In re Estate of the Late Koima Cheruiyot (Deceased) (Succession Cause 138 of 2012) [2023] KEHC 22955 (KLR) (11 August 2023) (Judgment)

Neutral citation: [2023] KEHC 22955 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

SUCCESSION CAUSE 138 OF 2012

SM MOHOCHI, J

AUGUST 11, 2023

IN THE MATTER OF THE ESTATE OF THE LATE KOIMA CHERUIYOT (DECEASED)

BETWEEN

VICTOR KIPRUTO KOIMA .... PETITIONER

AND

WILSON KIPKAZI KOIMA .... 1ST OBJECTOR

JAMES KIPKEMOI KIPKAZI .... 2ND OBJECTOR

JUDGMENT

Introduction

1. The Late Koima Cheruiyot passed away on the 7th January 2007 at the Nakuru PG Hospital and left behind the property known as Baringo/Perkera 101/136 where her was interned and it is uncontested that the deceased was married to two wives namely Kabon Koima and Elizabeth Koima.

2. According to the Chief's letter from Perkerra Location, dated 20th February 2012, the deceased was married to two wives Kabon and Elizabeth Koima and had the following children:

   I. Ruth Jebet Cheruiyot

   II. Benjamin Kipkemoi Koima

   III. Micheal Kipchumba Koima

   IV. Victor Kipruto Koima

   V. Jane Jerotich Koima

3. Victor Kipruto Koima, the Petitioner posit on behalf of the 2nd House that, Kabon Koima the 1st wife of the deceased was never blessed with a child,and thatWilson Kipkazi Koima is the son of Koima

Cheruiyot's brother Chepng'eno Cheruiyot -deceased and the blood brother of Joseph Chepyegon Chepng'eno.

4. On the other hand, Wilson Kipkazi Koima the 1st Objector claims to be Kabon Koima's son, and used to live on the suit property, Baringo/Perkera 101/136, for a long time. consequently, a beneficiary of the deceased from the 1st house who is being disinherited by the 2nd House.

5. The contention by 1st Objector was that, the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case, making untrue allegations of fact essential in a point of law to justify the grant by omitting him as beneficiary.

6. A Petition for grant of letters Ad litem was filed on the 3rd April 2012 by the Petitioner, seeking to sue the two Objectors who had moved into the deceased property claiming ownership.

7. By the 25th April 2012, the 1st and 2nd Objectors had successfully obtained temporary injunction against the petitioner

8. On the 5th October 2012, the Court allowed and imposed an injunction against the Petitioner from interfering with the 7.5 acres hived off the deceased property. And parties to maintain the status quo.

9. In the Interim the Objector had sought for leave to commence contempt proceedings against the Petitioner which proccedings were ultimately withdrawn upon consent.

10. By the 7th of November 2013, the matter came up for hearing of the application dated 22nd March 2013 and Mr. Ogeto and Mr Akango entered consent adopted by the court to have the application dated 25th April 2022, abandoned and marked as withdrawn as well as the Application dated 30th October 2013, the cause was to proceed by way of *viva voce* evidence with the objector to testify first. The subsequent date fixed for hearing of the succession Cause was the 13th February 2014.

11. The matter came up for hearing on the 13th February 2014 and by the time assigned for hearing, Mr. Akango and Mr. Ogeto entered consent which the court adopted to enjoin, James Kipkemoi into the proceeding as an interested party and do participate in the proceedings as the 2nd Objector and that the application dated 30/1/2014 be marked as withdrawn.

12. The Objectors case commenced Before Hon. R. Wendoh on the 13th February 2014, with Wilson Kipkazi Koima testified under oath and a further hearing was conducted on the 6th March 2014 where James Kipkemoi Kipkazi the 2nd Objector testified under oath and Joseph Kiprop Kigen testified as Objector witness number 3, the matter was adjourned and by the 12th February 2015 the matter had been assigned to a new judge Hon Janet Mulwa who directed the typing of proceedings and the matter was by consent of parties fixed for hearing for the 15th October 2015.

13. On the 15th October 2015 the matter was by consent of parties fixed for hearing for the 20th November 2015 before Hon. A. K. Ndung'u Judge where the Objector's Advocate was indisposed and the master was adjourned to the 17th March 2016.

14. On the 17th March 2016, the court was not sitting and the Hon. Judge was indisposed and the matter was adjourned to the 2nd August 2018, on a date the Petitioners were absent further forcing an adjournment to the 14th November 2016when the Objectors were absent forcing an adjournment to the and the matter was adjourned to the 3rd April 2017 on a date when the Objectors were absent and Mr Akango for the Petitioner was indisposed forcing an adjournment to the 3rd October 2017, on a date when the Objectors were absent, further forcing an adjournment to the 7th March 2018.

15. On the 7th March 2018, the Objectors were absent, further forcing an adjournment to the 12th June 2018, when the Objectors case continued with Kipyego Chemng'eno who started testifying briefly, only for the parties to entered a consent, to allows a grant of probate intestate be made in the estate of the deceased and that the Petitioner be appointed the Administrator and summons for confirmation be filed within 30days while the Objectors evidence on record be deemed as evidence for purposes of determining distribution of the estate.

16. The grant of letters of Administration intestate was issued to the petitioner herein on 12th June 2018 and on the 24th September 2018, when the matter came up for directions, the 1st Objector was yet to comply and file his opposition to the summons for confirmation and the matter was ultimately fixed for hearing on the 9th April 2019.

17. On 9th April, 2019 when the matter came up for further hearing the parties proposed that DNA be conducted in order to ascertain whether or not the 1st Objector is the son of the deceased. The court *vide* an order dated 9th April 2019 ordered that, the 1st objector and the petitioner to avail blood samples within 30 days to the government chemist for DNA analysis and gave a mention date of 10th June 2019.

18. On 10th June 2019, parties recorded a consent to the effect that, the 1st Objector, the Petitioner, Joseph Chepyegon Kipngeno and Joseph Kibet to be included in the DNA Specimen taking and matching.

19. By the 22nd January 2020 parties had complied with the court's directions and DNA test had been conducted by Dr. Joseph Kagunda Kimani, a government analyst based at the government chemist Department in Nairobi, and the head of the Forensic Biology section, with twenty (20) years' experience, dealing with issues of human identification through DNA, technology, forensic analogy of homicide and sexual cases and determination of genetic relationships

20. Dr. Joseph Kagunda Kimani, who testified on 31st may 2021 came to the following conclusions;

> That; Wilson Kipkazi Koima, Joseph Kipyegon Kibet and Joseph Chepyegon Chepngeno share a common patrilineal lineage, while Victor Kipruto Koima was of a different Patrilineal lineage. as to whether one was the biological father of the other. He said that for paternity testing, one would require the DNA profile of the alleged father hence genetic determination could not be conclusive.

21. With the inconclusive DNA results, the court directed the objector proceedings to continue as well as the petitioner's summons for confirmation.

22. On the 10th February 2022,Kipyego Chemng'eno testified under oath with the Objectors closing their case while the petitioner case commenced on the 14th February 2022 with Victor Kipruto Koima and Thomas Kiptoo Tuikong Testifying under Oath.

23. The Petitioner ultimately closed their case on the 30th June 2022 with the court directing the parties to file their written submissions that the parties filed on the 19th December 2022, and 20th December 2022, for the Objectors and the Petitioner Respectively.

Objector's Case

24. OW1 the 1st Objector testified under oath that he lives at Kapkain in Koibatek District and that his father was called Koima Cheruiyot and mother is Kabon Koima, both deceased. That his father had two wives. And that he belongs to the first house where he was alone with no brother or sister.

25. The 1st Objector knew Victor Kipruto Koima the petitioner whom he described as brother from the deceased second wife that got married to the deceased in 1982.

26. The witness went at length to discuss the 2nd House, that he was a grown up by the time Victor was born in their home.

27. That the 1st Objector was born in 1948 by Kabon he went Kapkain Primary School till 1963 and was taken for circumcision by the Deceased and Kabon. After his initiation in 1964 he joined Sirwo Intermediate School in Koibatek.

28. That the Deceased was leaving in the forest at the time and the government gave him land at Settlement, Perkera. He paid 246/= for the land. The 1st Objector went to the Perkera Scheme in 1965. That the Government gave people 3 cows on loan. That they were given loan of 500/= for farming the land, he was alone with Kabon and the Deceased, he used to deliver milk and the security would deduct the money. I got married in 1967 when in the at Settlement, Perkera

29. That in 1980 he finished paying the loan and got the title in name of Koima Cheruiyot, a short while later in 1982, when the Deceased got married with three children, he had another land and because of friction between the two ladies they went to his land with his wife and mother Kabon, she later got sick and he took her to Tenges hospital and she died. he buried her mother in the home of her aunt near where she died. She was not buried in his home or the Deceased's home.

30. That the 2nd wife of the Deceased was left in Perkera Scheme and he was residing on the land he bought himself.

31. That, the Deceased got sick was taken to Nakuru Hospital, PGH succumbed and died, he got the burial permit. removed the body from hospital buried him at Perkera Scheme.

32. That, the family sat down to discuss the deceased's estate, Chairman was Kibet Cheruiyot the Deceased's youngest brother (uncle) and that they agreed to give death certificate and title deed to Kibet.

33. That the land was 32 acres, which Elders sat and distributed to the 3 sons in the 2nd house and himself to get 7 ½ acres each and that the deceased had given his grandson- the 2nd Objector his son 1 ½ acres for educating Cherotich Koima the deceased's daughter of the 2nd house, plus an extra ½ acre as compensation for financing the Succession.

34. That, the Elders agreed the 2nd Objector shall receive 2 acres from the estate of the deceased on 30/1/2012 that they agreed and signed.

35. That, he started ploughing his 7 ½ acres. When we agreed to go for succession Victor went to Court alone and filed this case.

36. The Witness produced minutes of multiple family meetings - dated 4/8/2007, 17/8/2007, 12/9/2008, 26/9/2008, 31/1/2012- bundle - MFI (1).

37. It is lies to say that he is not the son Koima, that, he is the son of Kabon. he saw when the Petitioner was born and is certain the Petitioner can't tell relationship between him, the deceased and Kabon. the Petitioner is a young person. That he wants the land distributed like the elders had agreed and that children who were born outside be omitted. he wants the court to include him as one of the beneficiaries of the deceased.

38. In Cross-Examination the 1st Objector stated that he was born in 1948 and he did not know when Koima Cheruiyot- the Deceased was born. That Kabon Koima was his mother, her parents were

Chebon Kipkwer and could not recall the name her grandmother. That Kabon was born at Kipinchor - about 10 km from Kipkain and he used to live with Kabon at Kapkain.

39. That his mother had two brothers Chelimo and Masialony and no sisters and that Koima is his father's name, that Kabon was also known Kabon Kaprandich Koima he used to live with his mother at Kapkain from Perkera in 1986. From 1965 he was at Perkera Scheme with the Deceased and Kabon. In 1986 he moved with his mother because there was a dispute between Kabon and the other wife.

40. That the Deceased did not chase Kabon away and It was his decision to take her to Kapkain and the Deceased did not follow them there where he built for Kabon on the shamba in Kapkain that he got in 1975. I used to live in the said land with other people and it's in 1990 that he got title to the land and did not buy the Kipkain shamba but was given the shamba by committee. It's the committee of the shamba. It was a forest reserve. Before that he was staying there with his 2nd wife.

41. The Deceased went to Ravine in 1964 and he married first wife in 1967and came to Ravine with the Deceased in 1965, in Deceased's home. When he got married he started to build his house.

42. That the land in Kipkain was not the Deceased's and Kabon did not have other children. That he moved his mother, she became sick in 2002 and died same year and was buried by her aunt about 10kms from Kipkain without a road access, hence the reason for three unique internment.

43. That he was not given the land in Kipkain by the Deceased who married the Petitioner's mother in 1982 and that she came with 3 children and 2 others were born in the home.

44. That he knew Cheptigain Cheruiyot who is an older brother to the deceased that Kipng'eno Cheruiyot is not his father. That he knew Kipkenei Chepng'eno son to Chepng'eno, Siienei, Tabkele, Tabutau, Joseph, Kiprop Charles are also children of Chepng'eno Cheruiyot. They are not his brothers and sisters. It's not true that he is the son of Chepng'eno and went to stay with Koima because he had no child early in years to assist them. That the deceased did not give him the land in Kapkain as a gift for his help.

45. He was at pains to explain why Kabon Koima was buried away from her matrimonial home despite his claims that she was the deceased's wife. He also explained that Kabon Koima was buried at her aunt's place because the area was inaccessible but noted that it was possible to transport the body for burial at her husband's home. Additionally, OWI admitted that it would be contrary to custom of the Tugen to have a married woman buried outside her matrimonial home especially where the deceased wife had children as alleged by OW1 in this case.

46. OW2- James Kipkemoi Kipkazi -stated that his father is Wilson Kipkazi Koima, (the 1st Objector), and Koima Cheruiyot (deceased) was his grandfather. He stated that the late Koima Cheruiyot gave him a responsibility of paying fees for his daughter (James Kipkemoi Kipkazi's aunt) and he would give him a piece of land measuring 1½ acres, Pekera/136.

47. He stated that he had receipts, evidence of payment of school fees. It should be noted however that the receipts he had were not in his name, thus it was not conclusive that he was the one who paid the school fees. He added that when his grandfather was still alive, he showed him the 1 ½ acres of land that he had promised him. He added that after burial, they sat down as a family and he was shown the piece of land by the family, he fenced it, cleared bushes, and built a toilet. He had been farming a smaller portion and had started building a house.

48. On cross-examination, he stated that he was shown where the land was but they did not measure it. That was done in 2006 when he had already completed paying school fees for Jane, the deceased's daughter. He stated that he did not have the money to start any development and so he did not ask

Koima Cheruiyot to show him exactly where the land was. He stated that he used to plough the land and plant some maize from 2005.

49. That in 2006, Koima Cheruiyot showed him the land, but in 2005 the deceased had granted him the right to start using some of the land and he started ploughing and planting the land. He added that he couldn't state whether the land he was ploughing was 1 ½ acres as the land was measured after the deceased died.

50. OW3, Joseph Kiprop Kigen, testified and stated that he knew Koima Cheruiyot, the deceased as he used to live near him in Kapkain in 1950 before the deceased moved to the scheme and that he knew the deceased had one wife, Kabon Koima, and that they came to the scheme, Perkera, in l965.

51. He added that they had their son called Wilson Kipkazi Koima (1st Objector), that he was a bit far from deceased but Kabon went back to Kapkain with the Wilson Kipkazi Koima where the 1st Objector got a piece of land there. He added that the deceased got another wife and that is when Kabon went back to Kapkain where she got sick and stayed with the aunt until she died. He stated that she was buried at the aunt's home and not at her husband's home because of the bad roads.

52. On cross-examination, he stated that he was born in 1940 and he was older than Wilson Kipkazi Koima, that they were neighbors at Kapkain and were about 10 kms apart, however, he went to Kapkain in 1965 when he was 25 years old. They were about 10km apart. He stated that he was sure Wilson Kipkazi Koima is the son of Kabon Koima and the deceased since he started seeing Kabon and Wilson Kipkazi Koima around 1952 when he was about 12 years and that Wilson Kipkazi Koima was younger and that he believed him to be the late Kabon's child, because they were always together. On Kabon's burial at her aunt's place, he conceded that it was contrary to the Tugen customs especially where one had a child.

53. OW4: Chepng'eno Chepyegon, testified that he knows Wilson Kipkazi Koima and 2hd Objector and he also knew the deceased, Koima Cheruiyot. He added that his father, the late Chepngeno Cheruiyot, who was the elder brother to the late Koima Cheruiyot and the late Kibet Cheruiyot was their last bon. He further stated that he knows that Wilson Kipkazi Koima is the son of the late Koima Cheruiyot from the first wife, Kabon Koima. He denied being a brother to Wilson Kipkazi Koima.

54. The Objectors took the View that the DNA test confirmed the 1st Objector as the son of the deceased thus separating fiction from fact and entitling him to the 7.5 acres and that the DNA analysis is the only way of proving paternity and thus urge for the revocation of the grant.

55. Reliance was placed on the *In Re Estate of Jacob Mwalekwa Mwambewa Deceased)* 2018] eKLR, Thande J rendered herself thus: -

> " This Court would wish to keep faith with the deceased herein and not disturb his remains. Nevertheless, the pursuit of the truth overrides the supposed wishes of the Deceased. Further, family as well as cultural discomfort and outrage must give way to establishing the truth regarding the paternity of the Objector/ Respondent which as stated earlier is central to the succession dispute herein. The DNA testing will not prejudice the Objector/ Respondent if anything it will reaffirm his claim as the only son of the Deceased and settle the dispute herein with finality."

Petitioner's Case

56. Petitioner- Victor Kipruto Koima contends that, Wilson Kipkazi Koima is the son of Koima Cheruiyot's brother Chepng'eno Cheruiyot -deceased and the blood brother of Joseph Chepyegon Chepng'eno.

57. Reliance is placed on the fact that Wilson Kipkazi Koima's name was also excluded among the children of the deceased in a letter drawn by the Chief of Perkera Location dated 20th February 2012. The Chief of Perkera Location, Thomas Tuikong, stated that the late Koima Cheruiyot and his first wife Kabon Koima were not blessed with any children.

58. The Court on 13th June, 2019, ordered for a DNA test to be done to match blood samples of the Objector and the Petitioner. Wilson Kipkazi Koima, Victor Kipruto Koima, Joseph Chepyegon Chepngeno and Joseph Kipyegon Kibet were included in the DNA specimen taking and matching.

59. PW1 Victor Kipruto Koima testified and stated that, Koima Cheruiyot (deceased) is his father and Elizabeth Koima (deceased) is his mother and the second wife to his father. He added that the deceased had a first wife. Kabon Koima, whom he did not get to meet but he had heard of her. He stated that the first wife was not living with the deceased as she had gone back to her parents' home and that was where she was buried. He stated that the first wife was buried at her parents' home because she and the deceased were not blessed with any children, and she had left the deceased's home before her death.

60. He testified and stated that Koima Cheruiyot at the time of his death was living with his children at Eldama Ravine. He added that he knew the objectors as they were his relatives, Koima Cheruiyot (deceased) was a brother to the 1st Objector's father. He stated that he knew the mother to Wilson Kipkazi Koima, whose name is Kimoi Chepng'eno. He added that Wilson Kipkazi Koima was claiming to be the son of the deceased because he wanted to inherit. property that is not rightfully his.

61. He stated that, Kabon Koima and his father, were not blessed with a child so the deceased requested his brother, Chepng'eno Cheruiyot, to allow Wilson Kipkazi Koima to come and stay with him to help him with house chores. He added that they lived together in Kapkeino before the deceased moved to Ravine and told Wilson Kipkazi Koima to continue living in the Kapkeino land. He testified and stated that the James Kipkemoi Kipkazi didn't have any relationship with the deceased and that he came to mourn Koima Cheruiyot at his death and was the secretary to the meeting held at the funeral.

62. He testified and stated that the claim by James Kipkemoi Kipkazi, how he helped pay school fees for Jane Koima, was not known as at the time of the deceased's death in 2007, Jane had already finished form four in 2006 and was done with schooling. He added that before Koima Cheruiyot died, James Kipkemoi Kipkazi had never approached the deceased to claim his money nor the land he claimed as payment.

63. That James Kipkemoi Kipkazi only started the claim after the deceased had died. He added that the meeting was held where James Kipkemoi Kipkazi was secretary and was writing the minutes but they never talked as a family that James Kipkemoi Kipkazi should be given 1 ½ acres of land from the deceased's estate. He stated that at the meeting James Kipkemoi Kipkazi was the one that stated he was owed by the deceased 1 ½ acres despite not bringing the claim to the deceased while he was alive.

64. On cross-examination, he stated that the 1st Objector was the son of the brother to the deceased and that he was brought to live with Kabon and Koima Cheruiyot because they were not blessed with any child (ren). He added that while his father Koima Cheruiyot was alive, the 1st Objector never asserted any claims to the property of Koima Cheruiyot since he's the son of Chepng'eno Cheruiyot. He added

that the Koima Cheruiyot was giving the 2nd Objector money to pay Jane Koima's school fees since James Kipkemoi Kipkazi was a teacher at Jane's school at the time, Koror Secondary School.

65. On re-examination he reiterated that James Kipkemoi Kipkazi was a teacher at Koror Secondary School where his sister was a student at the time and so the deceased was giving him money to pay the school fees, the James Kipkemoi Kipkazi was not removing the money from his own pocket.

66. PW2-Thomas Kiptoo Tuikong, testified and stated that, he was a retired chief of Perkera Location and a farmer by profession, that he was an assistant chief of Perkera Location from 1989 to 1995 and became the area chief from 1995 to 2014 when he retired. He stated that he knew Koima Cheruiyot (deceased) because he was staying in his village and he was alive when he was chief.

67. He remembered writing the letter accompanying the petition and that the deceased had two wives. He added that the 1st wife. Kabon Koima, had no children and was dead at the time of his writing the letter. The 2nd wife was Elizabeth Koima who had 5 children. He added that even though he knew the deceased. he had to make sure that the letter was accurate and so he asked the village elders who confirmed that the 1st wife had no children, and that's what he wrote in the letter.

68. On cross examination, he stated that Koima Cheruiyot is his father, though he did not know when Koima Cheruiyot was born, and Kabon Koima was his mother. He added that Koima Cheruiyot's parents were Chebon Kipkwer, though he did not know the name of the mother of Kabon. He further stated that Kabon was born at Kipínchor, about 10 kms from Kipkain, and he used to live with Kabon at Kipkain. He stated that his mother had 2 brothers, Chelimo and Masialony though she had no sisters. He added that Kabon Koima (deceased) did not have any other children and in the year 2002, when she died after a short illness, she was buried at her aunt's place which is about 10kms from where he lived. He stated that he was not given land in Kipkain by Koima Cheruiyot, the deceased.

Issues For Determination

I. Whether the 1st and 2nd Objectors have proved their cases to entitle them to the orders sought?

II. If so, what is the appropriate distribution mode?

1. Whether the 1st and 2nd Objectors have proved their cases to entitle them to the orders sought?

The 1" Objector.

69. In this cause, Wilson Kipkazi Koima contends that, he was fathered by the deceased and that he is therefore a beneficiary of the estate of the deceased, this has been strenuously denied by the petitioner. In support of his contention, Wilson Kipkazi Koima gave a history of his association with the deceased and the deceased's family from childhood until adulthood. He alleged that he was the child of the first wife of the deceased, Kabon Koima, whilst the petitioner has adduced evidence to show that the first marriage of the deceased was not blessed with any children. The 1st Objector is craving that he be recognized as a child of the deceased and be allowed to partake in the distribution of the deceased's estate. The petitioner on the other hand retorts that the 1st Objector is a stranger who wants to squeeze them unfairly in their entitlement to their deceased father's estate.

70. That, this Court ordered a DNA test to be done to match blood samples of Wilson Kipkazi Koima's and the Petitioner. The 1st Objector, the Petitioner, Joseph Chepyegon and Joseph Kipyegon Kibet were included in the DNA specimen taking and matching the results of the DNA test proved to be interesting with the DNA specimen taken from the 1st Objector, Joseph Chepyegon Chepngeno and

Joseph Kipyegon Kibet matching completely, while some variations were noted on the petitioner's specimen.

71. The Government Analyst who conducted the DNA specimen taking and matching made comments that Joseph Kipyegon Kibet and Joseph Chepyegon Chepng'eno shared a common patrilineal lineage while the petitioner was of a different patrilineal lineage.

72. The Petitioner contends that, there was never a question as to whether the petitioner was a child to the deceased. In any event, under Section 118 of the *Evidence Act*, Cap 80 Laws of Kenya, there was conclusive proof in law that the petitioner being a child of the 2nd wife, Elizabeth Koima, born during the subsistence of the marriage between the deceased and the 2nd wife, was the legitimate child of the deceased, which conclusive proof was never called into question.

73. Therefore, it is submitted that, the remarks made by the Government Analyst that Wilson Kipkazi Koima's, Joseph Kipyegon Kibet and Joseph Chepyegon Chepng'eno shared a common patrilineal lineage reflected the petitioner's contention that Wilson Kipkazi Koima is the brother to Joseph Chepyegon Chepng'eno and their father is Chepng'eno Chepyegon (deceased) who was the elder brother to Koima Cheruiyot (deceased).

74. The Petitioner contends that, if the court holds that Wilson Kipkazi Koima is a biological child of the deceased while in fact he is not, it will have grave and long-term psychological and emotional! consequences for the family of the deceased, far beyond mere inheritance of his property.

75. It is the Petitioner's submission that Wilson Kipkazi Koima has failed to prove on a balance of probability, that he was a biological child of the deceased. Under section 29(a) of the *Law of Succession Act*, if Wilson Kipkazi Koima is able to prove that he is a biological child of the deceased, he would be a dependant of the deceased without having to prove that he was maintained by the deceased immediately prior to his death.

76. Independent of being a biological child of the deceased, and therefore an automatic dependant, Wilson Kipkazi Koima would also qualify as a dependant of the deceased if he can prove that he is a child whom the deceased had taken into his family as his own, and who was being maintained by the deceased immediately prior to his death. Unlike the dependant under section 29(a), the dependant under section 29(b) has to establish that the deceased had taken him or her into his family as his own child and that he or she was being maintained by the deceased immediately prior to his death.

77. The fact that the 1st Objector lived with the deceased and his first wife in his early years of life, does not go to show that he was indeed a child of the deceased. The witnesses that he also called to testify, only testified on seeing him living with the deceased and his first wife.

78. The petitioner on the other hand called to the stand, the retired area chief Thomas Kiptoo Tuikong who testified and stated that at the time of writing the letter to state the beneficiaries, he gathered information by going to the village elders who knew the deceased's first wife, and was told that the first wife bore no children.

79. There are other aspects of the Wilson Kipkazi Koima's claim that seriously undermine the 1st Objector's allegation of being the deceased's biological child.

    i. First is the fact that Wilson Kipkazi Koima has not produced any witnesses to show that the deceased acknowledged him as his child nor has he shown that he was integrated into the deceased's family with the 2nd wife.

ii. Secondly, he did not show that the deceased recognized him or accepted him as his own child or voluntarily assumed permanent responsibility over him to warrant him being a dependant under section 29 (b) of the *Law of Succession Act*. If anything, Wilson Kipkazi Koima's case is not founded on section 29 (b) but rather on section 29 (a) hence it does not fall for consideration under section 29 (b).

80. With regards to James Kipkemoi Kipkazi's claim, the Petitioner contends that, the claim was to an undefined piece of land measuring about 1 ½ acres that he claimed was owed to him by the deceased. He alleged that he had an agreement with the deceased that he would pay the school feed for Jane Koima, the deceased's daughter, and inn return the deceased would give him 1 ½ acres of land. The petitioner vehemently refuted thisclaim and stated that the deceased was giving the school fees money to James Kipkemoi Kipkazi as he was a teacher at the place Jane Koima schooled at the time. He added that, the money never came out of the 2nd Objector's pocket but rather from the deceased.

81. Interestingly, the receipts allegedly produced by the second objector are all in the name of Jane Koinna without showing the source of the money.

82. The James Kipkemoi Kipkazi never produced any written agreement to support his allegations, Section 3 (6) of the *Law of Contract Act*, Cap 3, Laws of Kenya, provides as follows

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless;

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has bcen attested by a witness who is present when the contract was signed by such party:

> Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act*, nor shall anything in it affect the creation of a resulting, implied or constructive trust.

83. That the above cited law is in black and white; agreements for disposition of land are supposed to be in writing for them to be enforceable. The signatures of the parties signing also need to be attested by a witness as noted in Section 3 (3) (b) above. That they can only know, that there is such agreement if the document itself is produced as evidence in the case. In this instance, no agreement was ever produced.

84. The Petitioner contends that, the James Kipkemoi Kipkazi's claim in this cause is not as a beneficiary to the estate of the deceased but as a creditor. Refence is made to the case of *Re Estate of Alice Mumbua Mutua (Deceased)* (2017] eKLR it was stated as follows:

> "The *Law of Succession Act*, and *the Rules* made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the asset.

Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and then *Probate and Administration Rules* are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the *Probate and Administration Rules*. Such have to be resolved through the structures created by the *Civil Procedure Act* and *Rules*, which have elaborate rules on suits by and against executors and administrators".

The *Probate and Administration Rules* recognize that, and that should explain the provision in Rule 41(3). which provides as follows-

Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of *the Act*, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the *Civil Procedure Rules*

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court 's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above. "

85. The Petitioner relies on the case of *Re Estate of Solomon Mwangi Waweru(deceased)* (2018| eKLR to emphasize the point that this Court, sitting as Probate Court, cannot entertain the claim by the 2 Objector. In that case the court stated that:

> " The duty of the Probate Court is to oversee the transmission of the estate of the deceased to his beneficiaries. Its jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime and its purpose is to ascertain the assets, liabilities, if any, the beneficiaries and the mode of distribution of the estate".

86. Therefore, it is the Petitioner's contention that, claims by third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that claims against the estate of a deceased are determined through settlement or where inapplicable through suits against the administrator(s) of the estate and not through an objection like the one before court. This was seen in *Re Estate of Alice Mumbua Mutua (Deceased)* [2017| eKLR where the court stated that:

> " ......the provisions of the *Law of Succession Act* and the *Probate and Administration Rules* are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third

parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the *Probate and Administration Rules*, Such have to be resolved through the structures created by the *Civil Procedure Act* and *Rules*, which have elaborate rules on suits by and against executors and administrators"..

87. The Petitioner submitted that after analyzing the report of the Government Analyst, Dr JK. Kimani, the sample conclusion was that the 1st Objector could not possibly be a biological brother of the petitioner. His conclusion was that the DNA results pointed to the existence of two different patrilineal lineage. Since the patrilineal lineage of the petitioner was never in question, that is the petitioner being the deceased biological child was never an issue, this brings us to the conclusion that the 1st Objector cannot possibly be considered a biological son of the deceased. As the maxim goes, pale rest quem nuptiae demonstrant - a child born to a married woman is presumed to be that of her husband. There was conclusive proof in law that the children of Elizabeth Koima, born during the subsistence of the marriage between the deceased and Elizabeth Koima, were the legitimate children of the deceased. It is our submission that the 1st Objector has not proved on a balance of probabilities that he was the biological child of the deceased or that he was a dependant of the deceased within the meaning of the *Law of Succession Act*.

88. As for the 2nd Objector, the Petitioners cite the case of *Alexander Mbaka vs. Royford Muriuki Rauni & 7Others* [2016] eKLR the court held that:

> " it is only where one has an established claim against the estate that has already crystalized that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystalized. The right must be shown to have crystalized before the family court can entertain it".

89. It is Submitted that 1st Objector has failed to prove on a balance of probabilities that he is indeed a biological child of the deceased. The 2nd Objector on the other hand, had no jurisdiction to approach this court, and having provided Court with insufficient evidence to support his contention as per section 3 of the *Law of contract Act*, makes his claim null and void.

90. The 2nd Objector's claim on the estate of the deceased is untenable in law to the extent that the 2nd Objector alleges he was to be given land by the deceased, in lieu of the school fees payment support he was providing, no evidence was tendered in this regard. His claim on the land cannot be sanitized by Elders and the said purported distribution by elders before the making of a grant was illegal, unlawful and would constitute intermeddling with the estate of the deceased person.

Analysis and Determination

91. The *Black's Law Dictionary* 7th Edition defines a dependent as;

> " One who relieves on another for support; one not able to exist or sustain oneself without the power or aid of someone else...
>
> Lawful dependent. 1. One who receives an allowance or benefit from the public, such as social security. 2. One who qualifies to receive a benefit from private funds as determined within the terms of the laws governing the distribution.

Legal dependent. A person who is dependent according to the law; a person who derives principal support from another and usu. May invoke laws to enforce that support.”

92. The question of who a dependantis in this context is well provided for under Section 29 of the *Law of succession Act* a "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's parents, step-parents, grandparents, grandchildren, 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.

93. Proof of dependency is thus a condition precedent to the exercise of the discretion in section 29(b) cited hereinabove. In addition, while considering the meaning of a dependant under section 29 of the Act, the court held as follows in the case of *Beatrice Ciamutua Rugamba. vs. Fredrick Nkari Mutegi & Others*, Chuka Succ. Cause No. 12 of 2016: -

> “From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency."

94. References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

(3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.

(4) Where the date of birth of any person is unknown or cannot be ascertained, that person shall be treated as being of full age for the purposes of this Act if he has apparently attained the age of eighteen years, and shall not otherwise be so treated.

(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

95. I am of the view that the consent entered into by parties to undertake a DNA examination in general terms, resulted in an inconclusive result and that no proof of paternity was demonstrated thereby and I associate myself with the position by Lady Justice S. N. Mutuku In *FNT & Another V Cm on behalf of CSNT* [2021] eKLR holding that;

> “Should DNA be conducted to prove paternity? It seems to me that the Applicants are assuming that they carry the DNA of the deceased. That is why they volunteer to have DNA

samples extracted from them. The only way these samples can be 100% accurate is if the samples are taken from the body of the deceased. This way, both the Applicants and the minor can be confirmed to be either his children if the results are matching or not if the results fail to match for either of them. Yet the Applicants are not keen on having the body of the decease exhumed for this purpose."

96. This court concurs with Lady Justice L. Achode (as she then was)*In Re Estate of JMK (Deceased)* [2021] eKLR that, DNA scientific examination should only be undertaken in specific terms (emphasis is mine) and she held that;

> "It is my view that where sufficient evidence exists which resolves the issue in controversy without necessarily ordering for a DNA test, an order for a DNA test would be inappropriate. However, in this case, there is sufficient evidence to link the children of the applicant and the deceased to warrant the exercise of discretion in favour of an order for DNA testing sought by the applicant."

97. In the case of *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others* [2016] eKLR, it was observed that;

> "a dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts."

98. The 1st Objector contends that he is a biological son of the deceased and does not claim that he had been taken in as a child of the deceased and thus has not demonstrated of being maintained by the deceased immediately prior to his death.

99. Section 45 of the *Laws of Succession Act* prohibits dealing in properties belonging to a deceased person before obtaining grant. It provides-

> "(1) Except so far as expressly authorized by this Act, or by any other written law or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with any free property of a deceased person."

100. For instances, in the case of *Benson Mutuma Muriungi v C.E.O. Kenya Police Sacco & Another* [2016] eKLR the court observed that:

> "Whereas there is no specific definition provided by *the Act* for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and

has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person."

101. As held by J. Mativo, *in the matter of the Estate of Patrick Mwangi Wathiga* Succesion Cause No.342 of 2005, that the objector who had showed up after the deceased's death bore the burden of prove that he was a child of the deceased hence a beneficiary of the deceased's estate. The judge observed:

> " I am clear in my mind that the burden of proof lies on the objector to prove paternity or his claim to be a beneficiary of the deceased's estate......... The case becomes even more difficult where no medical evidence is adduced to prove paternity...."

102. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* (2014) eKLR the Supreme Court held *inter alia*:

> " The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue". Emphasis ours.

103. *In Re Estate of Patrick Mwangi Wathiga* [2015] eKLR, the court held that proof of paternity is on a balance of probability and it frowned upon the practice where someone crops up to lay claim on an estate of a deceased after his death when no known relationship existed during the lifetime. In this instance, while the 1st objector was allegedly known as relative and son of Chepng'eno Cheruiyot prior to the death of the deceased, he only for the first-time laid claim by introducing himself before the "elders meeting" as the son of Kabon and Koima and the same was minuted.

104. This court notes that the 1st objector not only claimed to be a beneficiary to the estate but in fact claimed to have paid for and acquired the property known as Baringo/Perkera 101/136 on behalf of the deceased. It would thus appear that the 1st Objector is only fixated on gaining land whichever way, without any other regard as to the probate of the deceased.

105. In my agonizing scrutiny of the evidence on record, it is clear that the Objector had not been known as the son of the deceased prior to his demise, the Late Koima Cheruyiot never introduced the Objector to the 2nd House as their brother, and it thus becomes apparent that Wilson Kipkazi Koima emerged and laid claim as the biological son of the deceased long after he had died.

106. The 2nd Objector's witness statement of Kipyegon Arap Changwony dated 5th February 2014 explicitly admits that the 1st objector was not a biological son of the deceased and that he was gifted the Land in Kapkein by the deceased for living with him and Kabon for may years.

107. I have Considered the Exhibits produced in support of the 2nd Objector and of particular mention are the Elders Meetings dated 4/8/2007 at chepsito, 17/8/2007 at chepsito, 12/9/2008 at chepsito, 26/9/2008 at chepsito and 31/1/2012 at the Assistant Chief's Office and make the following observations;

    a) Save for the last meeting dated 31/1/2012 at the Assistant Chief's Office that is signed by all parties herein, the rest were signed by the 2nd Objector and Chairman Musa Kibet, while the

Petitioner contends that all the meetings were instigated to legitimize the 1st and 2nd objector's claims.

b) The Elders had no legal authority to distribute the deceased estate before the making of the grant and any such decisions are null and void.

c) The fact that the 2nd Objector laid claim over land and took possession thereof long after the demise of the deceased before the making of grant, remain null and void and any such possession remains illegal.

108. Section 38 of the *Law of Succession Act* (the Act) provides that:

> " Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Section 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."

109. In the case of *Stephen Gitonga M'Murithi –v- Faith Ngira Murithi* [2015] eKLR where the Court of Appeal noted that:

> Cap 160 of Laws of Kenya, Section 38 of the *Law of Succession Act* enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried. Also see *Rono versus Rono & Another* [2008] 1 KLR G&F) 803.

110. I am equally content to cite Article 27 of the *Constitution* which provides for equality and freedom from discrimination and consequently find that all the children of the deceased are entitled to inherit equal shares of their father's estate.

111. International law applies in Kenya, and it is relevant to this discussion. Kenya has signed many International instruments which provide for equal treatment of men and women. Article 2(5) of the *Constitution* has made thee international instruments part of Kenya law, and the principles stated in them are of application in Kenya without the necessity of their being domesticated through local legislation.

112. I am thus unpersuaded that the 1st objector was born in 1948 by kabon Cheruiyot and the deceased and is thus a dependent within the law, the objection by the 1st Objector thus fails and is accordingly dismissed.

113. As for the 2nd Objector he staked a claim on land without offering any evidence that, the deceased had offered land in lieu of school fees paid up top 2006 and as a creditor he ought to have presented an agreement on the terms claimed, the said claim against the deceased was never raised in his lifetime, this court thus find no merit in the 2nd Objector's Claim and the same is accordingly dismissed.

Conclusion

114. In the upshot I issue the following orders;

a) The Objection to making of grant dated 27th June 2012 by the 1st Objector is hereby dismissed for want of merit.

b) The Notice of Motion dated 30th January 2014, by the 2nd Objector is hereby dismissed for want of merit

c) With regards to the Summons for confirmation of grant made, dated 3rd July 2018, is allowed, the estate of the deceased shall be distributed equally to the following listed dependents;

   I. Benjamin Kipkemoi Koima

   II. Michael Kipchumba Koima

   III. Victor Kipruto Koima.

d. The 1st Objector and/or Musa Kibet are hereby Ordered to forthwith produce and surrender to the Petitioner, the original title deed for Land Parcel Number Baringo/Perkera 101/136 within 14 days of today, for onward transmission to the relevant land registrar which failing, the land registrar is hereby directed to dispense with the production of the original title deed in the registration and transmission of the subdivisions herein. This order will facilitate distribution of the estate of the deceased.

e. Cost are hereby awarded to the Petitioner

115. It is So Ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 11TH AUGUST 2023

MOHOCHI S.M

JUDGE

In the presence of: -

Mr. Ogeto, Advocate for the Objectors

Mr Akango, Advocate for the Petitioner