



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**SUCCESSION CAUSE NO. 266 OF 2015**

**IN THE MATTER OF THE ESTATE OF THE LATE RAYMOND CHEBET CHEPKONGA (DECEASED).**

**ESTHER RAYMOND CHEBET.....PETITIONER/RESPONDENT**

**VERSES**

**LOYCE JELIMO RAYMOND.....OBJECTOR/APPLICANT**

**JUDGEMENT**

1. The late **Raymond Chebet Chepkonga** died on the 29<sup>th</sup> day of January, 2009 and according to the P&A form 5 left behind two widows, the Applicant and the objector. The applicant had 4 children with him while the objector had 9 children with him.
2. The proceedings seemed to have been filed without the consent of the objector who filed the objection proceedings when she realised that this cause had been filed. The court after the close of the pleadings directed that the same was to proceed by way of viva voce evidence. The objector was to be the plaintiff and the Petitioner the Respondent.
3. In that regard **PW1 Joshua Kipkesei** on behalf of the Objector testified that he knew the deceased having bought land together at **Ainabkoi Settlement Scheme** in the year 1962. The deceased land was **No. 67** and his was **No. 66** and that when they came the objector was carrying a pregnancy. He said that he did not see any other wife save the Objector.
4. He testified further that all her children were born in Ainabkoi before he moved to Kitale in 1978 after exchanging the land with the late **Kipkoti**. On cross examination he said that he would not know if the deceased had another wife in Marakwet before coming to Ainabkoi.
5. **PW2 Kiptoo Chepkonga** testified that the deceased was his brother and he knew that he had married the Petitioner in 1954 but were separated in the year 1958 when she set fire on the house and all the deceased clothes and personal items were also burned. By then they had 2 children **Jepkorir** and **Kiplagat**. He said that dowry had however not been paid and no marriage ceremony conducted.
6. He said that the deceased married the Objector after 3 years and thereafter left for Ainabkoi. He said that all the children were born in Ainabkoi. He said that he did visit them in 1967 and stayed for three months. He said that as a clan they only recognise the 2 children.
7. On cross examination he confirmed that the son Kiplagat died but he did not know where he was buried neither did he know when the applicant came to Trans Nzoia.

8. **PW3 Loiyce Jelimo Raymond**, the objector said that she was 80 years old and married the deceased in February 1961. That prior to that he told her that he had married another wife called Esther who left in 1958 after burning the house which was considered a taboo.

9. They thereafter moved to Ainabkoi Settlement Scheme where they purchased land for a sum of Kshs.600 and did some agricultural activities in their parcel of Land Plot No. 67 measuring 36 acres.

10. She said that the deceased later exchanged the land with one Kipkoti which was situate in kitale and she produced documents to that effect. This took place in the year 1977 and they moved formally in 1978. She said that all her 9 children were born in Ainabkoi. They went to the land control board where the exchange was formally done. Later the kitale land which by then comprised the larger Koitogos land was subdivided and they got two parcels all totalling 36 acres though the titles were two. These were parcels Nos. 121 and 167.

11. She produced the uncontested green cards as well as other documents exhibiting transfers at the land board.

12. She said that her son Samuel was allowed by the deceased to go and reside on the said land, that is, Parcel No. 121, also known as Meru farm. That land later became Plot No. 1363. Her husband then became sick and subsequently died.

13. She said that the applicant did not stay with them or at all but came visiting her daughter who was married nearby. She said that the deceased refused to recognise her and she brought some case at the chief's office.

14. She said that the rest of the Petitioner's children do not belong to the deceased as she was married elsewhere and that she was willing to have them undergo a DNA exercise to determine their paternity. She further stated on the property that it was her and her late husband who struggled to have them and that there was no contribution on the part of the petitioner. She said that it was her and the rest of her family members who contributed to the treatment and eventual burial of the deceased.

15. **PW4 Samwel Kiprotich Raymond**, the son to the deceased said that he was born in 1962 and that they were in Ainabkoi all along where he schooled. He said that they moved to Kitale in 1977 after the exchanged of the land with kipkoti. He denied that the petitioner ever stayed with them at Ainabkoi.

16. He said that he sought the permission to stay on the Land No. 1363 in 1990 when he married and his father allowed him to do so and he produced the application form for electricity. He said that it was one Benjamin Kangogo the son to the objector who tried to disposes him of the suit land through fraudulent acquisition of the title.

17. He said that there have been numerous criminal cases pending in court against the said Kangogo and his cohorts and are yet to be concluded. He said that the petitioner came in the year 2005 when the deceased was unwell and demanded land. He said that she did not even attend his burial. He said that he received letters to vacate the land from J. M. Wafula Advocates and other frustrations by the petitioner to have him vacate the land.

18. **PW 5 Patrisia Wanjiru** a retired teacher and formally the head teacher Naisambu primary school testified of a letter shown to her by pw4 in regard to two students whose admission number were 204 and 315. She said that admission number 204 was for **Agnes Achenka** who was in class 3 in 1989 and admission No. 315 was for one **Amos Nyongesa** and the father was **Joseph Nyongesa**. She said that **Susan Raymond** and **Rose Raymond** were not students in that school.

19. On her part the petitioner testified that she was 93 years old and that she married the deceased in the year 1953 and had 5 children. Two have since died including Isaac Lagat who was buried at Koitogos. She said that she brought the Objector to be a wife to the deceased as they had a lot of business. She said that they moved to Trans Nzoia in 1977 where they stayed with the Objector though they had differences with her but were reconciled by the elders.

20. She went ahead to produce her National identity card as a testimony that she was married to the deceased. She said that Samuel, PW4 ejected her from her land after the death of her husband. She said that the deceased sold part of the land to the church and some other people and she witnessed the agreements.

21. She further produced some photograph taken at the chief's place where her son had requested the deceased to give him land to utilise. There was also another photograph taken allegedly when the deceased was unwell.

22. On cross examination she denied that she had been married elsewhere and that the children she now had belonged to someone else and not him.

23. **DW2 Joseph Kimaiyo Togom** the former assistant chief Kibomet sub location which was later subdivided into Milimani and Bidii location testified that he knew the parties and that the two widows were the wives of the deceased. He said that in the year 2007 the deceased came to see him as his son wanted some land to plough. He allowed him to use the land as long as he fed his parents. On that material day they took the photo which he identified. He denied that they discussed anything to do with his marriage.

24. **DW3 Rev. Peter Maina** of the Kenya Assemblies of God church did produce the sale agreement between the deceased and the church dated 17<sup>th</sup> October, 1994 which according to him was signed also by DW1.

25. **DW4 Susan Moraa** produced the sale agreement between her late husband and the deceased which was also witnessed by the petitioner. The same was dated 26<sup>th</sup> August, 2001.

#### **ANALYSIS AND DETERMINATION.**

26. Having heard the parties the court directed the counsels on record to file written submissions which they did and the court so as to save judicial time do not intend to reproduce them here save to state that each pulls towards their respective positions.

27. The substantive issue to determine is whether in the light of the evidence adduced the Petitioner can be termed as the wife of the deceased. The question of the way the suit properties namely the two parcels of land were acquired was not disputed. The same was as a result of exchange with one George Kipkoti in the year 1977 or thereabouts.

28. It was not disputed that once the exchange was completed the deceased moved from Ainabkoi to Koitogos in Kitale.

29. From the evidence also it appears that there was no dispute that the deceased married the Objector, a fact admitted and not questioned by the Petitioner.

30. Did the deceased marry the Petitioner as she has claimed" The evidence on record shows that she was married to him in the year 1953 but parted ways in the year 1958 after she was accused of burning the house which contained the deceased personal effects. Although there was no prove of any form of customary marriage PW2 concedes that the deceased married her.

31. The objector did not deny this fact as she said that the deceased told her that he had married once. It was also admitted across the board that she had children with him although the Objector's side talks of two whereas the petitioner says that all the children she had belonged to the deceased.

32. Having stated so, what I am unable to trace from the evidence is the whereabouts of the petitioner between the years 1958 to 1978. PW2 who was a neighbour of the deceased at plot no 66 at Ainabkoi ,while the deceased occupied Plot No. 67 told the court that from the year 1962 when they moved there he did not see any other wife of the deceased except the Objector. He said that all the deceased children were born at Ainabkoi and that to me was considerable years of about 15 years in which it was sufficient to have noticed the presence of the Petitioner.

33. There was no much evidence or at least none at all to show that the Petitioner stayed with the deceased at Ainabkoi as she wants the court to believe. In my considered view she came to Kitale after the deceased had moved here at Tran's Nzoia.

34. The court has perused the annexure to the replying affidavit of the petitioner sworn on 25<sup>th</sup> October, 2016 where the head teacher Naisambu primary school has said that her children Susan Raymond and Rose Raymond admission Nos. 204 and 315 were students at that school in 1980 and 1981 in standard one. That position was denied by pw5 the former head teacher of that school.

35. The Petitioner did not call the said **Mr. Joseph Konyago** or any evidence to rebut the fact that the said two girls were never students at the said school. There was no difficulty in showing that her children schooled in the said institution and at any rate they sat in court all through. There was no other evidence in form of fees payments or even school certificates that they indeed schooled in the said school or at all.

36. Taking totality of the evidence adduced in court I hold that the Petitioner never stayed with the deceased at Ainabkoi and that she may have come to Kitale later and not in 1977 as she claims.

37. The meeting that they went to the chief and photographs taken was interesting as she claims and the chief confirmed that the deceased wanted to give the land to the son called Benjamin to utilise. Why would he discuss such issues of giving him his land before the Chief" What was difficult in giving him the land without involving the provincial administration"

If the Petitioner and her children occupied the land for the number of years, why would they seek the deceased consent to utilise"

38. I find this argument not very convincing taking into consideration the position taken by the said Benjamin after the death of the deceased. This is exemplified by the Kenya gazette dated 2<sup>nd</sup> November, 2012 in which he was gazetted as the owner of **Land Parcel No. Kitale /Municipality Block 15/Koitogos /1363** with a full knowledge that the same belonged to the deceased. This and other criminal matters pending at the court shows that the petitioner knowingly or unknowingly acquiesced to what her son was doing.

39. Whereas the Petitioner was able to establish how hard she worked with the deceased through rearing of dairy cows and planting of potatoes and pyrethrum so that they could pay the loan at Ainabkoi land there was nothing exhibited by the petitioner. As found above there was no trail of her whereabouts during that period.

40. Mere posing and taking of a photo with the deceased is not sufficient evidence without the backing of minutes of that occasion. It appears as explained in the evidence that the deceased at that time was in ill health.

41. The court has perused exhibit D7, the sale agreement between the deceased and one Paul Ochagwa. The same has been signed by the Petitioner in writing yet in court she said that she did not know how to write. The other details like the number of the land have been hand written which again raises some suspicion. This could however be raised in another forum.

42. Then there was the issue of the passage of rite otherwise known as circumcision of Benjamin the son to the Petitioner. It was not disputed that the same was done by one Lelmengit who was not the father to Benjamin contrary to the Kalenjin culture. At that time the deceased was also initiating his other son. If that was the position there was no reason of not involving him too instead of the exercise being undertaken by someone else"

43. The court has seen the Petitioner's identity card which she has produced and she alleges that she was born in the year 1942. If that was the position then she got married at the age of about 10 years or thereabouts. I do not think that is true.

44. Having stated that the petitioner was married to the deceased although there was no such prove, I find that, that position was conceded by the parties. I do not believe respectfully that he stayed with the deceased throughout. I find that they separated just as was advanced by the Objector's evidence. Even if there was no such prove of separation I find that for several years she was nowhere to be seen. In fact it was not denied that one of her daughters was married at the neighbourhoods and probably she met the deceased again when she came visiting her.

45. There was no tangible evidence that she stayed with the deceased whether at Kitale or Ainabkoi. No evidence of her being settled by the deceased and no evidence of her contribution to the estate including the acquisition.

46. In short, I shall however categorise her as a wife pursuant to the provisions of Section 29 of the Succession Act. She was not divorced but separated with the deceased and later attempted to join him in Kitale. I have in fact not been shown any evidence that the deceased settled her in form of building a house or any other settlement or support. On the contrary it has been her son Benjamin

who has attempted to wrestle the estate from the Objector.

47. Having found that she was a former wife her entitlement would be minimal. As stated above she was never supported by the deceased directly or indirectly. Even though she may appear as a witness in the sale agreements of the land she did not exhibit any direct support or contribution to the estate.

### **CONCLUSION**

**a. In the premises, the objection proceedings are hereby allowed and the grant issued to the petitioner ESTHER RAYMOND CHEBET on 9<sup>th</sup> March, 2016 is hereby cancelled for all intend and purposes.**

**b. A fresh grant is hereby issued to LOYCE JELIMO RAYMOND in respect to the deceased estate herein.**

**c. The Petitioner once the grant issued above is confirmed shall be entitled to 3 acres out of Land Parcel No. KITALE MUNICIPALITY BLOCK 15 /KOITOGOS/1363. This is in consideration of her being a former wife to the deceased.**

**d. Being a family dispute each party shall bear**

**their respective costs.**

**Dated signed and delivered in open court at Kitale this 26<sup>th</sup> day of June, 2019.**

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**H. K.CHEMITEI**

**JUDGE**

**26/6/19**

**In the presence of:-**

**Chebii for Objector**

**Barongo holding brief for Mengich for Petitioner**

**Court Assistant – Kirong**

**Judgment read in open court.**



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