



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO. 2 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE MARITIM RUGUT (DECEASED)

GRACE CHELANGAT MARITIM.....PROTESTOR/APPLICANT

VERSUS

ESTHER CHEPKEMOI RUGUT.....PETITIONER/ RESPONDENT

JUDGMENT

1. The present proceedings raise the question whether a woman allegedly married in a woman to woman marriage to a wife of a deceased person is a dependant or beneficiary of the woman's deceased husband in her own right.

2. The deceased, Maritim Rugut, died on 17th August 1983. An application for letters of administration intestate was made by his widow, Esther Chepkemoi Rugut. The beneficiaries of the estate as set out in form P&A 5 were the following:

- i. Esther Chepkemoi Rugut, widow, 69 years**
- ii. Recho Chepngeno Chepkwony, daughter, 42 years**
- iii. Sarah Chepkurui Langat, daughter, 40 years.**

3. These are also the beneficiaries set out in the letter from the Chief of Chemamul location, Daniel C. Rotich, dated 1st July 2010.

4. The estate of the deceased comprised one property, Kericho Kabianga/454 measuring 2.0 ha.

5. Letters of administration intestate were issued to Esther Chepkemoi Rugut on 11th July 2011. Thereafter, by an application dated 18th May 2012, the administrator sought confirmation of the grant. She proposed that the estate of the deceased be distributed as follows:

- i. Esther Chepkemoi Rugut – 0.94 acres**
- ii. Recho Chepngeno Chepkwony – 2 acres**
- iii. Sarah Chepkurui Rugut – 2 acres**

6. By an application dated 6th February 2013, Grace Chelangat Maritim, then referred to as the objector, sought revocation of the grant to the petitioner. She alleged that the proceedings to obtain the grant were defective in substance and that they were obtained through misrepresentation of facts. She further contended that the petitioner had obtained the grant by concealing from the court the actual beneficiaries of the estate. In her affidavit in support of the application, she averred that the petitioner failed to include all dependants of the estate, and she named herself and some 9 others as beneficiaries of the estate.

7. She asserted in her affidavit that she had every right to administer the estate of the deceased. She produced a letter dated 2nd May 2012 from the same Chief of Chemamul location, Daniel C. Rotich, who had issued the letter dated 1st July 2010 indicating the petitioner and her two daughters as the beneficiaries of the estate of the deceased. In the said letter, the Chief indicates that Esther Chepkemoi Rugut, the petitioner and wife of the deceased, had married Grace Chelangat Maritim in 1986 as she had no sons. The said Grace Chelangat Maritim had nine (9) children born between 1988 and 2010.

8. The objector, Grace Maritim, avers that she has her home on the deceased's homestead and she and her children would be rendered

homeless if the grant to the petitioner is not revoked. She maintains that she and her children are beneficiaries of the estate of the deceased. This is because the woman to woman marriage was entered into by the petitioner for the benefit of the deceased as he had no sons.

9. It appears that the objection was not dealt with, for reasons that are not clear from the record. Instead, the objector filed an affidavit of protest dated 7th March 2017 in which she repeats the averments in her affidavit in support of her application for revocation of grant. It is not clear from the record what the fate of that application was, but it is deemed to have been abandoned as the objector elected to proceed with the protest.

10. In the affidavit sworn on 7th March 2017, the objector avers that she has equal rights as Esther Chepkemoi Rugut in respect of the estate of the deceased, Maritim Rugut, as well as his other beneficiaries. She avers that since the deceased did not have any male children, Esther Chepkemoi Rugut had married her under Kipsigis customary law and she had children whom Esther Chepkemoi Rugut accepted and took as her own. She relies on minutes of a meeting of the Kabwareng clan dated 10th April 2012 in support.

11. She avers that she had filed an application for revocation of the grant to the petitioner and was filing the affidavit of protest as the petitioner had failed to include her and other beneficiaries in form P&A 5.

12. At paragraph 12 of her affidavit, the protestor alleges that she had purchased one (1) acre of land from the deceased, Maritim Rugut. She asks the court to take into consideration the mode of distribution that she has proposed.

13. When the parties appeared before me on 20th February 2017, and after hearing counsel for the parties, I identified two issues for resolution in this matter as follows:

i. Whether the protestor, as the ‘wife’ of the petitioner in a woman to woman marriage has a claim (as a beneficiary) in her own right to the estate of the petitioner’s husband, Maritim Rugut.

ii. Whether the protestor is a wife of the petitioner, Esther Chepkemoi Rugut, through a woman to woman marriage.

14. I took the view that if the answer to issue no. i is in the negative, then the court would not need to address issue no. ii. This is because the interest of the protestor would lie in the estate of the petitioner, whose wife she alleged to be, and not to the estate of the deceased in this cause. I then directed the parties to file their submissions on the first issue, noting that it is a matter of law, not fact and, unlike the second issue, would not need to be determined on the basis of oral evidence.

15. It took some time following the issue of these directions but eventually the protestor filed submissions dated 3rd April 2018 filed on 10th April 2018. The petitioner’s submissions are dated 16th October 2017 and were filed on 18th October 2017.

The Protestor’s Submissions

16. The protestor identified two issues in her submissions:

i. Whether the practice (concept) of woman-to-woman marriage under the Kipsigis customary law is acceptable in law or is repugnant to justice and morality as stated in section 3 (2) of the Judicature Act.

ii. Whether the objector (protestor) was the dependant of the deceased.

17. The protestor made various submissions intended to demonstrate that the woman to woman marriage is a good custom. She relied in support of her submission on the decision of Ojwang J in **Estate of Cherotich Kimong’ony (deceased)-Monica Katam vs Jackson Chepkwony & Another, Mombasa High Court Succession Cause No.212 of 2010**. She also made various submissions with respect to the reasons for woman to woman marriages, including the need to keep family property within the family when the male husband of a childless woman dies, or to secure the property of a wealthy wife who had no sons of her own.

18. The protestor submitted that she was a beneficiary of the estate of Maritim Rugut and the petitioner was under both a legal and moral duty to seek her consent before petitioning for letters of administration intestate. Further, that she was a direct beneficiary of the estate of the deceased, reliance being placed on **Eugene Cotran’s ‘Law of Marriage and Divorce (vol.1), London 1968, p.177** and the case of **Agnes Kwamboka Ombuna vs Birsila Kerubo Ombuna – Court of Appeal at Kisumu-Civil Appeal No.106 of 2011**, as well as **Monica Jesang Katam vs Jackson Chepkwony (supra)**.

Submissions in Response

19. In her submissions, the petitioner also relied on the decision in **Agnes Kwamboka Ombuna vs Birsila Kerubo Ombuna** cited above by the protestor to submit that the alleged marriage between her and the protestor was a non-issue. Her contention was that the practice of woman to woman marriage was based on discriminatory practices that saw sons as the only ones entitled to inherit. Her submissions was that the protestor was attempting, with clan members, to disinherit the daughters of the deceased.

20. The petitioner identified two issues for determination:

i. Whether the objector (protestor) was a dependant of the deceased.

ii. Whether the protestor is entitled to inherit from the deceased's estate.

21. The petitioner relied on the provisions of section 35 (1) (5) of the Law of Succession Act. She submitted that the deceased had been survived by a widow and two children. In her view, the protestor was attempting to disinherit the petitioner and her daughters, with help from the clan, by imposing a marriage that never existed.

22. The petitioner relied further on section 29 of the Law of Succession Act with respect to the definition of a dependant. Her submission was that a dependant should have depended on the deceased immediately before his death. The protestor and her children had not been in the picture in the lifetime of the deceased and the protestor and clan were attempting to impose on the deceased duties he did not have prior to his death.

23. On whether the protestor was entitled to inherit from the estate of the deceased, the protestor's submission was that the woman in a woman-to-woman marriage can only claim a share from the portion inherited by her woman 'husband' and not directly from the deceased's estate as claimed by the protestor.

Analysis and determination

24. The present matter relates to the estate of Maritim Rugut, who died intestate on 17th August 1983. He was survived by a widow and two daughters. As he died intestate, his estate is to be distributed in accordance with section 35 and 38 of the Law of Succession Act. His widow would have a life interest in his estate, while the children, upon termination of the widow's life interest, would have an equal share in the estate. (Declaration of this provision of the Law of Succession Act unconstitutional).

25. The law also provides at section 29 for dependants of the estate of the deceased. It defines a dependant as follows:

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;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

26. There is, I believe, no dispute about the place of woman-to-woman marriages among the Kipsigis and other communities in Kenya. I agree in this regard with the decision of Ojwang J (as he then was) in **Estate of Cherotich Kimong'ony (deceased)-Monica Katam vs Jackson Chepkwony & Another**. Whether one agrees with the rationale behind the custom or not—that a woman with no children or with no sons should "marry" a woman to get sons for her—it is a custom that has been recognised and accepted in many communities and given legal protection in succession disputes. However, in the present case, the deceased died in 1983. The protestor was not in the picture at the time of his death. She and her children were therefore not 'dependants' for the purpose of section 29 of the Law of Succession Act. They cannot therefore claim a share in his estate under that section.

27. Can they claim a share of his estate on the basis that the protestor was allegedly married to the petitioner? The protestor alleges that she was married to the petitioner in 1986. She has children that she alleges she got between 1988 and 1998. She alleges that the petitioner accepted these children as her own.

28. I take the following view of this argument. Had the present proceedings related to the estate of the petitioner, the alleged 'husband' of the protestor, I would have taken the view that if the protestor is able to establish that she was indeed the 'widow' of the petitioner, she and her children would be entitled to a share of the estate. However, in my view, the protestor has no interest in the estate of the deceased in this cause. The Chief, in his letter dated 1st July 2010, correctly identified the beneficiaries of the estate of the deceased as the petitioner and her two daughters. That he purports to write another letter a few years later identifying the protestor and her children as beneficiaries of the estate of the deceased shows a lack of integrity that is not acceptable in a public officer. It would appear that as contended by the petitioner, the intent of the Chief and members of the deceased's clan is to deprive the daughters of the deceased of their father's land because of their gender.

29. I note that the protestor alleges at paragraph 12 of her affidavit that she had purchased an acre of land from the deceased. Given that the deceased had died in 1983, while the protestor alleges that she was married to the petitioner in 1986, it is not clear at what point she would have purchased the land from the deceased. In any event, this appears to be an afterthought that was not followed up. Should she, however, have a purchaser's interest in the land, then she is entitled to lodge such claim in the appropriate forum. What this claim illustrates, however, is that the protestor is not being forthright – is she a dependant or a purchaser, or she will pursue any argument that will get her a share in the deceased's estate?

30. At any rate, I find that there is no merit in the protest, and it is hereby dismissed but with no order as to costs.

Dated Delivered and Signed at Kericho this 3rd day of October 2018

MUMBI NGUGI

JUDGE