**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**SUCCESSION CAUSE NO. 17 OF 2001**

**IN THE MATTER OF THE LATE JOHN K. BARTILOL DECEASED THROUGH**

**DINAH JEPKEMBOI BARTILOL.....1ST PETITIONER/RESPONDENT**

**JAPHET KIPROTICH BARTILOL.....2ND PETITIONER/RESPONDENT**

**VERSUS**

**EDNAH KANGOGO.....APPLICANT/ OBJECTOR**

**RULING**

**1.** Upon the death of **JOHN K.BARTILOL** on 8th October 1998, **DINAH JEPKEMBOI BARTILOL** and **JAPHET KIPROTICH BARTILOL** petitioned for grant letters of administration of his estate in their capacity as widow and son respectively. **DINAH** had obtained a letter from the chief of **KAYAMIT**, stating that she was the deceased's only wife. The Applicant/Objector **(EDNAH KANGOGO)** by an application dated 17th December 2018 describes herself as a wife of the deceased, and complains that the petitioner/respondents **(DINAH JEPKEMBOI BARTILOL** and **JAPHET KIPROTICH BARTILOL)** are intermeddling with the estate of the deceased in a manner that is unjust to her interests.

**2.** It is her evidence that she got married to the deceased (who then served in the Kenya Army and eventually became a pensioner) at her **CHEPKORIO**, and customary rites were performed at her parents' home, when on 19/08/1989, the deceased came accompanied by his brother **JOSEPH BARTILOL**, his cousin **EDWARD CHUMBA**, his mother **KABON BARTILOL** and other family members. They paid dowry in the form of 4 cows and Kshs.140 for the elders. Prior to the formalization of the relationship, she had cohabited with the deceased from 1993. She explained that they were only living apart by virtue of the nature of the deceased's job, which stationed him in Nakuru, while she worked in Eldoret. However, in 1991, after dowry had been paid, she moved to live on his 50 acres farm in **UASIN GISHU/ILLULA SETTLEMENT SCHEME/PLOT**.

**3.** They had 4 children whose birth certificates she produced in court and mentioned them as:

**HILARY KIPRUTO BARTILOL -1985**

**WILLY CHEBET BARTILOL – 1989**

**JOYCE CHEMUTAI BARTILOL -1993**

**ALICE CHERONO BARTILOL -1994**

**4. EDNA** was aware that the deceased had another wife named **DINAH** who was settled at the deceased's 40 acres **SOY** farm, and they met frequently at ceremonies within the deceased's farm. That **DINAH** (whom she refers to as her co-wife) never lived on the ILLULA parcel, but **EDNA** visited her at Soy in the company of the deceased, on many occasions.

**5.** That the deceased had purchased the **ILLULA** parcel in 1993 through the **Settlement Trustee Fund,** and, upon his demise, he was buried at the **ILLULA** farm. She relies on the funeral programme which was prepared by his brothers, to demonstrate that she was acknowledged as part of the deceased's family, as the programme reads that he had two wives and ten children-that number included her children, as Dinah had 6 children. That before his death, the deceased educated and cared for her children

**6.** She proposes that all the assets be shared equally, except for the **ILLULA** parcel in which she is willing to have 10 acres hived off and given to **JAPHETH BARTILOL** (the deceased's eldest son), whom she says has been living on that land alongside herself. She denied suggestions that she had a secret affair with the deceased, saying **DINAH** was even represented at her dowry ceremony by the son known as **DICKSON KIPLAGAT**, and she participated in the betrothal ceremony of **DINAH's** daughter.

**7.** The applicant acknowledged on cross-examination that by the time she joined the deceased's family, the 1st petitioner and the deceased had lived together for 20myears, and had acquired some property in her absence. She does not mind a reasonable being taken out of the properties, and being given to the 1st petitioner. She however maintains that she took part in the development of the **ILLULA** farm

**8.** The deceased's brother **JOSEPH CHERUIYOT BARTILOL** (PW2) maintains that his brother had two wives (who are the protagonists herein), and that he accompanied his late brother in the team that went to the applicant's home to formalize the marriage. He testified that the deceased and the applicant had been staying together even before the formalization and eventually had 4 children. That the deceased and the applicant established their matrimonial home at **ILLULA** farm, whilst the 1st Petitioner was already settled at **SOY.**

It is his further evidence that at no time did Dinah live on the **ILLULA** farm, but she would visit during ceremonies, and even when their daughter **CAROLYNE** got married, the petitioner attended the ceremony at **ILULA**. As far as he knows, the house which stands on **ILLULA** farm was built by the deceased.

**9.** A similar version regarding the status of the applicant has been given by the deceased's cousin, **EDWARD CHUMO**, who was also in the team that went to pay dowry for **EDNA**. The chef of **KAPSOYA BARNABA KIPRONO KIBOS (PW4)** also confirmed that the deceased had two wives, and that the 1st wife was fully aware of **EDNA's** existence.

**10. DINAH JEPKEMBOI BARTILOL (DW2)** told this court that as far as she knew, she was the deceased's only lawful wife, having formalized their union at the DC's office in Eldoret, on 8th January 1966, and produced the marriage certificate, and had six issues, namely:

**IBRAHIM KIPRONO -1966**

**DICKSON KIPLAGAT -1968**

**CAROLYN CHEPSKWONY -1969**

**GEOFFREY KIMUTAI -1972**

**MARGARET CHEPKOECH -1974**

**KIPROTICH JAPHETH – 1970**

During their marriage, they bought property at **SIRGOI SCHEME** in 1967 and built their matrimonial home there in 1969. They also purchased land at **NDALALA** in 1976. In 1978, one of her brothers-in-law died, and her late husband assumed responsibility over his six children. This resulted in heavy financial strain, leading to the deceased requesting her to ask for funds from her father **(MIKA TEREITO)** so as to buy land. Her father gave them Kshs 6000/-which they used to buy the **ILLULA** property in 1982.

**11.** In 1990, her daughter **CAROLYNE** was set to travel to **CANADA**, and Kshs 56,000/- was raised towards an educational harambee. However, she failed to make the journey due to visa issues, and it is the 1st respondent's evidence that it is these harambee funds which were used to build a house at **ILLULA**, with the consent of **CAROLYNE**. They took possession and occupied both the house at **SERGOI** and **ILLULA.**

**12.** In 1998, her late husband got ill, and he wanted to make a will, but never got to do so. He died without disclosing to her that he had another family, so she was not aware of the applicant's existence until the funeral arrangements of her husband, when her brothers- in –law introduced her to the applicant as her co-wife, and that they had 4 children who were also introduced to her. She stated:

> "***It transpired that Edna was secretly married to my late husband to the knowledge of my brother-in-law, and kept me out because my marriage was legal. My late husband was married at ILIULA farm, the one we jointly built a house on. The ceremony of Carolyne was performed there. I am the one who resolved that he be buried there since he had told me in his lifetime that it was our main home".***

**13.** She explains that it is on account of the afore-going factors that she excluded the applicant and her children when she petitioned for grant of letters of administration, and the farms **SOY** and **ILULA** properties were acquired through the joint efforts of herself and the deceased.

She however has no objection to the applicant being given the **KITALE** property. That she only moved out of the **ILLULA** property due to hostility by the applicant, and her brothers in-law who threatened to beat her up for rejecting the applicant. She admitted leasing out 70 acres of the Kitale property at a sum of Kshs. 5000/- per acre, but explained that she did so in a bid to raise money to repay a loan which the estate owed the Settlement Fund Trustee over the ILLULA property. She produced documents as evidence of such repayment.

That despite leasing out the petrol station, there was an agreement that she would only started receiving the proceeds 5 years later- so currently she does not receive any money. Further, the tractor registration **KUM 052** is parked at the farm, as it broke down, while motor vehicle registration No. **KUJ 577** is in the garage, awaiting repairs. The 1st petitioner is categorical that she cannot tell how much money she has received from the deceased's estate because the funds were being used to settle the debts owed by the deceased, including repaying the **AFC** loan

**14.** The 1st petitioner's sister **(MARGARET TEREITO)** told this court that she runs a hardware shop in **ELDORET** town, and in 1982, **DINAH** went to her shop accompanied by their father who handed over to her the sum of Ksh. 6000/-, with a request for her to count the

money and confirm the amount, then told her:

> ***"Give to your sister, she is going to pay for land"***

Later on **DINAH** told her she had given the money to the deceased to pay for the parcel at **ILLULA SETTLEMENT SCHEME**

**15.** This matter proceeded before various judges, and when parties appeared before Ibrahim (J), on cross examination by **Mr. Cheruiyot**, the 1st petitioner stated :

> ***"Edna's children I accept to be his children- these four (4) children. He had 10 children…At the funeral, it was stated that she was the other wife of the deceased…I went along with everything since they wanted to beat me up…"***

**16. CPT MOSES SANDE (DW1)** who works at the Department of Defence **(DOD)** presented records dating back to 1992, to this court which showed that the deceased had only listed his next of kin as the 1st petitioner as his wife, and six children (none of which belong to the applicant). On cross examination the witness stated:

> ***"We do not keep a record of what an officer does outside the military. If he decided to marry under customary law without disclosing to us, the military would not know. But when we compute benefits, we as the military would not include the non-disclosed beneficiaries. If he withheld any information from us, we will not know".***

**17.** The matter then proceeded before Ngenye (J) where **PETER MANENYA OHANYA (DW3)** who lives in **SOY SCHEME**, and has known the **BARTILOL** family since the year 1967 as he worked for them as a farm hand, told the court that he only knew **DINAH** as the deceased's wife, plus her 6 children. The deceased was his good friend, and used to confide in him. As the deceased's health deteriorated, he called DW3 and told him that in the event of his death, he wanted his property to be divided according to the law. However, DW3 did not understand what that meant, although the deceased was categorical that **DINAH** was not to inherit any property, but all his children, being the 2 girls and 4 boys had to get a share of the property.

**18. CAROLYNE CHEPKORIR KIRUI (DW4)** supported the 1st Petitioner, saying Kshs 560,000/- which had been raised to enable her pursue studies in Canada is what her late father used to develop the ILLULA property after her travel plans aborted due to visa application rejection. That it was after her father's death that her uncles summoned her together with her siblings to deliberate on the place of burial, and told them about **EDNA** and her brood. It was after her father's burial that her uncles said **EDNA** should live on the **ILLULA** property, but her mother's property remains in the **ILLULA** farm. As far as she is concerned, it was her uncles who pushed for **EDNA** to be recognized as her father's wife.

On cross examination, DW4 told this court that her brother **JAPHETH** lived with their father at **ILULA**

**19. JAPHETH KIPROTICH BARTILOL (DW5)** stated that he had lived on **ILLULA** farm with his late the deceased since 1989, after completing school. His mother **(DINAH)** lived in **SOY.** That the deceased begun constructing a house thereon, in 1990, and upon completion, his father moved in to live with his mother **(DINAH)** who would sometimes visit, and other times stay in **SOY**. Both DW4 and DW5 maintain that **EDNA** only moved into the **ILLULA** property in 1998when their mother had an accident and was away from the premises seeking treatment elsewhere. DW3 described **EDNA** as ***"just my father's friend, like many others that he had"***. He too only got to know that Edna's children claimed to share a father with him, after their father had died

**20.** When **JOHN K. BARTILOL** died, he left the following;

**a) NDALALA FAM KITALE L.R NO. 5 measuring approximately 100 Acres.**

**b) ILLULA SETTLEMENT SCHEME PLOT NO. 4 measuring Approximately 50 Acres.**

**c) KAKAMEGA/SERGOIT/147 measuring 29.75 Acres.**

**d) PLOT AT SOY L.R NO. 15074-measuring 0.022353 Ha.**

**e) TRACTOR REG NO. KUM 052**

**f) TRACTOR (BROKEN DOWN).**

**g) DATSUN –PICK UP -1200 REG NO. KUJ557**

**21.** It is the applicant's case that the respondents have sold 25 acres out of the 100 acres of the parcel known **NDALALA FAM KITALE L.R NO. 5 contrary** to the court orders, and while the cause is pending in court. Further, the respondents have been leasing out of the same parcel, 80 acres at **Kshs. 10,000/-** per acre for the last 18 years. That the respondents have also been leasing out the **PLOT AT SOY L.R NO. 15074-measuring 0.022353 Ha** to a diesel power petrol station at a sum of Kshs. 18,000/- per month for the last 18 years. The applicant prays that the respondents be summoned to court to account for all the income received from the deceased's estate

The matter there proceeded to hearing and final determination by the Court on the application and parties herein agreed that the same should be conversed through written submissions.

**22.** Applicant's case is that while this case was pending in Court parties met and agreed on some interim issues thus;

i. THAT the objector and her children continue to stay at land **parcel ILLULA SETTLEMENT SCHEME PLOT NO. 4 and occupy and use 40 acres** and the petitioners and other beneficiaries have no interest in the said portion.

ii. THAT the 2nd Petitioner and his children continue to stay, occupy and use **10 acres within ILLULA SETTLEMENT SCHEME PLOT NO. 4** and the 1st petitioner has no interest in that portion.

iii. THAT the 1st petitioner and his children continues to stay, occupy and use **KAKAMEGA /SERGOIT/147.**

**23.** That at no time was there ever an agreement that **NDALALA FARM KITALE L.R NO. 5** be sold and/or leased out, nor was there any agreement that the **PLOT at SOY L.R NO. 15074** be leased out and or sold. In infact the above agreements were entered into mutually as a family despite the petitioner continuing to hold the allegation that the Objector is not a wife or a dependant. It is submitted that their testimony and that of all witnesses clearly points to the fact that the applicant lived with the deceased, took care of him during illness, sired children with him and continues to live by consent in ILLULA FARM where the deceased was laid to rest. She contests and claims that the petitioners got consent from the beneficiaries to sell Kitale land to pay my loan and infact ILLULA loan was paid by the Objector.

**The applicant argues that the petitioners are acting in contradiction to the provisions of Section 45 of the Law of succession Act** which provides inter alia that there should be no intermeddling with the property of the deceased person. Further, the Act states that: -

*" 1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant or representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.*

*2. Any person who contravenes the provisions of this section shall-*

*(a)be guilty of an offence and liable to fine not exceeding ten thousand shillings not to a term of imprisonment not exceeding one year or to both such file and imprisonment and .*

*(b)Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after directing any payments made in the due course of administration."*

**24.** The applicant reiterates that the petitioners have been receiving income generated from the leased parcels of land being 80 acres out of the 100 Acres of that parcel of land known as **Ndalala Farm Kitale LR NO. KITALE 15** and the petrol station christened diesel **Soy Farm CR NO. 15074 measuring 0.022353 HA f**rom the time the deceased passed on. Further the petitioners/respondents have sold 25 acres out of 100 acres parcel of land known as **NDALALA farm (LR NO. Kitale 15)** contrary to Court orders and yet succession is pending.

**25.** To demonstrate that the petitioners/respondents are acting in violation of the court orders, the applicant cites the case of **Econet wireless Kenya Ltd -vs- Minister of Information and communication of Kenya and another,** the Court stated that:-

***"It is essential for maintenance of the rule of law and order that authority and the dignity of our Courts are uphold at all time. This Court will not condone deliberate disobedience of its order and will not shy away from its responsibility to deal fairly with proved contemnors...***

***……. It is the pain and unqualified obligation of every person against or in respect of whom and order is made by the Court of competed jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void".***

**26.** That since the respondents have been leasing out the remaining 80 Acres of that parcel of land Known as **NDALALA Farm Kitale LR. NO. 5 KITALE at Kshs. 14,400,000/=.** They have also been leasing out the plot farm **LR NO. 15074 measuring 0.022353 ha to diesel power station at Kshs. 18,000/= per month for 18 years totaling to Kshs. 3,888,000/-,** then it is in the interest of justice that the Petitioner/Respondents be summoned to appear before this Court to account for all the income received from the deceased estate in relation to the above mentioned properties, and the income generated from the two properties mentioned above be deposited in a mutual bank account under the Court's direction.

**27.** The court is also referred to **Section 82 (a) of the Law of Succession Act** which provides that; **-**

**Personal representatives shall, subject only to any limitation imposed by their grant, have powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate**.

It is argued that pending succession to the deceased estate the respondents have no right to act as personal representative to the same estate and thus their actions are a breach of the law as shown above. In interpreting the above provision of law, the Honourable Court in the case of **ALEXANDER MUTUNGA WATHOME –VS- PETER LAVU TUMBO & ANOTHER [2015] EKLR (MACHAKOS SUCCESSION CAUSE NO. 80 OF 2011)** noted that;-

***"In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession***

***Act. In addition section 82 of the Law of Succession Act provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person."***

**28.** This court is also urged to consider the following authorities;-

**1) Republic Of Kenya In The High Court Of Kenya At Makueni Hc P&A No 446 Of 2017**

**Estate of Malai Alias Lili (Dcd) Verses James Kiendi Malai And Another.**

**C. Kariuki**

**2) Republic Of Kenya in the High Court Of Kenya at Machakos P&A No 30 Of 2013 Estate of the Late Giedeon Mwilu Mwake (Dcd) Florian Muindi Mwake Verses Tom Mutunga. D. Kimei. J**

**29.** The respondents point out that the deceased had only one wife who is the 1st petitioner, having married under the Marriage Ordinance Act (Cap 150 Laws of Kenya), and he had no capacity to contract another marriage during the subsistence of the first marriage that under section 37. I do not think there is much of a contest in that line of submission, the law is clear that once a party contacts a marriage under statute which provides that such union must be monogamous, then there can be no room to contract a subsequent one, whether under custom or through cohabitation. Any such union remains null and void, whether dowry, and a platoon of relatives pronounce the subsequent relationship in their eyes.

**30.** It matters not whether the applicant moved onto the **ILLULA** property by virtue of the deceased's design, or out of her own volition and arrangement with the deceased, or courtesy of her brothers in-law- such action does not sanitize the union, and transform it into a valid marriage under the law. There can even be no presumption of a marriage, despite the number of years they may have been together.

**31.** It would have been different if the first marriage had been contracted under customary law which allows polygamy- then the applicant's claim to being a wife would have had a leg on which to stand. The issue of equal distribution does not therefore

It then follows that the applicant does not qualify to be considered as a dependent under section 29 of the Law of Succession Act as there was no valid polygamous union.

**32. What about the children who are said to belong to the deceased?** The respondents' counsel argues that the birth certificates produced, and which show that the deceased was the father of the applicant's 4 offspring is not proof of any relationship with the deceased, and that the applicant should have presented a **DNA** profiling of each child. That in any case, the deceased did not recognize the 4 as his children, as he deliberately omitted making any reference to them even in the information he provided in his work records which only named the 1st petitioner/respondent and her brood.

While this may hold some water, it is not lost to me that those work records were made in 1972, long before the association between the applicant and the deceased germinated-even if it was to be referred to as mere friendship, like he had with many others.

**33.** When did the deceased retire from the armed forces, and would that alone be conclusive proof that the 4 children belonging to the applicant were not sired by him, and that he never recognized them nor even provided for them. None of the applicant's children testified to confirm that they lived with the deceased, and that he provided for them and maintained them, yet I pause to ask is the entry of the name of a man into a birth certificate the father, prima facie proof of parentage?

I would think so, and the burden would shift onto the person saying otherwise to adduce contrary evidence.

**34.** I note that the petitioner and her witnesses did not suggest that the applicant falsified the birth certificates or had amorous liaisons with other men as to result in the 4 children. Infact the 1st petitioner confirmed before Ibrahim (J) that she recognized the 4 children as belonging to the deceased, and she even seemed to relent on her hard stand, saying they could have the Kitale property. I think the lyrics now being waxed about DNA is simply intended to throw a last spanner into the works and I am of the view that if the respondents were serious about the question of who fathered those 4 children, nothing would have stopped them from requesting that the court orders the 4 to be subjected to **DNA** profiling. From the 1st petitioner's own admission, I hold and find that the 4 children of the applicants are children of the deceased and qualify as dependents under section 29 of the Law of Succession Act, on an equal footing with the other six children belonging to the 1st petitioner.

**35.** The 1st petitioner has admitted that she has been receiving some monies from assets of the estate, and that she has used the funds to settle debts owed by the estate. Yet again, she claims that the monies she has used to settle the debts have largely been provided by her children- she is blowing hot and cold at the same time. What she has shown is evidence of repayment, not the source of the funds- a sweeping statement that her children are the source of funds is not proof- **WHAT I INFER IS A REFUSAL TO DISCLOSE EXACTLY HOW MUCH THE 1ST** Petitioner has been receiving. I am thus **INCLINED TO USE THE FIGURES PRESENTED BY THE APPLICANT** which will act as a guide in determining what portions each of the beneficiaries will get. There appears to be some vehicular assets which the 1st petitioner says are in a state of disrepair, but no evidence has been presented to prove this.

**36.** In light of the afore-going observations, the parties are directed within **21 days** hereof, to each file proposals on the mode of distribution which shall exclude the applicant. A valuation report on each asset be filed simultaneously so that in the event of there being no harmony in the mode of distribution, this court will have the final say on distribution. The matter shall be mentioned on **11th February 2020**.

**Delivered, Signed and dated** at **ELDORET this 21st day of January 2020**

**H. A. OMONDI**

**JUDGE**