



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**SUCCESSION CAUSE NO. 77 OF 2014**

**IN THE MATTER OF THE ESTATE OF THE LATE**

**CHARLES B. KIMINYEI KAPJOFTI - (DECEASED)**

**BETWEEN**

**BEATRICE CHEMUTUNI KIMINYEI.....PETITIONER**

**VERSES**

**MARY CHEPNGETICH BUTIA.....OBJECTOR**

**JUDGEMENT**

1. The late **CHARLES KAPJOFTI** died on the 9<sup>th</sup> day of December, 2013 and the Petitioner **BEATRICE CHEMUTUN KIMINYEI** granted letters of Administration on 14<sup>th</sup> September, 2016. As she proceeded to have the same confirmed, the Objector did file a protest vide her affidavit dated 5<sup>th</sup> December, 2016. The court then halted the application for confirmation dated 18<sup>th</sup> October, 2016 pending the determination of the said objection.
2. The court then gave direction that the objection be heard by way of viva voce evidence and the parties granted leave to file their statements and any other necessary affidavits.
3. The Objector did testify and stated that she was married to the deceased in the year 1993 when she came to their home and from the year 1994 they have lived together as husband and wife in Eldoret town. She said that she was a civil servant and the deceased equally worked as an accountant in Eldoret.
4. She said that as a result of their marriage they were blessed with 4 children namely, **WINNIE CHEBET KIMINYEI, HILLARY MATWEI KIMINYEI, and FESTUS SIMOTWO KIMINYEI AND JOAN KAPKARICH KIMINYEI**. She produced the certificates of birth for the said children which showed their father as the deceased.
5. She testified that she all along knew that the deceased had another family based at his rural home at Trans Nzoia and the Petitioner was her wife. She said that they lived together with the deceased at Eldoret till the time of his demise. They purchased land and developed a home beside other commercial properties in Eldoret. The deceased did not however build a home for her at the rural farm where the petitioner stayed.
6. She said that the deceased had dowry negotiations with her family where she paid a total sum of Kshs. 30,000 as a down payment. She further testified that she did not get involved in the deceased funeral as she was not welcomed and that the amount of Kshs. 20,000 she sent as her contribution to the petitioner was returned via mobile money transfer.
7. In her view therefore she was a legal wife to the deceased and that she and her children were entitled to the estate just like the Petitioner and her children.
8. **PW2 SAMWEL KIBET KORIR** testified that he was not the deceased relative but knew the Objector and the deceased as husband and wife since they lived as neighbours in Eldoret. He said that he was present when the Objector's parents were given kshs. 30,000 by the deceased although there was no written agreement.
9. **PW3 KUWAKA NDIWA** said that the deceased was a son to his brother. He said that he was aware that the Objector was the wife to the deceased as dowry was given although it was not reduced into writing.

10. **PW4 ANTONY KIBOR KAPJOFTI** testified on cross examination that he knew the objector since 1994 when he found the deceased with her. He said that she was present during the burial of her grandmother at Machewa.

11. When the Petitioner took the witness box she said that as far as she was concerned she did not know the Objector. She said that she married the deceased under customary law of Sabao people and she produced some written agreement.

12. She said that indeed the deceased used to work and live in Eldoret as well as their Machewa farm which she has always stayed and where he was buried. She said that she did not know another wife or children the deceased had outside hers.

13. She testified that the properties in Eldoret were solely developed by her and the deceased and there was no input from the Objector. She narrated the said assets including the estimated rental income it fetches monthly. She said that the objector came during the funeral and that she came just like any other person and not as a wife. She said that she refunded the sum of Kshs.20, 000 sent to her by the objector as she claimed that she was the deceased wife.

14. **DW 2 JUDITH NABANGALA NGEYWA** testified that the deceased was her brother and that all the years she worked and lived in Eldoret. She said that she knew where he lived in Eldoret but she did not know if he had a family in Eldoret. She said that the objector came during the funeral although she did not see the children.

15. **DW4 SILAS KIMISTO JOFTI** is the older brother of the deceased. He also confirmed that the deceased stayed in Eldoret at Raiply. Although he used to visit him he did not see whom he lived with. He did not get to know the children he had with the objector although the names given were those of their family.

16. **DW5 KELVIN MUTAI KIBOI** testified that the deceased was his eldest brother and as far as he was concerned he only had one wife the petitioner. He said that the deceased lived in Eldoret but he never lived with him and he did not know whom he lived with. He said that he only heard of the objector during the funeral.

17. The parties were then instructed to file written submissions which the court has perused and see no need of reproducing them. The court has equally perused the attached cited authorities.

18. The issue to be determined for now is whether in light of the evidence adduced the Objector for all intend and purposes is the wife and thus the widow to the deceased. The question of whether the Petitioner is a wife is not in dispute and the same did not arise during these proceedings.

19. There was no evidence of any marriage ceremony conducted between the deceased and the Objector save the mention of the Kshs. 30,000 allegedly given to the Objectors parents by the deceased. The same was not in writing and it was thus her word and that of the Petitioner.

20. Short of taking that route, the courts have over the years developed the law on such marriages and reduced the same to what is called “*repute and cohabitation*”. In other words once it is found that the two parties, that is man and woman have had along cohabitation to the extent that the reasonable members of the public have concluded them to be husband and wife, then this type of marriage kicks in. It is presumed that they are married.

21. The same however is not without proof. He who wants to rely on the same must establish several parameters as was stated by Madan JA in **MARY NJOKI V. JOHN KINYANJUI MUTHERU (1985) eklr**. The court stated that;

***“It is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long time without solemnising their union by going through a recognised form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the “husband “ ,or because he dies ,occurrences which do happen ,the law ,subject to the requisite proof ,bestows the status of “wife “upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased “husband “. It is a concept which is beneficial to the union of marriage, status of the parties and to the issue of their union.”***

22. Much of this principal was earlier enunciated in the case of **HORTENSIAH WANJIKU YAHWEH VS. PUBLIC TRUSTEE, CIVIL APPEAL NO. 13 OF 1976** where **Mustafa J. A** stated *inter alia* that ,

***“I agree with the trial judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on this issue, the trial judge omitted to take into the consideration a very important factor. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. only cogent evidence to the contrary can rebut such a presumption ,see re:Taplin Watson v. Tate (1973) 3 ALL ER 105”.***

23. Taking the above cited authorities into account can it be said that the deceased married the objector? It was agreed by the Petitioner witnesses that the middle names given to the boys specifically were the known family names of their family. Those names could not have been given by the mother, the Objector but by the father.

24. The birth certificates produced bore the names of the deceased as the father and the Objector as the mother. The said legal documents were obtained during the life of the deceased and way before he passed on. One would be at pains to conclude that they were obtained by the Objector solely for these proceedings.

25. She further went ahead to produce the school fees structures and the payslips from the banks from the schools which the children attended. The names of the children are those mentioned in the pleadings herein.

26. It was admitted that the deceased had properties in Eldoret which were developed and that the Objector stayed and collected rent in one of them. How then can she stay and manage some of them as accepted by the petitioner in the absence of the express consent of the deceased.

27. In a nutshell I find that there was sufficient evidence that the deceased was living as a husband and wife with the Objector in Eldoret while his other family comprising the petitioner lived at Machewa his rural home. He had however not build a home for the objector in the rural farm which to date is occupied by the Petitioner.

28. Whatever transpired during the funeral exercise cannot oust out the fact that the Objector was not a wife. The fact that she was not welcomed by the Petitioner and her close relatives and to the extent of returning her contribution of Kshs.20,000, does not negate the fact that they stayed and or cohabited with the deceased for a period of about 19 years.

29. In my respectful view, I do not find the Petitioner truthful to state that they were not aware of the cohabitation based on the period the deceased stayed in Eldoret and contributed to the development I presume of the properties and the education of the 4 issues of the marriage.

30. In the premises, I find that the objector is a wife to the deceased as per their long cohabitation and in line with the provisions of Section 29 of the Succession Act, a wife for that purpose.

### **CONCLUSION**

**31. For the forgoing reason, the protest is hereby allowed and the objector MARY CHEPNGETICH BUTIA is hereby appointed joint administrators of the estate of the late CHARLES KIMINYEI KAPJOFTI with BEATRICE CHEMUTUNI KIMINYEI.**

**32. This being a family dispute each parties shall meet their respective costs.**

**Dated signed and delivered in open court at Kitale this 23<sup>rd</sup> day of July 2019.**

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**H .K CHEMITEI**

**JUDGE**

**23/7/19**

**In the presence of:-**

**Ingosi for the Objector**

**Teti holding brief for Arunga for the **Petitioner****

**Court Assistant – Kirong**

**Judgment read in open court.**