



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**PROBATE & ADMINISTRATION CAUSE NO. 59 OF 2007**

**IN THE MATTER OF THE ESTATE OF WILLIAM KIPKOSGEI KIPTUM (DECEASED)**

**AND**

**IN THE MATTER OF AN OBJECTION TO THE MAKING OF GRANT**

**BETWEEN**

**ESTHER JEPTANUI KIPTOO.....1<sup>ST</sup> OBJECTOR**

**EDNA JESANG KOSGEI.....2<sup>ND</sup> OBJECTOR**

**AND**

**EUNICE CHEBICHII KIPKOSGEI.....1<sup>ST</sup> PETITIONER**

**VIOLAH CHERUTO KIPTUM.....2<sup>ND</sup> PETITIONER**

**JUDGMENT**

[1] The deceased herein, **William Kipkosgei Kiptum**, died intestate on **1 June 2006** at the age of 50 years. Following his demise, this Succession Cause was filed on behalf of his estate by the 1<sup>st</sup> Petitioner, **Eunice Chebichii Kipkosgei**, in her capacity as the deceased's widow; jointly with her daughter, **Viola Cheruto Kiptum**, as the 2<sup>nd</sup> Petitioner. The Petition was filed on **27 February 2007**. The value of the estate was then estimated to be **Kshs. 1,000,000/=**.

[2] It so happened that on the **5 March 2007**, parallel proceedings were commenced by way of another Succession Cause, being **Eldoret High Court Succession Cause No. 67 of 2007**, in respect of the same estate, purportedly by **Esther Jeptanui Kiptoo**, **Eunice Kosgei Kiptum** and **Edna Jesang Kosgei**. In the subsequent matter, it was represented that the deceased was survived by two widows, the 1<sup>st</sup> Objector and the 1<sup>st</sup> Petitioner; and their 5 children. In this 2<sup>nd</sup> Cause, the value of the estate was given as **Kshs. 20,000,000/=**. At the same time, two of the Petitioners in **Eldoret High Court Succession Cause No. 67 of 2007**, namely, **Esther Jeptanui Kiptoo** and **Edna Jesang Kosgei**, also filed their Objection to the making of a grant herein. The same was filed on **28 May 2008**. Thereafter, the Objectors filed their Answer to the Petition for Grant and Petition by way of Cross-Application for Grant.

[3] When this state of affairs was brought to the attention of the Court, directions were made for the consolidation of this cause with **Eldoret High Court Succession Cause No. 59 of 2007**, and that this cause be the lead file. Directions were also given, *inter alia*, that the two Petitions be disposed of by way of *viva voce* evidence; and that the Objectors in this matter be deemed to be the Plaintiffs; while the Petitioners be deemed to be the Defendants. Accordingly, hearing in the matter commenced on **9 February 2009** before **Hon. Ibrahim, J.** (as he then was) but could not, for one reason or another, be completed until **1 April 2019**.

[4] At the centre of this dispute is the question as to whether the Objectors are entitled to a share of the estate of the deceased; the contention of the Petitioners being that the deceased was married to only one wife; and that is the 1<sup>st</sup> Petitioner; and that together they had 4 children, namely: **Viola Cheruto Kiptum**, **Amos Kiprono Kiptum**, **Loice Cheptanui Kiptum** and **Flevian Kipkemboi Kiptum**. The contention of the Objectors on the other hand is that, prior to marrying the 1<sup>st</sup> Petitioner, the deceased had contracted a customary law marriage with the 1<sup>st</sup> Objector and sired the 2<sup>nd</sup> Objector, **Edna Jesang Kosgei**; and that they too have a right to the deceased's estate as his beneficiaries.

[5] In support of their case the Objectors testified on **9 February 2009** and **18 May 2009** as **PW1** and **PW2**. In her evidence the 1<sup>st</sup> Objector told the Court that he got to know the deceased in **1981** and agreed to marry him; whereupon the deceased visited her parents to ask for her hand in marriage. She further stated that with the consent of their parents, they got married under Keiyo Customary Law and thereafter lived as husband and wife in **Kaprobu** in **Soy**. In the course of their cohabitation they were blessed with one child in **1982**, namely, **Edna Jesang**, the 2<sup>nd</sup> Objector.

[6] It was the testimony of **PW1** that, as she was sickly, frequent disputes began to rock their marriage; and that ultimately, they separated and she went back to her parents. She however contended that she maintained her relationships with her in-laws; and that although she initially went with the 2<sup>nd</sup> Objector, she later released her to go and stay under the care of her mother-in-law. She added that it was upon the subsequent demise of her mother-in-law that the 2<sup>nd</sup> Objector went back to stay with her at her parent's home. It was further the evidence of **PW1** that when the deceased died, she went for his funeral and that thereafter, a memorial was held which she also attended. She added that during the memorial the property of the deceased was divided between the two houses. She therefore acknowledged that after their separation, the deceased contracted a second marriage to the 1<sup>st</sup> Petitioner, with whom he had other children. She produced as exhibits a Certificate of Death in respect of the deceased and Certificates of Official Search for two of the deceased's pieces of land No. **Moiben/Moiben Block (Merewet) 153 and 228** (marked the **Plaintiffs' Exhibits 1, 2 and 3**, respectively).

[7] The 2<sup>nd</sup> Objector told the Court that the deceased was her father; and that he died in **June 2006**. She likewise acknowledged the 1<sup>st</sup> Petitioner as the deceased's second wife. She stated that she used to stay with her grandmother after the separation of her parents; and that her mother would visit them from time to time. She added that, as she grew up towards adulthood, her father had assured her that he would give her a portion of his land; and that the decision was endorsed by the elders after the death of the deceased.

[8] **John Kiptanui Too (PW3)**, told the Court that he knew the deceased, **William Kipkosgei Kiptum**; and that it was within his knowledge that he got married to the 1<sup>st</sup> Objector in **1981**; and lived with her until **1984** when the 1<sup>st</sup> Objector left and went back to her parent's home. He also stated that he was present when the marriage ceremony was conducted and acted as the "**Motiriot**" and untied the couple after the parents of the 1<sup>st</sup> Objector consented to the union.

[9] The last witness for the Objectors was **Dr. Omar J. Ally (PW4)**. His evidence was basically that the deceased was one of his patients and that he would visit his clinic from time to time for treatment for depression up to the time he died. He produced a Medical Report he prepared and signed as the **Plaintiffs' Exhibit No. 4**; and with that the Objectors closed their case.

[10] On her part, the 1<sup>st</sup> Petitioner, **Eunice Chebichii Kipkosgei (PW1)** told the Court that she got married to the deceased on **20 November 1999** at **Chemina Catholic Church** and were thereafter blessed with four issued. She produced the Marriage Certificate as the **Defence Exhibit No. 1**. She denied any knowledge of the Objectors and asserted that they are not at all entitled to a share of the estate of the deceased. She further refuted the assertions by **PW4** that the deceased was mentally ill and urged the Court to dismiss the Objection and the Cross-Petition filed by the Objectors.

[11] The 2<sup>nd</sup> Objector, **Viola Jeruto Kiptum (DW2)** reiterated the testimony of her mother, **DW1**, to the effect that the deceased was her father and that he died in **2006** while she was in **Form IV**. It was her evidence that, in his lifetime, the deceased was mentally fit and went about his affairs without any problem. **DW2** denied any knowledge of the Objectors and asserted that they have no right to her father's estate. She likewise denied having signed any of the papers filed by the two Objectors in **Eldoret High Court Succession Cause No. 67 of 2007** and prayed for the dismissal of the Objection application with costs.

[12] At the close of the hearing, the parties were given an opportunity to file and exchange their written submissions. In the written submissions filed by **Ms. Tum of Birech, Ruto & Co. Advocates** on **28 February 2019**, a single issue was proposed for determination; namely, whether the Objectors and the Petitioners are beneficiaries of the estate of the deceased. She cited **Section 60** of the **Evidence Act, Chapter 80 of the Laws of Kenya**, and the case of **Hortensia Wanjiku Yawe vs. Public Trustee, Civil Appeal No. 13 of 1976** in urging the Court to find that the marriage between the deceased and the 1<sup>st</sup> Objector was celebrated in accordance with Nandi Customary Law and that all the requirements for the validity of such a marriage were fulfilled and proved by the Objectors; such as the payment of dowry and the presence of a "**Boiyoptum**". Counsel also referred the Court to the **Restatement of African Law of Marriage and Divorce** by Eugen Cotran and the case of **Loise Selenkia vs. Grace Naneu Andrew & Another [2017] eKLR**, in urging the Court to find that the Objectors and the Petitioners are all beneficiaries of the estate of the deceased.

[13] On his part, **Mr. Kiboi**, Learned Counsel for the Petitioners, proposed more or less similar issue but differently put, namely:

[a] Whether or not the 1<sup>st</sup> Petitioner is the legal wife of the deceased and therefore a dependant in terms of **Section 29(a)** of the **Law of Succession Act**;

[b] Whether or not the 1<sup>st</sup> Objector is the legal wife and/or former wife and therefore a dependant of the deceased in terms of **Section 29(a)** of the **Law of Succession Act**;

[c] Whether the 2<sup>nd</sup> Objector is the child of the deceased herein and therefore a dependant in terms of **Section 29(a)** of the **Law of Succession Act**;

[d] Whether or not the children of the 1<sup>st</sup> Petitioner are dependants in terms of **Section 29(a)** of the **Law of Succession Act**; and,

[e] Who should be the administrator(s) of the estate of the deceased person.

[14] **Mr. Kiboi** urged the Court to find that the 1<sup>st</sup> Objector had utterly failed to prove that she got married to the deceased under any known

system of marriage; and that she also failed to challenge the marriage between the 1<sup>st</sup> Petitioner and the deceased; which being monogamous could not have been compatible with another marriage. In the same vein, **Mr. Kiboi** submitted that the only way of proving that the 2<sup>nd</sup> Objector is indeed a daughter and therefore a dependant of the deceased would have been through DNA test; which was not done. He therefore urged the Court to find that the deceased died intestate and left only one widow, the 1<sup>st</sup> Petitioner and her four children; and that the Objectors are not entitled to either administer the deceased's estate or share therein. In his view, the Petition filed by the Objectors in **Eldoret High Court P&A No. 67 of 2007** ought to be dismissed and the grant issued therein revoked; and that in this case, the Objection and Cross-Petition filed by the two Objectors should likewise be dismissed with costs.

[15] Having carefully considered the documents filed herein, the proceedings on the record as well as the written submissions filed by Learned Counsel for the parties, there is no dispute that the deceased, **William Kipkosgei Kiptum** died on the **1 June 2006** and left behind some property comprising his estate. The particulars thereof were supplied herein in the Petitioners' Affidavit in Support of Petition for Letters of Administration Intestate (Form P&A 5) to be 3 parcels of land known as MOIBEN/MOIBEN BLOCK 5 (MEREWET)153; MOIBEN/MOIBEN BLOCK 5 (MEREWET) 257 and MOIBEN/MOIBEN BLOCK 5 (MEREWET) 228. I note however that, in **Eldoret High Court P&A 67 of 2007**, the 1<sup>st</sup> Objector included movable property in the list of assets. No serious objection was taken to this during the hearing.

[16] Although **Mr. Kiboi** made heavy weather of the question as to whether or not the deceased was married to the 1<sup>st</sup> Petitioner, this was in my view a non-issue; for the simple reason that the Objectors did not dispute the second marriage. They, in fact, acknowledged it and focused their attention on the fact that the "tent" of the deceased should be widened, so to speak, to include them as the 1<sup>st</sup> House. Secondly, and more importantly, the 1<sup>st</sup> Petitioner produced a Marriage Certificate to demonstrate that she got married to the deceased in a church ceremony celebrated at **Chemina Catholic Church on 20 November 1999**. Likewise, the Objectors did not raise any issue to contradict the assertion by the Petitioners that the four children of the 1<sup>st</sup> Petitioner, including the 2<sup>nd</sup> Petitioner are children of the deceased and therefore his dependants.

[17] A thinly veiled disputation to the deceased's second marriage could be attributed to the evidence of **Dr. Ally, PW4**. However, in my perusal and consideration of that evidence, the role and place of **PW4's** evidence did not come out clearly, or enmesh well with the general framework of the Objectors' case. He testified that the deceased used to visit his clinic for treatment for depression; and that he saw him as a patient between **1993 and May 2006**. In his report, **PW4** expressed his opinion thus:

**"Severe depression is a mental illness that affects an individual; one loses interest in his life, work and family. At times he could not make decisions concerning his life and welfare. He was making wrong decisions for himself. The patient can also be confused and low in his moods. He continued to be on medication and psychotherapy..."**

[18] **PW4**, however, conceded in cross-examination that the deceased was otherwise normal and would carry on his life and make decisions for himself. So that, when Counsel for the Objectors submitted that at the time the deceased contracted his second marriage in **1999** he was not in the proper frame of mind to make sound decisions, it does not seem to have the support of **PW4's** evidence and Medical Report. At any rate, the 1<sup>st</sup> Objector had the liberty to raise an objection to the marriage at the opportune time, but chose not to.

[19] Thus, the only issues for my determination is whether or not the 1<sup>st</sup> Objector was married to the deceased as alleged and whether the 2<sup>nd</sup> Objector was sired by the deceased during such coverture so as to qualify as a dependant of the deceased. In this respect, the 1<sup>st</sup> Objector adduced evidence to the effect that she got to know the deceased in **1981** and got married to him in accordance with Nandi Customary Law, in respect of which it is stated thus in the **Restatement of African Law, The Law of Marriage and Divorce** (supra) at page 116 as to marriage ceremonies and formalities:

**"...When all the preparations are ready, the bride arrives. The ceremony is presided over by a senior elder who sits in the centre, surrounded by the couple and their *motirenika* (singular: *motiriota*) who are a married couple who act as best man and matron of honour to the bridal couple...The essence of the ceremony is the tying of the *segutiet* grass...Among the Nandi, the male *motiriota* ties a piece of the grass to the right wrist of the boy, whilst the female *motiriota* ties a piece of grass round the girl's neck. The couple are now husband and wife."**

[20] Thus, **PW1** told the court that the deceased visited her parents to ask for her hand in marriage; which consent was accordingly granted. She further stated that a ceremony was then conducted by **PW3** in which she was released to go and cohabit with the deceased as his wife after dowry was negotiated. She added that they lived with the deceased as such in **Kaprobu in Soy**. In the course of their cohabitation they were blessed with one child in **1982**, namely, **Edna Jesang**, the 2<sup>nd</sup> Objector.

[21] The evidence of the existence of the marriage between the deceased and the 1<sup>st</sup> Objector was augmented by the evidence of **PW3**, one of the elders who participated in the traditional ceremony and acted as the "**Motiriota**." He testified that he untied the couple after the parents of the 1<sup>st</sup> Objector consented to the union in a ceremony where the bride and groom were tied with grass-knot by the officiating elders. It is noteworthy that this evidence was entirely uncontroverted as the 1<sup>st</sup> Petitioner only came into the deceased's life about 17 years later and said she did not know **PW1** and was never informed that the deceased had a first wife.

[22] **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.**

[23] Thus, I would endorse the expressions of **Mabeya J.** in **Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another**

[2015] eKLR, 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..."**

[24] I am therefore satisfied that the 1<sup>st</sup> Objector has proved on a balance of probabilities that she got married to the deceased under customary law and that their marriage was blessed with one issue, the 2<sup>nd</sup> Objector. Having so found, it is pertinent to consider the effect of the nature of the subsequent marriage contracted between the deceased and the 1<sup>st</sup> Petitioner and whether it obliterated completely the prior customary marriage between the deceased and the 1<sup>st</sup> Objector. The submission of **Mr. Kiboi** was that the only legally recognized marriage the deceased contracted is that between him and the 1<sup>st</sup> Petitioner; which is indeed true, looking at it from the prism of **Section 9(a)** of the **Marriage Act**. It provides that:

**"Subject to Section 8, a married person shall not, while in a monogamous marriage, contract another marriage."**

[25] In the instant matter, the 1<sup>st</sup> Objector's marriage preceded the 1<sup>st</sup> Petitioner's union with the deceased. Indeed, it was the 1<sup>st</sup> Objector who ought to complain that the deceased lacked the capacity to contract a subsequent monogamous marriage with the 1<sup>st</sup> Petitioner. However, for purposes of the **Law of Succession Act, Section 3** thereof defines a "wife" to include a wife who is separated from her husband. And in **Section 3(5)**, the Act stipulates that:

**"Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act."**

[26] Moreover, in **Section 29** of the **Law of Succession Act**, a dependant is defined thus:

**"For the purposes of this Part, "dependant" means—**

**(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death."**

[27] In the premises, I am satisfied that both the 1<sup>st</sup> Objector and her daughter, the 2<sup>nd</sup> Objector are dependants of the deceased and are therefore entitled to apply for appointment as administrators of his estate alongside the two Petitioners, and to benefit therefrom in the manner set out in **Section 40** of the **Law of Succession Act**, namely: according to the number of children in each house, and treating the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> Objector as additional units to the number of the deceased's children.

[28] Accordingly, I would allow the Objection application dated **28 May 2007** and issue orders as hereunder, taking into account the Petition, Cross-Petition herein and the Petition filed in **Eldoret High Court P&A Cause No. 67 of 2007**:

**[a]** That the Petitioners, **Eunice Chebichii Kipkosgei** and **Violah Cheruto Kiptum**, and the Objectors, **Esther Jeptanui Kiptoo** and **Edna Jesang Kosgei**, be and are hereby appointed to act jointly as the personal representatives of the deceased, **William Kipkosgei Kiptum**; and that a Grant of Letters of Administration Intestate in respect of the estate of the deceased be accordingly issued forthwith in their joint names;

**[b]** That an application for Confirmation of Grant be filed herein to determine the question of distribution not later than 3 months from the date hereof;

**[c]** That costs be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2019**

**OLGA SEWE**

**JUDGE**