



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO 175 OF 2008

IN THE MATTER OF THE ESTATE OF THE LATE HARISH CHANDRA HINDOCHA - (DECEASED)

CATHERINE MATEI CHENA.....OBJECTOR/APPLICANT

VERSES

PRADEEP HARISH HINDOCHA.....PETITIONER/RESPONDENT

JUDGEMENT

1. The objector vide her application dated 21st October, 2015 applied to have the rectified confirmation of grant Dated 5th December, 2013 be revoked and annulled and that there be stay and preservation of the estate pending the determination of the objection proceedings herein.
2. The Applicants supporting affidavit stated that she was the widow of the deceased herein who had been left behind and had no knowledge of the proceedings in this estate.
3. The Respondent filed his objection vide the replying affidavit and stated that the Applicant was never a wife to his deceased father and that as far as he was concerned the deceased was a Hindu and was monogamous.
4. When this matter came up for direction it was ordered that the same be disposed by way of oral evidence. The Objector became the Plaintiff and the Petitioner the Respondent.
5. The Applicant testified and called her witness. She said that she met with the deceased in the year 1986 in Kitale town and stayed with him at Milimani and Railways where he had rented her a house. As a result of their union they were blessed with two children namely **Joel Keru Hindocha** who was born on February, 1987 and **Cherop Hope Hindocha** born in February 1989.
6. She further stated that they purchased land at Matunda Plot No. 11562 Chebarus Farm Parcel Number 324 from one **Bernard Kamau Wainaina**. The agreement was done before the village elders and she produce a copy. She stated that she did some business with the deceased which took them all the way to Kisii, Homabay among other places. She produced a photograph showing her and the deceased in some place in Mombasa. She said that the Respondent knew that she was her step mother and though she was not made aware of his demise and therefore she could not attend the funeral.
7. In cross examination she said that there was no dowry paid by the deceased neither did he visit her parents as per the Kalenjin Customs in which she subscribed to. She further conceded that she had already obtained the Title deed of the land at Matunda although she did not produce the original of the same but only a copy.
8. **PW2 Samwel Kiprop Lagat** a retired Chief of Moi's Bridge Location testified on behalf of the Objector and produced the handwritten sale agreement between the deceased, the Objector as well as the seller Mr Wainaina. He said that he called for a meeting when the deceased family came and complained but it was only the Objector who came and thus the matter was decided in her favour namely that she should take over the land. He said that they recognise her as the deceased wife.
9. On cross examination he said that the sale agreement was done in the presents of an elder called **William Chumo** and not him and he was not sure whether the Petitioner received the letter of invitation to attend the elders meeting.
10. The Objector thereafter did not turn up in court during further hearing of the case whether to call any other witness or to close her case and thus the Petitioners Counsel requested that the same be closed. In her absence therefore the court exercised its inherent jurisdiction and had the matter closed so as to pave way for the Petitioner's case.
11. In his evidence the Petitioner reiterated what he had said in his supporting affidavit namely that as far as he was concerned his late father was monogamous and he produced a copy of the marriage certificate between his deceased parents who were both married under the Hindu

Laws.

12. He denied that his father was married to the Objector and stated that the Matunda Parcel of Land was purchased by his father and he produced a Sale Agreement dated 29th October, 1994 between the deceased and Bernard Kamau which was done before R.N. Kiarie advocate.

13. He said that the Notification of Birth produced by the objector were a forgery and that no DNA was undertaken to establish that the two children indeed belonged to the deceased and the objector. He said that he was not privy to the other properties mentioned by the Objector that allegedly belong to the estate. He prayed for the objection proceedings to be dismissed.

14. Having heard the parties and the read the submission on record by the counsel for the Petitioner what stands out to be decided is whether in line with Section 29 of the Succession Act the objector was the wife to the deceased and thus the two children belong to her and the deceased.

15. As clearly demonstrated in the Petitioner's evidence and cross - examination as well as in his evidence the deceased married under the tenets of the Hindu Customs and a certificate produced to that effect. The said marriage was monogamous. There was no evidence that the deceased married the objector under any Act or any customs.

16. The Objector during cross examination admitted that she was a Kalenjin and that the deceased did not visit her parents nor any dowry paid as per their customs.

17. There was no evidence that she stayed together with the deceased during his lifetime. Although she claimed that she was leased a house at Railways by the deceased there was no such leased agreement and neither was there any witness who saw them living as husband and wife with the two children.

18. Consequently, it becomes difficult for this court to conclude that she was a wife to the deceased either through any form of marriage or at least by cohabitation and repute. There was no customary ceremony undertaken, no DNA profile of the children at least to proof any marriage.

19. The notification of birth produced as evidence cannot meet the evidential muster as the same is badly overwritten with a lot of rubbing. One could as well be excused to assume that it was prepared for this cause.

20. Neither is the photograph produced by the Objector sufficient to suggest that she was married to the deceased. This court may not one to speculate whatever she was doing with him at "turtle bay beach" in the absence of any marriage with the deceased.

21. There was no evidence produced by the objector showing any business venture between her and the deceased as she stated in her evidence. There was no joined license or any books of accounts to reflect such.

22. Finally on this area, there was no evidence that she participated in the deceased life when he was sick and admitted in Nairobi or least of all in his cremation rites. Surely if she was a wife then I should not see any difficulty in her participating in the deceased life and more so the two children. The irresistible conclusion is that she was not the wife to the deceased and specifically by virtue of the fact that no evidence of any marriage ceremony was done. (***SEE KITALE HC SUCCESSION CAUSE NO. 250 OF 2015.....ESTATE OF THE LATE JAMES EKAI MARUK***)

23. On the issue of the land, there were two sets of agreements produced by the parties. The agreement which is handwritten produced by the objector dated 28 October, 1994 which includes her name and the deceased and the said seller Bernard Kamau. The same being a photocopy cannot be relied on by this court. It is not reliable for the simple reason that it is not very clear.

24. The one dated 29th October, 1994 is typed and clear. It is signed by the deceased and the vendor and witnessed by R. N. KIARIE Advocate. The name of the objector is missing.

25. For now this court refrains from inquiring why and how the objectors name is missing. That is the preserve of the land and environment court. Suffice to state that the deceased in my view purchased the land as per the sale agreement produced by the Petitioner.

26. Having stated so, the title now being held and in the name of the Objector ought not to be so. She admitted that she obtained the same after the death of the deceased. She barked her evidence by producing the elder's proceedings. Unfortunately the said elders permitted her to go ahead and take over the land.

27. The elder's decision ran against the Succession Act in the sense that it dealt with the deceased estate without inquiring whether anybody including the Objector had taken out Letters of Administration. In short they did not have any capacity to decide over the same.

28. In the premises, I think the court has stated much to show that the objection must fail. The objector did not prove that she was the widow of the deceased and that the two children belonged to them.

29. On the question of the land, there was no sufficient evidence that she bought the land jointly with the deceased. The efforts by the elders as per the minutes produced were insufficient for they were intermeddling with a deceased person property without first obtaining the grant of letters of administration from the court.

30. The Objector flatly refused to surrender to court the original title deed despite being granted time. It even forced this court to coerce her by way of contempt but she was adamant.

31. In the premises the court makes the following orders;

a. The objection proceedings dated 21st October, 2015 are hereby dismissed with costs to the Petitioner and any orders of injunction are hereby vacated.

b. Title Number MOI'S BRIDGE /ZIWA BLOCK 16 /CHEBARUS /324 registered in the name of the Objector or any other Third Party is hereby cancelled for all intent and purposes. The respective Land Registrar to effect the cancellation forthwith and to have the same in the name of the Petitioner herein.

32. Orders accordingly.

Dated, signed and delivered in open Court at Kitale this 11th day of June, 2019.

H K. CHEMITEI

JUDGE

11/6/19

In the presence of:-

Mr Kiarie for the Administrator/ Respondent

None appearance for the Applicant/Objector

Court Assistant – Kirong

Judgment read in open court.