



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 139 OF 2005

IN THE MATTER OF THE ESTATE OF LOMULEN AKEHEM KARAMOE

BETWEEN

AMEKOI EKATAPAN EDUNG..... PETITIONER/RESPONDENT

VERSUS

THOMAS KIPROP KIMITEI

RHODA AKAI ARBACH

PETER NAKETE

DAVID EKALEBON ERENG AMERI KEEM.....INTERESTED PERSONS/APPLICANTS

RULING

1. Upon the death of **LOMULEN AKEHEM KARAMOE** on 12th January 2001, the petitioner (**AMEKOI EKATAPAN EDUNG**) applied for grant of letters of administration intestate in her capacity as his widow. Before the confirmation of grant the objectors (**THOMAS KIPROP KIMITEI, RHODA AKAI ARBACH, PETER NAKETE, DAVID EKALEBON ERENG and AMERI KEEM**) filed summons dated 20/04/2006, seeking revocation of the grant. The grounds for the prayers were that the grant was obtained fraudulently by making a false statement and by the concealment of material facts in contravention of **Section 76 of the Law of Succession Act**.
2. A summary of the objectors' case is that they each purchased land from the deceased in respect of plot number **167 Kuinet**, save for **David** who got his share as a gift *inter vivos*. They had been in possession and use of the land, and are adamant that the petitioner was never the widow and nor are her children those of the deceased. When the grant was issued but not confirmed, the objectors were served with eviction notices and they contend that having made direct purchases from the deceased they have priority in seeking a fresh grant if this application is allowed. The objectors were served with a notice of eviction on 7th February 2006 but upon perusing the court file there was no such eviction and the same was fraudulent.
3. The matter proceeded to hearing and **Rhoda Akai Arbach** (PW1) testified that she was a daughter of the petitioner but that the petitioner was not married to the deceased. She insisted that her mother was simply a friend to the deceased and they stayed together. It was her evidence that the deceased owned 5 acres on Parcel No. **UASIN GISHU/KUINET A/167**, and she bought one acre of land from him, and all the other interested parties each bought half an acre. She was categorical that **JOSPHAT** and **JAMES**, who are her brothers are not sons of the deceased, as their father was **ERAGAI ERUPE**.
4. On cross examination, the witness stated that **DAVID ERENG** was a son to the deceased's brother, and not her brother – he is the one who stays in the deceased's house. However, she mentioned another brother by name **PETER AMORU**, whom she said lives in **LODWAR**.
5. **PW2 (PETER NAKETE)** a nephew-in-law to the deceased by marriage, confirmed the deceased died on 19th January 2001 as a result of a road traffic accident. He admitted that the deceased lived with the petitioner at **KUINET**, but on opposite ends of the land. He bought half an acre from the deceased on 23/03/2000 and relied on a written agreement presented in court as MFI-1 and subsequently took possession thereof. He found the other interested parties already on the portions they claim.
6. After the deceased died, **JOSEPHAT** gave them a notice (MFI-2) to vacate the land, yet as far as he knows, the petitioner was not the deceased's wife.

7. **PW3 (THOMAS KIPROP KIMITEI)** who bought 2 acres land from the deceased on 22nd February 1996 at Kshs 74,000/- and he made payments in instalments, before eventually applying for consent from the Land Control Board vide Ex 2. He told the court that after selling the land to the purchasers, the balance of one and a half acres was given to **DAVID ERENG**, by the family. All was well until 07/02/2006 when he received eviction orders, yet he was a purchaser from **JOSEPHAT EREGAI**. He too was categorical that the petitioner was not the deceased's wife, and the petitioner in-fact lived with her sister (**MARY AIMURIA**), but she would visit the deceased annually, and at no time did the deceased ever introduce the petitioner as his wife.

8. PW4 claimed the petitioner was his wife but she left him. He admitted that he did, and she was not related to him not know the deceased or if the petitioner was married to him. He stated that he was forced to sign the affidavit in support of the annulment herein.

9. **AMERI KEEMU (PW5)**, a step-brother to the deceased who lived on the neighbouring parcel of land (**KUINET/134**) claimed the deceased lived alone, and had no wife or children. He did not know the petitioner, and confirmed that the deceased had sold the land to the purchasers. He confirmed on cross examination that **David** was their nephew. **ADAAN KEEMU**, a sister to the deceased gave similar evidence.

10. **LOWOTO LONGOLOBOI**, who has lived in KUINET since 1963, and is married to the deceased's sister (**ADAN LOWOTON**) was also categorical that the deceased never married nor did the petitioner have children with him.

11. **ERENG LOCHAM alias ARABACHU**, a brother to the deceased, and who gave his age as over 50 years lives in **MOIBEN**. He also maintained that the deceased never married, nor did he have any children. He did not know the petitioner, nor had he ever seen her.

12. The assistant chief of **KONGASIS** sub-location confirmed that he knew the deceased as one of the residents of **KUINET** which falls under his jurisdiction. He was not aware of the petitioner's relationship with the deceased, although he knows that she lives in **MERIWET**.

RESPONDENT'S CASE

13. The respondent maintained that the deceased was her husband, and she was not aware of any sale of land to the claimants, saying the transactions were done by **ERENG LOCHAM**, after her husband's death, and the purchasers moved in after the death. She disowned Rhoda, saying that is not her daughter, but **ERENG's** child. She also disowned **AMERIKAL** who claimed to be a bother to the deceased, saying they were just friends.

14. It was her evidence that the deceased sired two children with her, namely **JOSEPHAT ERAGAT and DENNIS AMANKOT**, and after the deceased passed on, the objectors became hostile, and demolished her house, forcing her to seek alternative residence in rental premises at **MERIWOT CENTRE**. She laments that the contested piece of land was the only property they had and she urges this court to allow her to confirm the 5 acres in her favour.

15. On cross examination, she now gave the names of her two children as **JOSEPHAT ARAKAI**, and **JAMES AMANKWAI**. She obtained a letter from the chief of **LONGISA** sub-location, although she did not seem to know under which county it fell. She later corrected this to say, the letter was by the chief of **SOY** location

16. The petitioner on cross examination confirmed that the objectors occupy different portions of the deceased's land on the strength of claims that they are purchasers. However, with regard to **RHODA**, she explained that after her husband's death, the deceased had pity on her, and gave her an acre to use. That **PETER NAKETER** also got half an acre at the time the deceased moved onto the land and was allowed to occupy because he was the deceased's in-law. She could not quite explain the presence of **THOMAS KIMITEI**, but stated:

“Deceased had said he pays for the portion he wanted, but deceased died before he paid”

It is her evidence however, that **DAVID** was never given anything

The objectors did not file any written submissions. The respondent/petitioner submitted that she lived with the deceased and that there was no reason a man and a woman could live together unless they were married. PW2 agreed that the deceased and the petitioner stayed together in the same plot at opposite ends.

That PW7 gave contradictory evidence that PW2 married a child of the deceased yet the objectors said he had no children.

The evidence is described as overwhelming that the deceased and the petitioner lived together and she was his wife. And that she qualifies as a wife and as a dependant of the deceased under **sections 29 and 26 of the Law of Succession Act**. The petitioner should remain the appointed administrator.

ISSUES FOR DETERMINATION

- a. Whether the grant should be revoked

WHETHER THE GRANT SHOULD BE REVOKED

The petitioner says that she was married to the deceased vide customary marriage. She needs to prove that she was married to the deceased.

In the case of *Kimani Vs Gikanga (1965) EA 735 at Page 739 Duffus J A* expressed himself on this question of customary law as follows; -

“To summarise the position; this is a case between Africans and African Customary Law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a Judicial decision but in view especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of this case.”

In **GITUANJA vs GITUANJA (1983) KLR** it was held;

The existence of a customary marriage is a matter of fact which is proved with evidence.

In order to prove she was a wife to the deceased she would have to call evidence to prove that there was customary law marriage between herself and the deceased. PW4 testified that the petitioner was his wife and they had three children together. There was no evidence produced to show that she was married to the deceased. Amongst the witnesses there was corroborative evidence of neighbours and relatives of the deceased to the effect that the deceased was never married.

The petitioner did not even disclose how long she had lived with the deceased at least to give her a straw of claim on the basis of cohabitation. The closest it got was the reference to her interactions with the deceased is that she occasionally visited him, but beyond that

Section 76 of the Law of Succession Act provides;

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.**

In the premises the grant was obtained by means of an untrue allegation that she was married to the deceased and must be and is hereby revoked. Each party shall bear its own costs

E-Delivered and dated this 5th day of May 2020 at Eldoret.

H. A. OMONDI

JUDGE