



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO.326 OF 2011

IN THE MATTER OF THE ESTATE OF ENERIKO OJUMA – DECEASED

AND

MAXIMILLA SIKUTATU BARASAPETITIONER

VERSUS

ROSEMARY BARASA OJUMAOBJECTOR

R U L I N G

1. At the heart of this dispute is whether Rosemary Barasa Ojuma (**the Objector**) is the daughter or otherwise a dependent of Eneriko Ojuma (The Deceased). The Objector seeks to be recognized as a beneficiary to the Estate of the Deceased and to be given a piece of the parcel of land known and described as South Teso/Apokor/893.

2. The Objection is a challenge to the Petition presented by Maximilla Sikutatu Barasa (**the Petitioner**) who took out these proceedings in her capacity as the daughter of the Deceased. In the Petition filed on 9th September states that the Deceased died intestate on 9th August 1999 and was survived by the Petitioner and one Ekapolon Ludovic Wafula (**Ludovic**). Ludovic also known as Ludofiko is the brother of the Deceased. This Court directed that the Objection be heard by way of viva voce evidence.

3. The Objector's case comprised of three witnesses. The common evidence presented by the Objector, Willimina Asokoni (OW2) and Ignatius Juma Iteba (OW2) is that OW2, who is the mother to both the Objector and the Petitioner and the Petitioner, was at one time married to the Deceased. The evidence of OW2 and objector is that the union was blessed with four children namely:-

- a) Rosemary (the Objector)
- b) Margaret Ajuma
- c) Maximila (the Petitioner)
- d) Josephine Friday

The Objector and OW3 say that there was disagreement between the Deceased and his wife (OW2) and the latter left her matrimonial home and got married to Eneriko Ekasiba (Ekasiba). According

to these two witnesses, OW2 left the matrimonial home when the Deceased was still alive.

4. The version of OW2 is that she only left the home of the Deceased after the Deceased had died and only because she was chased away by her brother-in-law (Ludovic). As to the timing of her marriage to Ekasiba she said,

“I got married to him after the death of the Deceased.”

The inconsistency between the evidence of the Objector and OW3 on the one hand and that of OW2 on the other as to when OW2 left the matrimonial home and married Ekasiba will turn out to be a decisive discrepancy.

5. What the Petitioner and her six witnesses sought to persuade this Court is that prior to contracting a marriage with the Deceased, OW2 was married to Ekasiba. The union of OW2 and Ekasiba was blessed with children, one of whom is the Objector. Upon breaking up with Ekasiba, OW2 got married to the Deceased and got one issue, namely the Petitioner. Again, OW2 disagreed with her second husband and separated. She was then remarried to Ekasiba.

6. The evidence of the Petitioner is that she was the only person who took care of the Deceased until her death. That upon the death of the Deceased, the Petitioner and her parental uncles including Chrispinus Barasa Emuna (PW2) and Ludovic (PW4) buried the Deceased. That neither the Objector nor the Deceased attended the funeral of the Deceased. PW2, Sylvester Obwaku (PW3) and PW4 gave evidence that supported the testimony of the Petitioner.

7. Moses Omojong Kacheliba (PW5) and Ananias Ijaka (PW6) sought to explain the nature of the disagreement between the Deceased and OW2 that led to their breakup. PW3 is the brother of OW2 while PW6 told Court that he was a village Elder of Apokor village at the material time. This is the village where the Deceased resided. It was their evidence that during the cohabitation of the Deceased and OW2, some dowry was paid for OW2's daughter, Margaret. The Deceased sold the cow and OW2 lodged a complaint against him because the cow did not belong to him. Following the complaint, the Deceased was charged in a Court of law and upon conviction he served a jail term. Thereafter OW2 left the matrimonial home and returned back to Ekasiba.

8. Then there was the evidence of Margaret Ekasiba (PW7). She is the daughter of Ekasiba and a half-sister to the Objector. Her evidence was that Ekasiba was married to 2 wives namely Mary Nyongesa and OW2. Margaret Ekasiba is the child of Mary. While the Objector was the daughter of OW2 from that union. That when the Objector was married her dowry was paid to their father Ekasiba. She told Court that she had come forward to testify that the Objector is a child of Ekasiba and not the Deceased and that the Objector's inheritance is at Ekasiba's home.

9. Under the provisions of Section 29 of The Law of Succession Act a dependant (for purposes of Part 111) of The Act) means

a) the wife of 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, 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.

For the Objection to succeed, the Objector needed to establish that she was either the daughter of the Deceased or a stepchild or child whom the Deceased had taken into his family as his own.

10. There is rival evidence as to whether or not the Objector was the biological child of the Deceased. Ordinarily the mother of a child ought to have the last word on this. OW2 who is the acknowledged biological mother of the Objector told Court that the biological father of the Objector is the Deceased. So is her word to be believed without question"

11. There is common evidence between the divide that OW2 was first married to Ekasiba, then to the Deceased and then remarried to Ekasiba. The evidence of the Objectors witnesses was that the Objector was the child of the Deceased. On the other hand, the Petitioners witnesses were emphatic that the Objector was the child of Ekasiba born within his first union with OW2. Although, as said earlier, OW2's word ought to carry weight on this matter an aspect of her evidence was inconsistent with that of the other two witnesses in support of the Objection. Eager to show that she remained the wife of the Deceased until his death, OW2 testified that she only left the home of the Deceased when she was forcefully ejected by the Deceased's brother (**Ludovic**). That only then did she get remarried to Ekasiba.

12. That evidence was not supported by the Objector and OW3. These two told Court that OW2 separated with the Deceased when the Deceased was still alive and after a disagreement between the two. That evidence of the Objector and OW3 was aligned to what the Petitioners witnesses said. PW2, PW4, PW5 and PW6 told Court that OW2 left the Deceased in the course of his life and after a disagreement between the two. PW5 and PW6 elaborated that the disagreement was because of a cow given as dowry for Margaret who was the daughter of ODW from her first marriage with Ekasiba. On this aspect as to when OW2 and the Deceased separated, OW2 stood alone against the evidence of six witnesses who included the Objector herself. For this reason I find that OW2 cannot be a trusted witness.

13. This Court having discounted the credibility of the Objectors' key witness believes the version of the Petitioners witnesses. The evidence of the witnesses was consistent and corroborated each other. The version of the Petitioner, which this Court believes, is that the Objector was born within the first union of OW2 to Ekasiba. At one time OW2 left Ekasiba and got married to the Deceased. In the course of that union, a quarrel ensued and OW2 separated with the Deceased and remarried Ekasiba. When OW2 left the home of the Deceased, she left with the Objector and the other children of Ekasiba. Left behind with the Deceased was the Petitioner. As to whether the Deceased had ever taken in the Objector as his own child, there was insightful evidence by PW7. She is the half-sister of the Objector sharing a common father (**Ekasiba**). Her testimony was that when the Objector got married her dowry was paid to Ekasiba and that the inheritance of the Objector is with the Estate of Ekasiba. From the evidence available, it would seem to me that the Objector is the daughter of Ekasiba. And if the Deceased had ever taken her in as his own child, father-child relationship ceased when OW2 remarried her father (Ekasiba) and left with the Objector to Ekasiba's home.

14. This Court reaches a conclusion that the Objector has failed to show that she is a Dependant of the Deceased within the meaning of Section 29 of The Law of Succession Act. For that reason the Objection proceedings must fail. The same is hereby dismissed. As to costs, admittedly OW2 is the mother of both the Objector and the Petitioner. The Objector and Petitioner will always remain blood relatives. I prefer not to widen any rift between them with an order of costs. The result. The objection is dismissed with no order of costs.

F. TUIYOTT

J U D G E

DATED, SIGNED AND DELIVERED AT BUSIA THIS 10TH DAY OF DECEMBER 2014.

IN THE PRESENCE OF

KADENYICOURT CLERK

PETITIONER IN PERSON

OBJECTOR IN PERSON



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