submitted that before initiating proceedings herein, the 1<sup>st</sup> petitioner approached the objectors but as it were, they completely refused to cooperate. Further, that when they sought the involvement of the objectors in the filing of this cause, they were chased away which saw them reporting the incident to the police. When filing this cause, the petitioners included all the beneficiaries to the estate - no person was omitted from the petition for grant. The petitioners indicated in form P&A.5 as well in the further affidavit in support of petition for Letters of Administration Intestate, the widows and the children of the deceased. No one was excluded and the petitioners did not make untrue allegation. Further, that neither did they make fraudulent statement in their petition nor conceal any material facts and truth from the Court.
18. Learned counsel submitted that as the 1<sup>st</sup> petitioner had still births and that some of the children she bore died in their infancy stage, they adopted two children. The first child, [Particulars Withheld], was adopted while the deceased was still alive. The said adoption was done with the consent of the deceased. The young boy then became part of the deceased's family. The 2<sup>nd</sup> child was adopted after the demise of the deceased but it was the petitioner's evidence that before the deceased passed on, he had consented to the 1<sup>st</sup> petitioner adopting another child.
19. It is the Respondent's case that the deceased got married under Nandi Customary Law which marriage is recognized and protected by our laws. She urged that since the persons were subject to the said customary law then it ought to apply in the distribution of the estate. She cited the cases of Gatimu



*Kinguru v Muya Gathangi* [1976] Kenya LR 253 at P263, In the matter of the Estate of Mwaura Gathari [2000] eKLR and *Mwathi v Mwathi and Another* [1995-1998] 1EA 229 in support of this submission.

20. The Respondents urged the court to distribute the estate equally between the houses. Further, that the application be dismissed with costs.

### **Analysis & Determination**

21. Upon considering the application, responses thereto and submissions, the following issues arise for determination;

### **Whether the Grant of Letters of Administration should be revoked**

22. Revocation of grant is governed by Section 76 of the *Law of Succession Act* which states as follows:

76. Revocation or annulment of grant

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.
23. The crux of the summons is that the Petitioners concealed pertinent and material facts in obtaining the grant. The material information allegedly concealed is; that the petitioner was not a wife to the deceased, that the beneficiaries she had included as children of the deceased were not beneficiaries to the estate. She maintained that the petitioners were intent on defrauding them and disinheriting them of the estate.

### **Whether there was concealment of material information**

24. The Applicants were adamant that the 1<sup>st</sup> Respondent was not a wife to the deceased. In this regard, my attention is drawn to the judgement in Eldoret Environment and Land Case No. 140 of 2017 – Margaret Jepkurgat Simatwa & Anor v Reuben Kiptarbei Tanui & 3 others which was annexed to the



replying affidavit of the 1<sup>st</sup> petitioner dated 28<sup>th</sup> February 2020. The dispute therein was with regards to Land Parcel LR No. [Particulars Withheld]. The court found that the 1<sup>st</sup> Plaintiff therein, who is the 1<sup>st</sup> Petitioner herein, was a wife to the deceased. The court went on to find that the Respondent's witness admitted the same which issue was conclusively dealt with.

25. Although not the conventional method used in determining whether a party is the wife to the deceased, it is my considered view that by virtue of the finding of the court in the land matter, it is indisputable that the 1<sup>st</sup> petitioner was a wife to the deceased.

#### **Whether the minors are beneficiaries to the estate**

26. The 1<sup>st</sup> Respondent stated that the two minors, [Particulars Withheld] and [Particulars Withheld] were adopted and were part of the family. Section 29 of the *Law of Succession Act* sets out the meaning of the term 'dependant' as follows:

“For the purposes of this Part, "dependant" 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, grand-parents, 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.”

27. In order for the minors to qualify as dependants, it needs to be demonstrated that they were being maintained by the deceased immediately prior to his death. Proof of dependency is therefore a condition precedent. In addition, while considering the meaning of a dependant under section 29 of the Act, the court held as follows in the case of *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & Others*, Chuka Succ. Cause No. 12 of 2016:-

“From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency.”

28. Whereas the Respondent urged that she adopted them with the consent of the deceased, she has not provided any evidence of the same. Adoption of children is a process governed by law and there would be a paper trail as evidence of the same. The Respondent did not provide any tangible evidence to corroborate the allegation that the children were adopted with the consent of the deceased or that they depended on him prior to his death. The chief's letter dated 15<sup>th</sup> November 2013 has no mention of the minors as beneficiaries of the estate either. Therefore, it is my considered view that they are not beneficiaries to the estate.

29. I take note that this is an old matter. The grant was issued in 2016 and is yet to be confirmed seven years later. To revoke the grant in its entirety will delay the process which is at its tail end. Therefore, the application for revocation is dismissed for lack of merit. However, the parties are directed to file proposed modes of distribution of the estate, keeping in mind that the minors have not been proved to have been dependants of the deceased.



30. As this is a succession matter, and the parties are family members, each party shall bear its own costs to prevent further acrimony.

31. It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2023**

.....

**R. NYAKUNDI**

**JUDGE**

In the presence of

Mr. Miyianda for the Respondent

Mr. Wafula Present

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