



REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

SUCCESSION CAUSE NO. 13 OF 2009

IN THE MATTER OF THE ESTATE OF KIPKOECH ARAP MOSONIK (DECEASED)

RAEL KERUBO KABINGA.....APPLICANT/OBJECTOR

VERSUS

JOHN K. KOECH.....1ST PETITIONER/RESPONDENT

JONATHAN K. MOSOIN.....2ND PETITIONER/RESPONDENT

JUDGMENT

1. The objector in this **RAEL KERUBO KABINGA** filed a summons for revocation dated 17/7/2020 seeking to have the certificate of confirmation granted herein on 7/7/2020 revoked and annulled.
2. The objector stated in her Affidavit in support of the summons for revocation that she was not provided for yet she is a beneficiary of the Estate of the deceased herein **KIPKOECH ARAP MOSONIK** having been married to **DAVID KIPRONO KOECH (deceased)** who was a son of the deceased herein.
3. The objector called four witnesses, **DAVID CHERUIYOT, DAVID KIPCHUMBA MAINA, SALLY CHEPNGENO CHERUIYOT and SAMUEL KOECH** who said the deceased **DAVID KIPRONO KOECH** had married the objector under Kipsigis Customary Law.
4. The petitioners, **JOHN K KOECH** and **JONATHAN MOSONIK** opposed the objector's Application and said that the brother **DAVID KIPRONO KOECH** was mentally sick and that he never married the objector.
5. The petitioners called one witness **JONATHAN KIPNGETICH MOSOIN** who said the deceased **DAVID KIPRONO KOECH** was not married.
6. The parties herein filed submissions which I have duly considered. The issues for determination in this case are as follows;
 - (i) Whether the objector was married to the deceased **DAVID KIPRONO KOECH**.
 - (ii) Whether the objector is entitled to inherit from the Estate of the deceased herein.
 - (iii) Whether the grant of Letters of Administration herein together with the certificate of confirmation should be revoked.
7. On the issue as to whether the objector herein was married **DAVID KIPRONO KOECH (deceased)**. The objector testified that she was married under Kipsigis Customary Law.
8. The objector called witness who testified that the ceremony was conducted at the home of a neighbour and that dowry was paid.
9. The petitioners who opposed the objector's summons for revocation said the deceased **DAVID KIPRONO KOECH** was mentally sick and did not have the capacity to enter into a marriage.
10. The law requires that he who alleges a fact is under a duty to prove the same. The petitioners did not produce medical proof that the deceased **DAVID KIPRONO KOECH** was mentally sick.
11. The standard of proof required in civil cases is on a balance of probabilities. I find that the objector has established her case to the required standard.

12. There is evidence that the objector married the deceased **DAVID KIPRONO KOECH** under Kipsigis Customary Law. The objector and the deceased had two children. There are witnesses who testified that the deceased and the objector lived as husband and wife and even in the absence of the evidence on the ceremony and the dowry, there is evidence to raise a presumption of marriage.

13. The Court of Appeal in **PHYLIS NJOKI KARANJA & 2 OTHERS VS. ROSEMARY MUENI KARANJA & ANOTHER CIVIL APPEAL NO 313 OF 2001 [2009] eKLR** it was held that:

"Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed."

14. **HORTENSIAH WANJIKU YAWE VS. PUBLIC TRUSTEE CIVIL APPEAL NO. 13 OF 1976** the court stated that the presumption of marriage does not depend on the law or a system of marriage. The presumption is just an assumption based on a very long cohabitation and repute that the parties are husband and wife.

15. There is evidence that the objector was chased away by the two petitioners from the deceased's house after the deceased had died and here house was burnt on allegations of witchcraft.

16. On the issue is to whether is entitled to inherit from the deceased herein, I find that the objector having established on a balance of probabilities that she was the wife of **DAVID KIPRONO KOECH**, she should inherit from the Estate of the deceased.

17. On the issuer as to whether the grant of letters and certificate of confirmation should be revoked. I find that the two petitioners are also rightful beneficiaries of the Estate of the deceased.

18. It would not be in the interest of justice to revoke the grant. The two petitioners are directed to file a summons for rectification and to cater for the objector as the widow of **DAVID KIPRONO KOECH (deceased)**.

19. The petitioners are directed to comply with the said directions within thirty (30) days of this judgment.

20. This case will be mentioned on 2/11/2021 for compliance.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 1ST DAY OF OCTOBER 2020.

A. N. ONGERI

JUDGE