



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC P&A NO. 63 OF 2004

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

ESTHER TABSINYEI MANDAGOI.....OBJECTOR

VERSUS

CATHERINE CHEPKOSGEI TABARNO.....1ST PETITIONER

RUTH JEPSIELEI BARNO.....2ND PETITIONER

BENARD KIPTARUS KOECH.....3RD PETITIONER

PAUL KIPKOGHEY BARN LELEI.....4TH PETITIONER

JUDGMENT

1. Upon the demise of *KIPKOECH ARAP MAINDI*, the petitioners petitioned for a grant of letters of administration of the deceased's estate.
2. The objector herein commenced objection proceedings on allegations that she was not aware that the petitioners had applied for grant of the letters of administration of the estate of her deceased husband. The grant was revoked and objection proceedings commenced.
3. In support of her case, the objector called 3 witnesses. PW1 *Esther Tapsinyei Mandagoi* testified that she was taken to the deceased house by *Catherine Barno* who is the elder co-wife where she was married to *Kipkoech Mahindi* as his 3rd wife.
4. The marriage took place at their home in Tarakwo under the Nandi customs. A dowry of 4 cows and 5 sheep was paid to her brothers. She conceived but miscarried the baby, after 5 years, she gave birth to another child who died 5 months later.
5. Due to that problem, she left her husband and went for traditional treatment at her parents' home. After the treatment she gave birth to *Lydia Jeruto* and 9 years later, she gave birth to *Samuel Kiptoo Tunge*. Before his demise, the deceased bought for her a farm at Lingwai
6. On cross examination, she confirmed having married the deceased as 3rd wife under the Nandi Customary Law and that a dowry of 4 cows and 5 sheep were paid.
7. She was not informed of her husbands' death and that she did not attend the memorial service. She could not recall the deceased's children.
8. PW2 *Philip Bundotich* testified that after *Tabsinyei* was circumcised, *Barno* went and asked for her hand in marriage. All ceremonies were performed and also, dowry was paid.
9. He further testified with regard to inheritance that if a man has 4 wives, they will all share equally. The Estate is shared by the widows and not the children. It does not matter how many children one has.
10. On being cross examined, he confirmed *Barno* having married Esther and a ceremony having been conducted. He was not present during the negotiations between *Esther's* father and *Maindi*.
11. PW3 *Marabe Randeji Juma* testified that she is the eldest sister to Esther and that she is the one who gave her away to the deceased.
12. A wedding under the Nandi customary law was performed and that she was given 5 heads of cattle and 5 sheep as dowry. Esther got

married as 3rd wife and that she had 2 children with the deceased.

13. When Esther together with her kids were chased away, she went to live with her mother at Laikipia.

14. On cross examination, she stated that she had been given permission by her uncles who were present during the ceremony to give away *Esther* to *Maindi* and that dowry was paid.

15. DW1 *Paul Kipkosgei Barno* testified that he is the son of the deceased. That *Catherine Tabsinyei Mandagoi* is his step mother, *Catherine Chepkonei Tabarno* is the 2nd wife, *Ruth Jepsielei Barno* the 3rd wife and *Tecra Barno* is the 4th wife. He adopted his statement dated 22/2/2019 as his evidence.

16. On cross examination, he stated that when they applied for succession cause in Kapsabet, some properties were left out. He denied knowing the objector herein.

17. DW2 *Catherine Chepkosgei Tabarno* the 2nd wife of the deceased adopted her statement as her evidence. She denied ever knowing the objector.

18. Further that she was not the one who went for her and brought her home. Also, that she never lived in the first wife's house. No ceremony was conducted on her behalf.

19. On cross examination she stated that the deceased had three brothers. Further, that *Esther* was never married between her and *Ruth* and that they never saw her nor her children.

20. DW3 *Ruth Jepsielei Barno* testified that she is the 3rd wife of the late *Kipkoech Arap Maindi*. That *Esther Mandangoi* is not known to her and that she saw her for the first time in court. *Esther's* children are also not known to her.

21. The deceased died in her house and not *Esther's* and that she never heard of *Esther* and her children during the funeral of their deceased husband.

22. On cross examination she stated that *Chepkirong* and *Catherine* were married almost the same time. *Esther* was not the 3rd wife and that she never saw her children when their husband died.

23. The deceased had land in Uasin Gishu and Lingwai. The land was not bought for *Esther Mandagoi* and is registered in the name of the deceased.

24. DW 4 *Tecra Tabarno* stated that she is the 4th wife of the deceased. She never saw *Esther Mandagoi* and her children in the family. The land in Lingwai was bought by the deceased for the family. The said land is being taken care of by Barabara.

25. On being cross examined, she stated that *Esther* was not married between *Ruth* and *Catherine* and that Lingwai farm is in the name of the deceased.

26. In their submissions, the objector counsel submitted that it is not in dispute that the deceased and the objector were married under the Nandi Customary law which marriage was never dissolved at any given time.

27. A person is said to have been married under a customary law if all the components of a customary law and the qualification under the Marriage Act 2014 have been satisfied.

28. It also not in dispute that the objector had 2 children with the deceased. Thus, the deceased property be distributed to all his children equally as provided under *Section 35* of the *Law of Succession Act*.

29. As regards the distribution of the deceased's estate, the objector urged the court to be guided by the provisions of *Section 40* of the *Law of Succession Act* which deals with distribution of the estates of polygamous persons who dies intestate. The objector relied on ***Njoroge Gitau vs. Peter Mwangi Gitau Nakuru HCSC No. 330 of 2003***.

30. Lastly, that the deceased's property should be divided according to the houses so that each house can divide the property to their children as per *Section 40* of the *Law of Succession Act*.

31. The respondent's submitted that it is incumbent on the applicant to proof her standing as a wife or dependant of the deceased for her to have a basis or foot hold for laying claim to the deceased's estate.

32. The burden of proof lies on her which burden she has failed to discharge as per *Section 107* of the *Evidence Act*.

33. It is the contention of the Respondents that the applicant's case is unmerited and untenable. The estate was distributed among the beneficiaries and/or dependants of the deceased around 20 years ago who have since occupied their shares with others having disposed off their shares.

34. Lastly, that it is clear that the applicant is not and has never been a dependant or a beneficiary to the estate of *Kipkoech Arap Maindi*, deceased.

35. The only issue for determination is whether or not the Objector was married to the deceased as alleged and whether the Objector was sired two issues by the deceased during such coverture so as to qualify as a dependant of the deceased.

36. In this respect, Objector adduced evidence to the effect that she got to know the deceased and got married to him in accordance to Nandi Customary Law.

37. It was the objector's evidence that after giving birth to her son, the deceased bought her land at Lingwai. It should be noted that the said land at Lingwai was not included in the estate of the deceased when the petitioners petitioned for grant of letters of administration and the petitioners never explained the reason as to why it was not included. Upto now the said parcel is being taken care of by a caretaker by the name Barabara.

38. PW2 told the court that the deceased visited the objector's parents to ask for her hand in marriage; which consent was accordingly granted. A ceremony under the Nandi customary law was then conducted and dowry was paid to **PW3** who in turn released the objector to go and cohabit with the deceased as his 3rd wife.

39. A perusal of the court file shows that when the objector filed summons for revocation of grant dated 23rd April, 2004, in support of her case, she annexed a letter from the Chief Koilot location which indicated that she was a wife of the deceased. It is noteworthy that this evidence was entirely uncontroverted by the respondents during the hearing.

40. *Section 107(1)* of the *Evidence Act, Chapter 80* of the *Laws of Kenya*, provides that:

"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".

41. **Mabeya J.** in *Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another [2015] eKLR*, stated that:

"...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true..."

42. The Objector has proved on a balance of probabilities that she got married to the deceased under the Nandi customary law and that their marriage was blessed with two issues and thus her and her children are dependants of the deceased and are therefore entitled to a share of his Estate in accordance with the provision of *Section 40* of the *Law of Succession Act*. **Her case succeeds.**

43. The deceased's Estate should therefore be divided among the houses according to the number of children in each house, where any wife surviving him should be taken as an additional unit to the number of children.

44. In short, the objector's case succeeds. Costs be in the cause.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 6th day of October, 2020.

In the presence of:-

Firm of Kiboi Tuwai are for the Petitioner (absent)

Mrs Nyakundi for objector

Ms Gladys - Court assistant