



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO. 212 OF 2010

**IN THE MATTER OF: THE ESTATE OF CHEROTICH KIMONG'ONY KIBSERA
(DECEASED)**

-BETWEEN-

MONICA JESANG KATAM.....PETITIONER

-AND-

1. JACKSON CHEPKWONY.....OBJECTORS

2. SELINA JEMAIYO TIROP

JUDGMENT

***I. SPECIAL RELATIONSHIP PLEADED IN SEEKING LETTERS OF
ADMINISTRATION INTESTATE***

The petitioner filed this cause on *15th July, 2008*, seeking grant of Letters of Administration Intestate for the estate of *Cherotich Kimong'ony Kibserea* (deceased).

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The petitioner pleads that the deceased died intestate while domiciled in Kenya, at Kwa Hola, Magongo in Mombasa; that she is the *widow* of the deceased; that “*every person having an equal or prior right to grant of representation has consented (or has renounced such right or has been issued with a citation to renounce such right and apply for a grant of representation and has not done so)*”; that she will faithfully administer according to law all the estate of the deceased which by law devolves to and vests in the personal representative of the deceased, and that she will render a just and true account of such estate whenever required by law so to do.

In a supporting affidavit, the petitioner deposes that the deceased died on *7th June, 2008* at Al-Bir Medical Centre, intestate, and was survived by: *Monica Jesang Katam*, widow (aged 35 years); *J.K.S*, son (aged 16 years); *I.K.S*, son (aged 12 years).

The deponent sets out the assets comprising the subject estate, these being:

(a) *money in Post Bank a/c No. B2072176;*

(b) *money in Post Bank Bidii a/c KCANBSA 0000586;*

(c) *money in Co-operative Bank a/c No. 0110244287700;*

(d) *Swahili house of 11 rooms, on plot No. 1502/VI/MN – Kwa Hola, Port Reitz;*

(e) *household goods.*

II. OBJECTION: PLEADING THAT DECEASED LEFT WILL

One month following the lodging of the petition, one of the objectors, *Jackson Kibiwot Chepkwony* wrote to the High Court’s Deputy Registrar recording “*caveats, objection and warning*” in respect of the subject estate; and on the same date the objector wrote to the Deputy Registrar stating that the deceased had left a written will dated *5th December, 2007*. The objector also made certain statements:

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- (i) *that the petitioner was not a “wife” to the deceased, but was a servant;*
- (ii) *that the beneficiaries named in the petition were unknown to the objectors;*
- (iii) *that the deceased had been a wife of one Sugun Kibiy (deceased);*
- (iv) *that the deceased’s co-wife, one Pauline Burgei (70) is still alive;*
- (v) *that the petitioners are not related to the deceased;*
- (vi) *that the deceased had no children;*
- (vii) *that the original death certificate is in the possession of the objectors, bearing serial No. 115467 and issued on 8th July, 2008.*
- (viii) *that the deceased, prior to her death, had been living with her niece who is one of the objectors, Selina Jemaiyo Tirop.*

The objectors thereafter filed an Answer to Petition stating, *inter alia*, that:

- (i) *notice of the petition for grant of Letters of Administration Intestate had not been published in the Kenya Gazette as required by law;*
- (ii) *the said petition should be dismissed, because the petitioner has not come to Court with clean hands, but has concealed vital particulars of relevance;*
- (iii) *the objectors intend to file a cross-petition for grant of representation for the subject estate.*

The objectors, on *22nd September, 2008*, filed a petition by way of cross-application, under Rule 17 (5) of the Probate and Administration Rules, pleading as follows:

- (i) *the deceased left a written will, dated 5th December, 2007;*

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(ii) the cross-petitioners are step-sons and a niece, being beneficiaries of the deceased's estate;

(iii) every person having an equal or prior right to a grant of representation has consented (or has renounced such right or has been issued with a citation to renounce such right and apply for a grant of representation and has not done so).

In the supporting affidavit, the cross-petitioners list the particulars of the estate in a manner consistent with the particulars stated by the original petitioners, save that they give an estimated value of Kshs. 2,000,000/=.

III. ANSWER TO PETITION BY WAY OF CROSS – PETITION

The petitioners filed an Answer to Petition-by-way-of-Cross-petition, pleading as follows:

(i) the deceased died intestate on 7th June, 2008, and there was no written will;

(ii) the original death certificate was issued to the petitioners on 8th July, 2008;

(iii) the cross-petitioners are not step-sons and niece and/or beneficiaries of the estate;

(iv) the petition-by-way-of-cross-petition, and the answer to petition, should be dismissed for want of locus standi;

(v) the petitioners have come to Court with clean hands and have not concealed any vital information;

(vi) the cross-petitioners were not dependants of the deceased;

(vii) the cross-petitioners are strangers and not beneficiaries;

(viii) the cross-petitioners/objectors have no relationship whatsoever to the deceased, and are interfering with the deceased's estate.

IV. EVIDENCE: THE CASE OF THE RESPONDENTS/CROSS-PETITIONERS

In this contested succession matter, the petitioner was represented by learned counsel, **Mr. Kirui**, while the respondents/cross-petitioners were represented by learned counsel, **Mr. Mkan**. From the beginning, it was clear the dispute herein would be solved primarily on the basis of *evidence*, even though at least *one unique issue of law* began to emerge at an early stage. To deal with issues of evidence, the Court took witness testimony.

First to be heard was the 1st objector, **Jackson Kibiwot Chepkwony**, who was led through his evidence by **Mr. Mkan** (O.W.1). This witness said he and one **Lulei Burgei** and **Selina Jemaiyo Tirop** were contesting the petitioners' prayer for grant of Letters of Administration Intestate in respect of the deceased's estate.

OW1, a farmer who lives at Eldoret, in Uasin Gishu, Rift Valley, said he was opposing the petition because the petitioner, **Monica Jesang Katam**, "was not a wife", she was not related to the deceased, "she was only a servant of the deceased" and she had "worked for only three years"; moreover, she had "left even before the deceased died". OW1 said the deceased was his "mother", who had died of diabetes. The witness said: "When my mother died, it took two days after the burial, before [**Monica Jesang Katam**] came"; the deceased was a Muslim, and was buried on the following day, after her death.

OW1 said the deceased had left a will, which she wrote with the help of village elders, and was dated 5th December, 2007. The witness produced a document expressed in Kiswahili, and typed, indicating as names of those who were present at the alleged will-making ceremony:

- (i) **Mr. Jackson Kibiwot Chepkwony** (Id. 6860792);
- (ii) **Mr. Joseph Onyango Opondo** (Id. 13597113);
- (iii) **Ms. Maritha Chepkwony** (Id. – not given);
- (iv) **Ernet Anginga** (Id. 8370152);
- (v) **Salina Tirop** (Id. 12465854);

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(vi) *[a name added to the list in hand-writing] Khamis Juma Mwahanje (Mzee wa Mtaa)*
(Id. 3155747)

There are signatures against the foregoing names; but against the typed name of the deceased, the identity card number is given as: 4594672 – and against it, there is a thumb-print.

The text of the alleged will thus reads:

“I, CHEROTICH KIMONG’ONY KIBSEREA, Id. No. 4594672, P. O. Box 92419, Mombasa, before the village Elder Khamisi Juma Mwahanje, do state that as my life draws to a close, I leave to my child JACOB KIPKORIR CHEPKWONY my house on Plot No. 1502, Sec. VI/MN, Kwa Hola, Port Reitz Location, together with bank a/c at Co-operative Bank, A/c No. 0110244287700, Post Bank A/C No. B2072176, Bidii A/c KCANBSA 0000586 c/o Post Bank. The household goods, that is, furniture, I leave for Selina Jemaiyo Tirop, Id. No. 12465854.

“This is my Own free will which I have written before the village Elder and Ernest Aginga, Id. No. 8370152, Location Community Policing Officer on 5/12/2007 at 1.00pm.”

OW1 said the deceased was married *“in the home of Bungei Sugum, and they had four children”*. He testified that the deceased had started living in Mombasa in **1960**; and that the person she lived with in Mombasa was *Selina Jemaiyo Tirop* (2nd objector), O.W.1’s cousin. Of the relationship between the deceased and the petitioner herein, O.W.1 said:

“[My mother] could not ‘marry’ the lady Monica at 80 years of age; [that is something] she could have considered [only at the age of] 40.”

The witness said the house on Plot No. 1502, Section VI/MN was occupied by *Selina Jemaiyo Tirop*, but that the petitioner, *Monica Jesang Katam* was threatening to invade.

O.W.1 had said repeatedly that the deceased was *“his mother”*, but upon cross-examination by learned counsel *Mr. Kirui*, he said something different: *“the deceased was my mother’s*

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sister". So the Court draws the inference that the deceased was **Jackson Kibiwot Chepkwony's** aunt, but not *mother*.

O.W.1 testified, on cross-examination, that the petitioner, who comes from Burnt Forest, was not "*married*" to the deceased.

Contrary to his statement in the evidence-in-chief, **Jackson Kibiwot Chepkwony**, on cross-examination, testified that "*the deceased had no children*".

Of the unique family set-up which sociologists describe as "*woman-to-woman marriage*", 1st objector said: "*A long time ago, a woman without children could marry; but this is no longer the practice*". A woman in such a position, O.W.1 said, "*herself elected the child to inherit from her*". The witness went on to say that 2nd objector, rather than **Monica Jesang Katam**, is the one who lived with the deceased up to the time of her death: "*so all things in the house were left to [Selina Jemaiyo Tirop].*"

The 2nd objector gave evidence as O.W.2 [**Selina Jemaiyo Tirop**]. She said she is a *niece* of the deceased, lives at Eldoret, and is unemployed. It emerges that the deceased was OW2's *aunt*, even though OW2 refers to her as "*grandmother*". OW2 testified that she had lived with the deceased in Mombasa from **2007** to **2008**; in **January, 2007**, OW2 stayed with her at Magongo in Mombasa, in a house which the deceased owned. Sometime in **2007**, the deceased fell ill, and OW2 took her to Pandya Hospital where she was admitted for two weeks; and OW2 did the same again, in **June, 2008** when the deceased fell ill; she died on **7th June, 2008**, at 7.00pm.

Of the petitioner, **Monica Jesang Katam**, OW2 said she did not know her, and had never met her.

Upon cross-examination by **Mr. Kirui**, OW2 said she knew about a *will* which the deceased had made; it had been *written by hand, by one of the elders*, and then it was typed, and the deceased signed. O.W.2 said she "*never heard of Monica*", and added: "*I know nothing about her; I never saw Monica living with the deceased*".

Joseph Onyango Opondo (O.W.3) said the deceased was his landlady, and he stayed in one of the deceased's housing units at Kwa Hola; the deceased herself occupied one of those units

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at Kwa Hola. O.W.3 said he had known the deceased for long, beginning even before she became his landlady. This witness knew the petitioner, *Monica Jesang Katam*, and said she had stayed for some time, in **2006**, with the deceased.

Of the alleged will, OW3 testified that the deceased had called a *family meeting* on **5th December, 2007** and he had been asked to attend; at that meeting a will was written, and he too was asked to sign it.

OW3 knew *Monica Jesang Katam* as the deceased's domestic servant, and in **October, 2006** while he was helping the deceased to collect rent from her tenants, she told him she "*wanted to send Monica to Eldoret*"; and indeed, OW3 later gave her Kshs. 4000/= for sending *Monica* home; it was OW3 who was sent to Coast Bus to buy tickets, for *both* the deceased and *Monica* to travel to the rural home (13th October, 2006); the deceased returned on **16th October, 2006** but left *Monica* at home. The consequence was that the deceased now had no one to help her in the house, which role OW3 personally performed. The deceased told him he needed to get another girl from home, to help with domestic chores – and this is how she brought in *Selina Jemaiyo Tirop* [2nd Objector], who was present at the time she died.

It was OW3's testimony that almost immediately after the burial of the deceased, at Kwa Hola, *Monica Jesang Katam* [petitioner] arrived from Eldoret, and *laid claim to the deceased's property*; this led to a misunderstanding – and OW3 began hearing of the existence of the instant Court proceedings.

On cross-examination by learned counsel, OW3 said she first met *Monica Jesang Katam* in **2006**, and did not know that there existed a "*marriage*" relationship between her and the deceased; he knew *Monica* as an employee of the deceased, and *Monica* used to do normal household duties, such as fetching water and washing clothes; he also knew that the deceased had travelled home with *Monica*, just before the deceased returned to Mombasa and subsequently, died.

Of the alleged will, OW3 said it had been *written by the local Chief*, who also arranged for its typing. On re-examination by *Mr. Mkan*, OW3 said it was the deceased specifying the content of the will, as *the Chief set it out in writing*.

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OW4, *Ernest Onyango Aginga*, said he was an Elder at Lilongwe in the Port Reitz area, which also covered Kwa Hola; he knew the deceased, who lived at Kwa Hola. *OW4 said he is the one who wrote the said will*, and that this took place at the Chief's office; "*the Chief had asked three elders to go to the deceased's house, to help her with the writing of the will*". OW4 said the deceased was stating the content of the will, and *he was writing it out*; and then he and OW3 went out and prepared it as a typescript; and it was then signed by himself, and by all those who were present.

Hamisi Juma Mwahanju (OW5) testified that he was a Village Elder at Kwa Hola, and, in *December, 2007* the deceased called him to her house, and asked for help with the preparation of her will. OW5 was in the company of other elders, on the said occasion; and the Chief asked them to give the requested assistance *at the deceased's house, rather than at the office*. OW5 said he and the other elders signed the will in question.

In cross-examination, it emerged that there were *two sets of documents purporting to be the said will of the deceased*; and, in relation to this confusing element, OW5 said: "*The typed and signed will is the valid one. The one in which my name is typed is false; the one in which my signature appears, but no typed name, is the correct one.*"

V. A NOVEL CASE: PETITIONER RELIES ON THE EXISTENCE OF A "WOMAN-TO-WOMAN MARRIAGE"

For the petitioner, PW1 testified that she lives at Kwa Hola, Magongo, and *had come to know the deceased through 1st objector's mother*; it was *1st objector* and his mother, *Rael Chumo* who had travelled from Eldoret to Burnt Forest, the home of *Daniel Katam*, the petitioner's father. On that occasion, PW1 testified, her father had a discussion with her mother and the deceased, after which they called her (PW1) to be present; and they informed her that the visiting party had come to discuss the question of "*inheritance*".

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The effect of PW1's testimony is that the visiting party had gone to her father's home, seeking consent for a "woman-to-woman marriage" between the deceased and the petitioner. The evidence in this regard went thus:

"They told me the deceased had come to discuss the question of inheritance. They asked me if I agreed. They said, Mama has come; do you agree to inherit her wealth? I said 'Yes, I agree to inherit'. She had no children. She wanted to marry me. I said I agree. It was 13th July, 2005. The deceased said that since I agree, she would take me to Mombasa."

It was PW1's evidence that, on the following day, *14th July, 2005* she and the deceased went to *the home of 1st objector*, whose mother, *Rael Chumo* is sister to the deceased; they stayed overnight, leaving for Mombasa on *15th July, 2005*. From that date to *October, 2006* the petitioner lived together with the deceased at Kwa Hola, Magongo in Mombasa.

PW1's evidence is that the purpose of her bus trip with the deceased on *13th October, 2006* (and *this evidence is consistent with that of OW3* who had purchased the bus tickets) was to return to Burnt Forest to formalize the "marriage" arrangements; and the "engagement" ritual did take place on *14th October, 2006*: "*Parents met; they spoke; they handed me over to the deceased; I was now 'wife' to the deceased.*"

PW1 gave details of the "bride-wealth" agreed upon, on that occasion: 1 Friesian cow; 1 Ayrshire cow; 1 lamb; 1 goat – and these were taken by *Daniel Katam*, PW1's father. PW1 produced in Court a signed contract recording these transactions, as well as a photograph album showing the ceremony which took place at *Daniel Katam's* home, at Burnt Forest. These photographs also show PW1's mother and father formally signing the "marriage" agreement. PW1, too, signed the agreement, as is reflected also in the said photographs. The deceased gave her endorsement by thumb-print. The ceremony, PW1 said, was a *Nandi traditional wedding*; and it gave her the status of a "wife" – and hence she was not a "servant" to the deceased.

PW1 testified that the deceased had left no will, and that *she* (PW1) was the right person to inherit the deceased's estate.

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PW1 already had two sons, *Jonathan Kipruto* and *Ian Kiplangat*, at the time the deceased “*married*” her: and the *deceased accepted the two boys as her own children*.

On cross-examination by *Mr. Mkan*, PW1 clarified that she had lived with the deceased from *2005-2006*; the deceased formally “*married*” her on *14th October, 2006*, in a ceremony at her father’s home at Burnt Forest; this ceremony was attended by several people, including: *1st objector and his mother*; PW1’s parents and siblings.

PW1 testified that she had lived with the deceased all through from *2005* to *2008*, except that towards the end, she (PW1) had to *go and mind the farm* which the deceased was leasing at Burnt Forest.

Of the *2nd* objector, PW1 said this was the *sister of 1st objector*, and she had only come to the deceased’s house in *July, 2007* when PW1 had gone to mind the farms at Burnt Forest. The task of minding the farms entailed *waiting there until harvest-time*, at the deceased’s two acres planted with maize. PW1 had been at home (Burnt Forest) when the deceased died, and she immediately set off for Mombasa, arriving on the following day; she was buried very soon after she died (by Muslim tradition), and PW1 just missed the final ceremony.

Kipsang Churman (PW2), paternal uncle to PW1, gave evidence on the “*marriage*” ceremony which took place at Burnt Forest on *14th October, 2006*; he said it was a *traditional Nandi ceremony*, and it was the occasion for “*giving our child*” to the deceased. Part of this evidence may be set out here:

“When [the deceased] came and said she wanted a girl, she said she loved Monica Jesang. When she said that, I asked if Monica Jesang would inherit her wealth. She said yes. I asked Jesang if she loved [the deceased]; she said yes. I asked [the deceased] again:

‘Do you love Jesang?’ She said, yes. So I asked her: ‘Will you give dowry?’ She said, yes. She said she would give money, for she had no cattle in Mombasa. She gave two cows; she gave money for two cows; also money for sheep. These things were received by Daniel

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Katam. So I asked her to sign. Monica signed. Katam signed. Witnesses also signed. That was all; once they signed, my work was finished. I am the elder brother to Daniel Katam. By tradition, I had to be there as the elder brother. I presided over the ceremony. I am 89 years old. That kind of marriage is part of the Nandi tradition. Childless mothers marry girls in Nandi culture. [The deceased] had no child. Monica became [the deceased's] wife."

PW2 oversaw the formal signing of the "marriage" agreement, and photographs of the entire ceremony were taken in his presence. PW2 himself endorsed the agreement by his thumbprint. In attendance were the parents of the petitioner, neighbours, and the deceased herself.

The petitioner's father, **Daniel Kiptum Katam**, gave evidence as PW3. He confirmed the testimonies of PW1 and PW2, that the deceased had visited his home at Burnt Forest on **13th July, 2005**, seeking the hand of his daughter, the petitioner herein, in "marriage"; the deceased was accompanied by **1st objector** herein and his mother, **Rael Chumo**; the visiting team, upon being allowed to take the petitioner, "said they would take her right away"; and they did take her away on **14th July, 2005** and, on **15th July, 2005** the deceased left for Mombasa with the petitioner. PW3 testified that the deceased had wanted to take the petitioner **to live with her, in accordance with Kalenjin culture**; in PW3's words: "*The deceased had no children, so she took my daughter*". The deceased and the petitioner lived together in Mombasa until **October, 2006**, when they returned to PW3's home for a "wedding", for the purpose of handing over PW3 to her in ceremony. The actual handing over of PW3, on that occasion, was done by PW3's wife and, in return, the deceased gave **bride-wealth** in the form of four head of cattle and a sheep – these being assessed in cash, and the deceased paid Kshs. 57,000/= for purchasing the animals. This ceremony was presided over by PW3's elder brother (PW2).

David Sawe Murei (PW4), an uncle to the petitioner, attended the said wedding ceremony, and served as the secretary who **recorded the proceedings**. PW4 testified that the wedding ceremony was also recorded in a series of **photographs**; and he produced the photograph album of the day, the individual photographs being marked with the date **14th October, 2006**. PW4 said he had witnessed the entire process of signing the marriage agreement, and that it had all been captured in photographs kept in the album.

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PW5, **Rael Chumo**, testified that the deceased was her aunt (sister to her mother); she had been one of those in the visiting party to PW3's home, who went to ask for the petitioner's hand in "marriage" to the deceased. Of the deceased's intention, PW5 said: "*She wanted a girl to care for her property*". In PW5's presence, the deceased spoke to the petitioner's parents: "**Cherotich** [deceased] *wanted to take the girl to Mombasa; she was later to arrange for engagement; I was present; I witnessed; I gave my fingerprint*" – the witness said. PW5 said the first objector, **Jackson Chepkwony**, who is her brother-in-law, **was present during the first visit to the petitioner's father's home (13th July, 2005)**. PW5 was called by the deceased, and joined the deceased during the **second visit** when the wedding ceremony took place at PW3's home. The ceremony was attended by some 50 people, and the deceased, on that occasion, paid money representing two head of cattle and a sheep; and she witnessed memorial documents being signed by the deceased, by witnesses and by the petitioner's parents; the deceased herself had led her delegation, whereas the "*bride's*" side was led by PW2. It was after the deceased had lived with the petitioner for one year and a half, that the wedding at PW3's home took place; and it is then that the bride-wealth was paid. At the time the deceased died in Mombasa, the petitioner was at Burnt Forest, where she "*had gone.....to till the land*".

PW5 testified that **Selina Jemaiyo Tirop** (2nd objector) is a **sister to 1st objector**, and she had stayed with the deceased in Mombasa while the petitioner was away minding the farms at Burnt Forest.

Pius Cheruiyot Ombois (PW6), a neighbour of PW3, was the photographer during the said wedding ceremony at Burnt Forest, on **14th October, 2006**. He produced the photograph album, and said he had taken all the photographs therein. On cross-examination by learned counsel, **Mr. Mkan**, PW6 said that those in attendance at the wedding included the deceased (who was referred to by the nickname "*Gogo*") and **Rael Chumo** (PW5) (whom he met for the first time). PW5 confirmed the evidence from other witnesses, that ***the deceased had no child***.

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It was PW6's evidence that match-making occasions such as that which took place at PW3's home on *14th October, 2006*, always involved a *ceremony*, and that attendance on that occasion included not only the *close family members of PW3*, but also *some 50 people* – some of them sitting in the house, while others sat in tents outside.

VI. LAW AND FACT: PERCEPTIONS OF COUNSEL

1. Petitioner's Position

Learned counsel, *Mr. Kirui* began by stating the petitioner's case: she seeks Letters of Administration Intestate, for the estate of *Cherotich Kimong'ony Kibserea* (deceased); she affirms that she is a *beneficiary* of that estate, by virtue of having been married to the deceased, in a *woman-to-woman marriage*; this marriage-type is a *tradition of the Nandi sub-tribe of the Kalenjin*.

As to the aptness of this Nandi tradition in the dispensation of justice by this Court, counsel invokes *Rule 64* of the *Probate and Succession Rules*, L.N. 104/1980, which thus provides:

“Where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African customary law he may do so by the production of oral evidence or by reference to any treatise or other publication dealing with the subject, notwithstanding that the author or writer thereof shall be living and shall not be available for cross-examination”.

Counsel urged that the petitioner had led evidence in proof of a woman-to-woman marriage: the petitioner (PW1) stayed with the deceased from *2005* to *2006*; the petitioner was married to the deceased, under Nandi customary law, on *14th October, 2006*; this marriage took place at the homestead of the petitioner's parents, *David Katam* and *Grace Katam*; on the occasion of celebrating the said marriage several things of evidential value were done – a contract of marriage was written down by PW4, and this was duly signed by the parties, including the deceased; photographs of the marriage ceremony were taken by PW6.

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Counsel submitted that the said marriage had been preceded by a *betrothal ceremony* in 2005 – and this ceremony had been *witnessed by several persons*, including the objector, *Jackson Chepkwony*. On that occasion, the deceased signalled her intention to marry the petitioner; and thereafter the petitioner was allowed to live with her at *Kwa Hola*, Magongo in Mombasa (13th October, 2005 to 13th October, 2006): and the marriage ceremony then followed on 14th October, 2006; the couple came to live in Mombasa as a *married couple*.

Learned counsel summarized the supporting evidence for his contention, and urged that the petitioner remained married to the deceased until the deceased died on 7th June, 2008. Counsel submitted that the objector has no basis for claiming that the petitioner was only a servant to the deceased: for the objector lived in Eldoret, and had at no time stayed with the deceased.

Counsel submitted that the objector's claim that the deceased had written a will to regulate the devolution of her property, was false. He urged the Court to disregard the evidence of *Selina Tirop* (OW2), who was *only helping to maintain the deceased's house*, and also the evidence of *Joseph Onyango Opondo* (OW3) who is a tenant and an outsider, with no real knowledge of the situation in the deceased's family.

Mr. Kirui particularly contested the evidence that the deceased had left *a will*; for there were two versions of the “*will*” – one with the signature of the village elder, and the other without this signature. This will, counsel urged, was a forgery. *Selina Jemaiyo Tirop* (OW2) had said the “*will*” was written by the village elder, *Ernest Onyango Aginga* (OW4); but OW3 said the will had been written by the local Chief.

Counsel submitted that the petitioner, *Monica Jesang Katam*, was married to the deceased under Nandi customary law, in a woman-to-woman marriage. This kind of marriage, “is often [contracted] by females who are barren”, and the deceased had *no child*.

Counsel submitted that there was abundant evidence, in the testimony of the petitioner's witnesses and in the photographs produced in Court: that the petitioner had been formally betrothed to the deceased, in the presence of *Jackson Chepkwony*, the first objector, and that

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a well attended marriage ceremony had taken place at the home of the petitioner's father, on *14th October, 2006*.

Counsel submitted that the petitioner had proved on a *balance of probability*, that she is the beneficiary of the estate of the deceased, and is entitled to be the administrator, while the objectors were not so entitled.

Counsel invoked, in aid of the petitioner's case, the learned work by *Eugene Cotran, The Law of Marriage and Divorce*, Vol. 1 (London: Sweet & Maxwell, 1968), at p.117:

“WOMAN-TO-WOMAN MARRIAGE (Kitum chi toloch). A woman past the age of [among the Nandi and Kipsigis] child-bearing and who has no sons, may enter into a form of marriage with another woman. This may be done during the lifetime of her husband, but is more usual after his death. Marriage consideration is paid, as in regular marriage, and a man from the woman's husband's clan has sexual intercourse with the girl in respect of whom marriage consideration has been paid. Any children born to the girl are regarded as the children of the woman who paid marriage consideration and her husband”.

Learned counsel gave relevant case law to illustrate the legal character of the woman-to-woman marriage among the Nandi community; the case is from the Resident Magistrate's Court at Kapsabet: *Esther Chepkuai v. Chepngeno Kobot Chebet and Johanah Kipsang*, Kapsabet RMCC Divorce Cause No. 16 of 1980. This decision of the Subordinate Court is, for the purpose of illuminating the relevant legal principle, significant and merits being excerpted here:

“The marriage in this case was dissolved by consent. The issue now at stake is custody of children. There is no dispute about the later children. The first two children were born during the subsistence of a legal marriage between Esther and Chepngeno [1st respondent]. The marriage, as I may mention, was known as woman-to-woman marriage. The natural father of the children – during the marriage – is not recognized. The children are, however, known to be those of the person – in this case, the woman- who pays dowry.....”

2. *Objectors' Position*

For the objectors, it is stated that there are three persons, **Jackson Kibiwot Chepkwony**, **Lulei Burgei** and **Selina Jemaiyo Tirop**, objecting to the petitioner's case, even though the objector-names clearly on record are those of the first and last.

The objectors' counsel urged that the petitioner's six witnesses are not "*independent witnesses*" as they are "all relatives to the [petitioner]". Counsel urged that the objectors' case is built upon a will: "*the same was prepared by the deceased before the village elder....[The] said village elder has no interest [in] the estate of the deceased*". Counsel urged that "*the said will is signed by the deceased by appending her [thumb-print] on the said documents and witnessed by competent witnesses who saw the deceased sign*"; that "*the said will is still valid, as the same was never revoked by the deceased*"; that "*no evidence whatsoever has been called by the petitioners and their witnesses as to why the said will should not be relied on*".

Counsel urged that the said will devolved the estate of the deceased upon one **Jackson Kipkorir Chepkwony** who is a minor; but he did not draw from the evidence to show the *exact identity of this minor*. Counsel went on to submit that "*the said written will reflects the testimony of the deceased prior to her death*".

Counsel contested the woman-to-woman marriage said to have taken place between the deceased and the petitioner; he urged: "*But more surprising, no traditional [rites] were explained to have been [conducted] to confirm such marriage. No Nandi elder was called to guide the Court, if such marriage was under the Nandi tradition, hence the Court was left guessing whether what is said can be true.....*"

Counsel went on to argue:

"Assuming [even] for a moment that kind of marriage between a woman and a woman is allowed under Nandi traditions, then it was incumbent upon the[petitioner] to call

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witnesses.....to [confirm]....how such marriage could be celebrated under Nandi traditions.....”.

Counsel submitted that the petitioner could not have stayed with the deceased as a wife; for the petitioner had called no neighbour as a witness to confirm this: “*the person who [called] a neighbour...was the objectors,[and the neighbour] stated....that the petitioner was a maid of the deceased.....”*

Counsel also contested the marriage ceremony said to have taken place at Burnt Forest on **14th October, 2006**, on the basis that:

“It is not explained why such celebration took place [at the] home of the petitioner [while none] took place [at] the home of the deceased, and no one was called from the [deceased’s] home to witness the same.....”

VII. ANALYSIS OF EVIDENCE, AND APPLICATION OF LAW

(1) The Framework of Analysis

Whether this is a matter of *testate* or *intestate succession* is the crucial question to be determined herein. If it is held that it is a case of testate succession, then it means the objectors’ case succeeds; but if it is held to be one of intestate succession, then the Court must go further and consider whether the petitioner has *locus standi* to be granted Letters of Administration Intestate; and if yes, then the petition will be for allowing.

(2) Is there a Valid Will, a Basis for Grant of Probate?

There are aspects of the document dated **5th December, 2007** which was produced as the will of the deceased, which present doubts that the Court must address its mind to.

Firstly, what is produced as the will of the deceased, *Cherotich Kimong’ony Kibserea*, bears a thumb-print, set against the typed name of the deceased and the hand-written identity card

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number. The record taken by Pw4 at the wedding ceremony on *14th October, 2006* also shows a thumb-print against the name of the deceased. Although neither party called a finger-print expert to confirm these two thumb-prints, this Court, by ordinary observation, takes judicial notice that the thumb-print of *14th October, 2006* is a relatively narrow one, whereas the one of *5th December, 2007* is an over-size one, with finger-marks running in different directions. This fact strongly suggests that either one, or both of the thumb-prints is/are not of the deceased.

Secondly, there is conflicting evidence as to how the said will was made; *Joseph Onyango Opondo* (OW3) testified that it had been written *by the local Chief*, who also arranged for it to be prepared in typescript; the deceased had been specifying the content, and the Chief was writing it down. OW2, *Selina Jemaiyo Tirop*, said something different: it was written by hand by *one of the elders*, and then typed; then the deceased signed. OW4, *Ernest Onyango Aginga*, for his part, said *he* is the one who wrote the will, *at the Chief's office*, as dictated by the deceased; and then he and OW3 went out and prepared it in typescript, before the several signatures were appended to it. There is a different account from OW5, *Hamisi Juma Mwahanju*: the deceased had called him *to her house, and he went there with other elders*; the Chief had asked OW5 and the other elders to help the deceased *right at the deceased's house*, in the writing of the will – and that is where this task was done.

Thirdly, in the cross-examination of PW5 it emerged that there were *two different sets of papers purporting to be the will of the deceased*; and OW5's explanation was:

“The typed and signed will is the valid one. The one in which my name is typed is false; the one in which my signature appears, but no typed name, is the correct one”.

Such notable discrepancies in the evidence, and such apparent discord in the evidentiary documents, lead to the inference that the will is *not a document based on candour*, and that the several witnesses have not given an honest account. The will, therefore, is *not* the will and final testament of the deceased; it is a *nullity*, and it is hereby, so pronounced.

It follows that the cause before the Court is one of *intestate succession*. And it follows that the objection to the petition for grant of Letters of Administration Intestate, based on the

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existence of a will, is hereby dismissed. The *original petition* must, hence, be considered on its own terms.

(3) “*Woman-to-Woman Marriage*”, as a Basis for Grant of Letters of Administration Intestate

The sacrosanct line of devolution of a deceased person’s estate is constructed around *dependancy*: the legal entitlement to take under that estate. The scheme of entitlement, in this regard, is set out in s.29 of the *Law of Succession Act (Cap. 160, Laws of Kenya)*:

“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 parents, step-parents, grand-parents, grandchildren, step-grandchildren 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.”

How does the petitioner’s cause fit into this context? From the terms of the application, and from the evidence, it is clear that the petitioner claims of the estate as a *wife* [s.29(a) of the Act]; and her two sons, *J.K.S* (16 years) and *I.K.S* (12 years) will be claiming as “*children*” of the deceased.

Since the petitioner is not a “*wife*” in the *conventional sense*, nor are her sons “*children*” of the deceased in the *ordinary manner*, it is necessary to consider how *the law* treats them, in relation to dependancy under the deceased’s estate.

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The governing law, in this regard, is *Nandi customary law*. Does this law entitle the *petitioner* and her *children* to take, under the deceased's estate? If yes, then the petitioner will be entitled to Letters of Administration Intestate.

It is clear from the evidence that: the deceased, at the material time, was an elderly woman of **85 years**; she had **no husband**; she had **no children**; she had a significant estate, mainly located in Mombasa; upon her death, there were **assets to devolve to her dependants**; the petitioners claim these assets, just as do the objectors.

The objectors' argument about the status in law of *woman-to-woman marriages* has not come out clearly. Mostly learned counsel had strived to show that the petitioner did not prove the fact of the existence of such a marriage; but in their line of evidence, counsel led **Jackson Kibiwot Chepkwony** (OW1) to state as follows:

“[The deceased] could not ‘marry’ the [petitioner] at the age of 80 years; she could only have considered it at the age of 40.”

When the witness was cross-examined, he also stated:

“The deceased had no children. A long time ago, a woman without children could marry, but this no longer applies”.

Such “*evidence*” is, however, not consistent with the valid position of the relevant *customary law*, which is to be gathered from works of scholarship. I have already referred to **Eugene Cotran's *The law of Marriage and Divorce*** (1968), which states that woman-to-woman marriage is a recognized family institution in *Nandi customary law*; and I have made reference to Kapsabet RMCC Divorce Cause No. 16 of 1980, ***Esther Chepkuai v. Chepngeno Kobot Chebet*** and ***Jonathan Kipsang***, which demonstrates the functioning of this marriage practice.

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I may refer also to a learned article: “*Is the Female Husband a Man? Woman/Woman Marriage among the Nandi of Kenya*”, by **Regina Smith Oboler**, in *Ethnology*, Vol. 19 No. 1 (January, 1980), pp. 69-88. The relevant passages may be set out:

(i) [pp.69-70] –

“A female husband is a woman who pays bridewealth for, and thus marries (but does not have sexual intercourse with) another woman. By so doing, she becomes the social and legal father of her wife’s children. The basic institution of woman/woman marriage is widespread in African patrilineal societies, although the way it functions varies from society to society. In Nandi, a female husband should always be a woman of advanced age who has failed to bear a son. The purpose of the union is to provide a male heir.

“The argument presented here is that the key to the question of the female husband’s gender lies in her relationship to the property that is transmitted through her to the sons of her wife”.

(ii) [p.73] –

“[Among the Nandi] women – wives and mothers – though supposedly barred from administering the family estate are critical in its transmission. A woman’s ‘house’ (patrilineal descendants) is automatically endowed with a share of her husband’s property at the time of her marriage.”

(iii) [p.74] –

“The demographic reality is that not every woman gives birth to a son. Woman/woman marriage is one solution to this problem. The intention is that the wife of a female husband should bear sons who will become their female father’s house’s male heirs in the property system”.

(iv) [p.74] –

“The motivation of a woman who becomes a female husband is fairly clear-cut; it is the acquisition of a male heir for her property.”

(v) [p.79] –

“Female husbands assume the formal role of father to their wives’ children”.

(vi) [p.80] –

“All Nandi informants strongly insist that a woman who takes a wife becomes a man and (except for the absence of sexual intercourse with her wife) behaves in all social contexts exactly as would any ordinary man.”

VIII. INFERENCES OF LAW

The state of customary law among the Nandi, there is no doubt, is in a *state of flux* and, as the community becomes more prosperous, and fuses more with the other Kenyan communities, such ethnic-culture-bound family-practices are likely to be replaced by more ecumenical, public-interest-related practices. But I take judicial notice that social change on such a scale is only gradual; and hence the institutions of justice must be relatively accommodative of current practices.

Indeed, contemporary social systems, for instance, in the shape of current practices in the domain of *family* among the Nandi, are, I think, to be regarded as aspects of *culture* which will rightly claim protection under Article 11(1) of the *Constitution of Kenya, 2010*, which thus provides:

“The Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation”.

These are the principles to guide the Court in considering the implications of the woman-to-woman marriage in this case.

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A witness for the objectors, *Joseph Onyango Opondo* (OW3) testified that the deceased, who had been staying at her Kwa Hola, Mombasa house with the petitioner, intimated in the course of *June, 2006* that she intended to travel to Eldoret with the petitioner; and sometime in *October, 2006* she, indeed, left with the petitioner, returning after two days, on *16th October, 2006*. This evidence tallies perfectly with that led for the petitioner; PW1 testified that, on *13th October, 2006*, she and the petitioner made a bus trip from Mombasa to the home of PW3 (*Daniel Kiptum Katam*) at Burnt Forest, where a wedding ceremony at which she was marrying the deceased, took place on the following day; and on *16th October, 2006* the two women travelled to Mombasa. On this point, there is perfect consistency in the evidence of the six petitioner's witnesses. There is remarkable consistency in the evidence of the petitioner's witnesses regarding both the betrothal ceremony of *13th July, 2005* and the marriage ceremony of *14th October, 2006*. After weighing up all the evidence, I have concluded that the consistency in the testimonies of the petitioner's witnesses shows the evidence to be truthful. The research-material referred to, shows this to have been the typical condition in which a woman-to-woman marriage takes place; and the testimonies show such a marriage to have taken place on *16th October, 2006*. It is, therefore, not true as the objectors say, that the petitioner was only a servant; on the contrary, she was a "wife", and, by the operative customary law, she and her sons belonged to the household of the deceased, and were entitled to *inheritance rights*, prior to anyone else. This custom, I hold, is to be read into the scheme of *s. 29* of the *Law of Succession Act* (Cap. 160), placing the petitioner and her children in the *first line of inheritance*: the petitioner herself for being "wife of the deceased", and her children for being the *children of the deceased*. The conclusion is to be drawn that the petitioner herein is entitled to the grant of letters of representation.

Consequently, I hereby dismiss the objection and the cross-petition, and make grant of Letters of Administration Intestate of the estate of *Cherotich Kimong'ony Kibserea* (deceased) to the petitioner, *Monica Jesang Katam* jointly with *Edward K. Cheruiyot*.

Decree accordingly.

DATED and DELIVERED at MOMBASA this 17th day of June, 2011.

.....

J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Petitioner: *Mr. Kirui*

For the Objectors/Respondents: *Mr. Mkan*