



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERICHO

SUCCESSION CAUSE NO. 3 OF 2015

**IN THE MATTER OF THE ESTATE OF DAVID KIMUGE CHEPKWONY ALIAS DAVID KIMUGE P.O KOYET
CHEPKWONY (DECEASED)**

LOICE BITENGO CHEPKWONY.....PETITIONER

VERSUS

EMMANUEL KIPKORIR MUGE.....1ST OBJECTOR

ISAAC M. MUGE.....2ND OBJECTOR

JUDGMENT

1. The objectors herein **EMMANUEL KIPKORIR MUGE** and **ISAAC M. MUGE** filed a summons for revocation dated 8/2/2017 seeking revocation of the grant of letters of administration issued to the petitioner herein on the grounds that the petitioner filed the succession cause secretly without seeking consent from the entire family and proceeded to obtain confirmation of grant on 16/11/2016.

2. The objectors further averred in the Affidavit in support of the summons for revocation that the petitioner is a total stranger to the Estate of the deceased and that the petitioner and some beneficiaries listed had no blood relationship with the deceased.

3. The hearing of the case proceeded by *viva voce* evidence. The objectors called three (3) witnesses whose evidence in summary was that the deceased had two wives **JULIANA CHEPTOO CHEPKWONY** and **ALICE CHEPTOO CHEPKWONY** now deceased. The objectors said the petitioner was a worker, she had leased a portion of the deceased's farm and she was housed by the deceased in the worker's houses which were later demolished.

4. The objectors produced a written will dated 16/6/2011 and they said the petitioner is not mentioned in the said will.

5. The petitioner also called three (3) witnesses and their evidence in summary was that the petitioner got married to the deceased in 1997 in accordance with Kipsigis Customary Law and they were blessed with three (3) children.

6. The petitioner and her witnesses said that the deceased paid dowry to the petitioner's brother. They said after the death of deceased, the petitioner was chased by the objectors and they demolished her house.

7. The parties filed written submissions which I have duly considered. The submissions are in line with the evidence adduced by the parties. The issues for determination in this case are as follows;

(i) Whether the petitioner obtained the letters of administration and confirmation of grant fraudulently.

(ii) Whether the petitioner is entitled to inherit from the Estate of the deceased.

(iii) Whether the deceased left a valid written will.

(iv) How the Estate of the deceased should be administered.

8. On the issue as to whether the petitioner herein obtained the letters of Administration fraudulently, I find that there is evidence that the objectors failed to cooperate with the petitioner for purposes of obtaining letters and she filed a petition.

9. I find that the petitioner included the homes of the objectors as beneficiaries of the Estate and therefore she did not conceal any material facts from the court or make a false statement.

10. There is no evidence that the grant was obtained by means of untrue allegations of facts.

11. On the issue as to whether the petitioner is entitled to inherit from the Estate of the deceased, the objectors said she is a total stranger to the Estate. The petitioners said the deceased had two wives, **JULIANA CHEPTOO CHEPKWONY** and **ALICE CHEPTOO CHEPKWONY** who are deceased.

12. However, there is evidence by the petitioner's three (3) witnesses that the petitioner got married to the deceased in 1997 and that the deceased paid dowry to the petitioner's brother **ZACHARIA ONTOMWA** who testified as PW3.

13. The petitioner established on a balance of probabilities that she was married to the deceased.

14. In the former Court of Appeal for East Africa in the celebrated case of **HORTENSIAH WANJIKU YAWE VS. THE PUBLIC TRUSTEE COURT OF APPEAL CIVIL APPEAL 13 OF 1976** (Wambuzi P, Mustafa VP and Musoke JA) held as follows :-

"i. The onus of proving customary law marriage is generally on the party who claims it;

ii. The standard of proof is the usual one for a civil action, namely, 'on the balance of probabilities;

iii. Evidence as to the formalities required for a customary law marriage must be proved to that standard;

iv. Long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;

v. Only cogent evidence to the contrary can rebut the presumption; and

vi. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage."

15. I find that she is entitled to inherit as a wife of the deceased under Kipsigis Customary Law.

16. The petitioner is entitled to inherit as a wife of the deceased by virtue of section 3 (5) as read with section 40 of the Law of Succession Act Chapter 160 Laws of Kenya.

17. On the issue as to whether the deceased left a valid written will dated 16/6/2011, I find that there is no evidence that the executor of the will has filed a petition for grant of probate. The said will has not been propounded and at this stage it is not possible to make a finding that the deceased left a valid written will.

18. On the issue as to how the Estates should be distributed, I find that section 40 is clear on how the Estate of a polygamous deceased person who died intestate should be shared.

19. Section 40 of the Law of Succession Chapter 160 Laws of Kenya states as follows;

Where intestate was polygamous

"(1) 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.

(2) 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."

20. Section 40 of the Law of Succession Chapter 160 Laws of Kenya does not however take away the discretion of the court to distribute the estate fairly. By dint of sections 27, 28 and 35 of the said Act, the Court has been clothed with wide discretion to provide adequately for dependents or beneficiaries.

21. I accordingly find that the summons for revocation lack in merit and I accordingly dismiss the same with no orders as to costs.

22. This case will be mentioned within thirty (30) days for objectors to intimate whether or not they wish to propound the will.

23. Failure to propound the written will the property to be shared in accordance with section 40 of the Law of Succession Act.

24. There is no evidence that the deceased sister co-owned the suit properties with the deceased and the properties will be shared amongst the deceased's children and the petitioner who was a widow of the deceased being added as a unit in accordance with section 40 of the Law of Succession.

Delivered, signed and dated at Kericho this 1st day of October 2021.

A. N. ONGERI

JUDGE