



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA**

**AT ELDORET**

**SUCCESSION CAUSE NO. 105 OF 2006**

**IN THE MATTER OF THE ESTATE OF NGAULO ARAP TANUI ALIAS MGAULO ARAP TANUI (DECEASED)**

**AND**

**EMILY JEPCHIRCHIR.....1<sup>ST</sup> APPLICANT**

**RICHARD KIMUTAI SOO.....2<sup>ND</sup> APPLICANT**

**DIXON KIPKETER BUSIENEI.....3<sup>RD</sup> APPLICANT**

**JOHN KIRWA TOGOM.....4<sup>TH</sup> APPLICANT**

**-VERSUS-**

**WILSON CHEPKOCHOI KORIR.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Birech Ruto & CO. Advocates for the Petitioner**

**Bitok & Sambu advocates for the applicant**

**J U D G M E N T**

1. **NGAULO ARAP TANUI (“the Deceased”)** to whom this Succession Cause relate, died on 23<sup>rd</sup> July, 1999. On 5<sup>th</sup> May, 2006 Wilson Chepkochoi Korir the Executor of the deceased’s last will and testament drawn on 15<sup>th</sup> September, 1997 petitioned for letters of administration of the estate of the deceased with written will annexed and set out the following as the survivors of the deceased;

- a) **Jemenjo Tanui (widow)**
- b) **Salome Jeptoo Tanui (widow)**
- c) **Cheruto Tanui (widow)**
- d) **Tembul Soo (son)**
- e) **Eggry Kimeli Kiriswo (son)**

2. He also set out parcel **numbers Parcel No. Nandi Chemuswa/14 measuring 36 acres, Tarakwa/Kerita Farm measuring 21 acres, Kiplombe farm ploy No.99 measuring 5.5 acres, Kiplombe farm measuring 9.5 acres and Kibakenge farm measuring 22 acres as the assets of the estate.**

3. On 8<sup>th</sup> March, 2016 the grant of letters of administration with the terms of the will was issued to **Wilson Chepkochoi Korir**. On 9<sup>th</sup> February 2017, **Emily Jepchirchir, Richard Kimutai Soo, Dixon Kipketer Busienei and John Kirwa Togom** filed Summons for revocation or annulment of the said grant alleging that they are beneficiaries of the deceased’s estate and had been left out. Subsequently, the

estate has since been subjected to numerous legal proceedings including mediation process by various persons claiming interests in the said estate either as beneficiaries and or dependants of the deceased.

## **DETERMINATION**

4. From onset, I must state that the subject matter that forms the very basis of this proceedings is the last will and testament of Ngaulo Arap Tanui (Deceased).

5. A Will is the means by which a person exercises his or her testamentary freedom to bequeath his or her estate without relying on intestacy rules of probate. There certain aspects of importance which must exist in the making of the Will, unless, therefore one possesses the right age of maturity, and mental capacity he or she will be considered as being incapable of upholding the legality of the Will.

6. Section 5 of the Law of succession does provide as follows;

*(1) Subject to the provisions of this part and part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by a 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.*

7. The Court in Elizabeth Kamene Ndolo V George Matata Ndolo, [1996] eKLR emphasized that the testamentary freedom to dispose of one's property by will in any manner one sees fit is unfettered as long as the testator is an adult of sound mind. A written will made in accordance with the law cannot be questioned. It can only be altered or revoked by another will made by the testator himself, if he is competent in terms of soundness of mind to do so.

8. Section 7 of the Law of Succession Act provides that a testator must exercise his free Will in the distribution of his estate and the absence of such free will invalidate a Will;

*“7. A will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void.”*

9. Section 11 of the Law of Succession Act, provides for the formal requirements of a valid Will, it states:

**11. 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 acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.*

10. Section 11 emphasizes explicitly on the formal and procedural requirements to make a Will. The Will must be in writing and signed at the end of it by the testator and at least two witnesses. The making of a valid Will is one of the best instruments that can ensure that the property of the testator will be distributed according to his or her wishes upon death.

11. In the case of Sospeter Kimani Waithaka succession cause No. 341/1998, the court had this to say;

*“The will of the deceased must be honored as much as it is reasonably possible. Re-adjustments of the wishes of the dead by the living must be spared for only eccentric and for only unlawfully harmful testators and weird wishes. But in the matters of normal preferences for certain beneficiaries or dependants, may be for their social goodness to the testator, the court should not freely intervene to alter them”.*

12. Generally speaking, the duty of the Courts will be slow to interfere with the Will, having regard to the fact that the testator intended the beneficiaries to be bound by the contents in the last Will and testamentary. Nevertheless, the Courts will do so, whenever this becomes necessary in the interest of justice and will act, if it is shown that the testators' purpose and intention in arriving at the last wishes/ Will did so

on a wrong application of the Law or lacked capacity to make the Will. These specific guidelines in the first schedule must be construed in a manner that certainly entitles the declaration of the text in the impugned Will.

13. A testator has power to dispose of his or her property as they please and the court is bound to respect those wishes as long as they are not repugnant to the Law and he or she does not leave out some dependants and beneficiaries. Failure to make provision for a dependant by a deceased person in her will does not invalidate the Will as the Court is empowered under Section 26 of the Law of Succession Act as demonstrated above to make reasonable provision for the dependant. Section 28 sets out the parameters that this Court should consider when making such provisions.

14. It is important to understand the role of testamentary freedom of a testator to have unfiltered discretion to dispose of his or her estate and the fundamental moral duty to provide maintenance for his or her children in death. Section 26, 27 and 28 of the Law of Succession Act (Chapter 26 of the Laws of Kenya) provides for application for adequate provision for dependants not adequately provided for by Will or on intestacy as follows:

*26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his Will, or by gift in contemplation of death, of the Law relating to intestacy, or the combination of the Will, gift and Law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for the dependant out of the deceased's net estate.*

*27. In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependants, or to make such other provision for him by way of periodical payment or a lump sum, and to impose such conditions as it thinks fit.*

*28. 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 reason for making the provision for the dependant.*

15. In the instant case it is worth noting that save for pursuing various interests in the deceased's estate, none of the parties herein has challenged the validity of the last will and testament of Ngaulo Arap Tanui (Deceased) that was drawn on 15<sup>th</sup> September, 1997 nor the appointment of the Executor. As it stands the last will and testament of Ngaulo Arap Tanui (Deceased) remains valid to date and should strictly form the basis which determines the mode of distribution of the said estate. The construction of the impugned will when put upon a statute best answers the intention which the maker had in view. Here there is prima facie evidence that the will was procured by fraud or deception for it to be considered voidable. I cannot find any support for the arguments that the deceased property should not be devolved as a whole applying the contents of the will. In **re Estate of Erwin W Schlueter** (see also NO 09-311(11 January 2000) WY Supreme Court par 14) the Supreme Court of Wyoming refers to **Matter of Estate of Buchanan: New York(App Div 1997)** "Mere proof that the decedent suffered from old age, physical infirmity and chronic, progressive senile dementia when the will was executed is not necessarily inconsistent with testamentary capacity and does not alone preclude a finding thereof, as the appropriate inquiry is whether the decedent was lucid and rational at the time the will was made."

In this cause of action the court has not been told that the testator was incapable of understanding the elements of the act in the making of the will, the nature and its effect thereof on distribution of his estate. The remarks by **Vermeulen v Vermeulen** the Court referred to the remarks by **Van Niekerk J, in Lerf v Nieft: 2004 NR 184 (HC) 1901B-C**; and see also **Cloete v Marais 1934 EDL 239 250** "In order to show that the deceased in this matter did not have the necessary mental capacity it must be shown that he failed to appreciate the nature and effect generally of the testamentary act; or that he was at the time unaware of the nature and extent of his possessions; or that he did not appreciate and discriminate between the persons, whom he wished to benefit and those whom he wished to exclude from his bounty; or that his will was in officious in the sense that it benefited persons to the exclusion of others having higher equitable claims to the estate"

It is appropriate to state that the context in which the will in question was ultimately made and pronounced was not blurred with any cognitive impairments or other factors recognized in law to invalidate a will. In my view I am persuaded that the deceased's testamentary motivations were not discriminatory.

16. In the end it is my finding that the last will and testament drawn on 15<sup>th</sup> September, 1997 by Ngaulo Arap Tanui (deceased) has never been invalidated by any court of law and hence still remains in force and has the full force of law. Consequently, I hereby order that mode of distribution that should be adopted by Wilson Chepkochoi Korir should be in consonance with the last will and testament of Ngaulo Arap

Tanui (Deceased) that was drawn on 15<sup>th</sup> September, 1997.

17. For the above reasons the rights that come into being after the deceased passed away are clearly posthumous rights. It is recognized that after the deceased death all rights that accrue devolve to his or her dependants or third party beneficiary. Generally, at times some contracts do not have postmortem provisions in the testamentary but merely remain unsatisfied at the death of the deceased. However, our jurisprudential development points to the direction that most of the contracts entered into by the deceased during his or her life time survive death more specifically under the cluster of constructive trust. It is apparent therefore that the distribution of this estate be allowed within the confines of the will.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 25<sup>th</sup> DAY OF MARCH, 2022.**

.....

**R. NYAKUNDI**

**JUDGE**