

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA
CIVIL DIVISION
SUCCESSION CAUSE NUMBER 6 OF 2019
IN THE MATTER OF THE ESTATE OF MARTIN PKEMOI LOSAPU
(DECEASED)

CAROLYNE CHEROTICH SOSHON:.....: 1ST PETITIONER

=VERSUS=

ROSALINE CHEPOO MAGAL:.....:1ST OBJECTOR

CATHERINE CHEPKEMEI:.....: 2ND OBJECTOR

CORAM: LADY JUSTICE R. WENDOH

JUDGMENT

1. The matter relates to the estate of **Martin Pkemoi Losapu**, who died intestate on 23/8/2006, while resident at Psigiro Sub-location, West Pokot as evidenced by the certificate of death. Grant of letters of administration intestate were issued to **Carolyne Cherotich Soshon** and **Irene Cherop Losapu** on 26/8/2021.

2. Later on 12/10/2022, the said grant was revoked following an application by the Objectors to have Kapenguria SPMCC Succession Cause E016/2021, filed by the objectors herein, **Roselyne Cheptoo Magal** and **Carolyne Chepkemei Magal**, transferred to the High Court and consolidated with this cause. Grants issued in both this cause and SPC E016/2021 were revoked on

12/10/2022 and a fresh grant was issued to the four petitioners, namely **Carolyne Cherotich Soshon, Irene Cherop Losapu; Roselyn Cheptoo Magal and Catherine Chepkemi (1st to 4th petitioners)**

3. On 14/2/2025, **Roselyne Cheptoo Magal** and **Catherine Chepkemei** the objectors filed summons for revocation of Grant issued to the petitioner. The application is brought pursuant to Section 76 of the Laws of Succession Act and Rule 73 of the Probate and Administration Rules. The basis of the application is that the grant of letters was obtained by means of untrue allegations of fact, and by concealment of material facts; that the objectors are the bonafide beneficiaries of the deceased's estate; that the objectors did not give consent to the filing of the cause; that the 1st respondent, Carolyne is not the legal wife of the deceased while Irene Cherop the 2nd petitioner is not related to the deceased. The application was supported by an affidavit sworn by 1st objector Roselyne Cheptoo of dated 14/2/2025 and reiterated the grounds set out above. Later directions were taken that the matter proceed by way of viva voce evidence.

4. On 27/3/2025 by consent of the parties, Irene Cherop the 2nd objector/respondent was removed from the case as an administrator. The only Petitioner / Respondent is therefore Carolyne.

Objectors Case

5. **PW1 Roselyne Cheptoo**, the 1st objector testified that Martin Magal the deceased, was her step son. At the time she married, she found the deceased was already born to her husband Peter Magal. PW1 had a co-wife by name Florence Magudi Magal now deceased and mother to the 2nd objector Catherine Chepkemei. PW1 adopted her written statement dated 28/5/2025 as her evidence in chief. She said that she took care of the deceased when he was unwell and was not aware that the deceased had any family; that after the deceased's demise, they filed PMCC E016/2021, unaware of this case; that the court ordered that the two cases be consolidated. PW1 denied that the 1st petitioner/respondent attended the deceased's funeral. She also denied that they ever attended exchange of dowry as evidence of a marriage between Carolyne and the deceased. PW1 acknowledged knowing the subject land in these proceedings being West Pokot/Keringent A/578. PW1 told the court that she saw Carolyne in court for the first time.

6. In cross examination, PW1 denied knowing the deceased's mother and that there was no funeral programme for the deceased and only saw the funeral program in court. She admitted that the deceased was entitled to part of A/578 but that it has all been sold. She denied that her intention was to deny the 1st petitioner/respondent and her children their inheritance.

7. PW2 **David Rotich Lopima** .a brother to Peter Magal PW1's husband denied knowing Carolyne (1st respondent). He adopted his statement dated 28/5/2025 as evidence in chief. He knew Martin Peter Magal, (deceased) and said that he had neither married nor did he have children during his lifetime; that the said Martin was born out of wedlock and was brought up by PW1 who also took care of him when he was sick; that the respondent never attended the deceased's funeral, and after the funeral the family sat and agreed that the objectors file a succession suit. He denied that dowry was ever paid for the respondent in accordance with Pokot customary laws and she does not qualify to be a wife.
8. In cross examination, he denied that there was any eulogy at the deceased's burial. He denied knowing the 1st respondent and her children. He did not know if Martin had any land; that he had heard that DNA had revealed that Martin had sired a child and the child should be given land.
9. PW3 **Michael Kamurosion Liman** adopted his witness statement dated 28/5/2025; that his mother and Peter Losapu were siblings; that he used to visit the objectors home and interacted with the deceased; that the deceased never told him that he had a wife or child; that after this case was filed, DNA

was done which revealed that one child, Samuel Ruto Losapu was the deceased's that he never saw the respondent at deceased's funeral and she can not be a wife of deceased because no dowry was paid as required by Pokot customary law. PW3 admitted that Martin died before he was given land but that there was land registered in joint names of the deceased and his father and that that portion should be given to the son.

Respondent's Case

10. **Carolyne**, the Respondent, testified as DW1. She told the court that Martin Pkemoi Losapu was her husband. They got married in 1990 and were blessed with two children, Irene Cherop born on 23/11/1994 and Samuel Ruto born in 20/9/1998; that they used to live at the Forest camp but in 1995, they moved to their Makutano home. DW1 knows the 1st objector, Roselyne Cheptoo as a wife to Peter Magal who was the deceased's father. DW1's witness statement dated 22/4/2025 was adopted as her evidence in chief. She stated that PW1 married her father-in-law Peter Magal after Maria Cheptakar, (DW2) the deceased's mother separated with Peter Magal. DW1 also identified Catherine as a step sister-in-law; that after Martin's death, the objector chased her from the matrimonial home and she went back to live with her parents. She revealed that Martin had eight (8) acres of land which

was part of West Pokot/Keringet A/578 which was registered jointly in the names of Martin and his father Peter Magal; that at the deceased's funeral, she was recognized as a wife as shown in the funeral programme that was prepared by the deceased's family; that even though the objectors denied that the deceased had a child, after the DNA, Samuel Ruto was confirmed to be the deceased's son; that she is aware that the objectors have sold some of the land and want to disinherit her and her children. DW1 produced in evidence the funeral programme and the children's birth certificates.

11. In cross examination DW1 told the court that among the Pokot, Martin's parents were supposed to meet her parents and discuss dowry in for there to be a marriage. She explained that because there was disagreement between Martin and his father Peter, his father could not have gone to her parents how to ask for her hand in marriage; that instead Martin's mother DW2 Mary Cheptaker and her brother went to meet her parents and paid dowry

12. DW1 further stated that when she went to Martin's home, she was shown where to build a house and she did. The family refused to give her the burial permit nor was she given the land she had been told she was entitled to.

13.**DW2 Maria Cheptakar**, Martin (deceased's) mother, adopted her statement dated 22/4/2025 as evidence in Chief. DW2 identified DW1 as her late son's wife; that the deceased was the first-born son of Peter Magal who was her husband but they separated and that Roselyne (PW1) married Peter Magal later; DW2 said that she was present at the deceased's funeral. According to her, DW1 and her deceased son were blessed with two children; that soon after the deceased died, the objectors chased DW1 away. In cross examination, DW2 confirmed that the deceased's father did not take cows to DW1's home but she did together with her brother.

14.DW2 also confirmed that Peter did not go to pay dowry for his son the deceased because of a disagreement between them; that DW1 lived on Martin's land at the time of his death but PW1 was chased away.

15.**DW3 Emily Chelimo Lomuk** of Lityei, adopted her written statement dated 22/11/2025 as her evidence in Chief. She identified DW 1 Carolyne as wife to her eldest brother-in-law Martin. While her mother-in-law is Maria (DW2). She confirmed that she got married in 1992 and found DW1 already married to Martin; that DW1 was recognized as wife to Martin at the funeral

but was chased away from the home. She was also aware that DW1 had two children with Martin. She is aware that the land subject of these proceedings has been sold by the objectors to a third party and they went to defraud DW1 of her inheritance.

16. **DW4 Alex Losapu Magal** adopted his written statement dated 22/5/2025 as his evidence in Chief. He testified that Peter Magal, Martin's (deceased) father, was a brother to his father and therefore the deceased was his first cousin. He knew Carolyne as wife to Martin and they were blessed with two children. He knows Roselyne (PW1) as wife to Peter Magal, his uncle. He knew that Martin and his father jointly owned land in equal shares. He confirmed that Carolyne (DW1) was included in Martin's funeral programme as the wife. He was aware that the objectors chased away Carolyne (DW1) from her home with the intention of disinheriting her. He was aware of the DNA test and the results and that even if the child Irene was not the deceased's biological child, he had accepted her as his.

17. In cross examination, DW4 told the court that at present, the objectors have occupied the land that belonged to Martin which was clearly demarcated by a boundary with Peter Magal's land.

Objectors submissions: -

18. Counsel for the objectors Mr. Lowasikou filed written submissions and the only issue discussed is whether the petitioner was the legal wife of Martin alias Martin Peter Magal the deceased. It was submitted that the petitioner is not recognized as a wife to the deceased because Pokot customary law marriage rites were never performed in accordance with Section 43 of the Marriage Act, which recognizes customary marriage.

19. Counsel submitted that a delegation from the husband's family and the wife's family participate in the exchange of dowry as a sign of consent of both parties; that's PW1 and 2, though close relatives of the deceased, never participated in any such ceremony; that dowry was never paid as required by Pokot custom; that the 1st petitioner admitted that it is her mother-in-law who paid the dowry but not the deceased's father.

20. In response to the Eulogy produced in evidence, it was submitted that no photographs were taken and that the petitioner was not present otherwise she would have been introduced as deceased's wife.

21. It was also submitted that the petitioner's marriage to the deceased was in doubt and that is why they requested for DNA on the children; that in any event having children with a person is not conclusive proof of a marriage as was held in **Anastacia Mumbi Kibunja & 4 others -VS- Njihia Mucina (2013) KECA** Counsel urged that from the evidence a marriage cannot be presumed as between the deceased and the Respondent. Counsel also relied on the case of **ASA Vs- NA & Another CA 133/2019 and Kimani -Vs- Gikanga (1965) EA 735**.

22. Lastly, Counsel submitted that the issue of whether the children are entitled to the estate will only be determined after the validity of the marriage is determined.

Respondents Submissions

23. Counsel for the petitioner Ms. Munialo submitted on four issues.

- (i). Whether the 1st petitioner was the de facto wife or spouse of the deceased;**
- (ii). Whether the deceased was survived by dependants within the meaning of section 29 of the Laws of Succession Act;**
- (iii) Whether the objectors, being a step mother and step sister have priority over the petitioner in the administration of the estate.**

(iv) Whether the petitioner and the children should be recognized as rightful beneficiaries of the estate.

22. On the first issue, Counsel submitted that the Respondent cohabited with the deceased as wife and husband for about fifteen (15) years; and that deceased's own mother confirmed that the petitioner was the deceased's wife; that the funeral programme did confirm that the petitioner was recognized as a wife and there is no evidence to the contrary; that courts have held that funeral and burial documents represent the deceased's family structure as was held in **Kisine -Vs- Kisine Succession case no. 91/2003 (2023) KEHC 19519.**

23. As to whether the deceased was survived by dependants within the meaning of section 29 of the Laws of Succession Act, it was submitted that the DNA report confirmed that Samuel Ruto is the deceased's son while Irene Cherop was not that Samuel Lusap the Respondent's son falls under section 29 (a) of the Laws of Succession Act as the biological child of the deceased; that Irene falls under section 29 (b) of the laws of Succession Act as a child that the deceased was maintaining as his own, prior to his death.

24. Counsel relied on the decision of the **Estate of Benard Njeru Kamau (2022)** in that respect.

25. On the third issue of priority, Counsel cited section 66 of the Laws of Succession Act which sets out the order of preference in appointment of administrators of a deceased's estate; that the order of preference is the surviving spouse, the children of the deceased followed by parents; siblings, half siblings and others follow, that the 1st objector being a step mother and 2nd objector step sister were far below the Respondent in terms of preference.

26. On whether the Respondent and her children should be recognized as rightful beneficiaries, Counsel urged that to do otherwise would violate Articles 27 and 45 of the Constitution and relied on the case of **Wanyoike & Another - VS – Kamau & Another CA 456/2018 (2024) KECA 115**, Counsel urged the Court to dismiss the objection.

Determination: -

27. The application under consideration was brought pursuant to section 76 of the Laws of Succession Act. Section 76 provides as follows

“ Section 76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false

statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either— (i) (ii) (iii) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or to proceed diligently with the administration of the estate; or to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

28. Under section 76 of the Laws of Succession Act, the court may revoke a grant so long as the grounds listed above are disclosed, either from its own motion or on the application of a party. A grant of representation may be revoked based on three general grounds

1. The first is where the process is defective either because some mandatory procedural step was omitted or the persons' applying for representation were not competent or suitable for appointment; or- where the process is marred by fraud and misrepresentation or concealment of material facts like where some beneficiaries are not disclosed or when the applicant lies that he is a survivor when he is not;
2. The next general ground is where the grant was obtained procedurally but the administrator fails to apply for confirmation or with administration;
3. The third ground is where the grant has become useless and inoperative following certain circumstances like death of an administrator.

For the court to revoke the grant, the applicants have to bring themselves within the ambit of these three broad grounds

29. The only issue that has arisen for determination is whether the Respondent was the deceased's wife and therefore the proper person to petition this court for Letters of Administration. To determine whether there existed a Pokot customary marriage between the deceased and the petitioner, this court is guided by various provisions of law. Article 2(4) of the Constitution provides as follows. **“Any law including customary law, that is inconsistent with**

this Constitution, is void to the extent of the inconsistency, and any act or omission in contradiction of this Constitution is invalid

Section 3(2) of the Judicature Act provides as follows **“The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”**

Sections 43 of the Marriage Act may come into play to determine whether or not a customary marriage exists. It states 43. **“Governing law for Customary marriage**

(1) A marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.

(2) Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.”

30. In this case both the deceased and the Respondent belong to the Pokot community. The objectors contend that consent of the parents and payment of dowry was not done which is key to proof of a Pokot customary marriage. Section 109 of the evidence Act provides **“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

31. In the case of **Hortensia Wanjiku Yawe -Vs- The Public Trustees CA 13/1976, (Wambuzi P. Mustafa -V – P and Musoke, JA)** laid down the principles regarding proof of customary marriages as follows; -

i) The onus of proving customary law marriage is generally on the party who claims it;

ii) The standard of proof is the usual one for a civil action, namely, one the balance of probabilities;

iii) Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.

32. PW1, a step mother of the deceased denied that the consent of the parents of the deceased and the Respondent were ever given and that the deceased’s father or her and close family members never visited the Respondent’s home to discuss

dowry. To the contrary, DW2, the deceased's biological mother told the court that she visited the Respondent's home to ask for her hand in marriage and paid dowry. It is not in dispute that the deceased was PW1's step child because DW2 had long separated from the deceased's father and left the matrimonial home. Both DW1 and 2 told the court that DW2 and her brother went to DW1's parents' home and paid dowry. No expert on Pokot customary marriage was called to tell the court the details of the process to be undertaken before a marriage ceremony. For dowry to have been paid the parties must have discussed and agreed to payment of dowry hence creation of a marriage.

33. DW2 and 4 alluded to there having been bad blood between the deceased and his father, Peter Magal. DW2 said that that is the reason why Peter Magal never went to negotiate for a wife for the deceased. DW 4 also alluded to the bad relationship between the deceased and his father. The allegation of the bad relationship between the deceased and his father was never denied by the objectors. The court was never told that it was against Pokot customary for one's mother to go and negotiate with the wife's parents and pay dowry. DW2 is the deceased's parent and this court finds that Dowry was paid in accordance with Pokot customary laws and there was a marriage.

34. Although the objectors deny that the respondent ever lived in the deceased's home, DW1 to 4 were adamant that she lived in deceased's home till after death of the deceased that she was chased away. PW2 and 3, though relatives of the deceased lived far away from that home and may have not known every happening in the home. DW4 a close relative (cousin) of the deceased was adamant that the Respondent lived with the deceased and with their two children on the deceased's land and that he even used to plough for the Respondent. Although the Chief of the area Joachim Kisang Kapeli was not called as a witness by either party, earlier on, this court had summoned him on 27/3/2024, to determine who was actually in occupation of West Pokot/Keringet A/578. The Chief knew the disputed land to belong jointly to Peter and Martin Magal (deceased) and he confirmed knowing the Respondent as the deceased's wife and objectors. He further said that the 1st objector had prevented the Respondent from accessing or using the land. The court cannot ignore the area Chief's evidence which was taken on oath.

35. The respondent produced the Funeral programme in which she was recognized as the deceased's wife with their two children. The objector denied that the programme is authentic and should have been accompanied by photographs. However, there is no evidence that photographs were taken on the day because the objector did not avail any.

36. After analyzing the evidence that was tendered before this court, the 1st objector Roselyne, did not impress this court as a credit worthy witness. She dared to deny that she ever knew Carolyne Cherotich, the Respondent and stated that they met in court for the first time because of these proceedings. She set out to blatantly lie to the court and lined up witnesses to do likewise. The court does not believe the objector's evidence and dismisses it as untrue.

37. The court finds that Carolyne Cherotich was married to the deceased according to Pokot customary law, lived with the deceased till his death till after which she was chased from the deceased's home which was on land half of West Pokot/Keringet A/578.

38. Section 66 of the Laws of succession Act sets out the order of preference of who can administer an intestate's estate. It provides as follows: - **“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—**

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

39. The deceased's spouse has first preference followed by the children in administering of an intestate's estate. The above section has to be read with part V of the Act. The objectors being a step mother and half-sister did not rank in priority in applying for Letters of Administration.

40. In the end, I find that the objectors have not proved their claim under section 76 of the Laws of Succession Act, that the petitioner obtained the grant by fraudulent means or by concealment of material facts. The petitioner was the rightful person to apply for administration of the deceased's Estate and was properly issued with the grant for representation.

41. At this stage, the court was only required to identify the proper Administrators of the deceased's estate which it has done. The issue of distribution of the deceased's estate will not be considered at this stage but during hearing of summons for confirmation.

42. The respondent remains the sole administrator of the deceased's estate.

43. In the end, the application dated 14/2/2025 lacks merit and is hereby dismissed with the objectors bearing the costs.

44. The Respondent do file the summons for confirmation within thirty (30) days hereof.

Judgment delivered, dated and signed in open court at **Kapenguria** on this 29th day of April, 2026.

R. WENDOH
JUDGE

In the Presence of:-

Mr. Ndinyo holding brief for Mr. Lowasikou for 2nd and 3rd Petitioner

Ms. Chebet holding brief for Ms. Munialo for Petitioner /Respondent-

Juma/Hellen-Court Assistants