



REPUBLIC OF KENYA



KENYA LAW

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**In re Estate of Kengi Arap Chepkwony (Succession Cause 343 of 2009)
[2023] KEHC 27071 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27071 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 343 OF 2009
RN NYAKUNDI, J
DECEMBER 20, 2023
IN THE MATTER OF THE ESTATE OF KENGU ARAP CHEPKWONY**

BETWEEN

**ANCHALINA SENGE CHEPKWONY 1ST PETITIONER
JEPTARUS CHEPKWONY 2ND PETITIONER**

AND

**KIMELI ARAP MASAN 1ST RESPONDENT
KIPKOSGEI ARAP MOROGO 2ND RESPONDENT**

AND

LEAH CHELIMO CHEPKWONY OBJECTOR

RULING

1. There are two applications pending in this cause. The first application is a Summons for revocation of grant dated 7th March 2012 where the applicant seeks the following order;
 1. The grant of letters of administration issued to Jeptarus Chepkwony and Anchalina Senge Chepkwony on 1st December 2009 be revoked.
 2. Costs of this summons be awarded to the Objector/Applicant.
2. The second application is a 18th September 2023 seeking the following orders;
 1. That leave be granted to Philip Carlos Kemboi, the proposed Objector/Applicant to substitute Leah Chelimo Chepkwony, the ailing Objector/Applicant herein and prosecute this cause.
 2. That costs hereof be in the cause.



3. The application is premised on the grounds set out therein and the averments in the affidavit in support of the application.
4. Application dated 18th September 2023
5. The applicant filed a Notice of motion dated 18th September 2023 seeking the following orders;
 1. That leave be granted to Philip Carlos Kemboi, the proposed Objector/Applicant to substitute Leah Chelimo Chepkwony, the ailing Objector/Applicant herein and prosecute this cause.
 2. That costs hereof be in the cause.
6. The application dated 18th September is one seeking substitution of the administrator as the applicant is now ailing and can no longer prosecute the objection. She was discharged from hospital on 1st July 2023 and is unable to testify or participate in the proceedings. She is 75 years old and suffering from chronic illnesses. She is related to the proposed party as he is her son.
7. As the application is unopposed and the applicant is the son of the deceased as per the list of beneficiaries, the court is satisfied that the application for substitution is merited.

Application dated 7th March 2012

8. The application dated 7th March is the main application that initiated the objection proceedings in this cause. The application is premised on the grounds that the proceedings to obtain the will were defective in substance and further, that the purported will on the basis of which the grant was obtained through fraud and coercion. Additionally, that the grant was obtained through concealment of material facts and the will was never executed by the deceased. The applicants also premised the application on the ground that the administrators have failed to proceed diligently with the administration of the estate.

Applicant's case

9. The applicant swore an affidavit in support of the application where she contended that the deceased never left behind a will as he was not the sole owner of the property listed in the will. She urged that Nandi/Kipkaren/Salient/228 was registered in the names of Kipleting Arap Kengu and the deceased on 15th December 1976 and 11th March 1977 respectively. Further, that Nandi/Kipkaren/Salient 151 is registered in the name of four people, namely;
 1. Kiptanui Arap Birech
 2. Sawe Arap Choge
 3. Veronica Jepkiring
 4. Kengu Arap Chepkwony.
10. Additionally, that Nandi/Kipkaren Salient 364 is registered in the names of
 1. Kipleting Arap Kering
 2. Kengu Arap Chepkwony.
11. Had the will been prepared by the deceased, the above facts would have been disclosed. He had also been sued by the 1st applicant before the tribunal ide Kapsabet LDT No. 53/06 wherein she claimed ownership of Nandi/Kipkaren Salient 228 seeking to be given 30 acres of the said parcel but the matter



- was not finalized due to the death of the deceased. Due to how bad the relationship between her co wife and the deceased was, she doubted the validity of the will.
12. The firm of M/s Gicheru & Company Advocates was on record for the applicant and filed submissions on 7th November 2023. Counsel submitted that the applicant faults the respondents for non-disclosure of the purported Will to her yet she is one of the deceased's widows and the beneficiary of the deceased's estate. Her consent was not sought before the letters of administration with will annexed was obtained and confirmed hence contravening rule 26(1) of the Law of Succession Act. It is not in dispute that the applicant is the deceased's 2nd widow and that her rights are protected under Section 66 of the Law of Succession Act as one of the surviving spouse to the deceased. The applicant ought to have been given equal preference as the respondents in the process of obtaining the grant. Further, that the respondents ought to have notified the applicant who has equal right or entitlement to administration to that of the respondents by way of the consents in forms 38 or 39. That would also include getting such consent signed by the Citees therein, who had been served with the citation as envisaged in Rule 7(7) of the Probate and Administration Rules. Something the Respondents inherently violated.
 13. It is the Applicant's case that rule 26(2) of the Probate and Administration Rules was not complied with by the respondents who adamantly failed to file an affidavit to explain the circumstances under which they applied for grant without the requisite renunciations and consents. Counsel cited the case of Nanzala v Mulunda (Succession Appeal 1 of 2021) (2023) KEHC 2829 (KLR) (24 March 2023) in support of the submission. Further, that the applicant could not have invoked the provisions of Rule 40(6) of the probate and administration rules at that time as she had not been notified of the existing grant and thus, the applicant was prejudiced. Counsel cited the case of Mburu Njoroge vs. Frederick Mburu Njoroge [2014] eKLR (Ngaah. J) in support of the submission.
 14. Counsel submitted that In the matter of the Estate of Isaac Kireru Njuguna (deceased) Nairobi HC Succession Cause 1064 of 1994 the court found that a grant is liable for revocation where all the heirs have not consented to the mode of distribution and all the properties which make up the estate are not taken into account or distributed. Further, that the applicant's consent was not sought and that the said confirmed grant should be revoked in order to serve justice to all the beneficiaries of the deceased's estate. Counsel maintained that the procedure of obtaining grant was defective in substance since it was marred with fraud and concealment of the material facts before this court and therefore it should be revoked.
 15. Counsel urged that evidence has been led in support of the position that the deceased was not in good terms with the 1st Widow (Jeptarus Chepkwony). She had sued the deceased in Kapsabet LDT No.53/06 over ownership of the Land Registration Number Nandi/Kipkaren Salient/ 228 seeking to be given 30 acres of the said parcel of land. The applicant avers that the deceased died before the matter could be concluded. The certificate of search dated 18th January 2010 showed the actual owners of the said land parcels and none showed the 1st widow Jeptarus Chepkwony as the proprietor of any of those parcels of land. The respondents failed to disclose the other owners of the said parcels of lands.
 16. In the 1st respondent's written statement dated 28th July, 2022 she confirmed that she contributed to Kshs.1540 towards the purchase of L.R No. Nandi/Kipkaren Salient/228 which she alleges to be entitled 30 acres of the said parcel of land. The applicant invited this court to scrutinize the logical contents in the purported will which creates suspicion that it was a forgery full of fraudulent information.
 17. The Land Registration numbers Nandi/Kipkaren Salient/ 228 measuring 45 acres was not wholly owned by the deceased since 0.3 acres had been allocated to the Catholic Church, 1 acre was sold to one Japheth Kimurgor and 0.5 acres had also been sold to the deceased's nephew one Simeon Kipkemboi.



This information was not disclosed to show that the deceased owned 43.2 acres of the 45 acres of Land. The parcels known as Land Registration numbers Nandi/Kipkaren Salient/ 228, Nandi/Kipkaren Salient/151 and Nandi/Kipkaren Salient/ 364 were not solely owned by the deceased and they could not therefore be bequeathed. Further, that the said will was executed on the last page through the purported thumbprint of the testator in exclusion of the first page. In regards to this the applicant's case is that she is aware that there is no requirement in law that the signature or mark of the deceased should appear on each page but as a matter of practice and to avoid manipulation of the alleged will, the courts have embraced that the execution of the Will ought to be on each page. Counsel relied on the case of *In re Estate of Ignatius Ndirangu Kamau (Deceased)* [2020] eKLR where the court highlighted on the need of the signature and/or mark of the deceased in a Will on each page. Further, in relation to the sentiments of the court in the above authority, the applicant concludes that the Wills contents do not reflect the actual intent of the deceased even though it met all the elements of a valid will as contemplated in Section 11 of the *Law of Succession Act*. This section therefore emphasizes on the need for the deceased's intent which reflects on the true account of what he had contemplated in the Will. The applicant posits that the petition for the grant of letters of administration with Will annexed was defective in substance and there existed no Will and that even if there existed a Will, the same was manipulated so as to favour the respondents who are the biggest beneficiaries of the alleged Will.

18. Counsel maintained that the alleged will is a mere sham and with no regards to the provisions of the law on the distribution of the estate. It conceals major information with intent to defraud the co-owners of the properties as well the applicant's family.
19. The Applicant urged that the wife (Teresa Jepkorir) of the 1st respondent Jeptarus Chepkwony) married under Nandi customary law was misrepresented as the deceased's daughter in the petitioners' affidavit to the petition of letters of administration with will annexed with the intent to benefit the 1st respondent to the detriment of the actual beneficiaries of the estate of the deceased. To worsen this, the respondents misrepresented the 3rd widow's children as the deceased's children with the intent to benefit strangers who have no relationship with the deceased.
20. The applicant maintained that she has proved her case based on the grounds provided for under section 76 of the *Law of Succession Act* and urged the court to declare the will invalid.

Respondent's case

21. The respondents/administrators opposed the application vide a replying affidavit dated 29th May 2012. They stated that the deceased made a will prior to his death. In the said will, the deceased named Kimeli Arap Masan and Kipkosgei Arap Morogo as executors of the will but they were unwilling to be executors. On 3rd June 2009 they made a citation to propound a document as a will under rule 21 of the *Law of Succession act* vide Misc. Succession No. 395 of 2009. Upon the citation being made, the administrators were granted orders to process the letters of administration. They filed the petition and eventually the grant of probate was issued and on 16th November 2010 they filed a summons for confirmation of grant. The grant was confirmed on 21st February 2011 and on 24th November 2011 the transfer by the personal representatives to the person entitled under a will or on intestacy was lodged to the district land registrar in respect of Nandi/Kipkaren Salient 228 and 364.
22. The respondents maintained that the will was executed before a senior advocate on 18th may 2004. They stated that Nandi/Kipkaren Salient 228 is solely registered in the name of the deceased as at 17th September 2007. Further, that the land sold by the deceased was taken into consideration as he only bequeathed 40 acres and not 44.4 acres which is the total acreage on Nandi/Kipkaren Salient 228.



23. The respondents disputed the allegation that she jointly owned a tractor as she did not annex any document as proof of said ownership. She has not produced any evidence that the objector and her husband were vendors involving the sale of the tractor or that as a result of the sale the deceased was to give 3 or 30 acres.
24. The respondents deponed that the objector and her children have been adequately provided for in the will, 12 acres in Nandi/Kipkaren Salient /151. Further, that in Nandi Customary Law, Teresa Jepkorir is regarded as a daughter by the deceased and a wife to Zipporah Cheptarus and this fact does not invalidate the will in any way. They urged the court to dismiss the application with costs.

Analysis & Determination

25. Upon considering the application, the following issue arises for determination;
 1. Whether the grant of letters of administration issued to the Petitioners should be revoked

Whether the grant of letters of administration issued to the Petitioners should be revoked

26. Section 76 of the *Law of Succession Act* states as follows:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any Interested Party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”

27. The applicant contends that the grant of letters of administration was obtained by concealment of material facts. Further, that the will that the grant was obtained on the basis of was not proved. In essence, the objector challenged the validity of the will. Validity of wills is governed by section 11 of the *Law of Succession Act* which provides for the requirements of the validity of a written will as follows:

No written will shall be valid unless-



- (a) 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;
- (b) 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;
- (c) 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 acknowledgment of his signature or mark, or of the signature of that 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.”

28. The will on which the petition for grant of letters of administration was premised has the fingerprint of the deceased. It has two names of witnesses being P.K.K.A Birech and Charles Rono with their signatures affixed. However, the applicant has challenged the contents of the will with regards to the properties that are included as the estate of the deceased. Section 11 of the [Law of Succession Act](#) does not envision a situation where the contents of the will are to be used to challenge the validity of the will. Further, by operation of law, the testator cannot bequeath that which does not belong to him and therefore, in the event that the administrators attempt to distribute the said properties, the same will not be possible.
29. The allegation that the will is defective because some of the beneficiaries were allocated a larger share of the estate is not a valid ground for a will to be found to be invalid. To hold the same would be an affront to the provisions of the act with regards to testamentary capacity. Section 5 provides;
- (1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.
 - (2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.
 - (3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.
 - (4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.
30. The applicant contends that she was notified of the petition for grant of letters of administration. The respondents produced a gazette notice dated 29th January 2010 which reveals that the petitioners issued a notification so that any objectors could have an opportunity to object to the taking out of the grant of letters of administration. Before the gazette notice, the petitioners issued a citation to propound a will to the named executors in accordance to Rule 23 of the probate and administration rules which provide as follows;



- (1) A citation to propound a document as a will shall be supported by an affidavit in Form 23 and be directed to the executors named therein (if any) and still living and to all persons interested thereunder, and may be issued at the instance of any citor having an interest contrary to that of the executors or such other persons.
 - (2) If the time limited for appearance has expired and no person cited has entered an appearance in either the principal registry or the Mombasa registry, or if no person who has appeared proceeds with reasonable diligence to propound the document, the citor may petition the court for a grant as if the document were not a valid will and the court before making a grant may direct such inquires and make such orders as it thinks fit.
31. I have considered all the allegations by the applicants and the response by the respondents and the documentary evidence and it is my considered view that the allegations of the applicant are unmerited. The burden of proving the will is invalid was on the applicant who has failed to satisfy the court. Further, the applicant has failed to satisfy the court that there were material facts that were not disclosed by the respondents,
32. In the premises, the application is dismissed with no orders as to costs.

DELIVERED, VIA EMAIL DATED AND SIGNED AT ELDORET ON THIS 20TH DAY OF DECEMBER 2023

.....

R. NYAKUNDI

JUDGE

