



REPUBLIC OF KENYA



**Psinen v Cherop (Succession Cause 2 of 2015)  
[2023] KEHC 22295 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22295 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
SUCCESSION CAUSE 2 OF 2015  
AC MRIMA, J  
SEPTEMBER 20, 2023  
IN THE MATTER OF THE ESTATE OF LOMARIA  
KOTORUK ALIAS PLIMO KOTORUK (DECEASED)**

**BETWEEN**

**AUGUSTINE KOTORUK PSINEN ..... APPLICANT**

**AND**

**SUSAN CHEROP ..... RESPONDENT**

**RULING**

**Introduction**

1. This ruling relates to the application filed by Augustine Kotoruk Psinen, the Objector/Applicant herein.
2. The application was by way of a Summons dated March 21, 2016. It sought to revoke the Grant of Letters of Administration Intestate issued by this Court to the Administratrix herein, Susan Cherop, on January 14, 2016.
3. The application was opposed by the Administratrix.

**The Application:**

4. The main ground on which the application was based on was that the Administratrix was not a member of the family of the deceased, as such, she lacked the *locus standi* to petition for the administration of the estate of the deceased.
5. On her part, the Administratrix contended that her mother, one Mary Cheriwoi, was the only child of the union between her grandmother one Chepochoptorok and the deceased. To that end, she claimed



- to be a grand daughter of the deceased herein, and an heir to the estate, hence, competent to administer the estate.
6. The Objector countered the Administratrix's position. He claimed that the said Chepochptorok was not married to the deceased, but was only a caretaker for the deceased who had suffered paralysis while in prison.
  7. Both parties were represented by Counsel. On the Counsel's proposal, which was adopted by this Court, directions were made that the application be heard by way of viva voce evidence. Parties filed witness statements.
  8. The Objector testified as OW1. He then called three witnesses being Bernard De-Philip Mangal who testified as OW2, John Kiptoo Chepchangalek who testified as OW3 and Pkukat Psinei who testified as OW4.
  9. The Administratrix then testified as PW1. She called one witness, Veronicah Chesika Remo as PW2.
  10. At the close of the respective cases, the parties filed written submissions, hence, this ruling. The parties expounded on their positions and referred to various decisions in support thereto.

**Analysis:**

11. Having carefully considered the application, the responses, the evidence adduced, the submissions and the decisions, two main issues arise for determination being: -
  - a. Whether Mary Cheriwoi's mother one Chepochptorok was the wife of the deceased.
  - b. If the answer to (a) above is in the affirmative, whether the Administratrix is entitled in law to administer the estate of the deceased.
12. This Court will deal with the issues in seriatim.

**a. Whether Mary Cheriwoi's mother one Chepochptorok, was the wife of the deceased:**

13. As stated above, the Objector posited that whereas the Administratrix was a daughter of Mary Cheriwoi, the said Mary Cheriwoi's mother one Chepochptorok was not married to the deceased. Instead, she was a caretaker to the deceased who had suffered paralysis.
14. The Objector was a son to one Ibrahim Kotoruk who was a brother to the deceased. That, the deceased had three brothers including the said Ibrahim. The Objector was, hence, a nephew to the deceased.
15. In his testimony, the Objector admitted that the said Chepochptorok came to the deceased's home long before he was born. He also admitted that he did not indicate the source of the averment in his affidavit to the extent that the said Chepochptorok was not the wife of the deceased. He only contended that he was told that the deceased was not married.
16. OW2 testified that he knew Mary Cheriwoi. He, however, admitted that he only saw her living on the parcel of land known as West Pokot/Keringet 'A'/89 (hereinafter referred to as 'the land') with her mother one Chepochptorok. That, Mary Cheriwoi lived with her mother and the deceased on the land until both died and were buried thereon. That, Mary Cheriwoi got three children one of whom was the Administratrix, and that, even when Mary Cheriwoi died, she was also buried on the said land.
17. OW3 was aged 89 years old at the time he testified. Like OW2 he also testified that he did not know where Chepochptorok came from, but he only saw her living with the deceased on the land. That, the two lived together until the said Chepochptorok died first leaving the deceased behind. He affirmed



- that the said Chepochoptorok had a child one Mary Cheriwoi and that the said Mary Cheriwoi gave birth to four children including the Administratrix. He confirmed that the deceased, Chepochoptorok and Mary Cheriwoi were all buried on the land.
18. It was OW3 's further testimony that during the life of the deceased two more caretakers joined the said Chepochoptorok. They were Cheusi and Mukodeng and that when the deceased died the two left to where they had come from. He also confirmed that neither Cheusi nor Mukodeng was buried on the land.
  19. OW4 was a brother-in-law to the Objector's father. It was the Objector's father who had married a sister to OW4. He testified that the deceased lived with Chepochoptorok since when she came into the deceased's home in 1956 until when Chepochoptorok died a year later. He confirmed that Chepochoptorok was buried on the land and her daughter, Mary Cheriwoi, remained with the deceased until when the deceased died in 1979. That Mary Cheriwoi died later in 1986 and was also buried on the land.
  20. OW4 only knew of Mary Cheriwoi's three children who include the Administratrix and two sons. Whereas the Administratrix was later on married, the two sons were born, raised and settled on the land and are there to date.
  21. The Objector then urged this Court to find that Chepochoptorok was not a wife of the deceased and subsequently that the mother of Administratrix herein was not a child of the deceased.
  22. The Administratrix held that her mother, Mary Cheriwoi, was the only child of the union between the deceased and her grandmother one Chepochoptorok. She contended that her mother was born and brought up on the land by the deceased and the grandmother until when both died. That, thereafter, her mother continued living on the land until her death. Like her grandparents, her mother was also buried on the land.
  23. It was the Administratrix's testimony that after the demise of her mother, she was still in Primary School and she was taken in by the Objector, her uncle. It was the Objector who aided her through school. That, in order to raise school fees, the Objector used to lease part of land. It was also averred that even when her Certificate of Birth was required in school, it was the Objector who obtained one, only for the Administratrix to realize that the Objector had indicated her to be his daughter and that her mother was the wife of the Objector.
  24. The Administratrix vehemently disagreed that her mother was not a child of the deceased and contended that the Objector was out to disinherit her despite him having a very large parcel of land elsewhere compared to what was left behind for her and her siblings by their mother.
  25. PW2 who was born in 1939 affirmed that she knew the deceased quite well. It was her testimony in her re-examination that '... Lomario [the deceased] had a wife called Chepochoptorok. She gave birth to Mary [Cheriwoi].....'
  26. The Administratrix then urged this Court to find that indeed the deceased was married to her grandmother, Chepochoptorok, and that her mother, Mary Cheriwoi, was the only child of that union.
  27. It is on the basis of the above evidence that this Court is called upon to determine the issue.
  28. A proper determination of the above factual issue will call upon a look the legal doctrines of the burden of proof and the standard of proof in civil litigation.



29. The two doctrines have been subjected to a lot of legal discourse such that it may not be necessary to replicate the same in this judgment. However, briefly put, the burden of proof is a legal doctrine which principally deals with the duty of a party or parties to adduce evidence in a matter in proof of a certain fact. The standard of proof relates to the evidential threshold required for a claim to be considered as having been proved.
30. The issue of the burden of proof has two facets. There are the legal burden of proof and the evidential burden of proof.
31. Sections 107(1), (2) and 109 of the Evidence Act, Cap 80 of the Laws of Kenya deals with the burden of proof. It states as under: -

Sections 107(1) and (2):

1. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

Section 109:

Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

32. The foregoing provision brings out what is referred to as the legal burden of proof. That burden remains on the party which instituted the litigation throughout the case.
33. Reinforcing that the legal burden of proof in constitutional Petitions is on the Petitioners, the Supreme Court in Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others [2014] eKLR stated as follows: -

Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

34. There is also the evidential burden of proof. This legal principle was discussed in Bungoma High Court Election Petition No 2 of 2017 Suleiman Kasuti Murunga vs IEBC & 2 Others (2018) eKLR as under: -
26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence



rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.

27. The principle of 'evidential burden of proof' is hence anchored on the rebuttable presumption of validity of election results. That, until and unless a Petitioner discharges the evidential burden of proof an election is presumed valid. It is on that background that the Court in *Singh vs Mota Singh & Another* (2008) 1 KLR 1 stated that an election is a matter of public importance not to be lightly set-aside and in the case of *Jeet Mohinder Singh vs Harminster Singh Jassi*, AIR 2000 SC 258 the Supreme Court of India stated that 'the success of a candidate who has won at an election should not be lightly interfered with...Any person seeking such interference must strictly conform to the requirements of the law....'.
28. The Supreme Court in the 2017 majority judgment had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof as follows: -
  - (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
  - (133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law....
29. It therefore follows that the legal burden of proof is static and rests on the Petitioner throughout the trial. It is only the evidential burden of proof which may shift to the Respondents depending on the nature and effect of evidence adduced by a Petitioner.
35. The Court will now deal with the standard of proof.
36. The *Black's Law Dictionary*, (9<sup>th</sup> Edition, 2009) at page 1535 defines 'the standard of proof' as the degree or level of proof demanded in a specific case in order for a party to succeed.
37. In many jurisdictions and decisions world over three main categories of the standard of proof emerge. They are the criminal standard of proof of 'beyond reasonable doubt', the application of civil case standard of 'balance of probabilities' and the application of an intermediate standard of proof.
38. The Supreme Court in Presidential Petition No 1 of 2017 *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR discussed the applicable standard of proof in election petitions to be the intermediate one.
39. As this matter is a civil litigation, then this Court settles that the applicable standard of proof shall be on a balance of probabilities.
40. Returning to the issue at hand, it was the Objector who filed the application to revoke the grant. The Objector, therefore, shouldered the legal burden of proof throughout. In a bid to discharge that legal



burden of proof, the Objector adduced evidence. That was the evidence of four persons being the Objector and three witnesses.

41. The Objector's evidence cumulatively averred that the deceased was not married to Chepochotorok, but that Chepochotorok was only his caretaker just like Cheusi nor Mukodeng.
42. The Administratrix averred otherwise. She also availed PW2 who was born in 1939 and stated that she knew that the deceased was married to Chepochotorok and that Mary Cheriwoi, the mother of the Administratrix, was the only child of that union.
43. The twin sets of evidence ought to be synthesized further. In doing so, several matters come to the fore. First, the fact that unlike Cheusi and Mukodeng, the known caretakers, who left the deceased's home after the demise of the deceased and later died and were buried elsewhere, the said Chepochotorok was buried on the deceased's land when she died. Second, unlike Cheusi and Mukodeng who did not leave behind any of their children at the deceased's home, Chepochotorok daughter [Mary Cheriwoi] remained with and lived with the deceased until his demise.
44. Third, the deceased took care of Chepochotorok's daughter during his lifetime. Four, even when Mary Cheriwoi died still the Objector took care of the children left behind by the said Mary. Five, the Objector lived with the Administratrix after the death of her mother until when she finished school and was married. Six, it was the Objector who obtained the Administratrix's Certificate of Birth wherein the Objector was indicated as the father of the Administratrix and the Objector's wife as the mother of the Administratrix.
45. Seven, the Administratrix has all along been using the deceased's name Lomario throughout her school life. The said name appears in her official school and educational documents. Eight, none of the children of Mary Cheriwoi, who were born and have all along lived on the land, have been evicted or so threatened.
46. There is also a further pointer to the issue of Mary Cheriwoi's parentage courtesy of the Chief's letter dated August 20, 2015. Such a letter is a prerequisite in succession proceedings. According to the letter, the Chief posited that Mary was a daughter of Lomario Kotoruk who died in 1979.
47. At this point in time, this Court is alive to the fact that no marriage was proved under any statute or customs. As such, the Court has to ascertain whether the doctrine of presumption of marriage arises in the prevailing circumstances.
48. The doctrine of presumption of marriage was recently, and partly, discussed by the Supreme Court in *MNK v POM*; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment) as under: -
  64. We find it prudent at this juncture to lay out the strict parameters within which a presumption of marriage can be made: -
    1. The parties must have lived together for a long period of time.
    2. The parties must have the legal right or capacity to marry.
    3. The parties must have intended to marry.
    4. There must be consent by both parties.
    5. The parties must have held themselves out to the outside world as being a married couple.



6. The onus of proving the presumption is on the party who alleges it.
  7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.
  8. The standard of proof is on a balance of probabilities.
49. The above matters when placed side by side with the parties' evidence apparently reveal that the Objector managed to give evidence which, in the first instance, shifted the evidential burden of proof to the Administratrix. When the Administratrix adduced her evidence, and in view of the matters raised above, the evidential burden of proof shifted back to the Objector. There is ample evidence to conclude the applicability of the doctrine of presumption of marriage in this case.
50. It was, therefore, incumbent upon the Objector to adduce further evidence to support his position that Chepochotorok, the Administratrix's grandmother, was not married to the deceased given that the Objector was not yet born when the said Chepochotorok and the deceased lived together. In other words, the Objector was duty bound to prove, by way of strong, distinct, satisfactory and conclusive evidence, that Chepochotorok and the deceased did not live as a husband and wife.
51. The Objector, however, failed to discharge that evidential burden.
52. The totality of the evidence, therefore, affirms the position that indeed Chepochotorok was married to the deceased herein and Mary Cheriwoi was their only issue. The Administratrix and her siblings are, hence, lawful grandchildren of the deceased and Chepochotorok.
53. Even if the foregoing is faulted for whatever reason, still the entitlement of the Administratrix and her siblings to the estate herein remain by dint of Section 3(2) of the [Law of Succession Act](#), Cap. 160 of the Laws of Kenya. The said provision states 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.
54. In this case, the deceased took care of Mary Cheriwoi, the mother of the Administratrix, for her entire life. Mary grew up knowing no any other family than that of the deceased. She knew the deceased as her father and she passed that information to her children. It was on the very basis that the Objector was obliged to take care of the children of Mary Cheriwoi when she last rested.
55. There is, therefore, no doubt that the deceased acquired full parental responsibility over Mary Cheriwoi, more so given that when Chepochotorok died, Mary was still quite young.
56. Deriving from the above, it is this Court's finding that Chepochotorok was married to the deceased herein and Mary Cheriwoi was their only issue. Alternatively, the deceased acquired full parental responsibility over Mary Cheriwoi, the mother of the Administratrix herein.
57. The first issue is, hence, answered in the affirmative. As such a consideration of the second issue follows.

**b. Whether the Administratrix is entitled in law to administer the estate of the deceased:**

62. This Court has already found that Chepochotorok was married to the deceased herein and that Mary Cheriwoi was their only issue. In such a case, since there is no any other beneficiary in the lineage of the



deceased save the children of Mary Cheriwoi, then it can only be the case that it is only those children who may challenge the administration of the estate of the deceased.

63. If, for whatever reason, the Objector wishes to mount his entitlement to the land, then that cannot be on the basis of the instant succession proceedings.
64. As the rest of the children of Mary Cheriwoi took part in these proceedings and do not impugn the proceedings in any way, this Court finds no reason to upset the status quo.
65. This Court has also been made aware of the proceedings undertaken by the Administratrix against the Objector before the Environment and Land Court. Given the nature of the proceedings, it is only prudent that the confirmation of the grant in this matter do await the outcome of the said litigation.
66. For clarity, therefore, the Grant of Letters of Administration Intestate made to the Administratrix herein, Susan Cherop, shall remain valid.

**Disposition:**

67. The foregoing discussion yields the following final orders of this Court: -
  - a. The Summons dated March 21, 2016 is hereby dismissed.
  - b. The confirmation of the Grant of Letters of Administration Intestate made to the Administratrix herein, Susan Cherop, shall await the outcome in the Environment and Land Court at Kitale Land Case No 54 of 2016 The Estate of Lomario Kotoruk alias Plimo Kotoruk represented by Susan Cherop vs Augustine Psinen.
  - c. The Objector shall bear the costs of the Summons.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**A. C. MRIMA**

**JUDGE**

**Ruling No. 1 delivered virtually and in the presence of: -**

Mr. Ndarwa, Learned Counsel for the Administratrix/Respondent.

Mr. Ingosi, Learned Counsel for the Objector/Applicant.

Juma/Hellen – Court Assistants.

