REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 190 OF 1998

IN THE MATTER OF THE ESTATE OF KIPCHUMBA TOROITICH KIPTENGWA (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR REVOCATION OR ANNULMENT OF GRANT

BETWEEN

SELINA TINGO KIPCHUMBA.....PETITIONER

AND

CHARLES KIMURGOR KKIPCHUMBA....RESPONDENT

RULING

[1] Through the law firm of **M/s Birech, Ruto & Company Advocates**, the Respondent, **Charles Kimurgor Kipchumba**, filed the application dated **16 May 2016** on **12 July 2016** seeking orders that the Grant of Letters of Administration Intestate in respect of the Estate of **Kipchumba Toroitich Kiptengwa,** issued on **2 July 2014** to the Petitioner herein, **Selina Tingo Kipchumba** and the Respondent, **Charles Kimurgor Kipchumba** be revoked or annulled. The application was brought pursuant to **Section 76** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya** on the grounds that:

[a] the Grant was obtained by consent whereby the Petitioner and the Respondent were made the Administrators of the Estate;

[b] There has been discovery of a valid written will by the deceased dated **7 March 1993** which justifies the revocation of Grant;

[c] The existence of a valid written will was not known to the Applicant when the Grant was issued;

[d] It is in the interest of justice that the application be allowed.

[2] The application was supported by the Respondent's/Applicant's Supporting Affidavit, filed herein on **12 July 2016**, to which he annexed copies of the Grant and the Will. The Applicant therein reiterated the Grounds set out herein above and averred that he was unaware of the Will as it was in the custody of his uncle; and that it is in the interest of justice that the Grant be revoked so that the wishes of the Deceased, as set out in the Will, can be adhered to.

[3] The Petitioner/Respondent opposed the application. She relied on her Replying Affidavit sworn on **20 April 2017** in which she deposed that the threshold for the setting aside of a consent order or judgment having not been met by the Applicant, the applicant is incompetent. She further averred that the purported Will cannot be relied upon to set aside the consent order and the proceedings herein until it is ascertained as a valid Will. She also raised the point that, since there was an earlier Grant to her on **27 September 2001** which was revoked by the consent order, to grant the orders sought would complicate these proceedings as it would revive the earlier Grant. It was further her contention that the alleged Will is a fabrication calculated by the Applicant to further delay the matter and disinherit her as a widow of the Deceased.

[4] Directions having been issued on **24 April 2017** that the application be disposed of by way of *viva voce* evidence the Applicant, **Charles Kimurgor Kipchumba** testified on **13 November 2018** as **OW1** and adopted his Witness Statement dated **27 April 2017**. He testified that he is the only offspring of the marriage between the Deceased and his mother, **Kabon Tamining Kipchumba**, who is also deceased; and that the Deceased did not marry a second wife. Accordingly, it was his evidence that the Respondent is not the Deceased's widow as she purports; and that had there been any such union, the whole family would have known of it during the lifetime of the Deceased.

He further testified that when he got to learn that the Respondent had applied for Grant of Letters to the Estate of his father, he filed his objection and informed his uncles about it because he was aware that his father had written a Will and had given it to his uncle **William Toroitich (AW2)**. He identified the Will to be the document marked the **Applicant's Exhibit No. 1** herein.

[5] The Applicant's uncle, **William Kiplagat Toroitich (OW2)** also testified herein on **13 November 2018**. He similarly adopted his Witness Statement dated **27 April 2017** confirming that the Deceased, **Kipchumba Toroitich Kiptengwa**, was his brother; and that he is survived by his only son, **Charles Kipchumba**. He further testified that the Deceased wrote a Will dated **7 March 1993** and that he was one of the two witnesses to the Will; the other witness being his sister in law, **Roseline Tabarno Kipkurgat (OW3).** He added that he kept the Will and had been looking for it but was unable to find it until his son, **Christopher Kiplagat** passed on, when they found it to be among his documents; and that had he found it earlier, he would have handed it over to the beneficiary.

[6] **OW2** denied that the Deceased was married to the Petitioner/Respondent in his lifetime; and was categorical that no dowry ceremony was ever held for the Respondent in accordance with the Keiyo customary laws. He added that had any such ceremony been held, he would, no doubt, have attended it along with his father and his friends; and that some cattle would have been taken as dowry after the couple had had children. **OW2** further told the Court that, although the Deceased lived in **Simotwo**, he also had a home at **Beliomo** where he bought some land. He added that it was within his knowledge that one of the Deceased's grandsons lived in the **Beliomo** property.

[7] **Rosalina Tabarno Kurgat (OW3)** augmented the evidence of the Applicant and **OW2** and stated that the Deceased was her brother-in-law; and that he had only one offspring, namely, **Charles Kimurgor Kipchumba,** whom he sired with his deceased wife, **Kabon**. She denied that the Deceased had any other wife. She confirmed that she was a witness to the Will that the Deceased wrote shortly before his death.

[8] The Objector's last witness, **OW4,** was a neighbour by the name **John Kipkemboi Kwambai**. His evidence was that he knew the Deceased, **Kipchumba Toroitich,** and his family; and that he only had one wife, **Kaabon Tamining**, and one child, **Charles Kimurgor**. He further stated that, as good neighbours, he was in attendance at all the marriage ceremonies that occurred within the families of the Deceased and his brothers. He further confirmed that he visited the Deceased at his **Beliomo** home where he was staying with one of his grandsons. He therefore denied that the Respondent was married to the Deceased, adding that he would not only have known of it, but would also have attended the marriage ceremony.

[9] On her part, the Petitioner/Respondent, **Selina Tingo Kipchumba (RW1)** adopted the Witness Statement filed by her on **5 July 2017** and asserted that she is the widow of the Deceased, having been married to him in his lifetime in accordance with Kalenjin customary law; and that they lived together as husband and wife at **Komba Emit** on the parcel of land known as **Tembeleo/Elgeyo Border Block 9 Komba Emit/76;** and thereafter at **Beliomo** on **Parcel No. Sergoit/Elgeyo Border (Beliomo)19**. According to her, all the Deceased's relatives knew her very well as the wife/widow of the Deceased; and to that end, she produced a photograph **(Respondent's Exhibit 1)** purporting it to be a family photograph taken with the Deceased's brothers at the **Beliomo** home before her eviction from the home. She added that she has not re-married since the death of the Deceased.

[10] The Respondent refuted the averment by the Objector/Applicant that the Deceased left a Will bequeathing all his property to the Applicant. According to her, the Deceased was illiterate and therefore could not have written the Will that was produced herein by **OW2.** The Respondent also mentioned that she has the Title Deed for the **Beliomo property** in her custody; and that the said Title is in her name. She acknowledged that the Applicant is the only offspring of the Deceased with his first wife; and therefore proposed that, since the Deceased left behind three pieces of land, she be given the **Beliomo property;** and that the **Komba Emit property** be shared equally between her and the Applicant; while the **Mutei farm** be given wholly to the Applicant.

[11] The Respondent called two witnesses in support of her case, namely, **Saulo Kiprono Kandie (RW2),** and **Enock Kipchirchir Katam (RW3),** who were neighbours of the Deceased at **Beliomo. RW2** testified herein to the fact that the Deceased and the Respondent, **Selina Tingo**, were husband and wife. He made a clarification to the effect that though in his Witness Statement it was indicated that he attended the traditional marriage ceremony known as **"Koito"** for **Selina**, this was not the case, as he was not a member of the Deceased's clan. He adopted his Witness Statement dated **10 May 2017** and testified that the Respondent continued to live on the Deceased's **Beliomo Property** for two years after the death of the Deceased in **1995** until she was chased away by the Applicant and his children.

[12] **RW3** also testified that the Deceased was his close neighbour; and that it was therefore within his knowledge that he cohabited with the Respondent at the Deceased's **Beliomo Property** as husband and wife. He further stated that the Respondent continued to reside in the **Beliomo Property** for two years after the death of the Deceased in **1995** until her eviction by the Applicant and his children.

[13] Pursuant to the directions given on **20 November 2018**, Counsel for the Applicant filed written submissions on **10 December 2018** reiterating his contention that a valid Will dated **7 March 1993** was left by the Deceased which was produced herein as the **Applicant's Exhibit No. 1**; and that the Deceased had the requisite capacity to make the Will for purposes of **Section II** of the **Law of Succession Act**. He further submitted that the Will was validly attested by **William Toroitich** and **Rosaline Tabarno Kipkurgat**. She relied on **Wambui & Another vs. Gikonyo & 3 Others [1988] KLR** to support her argument that an illiterate or mentally sick person can express his wishes by way of a Will on the disposition of his property in the event of his demise; so long as the prerequisites of a valid Will are met. Counsel further submitted that since the law presumes that the testator was of sound mind, the burden of proof was on the Respondent to demonstrate that the Deceased was of unsound mind or otherwise incapable of making a Will; which burden has not been discharged herein. Accordingly, Counsel for the Applicant urged the Court to find that the Deceased died testate and to proceed and uphold the wishes of the Deceased as per the testamentary disposition he made.

[14] With regard to the allegations by the Respondent that she was married to the Deceased, it was the submission of **Ms. Tum** that the onus was on her to prove the existence of the alleged marriage. In support of that argument, Counsel relied on **Section 60** of the **Evidence Act, Restatement of African Law of Marriage and Divorce by Eugine Cotran,** as well as the cases of **Hortensia Wanjiku Yawe vs. The Public Trustee, Civil Appeal No. 13 of 1976, Sakina Sote Kaittany & Another vs. Mary Wamaitha [1995] eKLR** and **Gachigi vs. Kamau [2003] KLR**. She therefore submitted that, in the event that the Court finds that the Deceased died intestate, it should find that the Applicant is the only beneficiary entitled to inherit his Estate.

[15] The Court was further urged to find that the Respondent acted fraudulently by not disclosing that the Deceased was survived by a son and that the Deceased had other properties other than the **Beliomo Property;** and therefore that, sufficient cause has been shown for the revocation of Grant pursuant to **Section 76** of the **Law of Succession Act.** Counsel also relied on **Re Estate of Ochieng' [1994] KLR** in which a Grant was revoked on the ground that the Petitioner did not disclose that the deceased was survived by a legal wife. In addition, the Applicant posited that the discovery of the Will of the Deceased comprised sufficient cause for revocation in line **Order 45** of the **Civil Procedure Rules** as read with **Rule 63(1)** of the **Probate & Administration Rules.**

[16] In the Respondent's written submissions filed on **30 November 2018, Mr. Korir**, Learned Counsel for the Respondent urged the Court to note that, in their evidence, the Applicant's witnesses, namely, **William Kiplagat Toroitich** and **Roseline Tabarno Kipkurgat**, told the Court that the Deceased was ill and was in hospital at the time he allegedly made his Will; and that he was not only illiterate but was also so sick that he could not comprehend what was going on or control his own actions. Hence, Counsel relied on **John Kinuthia Githinji vs. Githua Kiarie & Others, Civil Appeal No. 99 of 1998** and **Krishna Kumar Bhatti, Nairobi Succession Cause No. 3221 of 2013** for the holding that a testator must, of necessity, know and approve the contents of his Will in accordance with **Section 7** of the **Law of Succession Act**.

[17] It was further the submission of **Mr. Korir** that, should the Court agree with the Respondent that the so called Will is an invalid document, then it would fall back on **Part V** of the **Law of Succession Act** and find that the Deceased died intestate, and apply the provisions of **Sections 35 and 40** thereof in determining the application. Counsel urged the Court to adopt the proposal made by the Respondent on the distribution of the Estate of the Deceased; namely, that **the Beliomo Property** be given to her; the **Parcel No. Irong/Mutei/146** be given to the Applicant; and that **the Komba Emit Property** be shared equally between the parties.

[18] On the question whether the Respondent is entitled to a share of the Estate of the Deceased, **Mr. Korir** urged the Court to note that a Consent Order was recorded between the parties on **12 June 2018**, by which the Applicant expressly conceded that the Respondent is a beneficiary of the Estate of the Deceased and therefore entitled to half-share thereof. He therefore submitted that, once the consent was recorded and adopted as an Order of the Court and a Grant issued, the Petitioner remains an administrator and a beneficiary to the Estate unless and until the terms of the said Consent are set aside. He thus urged the Court to find that the Deceased had two houses comprising of **Kabon Tamining** and the Petitioner, **Selina Tingo Kipchumba** and that the Petitioner is entitled to a share of the Estate.

[19] The application was filed under **Section 76** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya,** which is explicit that:

> **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.**

[20] Accordingly, it is important to set out the full background of this matter so as to put the issues in perspective. According to the Affidavit filed in Support of Petition for Letters of Administration, sworn by **Selina Tingo Kipchumba** on **1 August 1998**, the Deceased died intestate on **28 November 1995** at Limo House Surgical Clinic; and that he left her as the only surviving widow. She also gave **the Beliomo Property** as the only asset left behind by the Deceased. The Petition was processed and a Grant of Letters of Administration Intestate was issued to the Petitioner which was subsequently confirmed on **5 December 2002**. The Objector/Applicant then filed an application dated **10 February 2003** for revocation of that Grant contending that:

> **[a]** The Grant was obtained by means of untrue allegation of facts;
>
> **[b] T**he Administrator concealed material facts to the court;
>
> **[c]** The Grant was confirmed fraudulently by making false statement to the court;

[d] The Administrator did not reveal to the court that there were other assets belonging to the deceased.

[21] The record further shows that, on the **12 June 2014,** the parties recorded a Consent Order in the following terms:

[a] That the letter of Administration granted on **27 September 2001** to the Petitioner and the Confirmed Grant issued on **5 December 2002** be set aside.

[b] The **Land Parcel Number Sergoit/Elgeyo Border Block 1 (Beliomo)/19** to revert to the name of the Deceased.

[c] That the Petitioner and the Objector be appointed as joint administrators of the Estate of the Deceased.

[d] That **Title No. Irong/Mutei/146** be included in the Schedule of Assets of the Deceased.

[e] That a further list of the inventory of assets or liabilities of the Deceased may be filed by any party within the next 14 days.

[f] That the Order of Court of **6 February 2014** for preservation of the Estate be discharged.

[22] In the premises, evidence adduced by the Objector/Applicant and submissions by Counsel for the Plaintiff that touch on the assertions that the Respondent acted fraudulently by not disclosing that the Deceased was survived by a son and that the Deceased had other properties other than the **Beliomo Property;** and therefore that, sufficient cause has been shown for the revocation of Grant pursuant to **Section 76(a) to (d)** of the **Law of Succession Act,** are misplaced**.** Misplaced because the grievances had been taken care of and corrected by the Consent Order dated **12 June 2014** by which the Objector was appointed a Co-Administrator. More importantly, the assertions are misplaced because the only ground raised in support of the instant application is that a Will of the Deceased was subsequently discovered.

[23] Accordingly, assuming that that would qualify as a valid ground for revocation of a Grant under **Section 76(e)** of the **Law of Succession Act,** namely: that the grant has become useless and inoperative through subsequent circumstances, in this case, the alleged discovery of the deceased's Will, the key issue for the Court's determination would be, whether the purported Will is a valid Will for purposes of **Section 11** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya;** which states:-

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.

[24] With the foregoing in mind, I have looked at the purported will marked **Objector's Exhibit No. 1** herein and it does show that there were two attesting witnesses, namely, **William Toroitich (OW2)** and **Rosaline Tabarno Kipkurgat (OW3).** However, the two witnesses told the Court that the Deceased was so sick at the time that he had to be helped to affix his thumb print on the document. In cross-examination **OW3** conceded thus:

"...The deceased was sick and therefore could not sign the will. He was about to die and William had to take his hand to place his thumbprint on the document. He was too sick and did not know what was happening. He could not wear his clothes on his own. He was about to die when he made the will..."

[25] Thus, a valid question to pose is whether the Deceased had the capacity to make a Will. In **Vaghella vs. Vaghella [1870] LR 5 QB 549**, it was held that:

"a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made."

[26] *Granted the circumstances set out by* **William Toroitich (OW2)** and **Rosaline Tabarno Kipkurgat (OW3)** as obtaining when **Objector's Exhibit 1** was written, it cannot be said that the Deceased was in full control of his mental faculty. *While it is true that even a sick person may have lucid moments as proposed by* ***Ms. Tum****, it cannot be said that there was a clear demonstration by the Objector that this was the case with the Deceased at the material time.* ***In Re Estate of Gatuthu Njuguna (Deceased) [1998] eKLR,*** *it was held thus:*

"where any dispute or doubt of sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the

person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity."

[27] In this instance, it was the attesting witnesses who alluded to the lack of capacity on the part of the Deceased. Neither the Objector nor **OW4** were present at the time and never touched on the alleged Will. Hence, it cannot be said that the person propounding the Will, namely the Objector, discharged the burden of demonstrating that the will was made by the Deceased during some lucid moment. Indeed the said document does indicate that the words used may not have been the Deceased's given their third party nature. The document reads thus in part:

"...Kuhusu kwa kusorota afya ya Mbwana Kipchumba Toroitich Kaptengwa ..."

One would have expected the Testator to personalize that phrase and thereby give a clear and unequivocal indication that he was intent on making a bequest. Moreover, the properties in question were not indicated.

[28] It is for the foregoing reasons that I am far from persuaded that **Objector's Exhibit No. 1** is a valid Will of the Deceased. Accordingly, I find no justifiable cause for revoking the Grant of Letters of Administration Intestate in respect of the Estate of **Kipchumba Toroitich Kiptengwa,** issued on **2 July 2014** to the Petitioner herein, **Selina Tingo Kipchumba** and the Respondent, **Charles Kimurgor Kipchumba**. Accordingly, I would dismiss the Objector's application dated **16 May 2016** with an order that each party shall bear their own costs of the said application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF MARCH 2019

OLGA SEWE

JUDGE