



REPUBLIC OF KENYA



**KENYA LAW**  
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**Cherotich & another v Kipkirui & 2 others (Civil Appeal  
E054 of 2022) [2023] KEHC 3481 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3481 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL APPEAL E054 OF 2022**

**JK SERGON, J**

**APRIL 24, 2023**

**BETWEEN**

**IRENE CHEROTICH ..... 1<sup>ST</sup> APPELLANT**

**MARY CHEPKIRUI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**WESLEY KIPKIRUI ..... 1<sup>ST</sup> RESPONDENT**

**KIPRONO BII ..... 2<sup>ND</sup> RESPONDENT**

**KIPNGENO ANDREW BII ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the ruling of HON. B.K. KIPYEGON (SRM) in  
Kericho C.M.C Succession Cause No. 4 of 2016 delivered on 6th March, 2019)*

**JUDGMENT**

1. The appeal herein is against the ruling of the trial court (Hon. B. K. Kipyegon) in Kericho C.M.C Succession Cause No.4 of 2016 wherein the trial court upheld the Protestors' Affidavit of Protest against the confirmation of grant dated 28<sup>th</sup> September, 2017 which sought for the orders that the 1<sup>st</sup> Respondent be made an administrator of the estate of Kipsoi Arap Kenduiyo Alias Kipsola Kenduiwo (deceased) on behalf of the other protestors, that the proposed mode of distribution by the 2<sup>nd</sup> Appellant be discarded and the estate of the deceased be distributed according to the deceased's wishes.
2. The appellants being aggrieved preferred this appeal and put forward the following grounds:
  - i. That the learned trial magistrate erred in fact and in law in holding that the deceased had distributed his estate during his lifetime when there was no evidence to support the said finding.



- ii. That the learned trial magistrate wholly relied on Protestor's Affidavit of Protest in arriving at his decision whereas the said Affidavit of Protest was vague, inchoate and marred with uncertainty.
- iii. That the learned trial magistrate gave undue weight to the Protestor's case and least weight to the Petitioner's case.
- iv. That the learned trial magistrate failed to apply the provisions of the Law of Succession Act to his decision.
- v. That the decision of the learned trial magistrate disregarded the rights of the Appellants as guaranteed by the constitution of Kenya by rendering a decision that discriminated against them.

Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. I have also considered the rival written submissions and found the issues for determination put forward by both parties to be as follows:

SUBPARA i.

Whether the deceased had distributed his estate during his lifetime.

SUBPARA ii.

Whether the Appellants rights as guaranteed in the constitution were disregarded hence discriminated upon.

3. On the first issue, the Appellants submitted that the deceased died intestate on 11<sup>th</sup> February, 2015 and therefore the administration of his estate should be in accordance with the Law of Succession Act and not customary law and that the Respondents assertion that the deceased died testate are mere speculations without substantive proof.
4. The Appellants further submitted that from the Death Certificate at the time of the alleged oral will, the deceased had become incoherent, senile and suffered from elusive and indefinable moments causing him to die suddenly hence it could not be said that the deceased made an Oral Will three months immediately prior to his demise. They cited the case of Michemi Aphaxard Nyaga & 2 others v Robert Njue & 2 others [2021] eKLR where the Court of Appeal held as follows:
 

“...In my view the averments do not constitute a valid will as it does not meet the threshold under Section 9 of the Act supra. It does not state the dates when the meetings were held or who was present. I find that there is no proof that the deceased made an oral will. It follows that the deceased died intestate in the year 2015 and the Law of Succession Act is Applicable in the administration of the Estate.”
5. It was the Appellants submissions that the elements of a gift inter vivos was not satisfied, that the Respondent's aim was to disinherit their sisters of the deceased's estate since had they acted in good faith, they would have petitioned the Court for Grant of Probate in order to execute the deceased's will instead of showing up under the guise that the Appellants are acting against the wishes of the deceased.
6. The Appellants submitted that the deceased died intestate and as such had not distributed his estate during his lifetime.
7. The Respondent on the other hand submitted that the issue of the deceased distributing his estate was well known to the Appellants as the Respondents called witnesses who witnessed the deceased



- distributing his estate to the extent of demarcating Kericho/Kiptere/1200 whereby each beneficiary took his portion long before the deceased died.
8. The Respondents' further submission that the law gives the owner of the property the right to deal with his property in any manner suitable to him, that the deceased exercised his authority in sharing his property and the Appellants having failed to raise objection during the deceased lifetime, they were estopped from raising such objection now.
  9. It was the Respondent's submissions that the Appellants did not challenge the mutation by demonstrating that they were not provided for in the mutation and by so not doing, they honored the deceased wishes hence the allegation that the law of succession was not followed was absurd. That in some circumstances such as in the matter at hand, the law of succession does not apply and the fact that the said parcel of land is still in the deceased name is not a ground that Appellants can use to overturn the deceased's wishes.
  10. On the second issue the Appellants submitted that even if the deceased had made an oral will prior to his death, the said wishes cannot be respected if they are unfair and discriminatory in the circumstances and that a close look at the sketch map presented to court by the Respondents affirming their position that the deceased had distributed the estate indicates that only a paltry section had been provided for five daughters with a heading "daughters".
  11. On this issue the Appellant relied on the case of *Re Estate of George Chumo Mibei (Deceased)* [2017] eKLR, where it was stated that:

“...Further, even were the court to find that he had indeed distributed his estate, which I have found not to be the case, the manner of distribution that the protestor alleges had taken place would be unfair and discriminatory. It would not be allowed to stand.”
  12. The Appellants further relied on the case of *Ludiah Chumutai Bett v Joseph Kiprop Tanui* [2017] eKLR, where the court observed as follows:

“...I believe I need not add anything else to these succinct words of the Court of Appeal. A child is a child regardless of gender or marital status. The protestor cannot seek to disinherit his sisters because of their gender or marital status. He does not have a special claim to his father's estate because he is a son...”
  13. To further emphasize on this issue, the Appellant relied on the case of *John Ngugi Karanja v Samuel Njau Karanja* [2016] eKLR, where it was held that:

“...My understanding of the above is that the proposal ought not to be discriminatory or biased against any or some of the beneficiary nor should it be unfair or unjust. The proposal contained in the said allotment or the alleged oral wishes or the deceased is totally discriminatory against the deceased daughter and to that extend it violates *the constitution*. Daughters have a right to inherit their fathers' properties...”
  14. The Appellants submitted that the trial magistrate disregarded their rights as guaranteed by *the constitution* by rendering a decision that discriminated against them and unreasonably agreeing with the Respondents that the deceased had died testate and had distributed his estate and that parties ought to be given a chance to present their respective cases, that by finding as it did in its ruling, the honorable trial Magistrate denied the Appellants the right to be heard and did not take into account their submissions and evidence presented in support of their application.



15. The Respondents submitted that the Appellants were not discriminated against in the subject ruling as they were well provided for. That there is a sketch map which was prepared by the deceased himself in the presence of the parties to this appeal and the elders indicating where he assigned each beneficiary's portion on the ground and the appellants never complained to the deceased hence by their allegation that the trial magistrate violated their constitutional rights by failing to apply the law of succession was misplaced.
16. This is a first appeal and this Court is empowered to review and analyze the evidence on record and arrive at its independent conclusions. (See *Selle & another vs. Associated Motor Boat Co. Ltd. & others* (1968) EA 123). Sir Kenneth O'Connor of the Court of Appeal for Eastern Africa in *Peters vs. Sunday Post Limited* [1958] EA 424 stated as follows:

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”
17. I have considered the parties submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the Trial magistrate. It is clear that the appeal fundamentally lies against the Trial Magistrate's ruling directing that the deceased's estate be distributed as earlier agreed and/or as endorsed by the deceased. I will therefore deal with the grounds of appeal contemporaneously under the following limbs:
18. The first limb of appeal concerns itself with whether the deceased distributed his estate during his lifetime.
19. In the Affidavit of Protest Against the Confirmation of Grant dated 28<sup>th</sup> September, 2017, the Protestors stated that few months before his death, the deceased in the presence of village elders pastor Philip Sigei and David Metet demarcated his land into two portions in which one portion was to be shared equally by his sons and the other portion was to be shared equally by his daughters after which he placed a boundary separating the two portions which boundary is still in place.
20. The Appellant in their written submissions dated 22<sup>nd</sup> February, 2019 submitted that the deceased died at an age of 90 years, that three months prior to his death he had become incoherent, senile and suffered from elusive and indefinable moments, for that reason he died suddenly and therefore it could not be said that the deceased made an Oral will three months immediately prior to his demise.
21. Upon considering the Protest, the trial magistrate observed that the protestors had revealed a letter of meeting dated 14<sup>th</sup> December, 2014 at their home alongside sketch drawings with names of the beneficiaries against their respective proposed portions.
22. The trial Magistrate further observed that the deceased died only after two months of the meeting and there was no evidence that he passed on senile or when unable to make sound decisions hence the deceased estate be distributed as earlier agreed and/or as endorsed by the deceased.
23. Upon my consideration of the above, I am of the view that contrary to the averments made by the appellant on the issue, the trial Magistrate addressed himself on whether the deceased died testate and arrived at a reasonable finding thereon. Grounds (i) and (iv) of the appeal therefore fail.
24. The second limb of the appeal touches on whether the Appellants were discriminated against and their rights as guaranteed in *the constitution* disregarded.



25. The Appellants in their written submissions aforementioned submitted that a close look at the sketch map presented by the Protestors indicate that only a paltry section had been provided for the five daughters of the deceased under the heading ‘daughters’ which was unfair, discriminatory and uncalled for at this error and age and that it has been held in numerous cases that the wishes of a deceased ought to be respected unless those wishes are unfair and discriminatory in the circumstances.
26. In citing the case of *Re Estate of George Chumo Mibei (Deceased)* [2017] eKLR, *Ludiah Chumutai Bett v Joseph Kiprop Tanui* [2017] eKLR and *John Ngugi Karanja v Samuel Njau Karanja* [2016] eKLR discussed above, the Appellants submitted that all beneficiaries of the estate of a deceased person ought to have an equal share of the estate irrespective of their gender or marital status.
27. The Respondents submitted that the Appellants were not discriminated against in the subject ruling as they were well provided for.
28. In his ruling, the trial Magistrate observed that the petitioners failed to refer to the proceedings of the meeting with the deceased and disguised themselves as having been since disinherited while in the real sense they were only dissatisfied with the proceedings of their father’s (the deceased) wish in the estate distribution. The trial Magistrate further observed that the deceased clearly had good intentions for all his children after his death.
29. In determining whether to interfere with the testamentary freedom, the court should consider whether all the dependants have been reasonably provided for. The factors to be considered are outlined in section 28 of the *Law of Succession Act* as follows:

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

- a. the nature and amount of the deceased’s property;
  - b. any past, present or future capital or income from any source of the dependant;
  - c. the existing and future means and needs of the dependant;
  - d. whether the deceased had made any advancement or other gift to the dependant during his lifetime;
  - e. the conduct of the dependant in relation to the deceased;
  - f. the situation and circumstances of the deceased’s other dependants and the beneficiaries under any will;
  - g. the general circumstances of the case, including, so far as can be ascertained, the testator’s reasons for not making provision for the dependant
30. I cite with approval the rendition in the case of *Elizabeth Kamene Ndolo v George Matata Ndolo* [1996] eKLR, relied upon in the case of *In re Estate of Gurdip Kaur Sagoo* [2021] eKLR where the Court of Appeal while considering the limitation of the testator’s testamentary freedom stated that:

This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment



of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime

The Court in *In re Estate of Gurdip Kaur Sagoo* (supra) continued that:

“With such express wishes, it is not the place of the Court to rewrite the Will of the deceased or make a new will for her or indeed alter the express wishes of Balwant in his will. The will of a deceased person constitutes hallowed ground that should not be trodden upon. In this regard, I follow W.M. Musyoka, now a Judge of this Court, who in his book, *Law of Succession*, published by lawAfrica stated at page 311:

It is not for the court to step into the shoes of the testator and substitute for the will with what it thinks the testator should have done.”

“... The Court’s jurisdiction to interfere with the valid will of a testator should be cautiously and sparingly exercised. Indeed, a testator must be allowed to exercise his unfettered testamentary freedom provided that his disposition as regards dependants is in the eyes of the Court, reasonable, taking into account all circumstances.”

31. Upon my study of the Appellants submissions, I observed that the cases of *Re Estate of George Chumo Mibei (Deceased)* [2017] eKLR, *Ludiah Chumutai Bett v Joseph Kiprof Tanui* [2017] eKLR and *John Ngugi Karanja v Samuel Njau Karanja* [2016] eKLR cited by the Appellants are distinguished in that in those cases, the protestors in their mode of distribution had excluded the daughters for the simple reason that they were daughters and/or married, unlike in this case where the deceased had apportioned part of the suit land to his daughters. Further, there was no evidence, like in this case that any advancement had been made to the excluded daughters.
32. It is not disputed that the deceased apportioned the suit land to the Appellants and their other sisters, in my view, the Appellants are only dissatisfied with the portions that they got. I am therefore not persuaded that a case has been made out for the Court to step into the shoes of the deceased and substitute for his oral will, what the Court or the Appellants think the deceased ought to have done. The balance therefore tilts in favour of honouring the wishes of the deceased as expressed in his Oral Will. Accordingly, I find that the trial Magistrate acted correctly in finding that the deceased had good intentions for all his children and the Appellants were just dissatisfied by their father’s wishes. Consequently, ground (v) of the appeal collapse.
33. The third limb of the appeal has to do with whether the trial Magistrate disregarded the submissions filed by the appellant before it.
34. The Respondents submitted that all parties to the suit were duly heard by filing witnesses written statements, list of witnesses and list of documents hence the appellants cannot say that they were never heard.
35. Upon my study of the impugned ruling, I have not come across anything to indicate that the trial Magistrate overlooked any of the material which was placed before it by the parties in respect to the application. Grounds (ii) and (iii) of the appeal cannot therefore stand.
36. Upon taking into account all the foregoing factors hereinabove, I see no reason to interfere with the impugned ruling. I am satisfied that the Trial Magistrate arrived at a reasonable finding.
37. In the end therefore, the appeal is found to be without merit, it is hereby dismissed with costs to the respondent. The ruling delivered by the Trial Magistrate on 6<sup>th</sup> March, 2019 in Kericho C.M.C Succession Cause No. 4 of 2016 is hereby upheld.



**DATED, SIGNED AND DELIVERED AT KERICHO THIS 24TH DAY OF APRIL, 2023.**

**J.K. SERGON**

.....

**JUDGE**

I certify that this is a true copy of the originally

Signed

**DEPUTY REGISTRAR**

**In the presence of:**

C/Assistant - Rutoh

Miruka for the Respondent

No Appearance for the Respondent

