



**In re Estate of Komen Chepkoi (Deceased) (Succession Cause 10 of 2020)
[2024] KEHC 11419 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11419 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
SUCCESSION CAUSE 10 OF 2020
RB NGETICH, J
SEPTEMBER 27, 2024
IN RE ESTATE OF KOMEN CHEPKOI (DECEASED)**

BETWEEN

**NOAH RUTTO 1ST APPLICANT
KIMOI KOMEN 2ND APPLICANT
MESHACK KOMEN 3RD APPLICANT**

AND

SAMMY NGENO RESPONDENT

JUDGMENT

1. The petitioner Sammy Ngeno who is the executor of the will dated 11th October 2009 filed petition for probate of administration with a written will. The objectors filed chamber summons application dated 18th June, 2021 filed in court on 22nd June, 2021 seeking to invalidate the will dated 11th October 2009 on ground that the will is not valid and that the Deceased died intestate. The 1st applicant is the grandson of the deceased, the 2nd applicant who is now deceased was the wife of the deceased while the 3rd applicant is the grandson of the deceased.
2. During the pendency of the petition, Tuitok Cheserem filed application dated 27th October, 2021 seeking to have the Property known as plot No.25 wrongly listed as the property of the deceased in the will executed on 11th October, 2009 and prayed it be excluded from these succession proceedings.
3. On 25th January, 2022 the court gave directions that two applications dated 18th June, 2021 and 27th October, 2021 be heard together by way of viva voce evidence.



Objector's Evidence

4. The 1st Objector Meshack Kiplagat Komen a son to the deceased testified that the deceased had three wives being Sokome Komen, Kabon Komen and Kimoi Komen and that he is the son of the 3rd wife and he is testifying on behalf of the 1st and 3rd house.
5. He testified Rodah Chebichi Komen and Elizabeth Komen are daughters of the deceased from the 2nd house and are the only two children from the 2nd house. He said his mother who was the 3rd wife is now deceased and that he substituted her following consent signed by his brothers and sisters. He confirmed that plot number 25 in Emining is registered in the name of Tuitoek Cheserem who is not related to his father and is therefore contesting his father's will in respect to the said plot. He further stated that Marigat Plot No.18 is registered in the name of the deceased's 2nd wife Kabon Komen and that there are also people left out in the will being his brothers Elijah and Charles Komen.
6. He further stated that the land in Kures being Poror Keben/185 was for the 2nd wife Kabon Komen and when she died Elizabeth Komen's son Kiprop who had been taking care of their elderly parents lived in the land. He said no house had been built for the said Kiprop but he was living in a kiosk. He confirmed that his father was buried in Kures land and said they requested elders to give them a portion of the land so that a male son could live in the land. He said 2nd wife Kabon Komen's daughters are married. He said after the executor read the will, they requested elders to rectify the will so that 4 acres is excised from the land in Kures where the deceased was buried to be given to his brother's son Kimutai Komen while the two daughters of the 2nd wife are given 7acres each.
7. PW2 David Kokoyo adopted his witness statement dated 23rd June,2023. He sated he attended a meeting held after the death of the deceased herein as a family member where talks were held concerning the deceased's properties. He confirmed that the deceased had 3 wives and beneficiaries from the 2nd house were present and they decided to give the deceased's son Kimutai from the 3rd house 4 acres from Kures land LR Poror Keben/185 as the 2nd wife who lived in Kures had no son. He confirmed that Komen Chepkoi was sick for a long period. On cross examination, he said the deceased was his brother but he did not know that the deceased had written a will and only heard about it recently. He said that in their culture, a son to a daughter is not supposed to live where maternal grandfather is buried.
8. He confirmed that the deceased understood his culture better than him and he knew that a grandson from the daughter was not allowed to live there. He confirmed that Kabon Komen lived in Kures Sub-location parcel Poror Keben/185 and there was nothing wrong with the deceased distributing his properties.
9. PW3 Tuitoek Cheserem testified that he filed application dated 27th October,2021 when he was informed that there was a case involving Plot Number.25 in Emining. He said that the plot is registered in his name and he has filed documents. He said that the plot does not belong to the deceased and the deceased's plot is No.21. He said that he pays rent for plot No. 25 and no one can transfer his plot to another person except him.
10. On cross examination, he said he does not live in the plot but he leases for rent of Kshs.6000/= per month. He said that there is a shop in the plot which was built by him and that he purchased the plot from an old man whom he could not recall his name in the year 1972 at Kshs.3000. He said he had a receipt but his house got burnt down and all his documents got burnt. He stated that he knows the deceased who comes from his wife's family.
11. He confirmed that they met at chief's office concerning his plot No.25 and the complainant was the deceased who was claiming his plot. He said it was resolved that the plot was his. He maintained that



- plot No. 25 is measuring 50 by 100 and he is the registered owner at Eldama Ravine lands office and that it is not true that the deceased had given him the plot to hold so that his son does not take it from him and that it was not decided that it be divided into two.
12. PW4 Noah Ruto adopted his witness statement dated 21st November, 2023. He testified that deceased was his grandfather and his father was late Elijah Komen from the deceased's 1st wife. He confirmed attending the meeting on 7th April, 2019 where deceased's properties were discussed. He said his grandfather's will was read by Simon Ngeno a cousin to his father. He said he did not participate in the talks but he had gone to support his uncle Komen who did not get anything in the will and said he should be given the plot in Emining since his grandfather had 2 plots in Kures and in Emining. He proposed that his uncle be given plot no. 21 in Emining as plot in Kures is for the deceased's 2nd wife Kabon Komen given to her by the deceased and the deceased was buried there.
 13. He said the elders sat and amended the will. He said plot no. 18 in Marigat was to be inherited by Kabon Komen the 2nd wife as per the will. He said it is the properties in Marigat and Kures that have issues. In respect to Kures land, he said the 2nd wife's daughter should inherit because it belongs to their mother. He said that in the will, plot no. 21 was to remain in the deceased's names while plot no. 25 was to go to the grandchild Brian Kiplimo and the deceased knew all his properties. He stated that he wishes to have the will revoked and the elders to decide on the distribution of the properties since some people were left out.

Petitioner's Evidence

14. PW1 who is petitioner/Respondent Sammy Ngeno adopted his witness statement dated 25th August, 2021 and replying affidavit dated 25th August, 2021. He testified that the deceased was his uncle being a brother to father. He testified that the deceased wrote a will and executed and that it is him who kept it and he is the executor of the will. He said he was to keep the will and read at the right time to the beneficiaries which he did during the memorial. He said that he cannot recall the year the deceased died but the will was written in the year 2009.
15. He said during the family meeting one Karanja who was his neighbor wrote the minutes of the meeting held on 7th April, 2019. He stated that the deceased said he was sharing plot No. 25 in Emining with Tuitoek though he never said much about it.
16. On cross examination, he confirmed that the deceased Komen Chepkoi had 3 wives being Sokome Komen, Kabon Komen and Kimoi Komen and the will says that the deceased had a plot in Kures where the 2nd wife Kabon Komen is living. He said that the 3rd wife is Kimoi Komen and his evidence is independent; he does not support anyone. He said that in the second page of the will, it says that Plot No. 18 at Marigat belongs to Kabon Komen in Kures.
17. He testified that daughters of the deceased were not given property and at the time he read the will, 2 wives of the deceased had already died and one wife was alive. He said the 3rd wife Kimoi was present when he read the will plus the children of the 2 deceased wives.
18. He testified that when he read the will on 6th and on 7th April, 2019 to the deceased's family, some children of the deceased said that the will was not balanced and they requested the elders to rectify and the elders requested them to step aside as they remain behind to deliberate and as the executor, he informed the elders that he had performed his part of reading the will to the beneficiaries and was leaving it to them to proceed. He said that the elders called the deceased's children after deliberating and informed them of their decision.



19. PW2 John Matinyit adopted his witness statement dated 25th August, 2021. He testified that he was present when the deceased Komen Chepkoi signed his last will. He said that he was with the deceased, PW1 and Richard. He said he witnessed the deceased distribute his estate as he wished. He said that he read the will when the deceased gave him and confirmed all listed were his properties.
20. Pw2 testified that in the will, the deceased stated that he wanted to be buried at Kures where his 2nd wife lived thought culturally a polygamous man is buried in the 1st wife's land and they did not oppose his wish to be buried in the 2nd wife's land as they could not change his wish.
21. He said that on the 6th April, 2019, he attended the memorial meeting and he was involved in the rectifying deceased's will. He however said the deceased did not tell them to change the will but it was the decision of the family members who were not present when the will was being written.
22. On cross examination, he confirmed that the deceased had 3 wives Sogome Komen, Kabon Komen and Kimoi Komen and from the will, his land in Emining was to be divided equally amongst the two wives and their daughters were not given a share in the land but he bequeath grandchildren from male children. He confirmed that Plot No.25 is registered in the name of Tuitoek Cheserem but it belonged to the deceased and the deceased bequeath to a grandson Brian Kiplimo. He said from the will, plot No.18 at Marigat belongs to Kabon Komen at Kures and that Sogome and kabon Kome died while the deceased herein was still alive.
23. He further stated that the deceased's children asked to rectify the will as some beneficiaries were left out. He said some of the children from the first wife Sogome were left out and Rodah and Elizabeth who are the children of the 2nd wife Kabon were left in their mother's land at Kures. He further said an old man's head is taken care of by the deceased's son and daughters were not given land but they can be given by their mother which in turn they can give to their children.
24. PW 3 Erick Sote Cheruiyot testified that he was a chief at Emining Location from 17th July, 1987 up to 11th July, 2016 when he retired as a senior chief and confirmed that he knew the deceased herein Chepkoi Komen. He stated that he heard a case between the deceased and Tuitoek Cheserem concerning plot No. 25 in Emining which is registered in the name of Tuitoek Cheserem. He said the deceased reported that he purchased land from Cheptilei and because he had a problem with his son, he decided to ask Tuitoek Cheserem to register it in his name to protect it from his children. He further stated that the deceased's 3rd wife Kimoi Komen is a sister to Tuitoek Cheserem and the son who was troubling the deceased was Elijah Komen a son to the 1st wife who wanted the land transferred to him.
25. He said during the hearing, the deceased and Tuitoek each said they purchased the plot but Komen said that he had borrowed 3000/= from Tuitoek to add in paying for the plot but later refunded which Tuitoek denied. He said after deliberation with elders, they decided that the deceased and Tuitoek share plot no.25 Emining equally and Tuitoek Cheserem took his portion and later sold it to Komen's son called Victor Kimutai who is now deceased; and the portion of the deceased remained and Victor's wife lives in Tuitoek's portion. He said the tenants in the plot are renting from Victor's wife Beatrice Mining. He said the said Beatrice has built permanent structures because her husband purchased the portion of the plot from Tuitoek Cheserem.
26. Pw3 said the deceased's portion was to be transferred in the year 2009 but when the new Constitution came in, transfers were stopped and that is why it is still in Tuitoek's name. He said he chaired the meeting which deliberated on the matter and no appeal was filed against their decision. He said the unutilized portion belong to the deceased herein. On cross examination, he said that Plot Number.25 in Emining is 50by 100 and Tuitoek sold his portion to deceased's son Kiplimo Komen and that it was their decision to have the plot divided into 2.



27. PW 4 Elizabeth Komen testified that she is the deceased's daughter from the 2nd wife Kabon Komen. She said that she learnt of the will in 2017 during the burial of her father and it was later to be read on 7th April, 2019 and some of the children of the deceased were not agreeable to what was in the will. She testified that Plot No.25 belongs to her father which was later divided between the deceased and Tuitoek and Beatrice the wife of his late brother Kimutai Komen lives in Tuitoek's portion after building it and she is renting out. She said the deceased's grandson Kiplimo was given the remaining portion by the deceased to use as a garage but Tuitoek chased him away.
28. On cross examination, she said Sogome had daughters who were given a plot in Emining plot No.21 which is measuring 50 by 100. She also confirmed that the Plot in Marigat is for the 2nd house and the land in Kures measuring 19 acres was left for their family the 2nd house. She said her mother passed on before the deceased died and the 3rd wife Kimoi Komen was present when the will was read. She prayed that the will be adhered to and if her son Kiprop is not suppose to stay in the land, she is ready to live in Kures land. she said it is not true that her father decided to be buried in the land so that his son could come and live there to take care of him.
29. PW5 Rodah Chebichii Komen a daughter to the 2nd wife Kabon Komen testified she had 3 siblings but only her and her sister Elizabeth Komen who is pw4 herein are alive .She confirmed that her father the deceased herein was buried at Kures land which is for their mother the 2nd wife herein as per the will read to them by the executor Sammy Ngeno. She confirmed that her mother Kabon Komen was living in the land and she had died at the time the deceased herein died. She said the 3rd wife and her children rejected the will on distribution which was read to them during memorial and the elders decided that daughters cannot be given land where their father was buried.
30. She further stated that the elders decided to give 4 acres of the land at Kures to a male child so that he could guard the head of their father and further decided that the plot at Marigat which was given to her mother to be divided twice and half of it given to the children of the 3rd wife Kimoi. She said that they did not agree with the elders as their decision touched on their mother's share and they felt that their decision that daughters cannot inherit where their father is buried is discriminatory against daughters.
31. Pw5 further stated that her father was aged 90 years old and was therefore an elder who understood culture but he decided to be buried at Kures land. She said burial ceremony was done in Emining and the body was taken to Kures land for burial. She said the family agreed on where he was to be buried but rejected allocation of the land to them.
32. Pw5 further stated that Marigat plot which is developed belonged to her mother Kabon Komen but Meshack Kiplagat from the 3rd house is collecting rent which should be collected by children of 2nd wife Kabon Komen. She stated that the elder's decision to have the plot divided into two between the 2nd and 3rd house goes against her father's wish. She urged this court to distribute the deceased's property according to her father's will. She stated that her brother purchased half of Plot No.25 in Emining from Tuitoek and the remaining half which belong to his father is empty.

Visit To Plot No.25 Emming

33. On 12th April 2024, the court visited plot No.25 Emining by consent of the parties. At the site, Beatrice Chepkemoui testified and was cross examined by counsels herein. She testified that she is the wife of victor Kimutai Komen who is the grandson of the deceased herein form the 3rd wife Kimoi Komen. she stated that her late husband who died on 16th June 2016 had purchased half of plot No.25 Emining from Tuitoek Cherem. She said she is the one who build the half portion purchased by her late husband



and that she has built a shop and 6 rental units; she said she is the one who receives rent and pays rates of kshs 1000 per year to the county Government.

34. She further stated that she installed electricity and water in the premises and she pays the bills. She confirmed that plot.no.25 is registered in the name of Tuitoek Cheserek and that she used his name in the building plan and for applying for electricity. She said no one complained while she was developing half of the plot. She said she does not know the owner of the remaining half of the plot and that she was shown beacons separating the plot into 2 by the county surveyor.

Submissions

Objector's /applicant's Submissions

35. The Applicants framed the following issues for consideration as follows:-
- i. Whether the applicants have demonstrated sufficient grounds for invalidation of the will dated 11th October 2009.
 - ii. Whether failure to prove ownership of the properties of the deceased can render a will void.
 - iii. Who is to bear the cost of the application?
36. On whether the applicants have demonstrated sufficient grounds for invalidation of the will dated 11th October 2009, the applicants submit that the existence of the will is not in doubt as the family members acknowledged its existence and asked elders to amend it. The applicants submit that it is only the testator who can amend a will.
37. The applicants restated that on 11th October 2009, when the deceased is alleged to have executed the will, he was admitted at the AIC KIJABE Hospital as confirmed by production of treatment documents attached to the application dated 19th June 2021 at paragraph 10 of the supporting affidavit.
38. The applicants further argue that the respondent admitted that at time of making the will, the deceased was ill but the illness did not affect his ability to understand the terms of the will. That even though the deceased was admitted in hospital, the deceased appears to be preparing the will as though he was at home and argue that it beats logic how the deceased who was hospitalized at the Hospital could be at the same time at home dictating the terms of the will. The applicants submit that the respondents did not lead any material evidence to show that the deceased was not in the hospital as of the 11th day of October 2009.
39. And if the deceased was hospitalized then Section 11 (c) of the Succession Act was contravened as it requires witnesses to be present at the time of execution of the will and deceased did not sign a will alleged to have been signed at home as he was hospitalized and the fact that the deceased did not sign his will contravenes Section 11(a) of the Law of Succession Act. The applicants submit that in view of the fact that it is not clear whether the will was signed in hospital or at home lead to conclusion that the will was signed under suspicious circumstances and the suspicions are fortified by the fact that the deceased left his children from the will and the will benefited a few persons. Further that suspicion is also fortified by the fact that the deceased bequeathed properties such as plot no. 25 which was not available for bequeathing. They urge this court to invalidate the will as prayed in the application and relied on the case of in re Estate of Krishna Kumari Matti (Deceased) [2018] eKLR.
40. On whether failure to prove ownership of the properties of the deceased can render a will void, they submit that in the petition for grant of probate, the petitioner only relied on the will to prove the existence of the properties but it later turns out that some properties either deemed or not available



for distribution. For instance, by an application dated 27th October 2021, the Applicant deposes that plot no. 25 as his land and has annexed proof of ownership. That the same position was confirmed by pw3. That the executor/petitioner should first ascertain whether the properties bequeathed belong to the deceased herein; and confirming the grant without proof of ownership could be wasting the courts time as there could be nothing to bequeath. They urged the court to invalidate the will and the estate be distributed following the law on intestacy.

Respondents/petitioner's Submissions

41. The Respondents/Petitioner filed written submissions dated 13th March, 2024 and submit that the issues that commend themselves for determination are:-
 - a. Whether the deceased had capacity to make the will dated 11th October, 2009
 - b. Whether the will dated 11th October, 2009 was properly executed
 - c. Whether a valid will can be amended by the beneficiaries of the deceased estate
 - d. Whether deceased's properties not registered in his name and listed in the will invalidates the will
 - e. Who should bear the costs.
42. On the first issue, counsel for the petitioner submit that it is evident that the deceased died on the 3rd January, 2017 and from the death certificate, the deceased was 87 years old at the time of his death; and the will was made and executed on the 11th October, 2009 which is a period of about 7 years prior to his death. Further that is not disputed that the deceased was above the age of majority at the time he made and executed the will; and documentary evidence tendered by the protestors to prove that the deceased was of unsound mind at the time he made the will does not support the allegations. That there is no medical report in respect to mental state of the deceased at the time of making the will as the documents relate to different dates after the will was made and executed which therefore does not support the claim.
43. Counsel further submit that the Respondent confirmed that he was present at the time the deceased made and executed the will at his home and was of sound mind and his evidence was supported by that of the witness who executed the will John Matinyit and relied on the case of Re-Estate of Lusila Wairu Waweru(deceased)(2020) eKLR
44. The Respondent further submit that there is no single witness availed by the protestors who knew the deceased to give evidence on the mental history of the deceased and the medical report dated 29th December, 2015 as earlier submitted was made way after the will was made and executed. That the report does not specifically state that the mental status of the deceased cannot allow him to make the independent decisions and in the circumstances the protestors failed to prove that the deceased was of unsound mind and therefore the burden cannot shift to the Respondent.
45. On whether the will dated 11th October, 2009 was properly executed, counsel submit that Section 11 of the Law of Succession Act provides for formal requirements of a valid will and the will has met the threshold set out under section 11 of the Law of succession Act, that it was a written will, signed by the testator and witnessed by two witnesses, John Matinyit Keter and Richard Kibusio. He submits that the Respondent testified that he was there when the will was executed and he also confirmed that the witnesses were present and his evidence was not challenged by the protestors during cross examination.



46. On argument that the testator used to sign his documents and the thumb print affixed in the will is not his, a look at annexure CK6 which purportedly bear the signature of the testator, does not have the name of the testator and there is no signature that can be associated with him at all. Further, the objector's allegations are criminal in nature and they ought to have made a formal complaint with the police to investigate the allegations of forgery or alternatively they should have called an expert to authenticate the testator's thumb print and ascertain whether it was his thumb print that was affixed in the execution of the will to prove their case but failed. That the deceased opted to affix his thumb print to acknowledge the contents of the will as his last wishes and he did it in the presence of the executor and witnesses who appeared in court and gave evidence confirming the same.
47. On whether the will can be amended by the beneficiaries of the deceased estate, counsel relied on the case of Estate of Margaret Njambi Thuo(2019) eKLR where the court outlined what entails a valid will and Section 17 of the Law of Succession Act which provides that a will may be revoked or altered by the maker of it at any given time when he is competent to dispose of his free property by will. That after reading of the will on 7th April 2019, the main concern was Kures Sub-location, Poror Keben/185 where deceased was buried was bequeath to his 2nd wife Kabon Komen who had sired only 2 daughters and no son and submit that there is no law mandating the family members to amend a will when the same does not meet their wishes, customs, culture and traditions and therefore the amendments are null and void.
48. On argument on inconsistency, counsel argue that the contradiction and/or construction of the wording used in the will is not a ground to invalidate the will and where there is inconsistencies in language and/or interpretation of the clauses contained in the will, the same cannot warrant amendment of the will and relied on the case of Re Estate of Lusila Wairu Waweru [2020] eKLR to support their arguments. That it is the business of this court to give effect to the wishes of the deceased expressed in his will and any words introduced into the will of the deceased by mistake or by design like in this case, without the instructions or knowledge of the testator, the court is bound to exclude them from the will; and submit that the will is clear and not ambiguous and it cannot be amended by any other party apart from the testator and placed reliance on case of Re-estate of John Mwaura Ndungu(deceased)[2020] eKLR and in the case of Re Estate of Samuel Njoroge Kamau(deceased) [2019] eKLR.
49. In respect to Plot No.25 at Emining as listed but does not belong to the deceased, counsel submitted that the Chief Emining testified and confirmed that the plot was shared equally between the deceased and Tuitoek Cheserem who sold the plot to one of the deceased's daughter in law and who is in occupation of the plot and the plot is still in the name of Cheserek Tuitoek despite having been shared. That half of the plot therefore belong to deceased. The Respondent urge this court to dismiss the protest and order for distribution of the deceased estate in accordance with the will of the deceased of 11th October,2009.

Analysis And Determination

50. I have considered averments in affidavits filed, oral evidence and submissions by both parties and also the relevant law and authorities cited and, in my view, the issues for determination are: -
- i. Whether the applicant have demonstrated sufficient grounds to invalidate the deceased will dated 19th October 2009.
 - ii. Whether Property No.25 Emining forms part of the estate of the deceased.



- (i) Whether the Applicants have demonstrated sufficient ground to invalidate the will dated 19th October 2009.
51. Its trite law that in civil cases the standard of proof is on balance of probabilities. In the case of *Miller vs Minister of Pensions*, Lord Denning said the following about the standard of proof in civil cases:
- “The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability.....if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.”
52. Section 11 of the Law of Succession Act, provides for the formal requirements of a valid will as follows:-
11. No written will shall be valid unless the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator; the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will; the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”
53. Further, the essentials of testamentary capacity were laid out in the case of *Banks vs. Goodfellow* as cited with approval in the case of *Vaghella Vs. Vaghella* as follows: -
- “a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made.”
54. In view of the above, the applicants bear the burden of proving that the deceased lacked capacity to execute a will. The applicants allege that the deceased was ailing and did not therefore possess the mental capacity to make and execute a will. Once they do that, the burden shifts to the respondent/petitioner to prove that he had mental capacity. This was the holding of the court in the case of *In Re Estate of Gatuthu Njuguna (Deceased)* where it quoted an excerpt from *Halsbury's Laws of England*
- “Where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had



discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity.”

55. The applicants argued that the deceased lacked capacity to prepare and execute a will and annexed treatment documents to their application but failed to prove that the nature of ailment affected his mental capacity and in particular at the time the will was executed. From evidence adduced the executor and the two witnesses were present when the will was read and signed by the deceased, executor and the two witnesses who all adduced evidence in court. From the foregoing, I find that the applicants failed to discharge the burden of proving that the deceased lacked capacity to make and execute a will.
56. From evidence adduced all the family members including elders acknowledged that the deceased left behind a will. This is confirmed that during burial preparations, the executor read out his wish to them concerning burial place and they all agreed to bury him in Kures land parcel number Poror Keben/185 as he wished and indicated in the will. This was despite the fact it is the land where the 2nd wife lived which went against the Kalenjin culture requiring a man to be buried where the 1st wife lived. Further the deceased knew very well that the 2nd wife did not have sons but he still opted to be buried in the land.
57. There also no doubt that the deceased knew his culture well as he died at advanced age. From the evidence adduced, the burial ceremony was held in Emining land which he bequeaths to the 1st and 2nd wife and the body taken to Kures for burial as he wished. This is clear acknowledgement that the deceased made a will and it was acknowledged by his family members and the elders.
58. Further, a look at the will clearly show that all the 3 houses were provided for. It is evident that despite the other two houses being sufficiently provided for, they are challenging the will for the reason that the 2nd house had daughters only and they are not allowed to inherit according to their culture. This in my view is against the provisions of succession Act which gives equal rights to children of a deceased person. I find the applicants’ objection to the will is ill motivated. If indeed their objection was made in good faith, they would have raised objection on deceased’s wish to be buried in the 2nd wife home instead of 1st wife as they admit is their cultural practice.
59. From the foregoing I find that no sufficient grounds have been advanced to warrant invalidating the deceased will dated 11th October 2009.

Whether plot no.25 Emining is available for distribution.

60. The Applicant Tuitoek Cheserem who filed application dated 27th October,2021 argues that he is the owner of Plot No. 25 located in Emining, Baringo County does not form part of the deceased’s estate. In his will, the deceased bequeath the said plot his grandchild, Brian Kiplimo.
61. In the case of In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR W Musyoka J, held as follows:-

“With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil



court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favor of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it”.

62. Pw5 who was the area chief then confirmed that there was a dispute between the deceased and Tuitoek Cheserek over plot No.25 and that he chaired sitting with elders which decided that the plot be shared equally between Deceased and the Applicant herein Tuitoek Cheserem. The whole plot is however still in the name of Tuitoek Cheserek though from evidence adduced by the retired chief, Tuitoek Cheserek has sold his position. Even though the said Tuitoek Cheserek testified that he pays rates for the plot, a visit by the court to the site confirmed that one half of the plot has permanent development. Beatrice Chepkemoi a wife to deceased's grandson testified that Tuitoek Cheserem sold half of the plot to her late husband; that she developed the said half plot and she is the one renting out.
63. She further stated that she is the one paying land rates for the plot contrary to evidence by the applicant Tuitoek cheserem. From the evidence adduced it is clear that not the whole portion of plot no.25 Eminging is available for distribution. Further, the whole of plot no.25 still registered in the name of Tuitoek Cheserek. In my view, the issue of ownership should be determined by the Environment and land court (ELC). Once the deceased's portion is established, the same to be distributed as per the deceased's will dated 19th October 2019.
64. From the foregoing I find that the objector's application dated 18th June 2021 application seeking to invalidate the deceased will dated 19th October 2009 is not merited and is hereby dismissed.
65. Final Orders: -
1. Application dated 18th June 2021 I hereby dismissed.
 2. Share of deceased in plot no.25 Eminging to be determined by Environment and Land Court (ELC) after which the deceased's share to be dealt as per the will dated 19th October 2019.
 3. Each party to bear own costs of this suit.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 27TH DAY OF SEPTEMBER 2024.

RACHEL NGETICH

JUDGE

In the presence of:

CA Elvis.

Mr. Kiptoon counsel for the Petitioner/Respondent.

Mr. Matoke H. H/B for Nyagaka counsel for the Applicants/Objectors.

