



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

SUCCESSION CAUSE NO.201 OF 2009

IN THE MATTER OF THE ESTATE OF KICHWEN LAGAT ANWOTO

ESTHER JEPTANUI LAGAT.....PETITIONER

VERSUS

EMILY JEBOR RONO.....OBJECTOR

ANDREW KOSKEI.....INTERESTED PARTY

RULING

1. The objector/applicant moved this court by an application dated 29th September 2011 for revocation of grant. The said application was brought under section 76 of the Succession Act and rule 44 of probate and Administration Rules. A grant had been issued to Esther Jeptanui Lagat and Joel K. Keino on 30th November 2009 for the estate of the late Kichwen Lagat Anwoto who had died intestate. The applicant was seeking the said grant be revoked on the grounds that the proceedings were defective, the grant had been obtained fraudulently by concealing material facts from the court and the administrators had failed to administer the estate in the right and/proper way.

2. The affidavit in support of the summons for revocation of grant was sworn by the objector Emily Jebor Rono. She deposed that the deceased died on 12.10.2008 and the petitioner had failed to disclose material facts, further she failed to disclose that other beneficiaries existed, including the applicant, by virtue of her being a daughter-in-law who had been married to his only son from the first house. Prior to his death the deceased had distributed his parcel of land no. Nandi/Chemoswo/530 which measures 9 acres as follows:

- a) Tarmatta Lagat (deceased) 1st house 4 ½ acres
- b) Esther Jeptanui Lagat.....2nd house 3 acres
- c) Hellen Cheptum.....Daughter 1 ½ acres

3. The petitioner disposed off her entire land and bought land in Kimogoch village where she lives, Joel Keino is a stranger to the family and not a relative to the deceased thus not an heir. He could not have been appointed an administrator. The family did not consent to the petitioner obtaining a grant and she had failed to disclose liabilities of the estate as the purchasers of the ancestral land had to be refunded their money. She had been allocated parcel no. Nandi/Chemoswo /530 and she had settled her nine children on the land. The petitioner had come to court with unclean hands and with the purpose of disinheriting the other dependents'. She further deposed that the petitioner be compelled to produce a full and accurate account of how she has administered the estate. She prayed that her application be allowed.

4. In response, Andrew Koskei swore a replying affidavit and deposed that he is an interested party by virtue of being a grandson to the deceased and a son to Emily Jebor Rono the objector. Further that prior to his death, the deceased had distributed his land as stated in paragraph two above. The petitioner however sold off her entire 3 acres in Nandi/Chemoswo/530 and settled in Kimogoch village. The petitioner wanted to unjustly enrich herself by claiming a share in Nandi/Chemoswo/530. Joel Keino was a stranger to the family thus it was not proper for him to apply to be granted letters of administration. The petitioner sold off her land to the following people who may need their refund:

- a) SK.....1 acre
- b) Wilson Kogey.....0.5 acres
- c) Pius Sawe.....0.5 acres

d) SK.....1 acre

The petitioner moved out of the land in 2003.

5. The portion of land given to Tarmarta Lagat (who is his grandmother) of 4.5 acres in Nandi/Chemuswo/530 was given to him and he has been in occupation of the same with no interference.

6. The petitioner filed a supplementary affidavit deponing that she was the only surviving widow to the late Kichwen Lagat Anwoto and indeed plot no. 531 was occupied by the 1st house of the late Tarmarta Lagat. She was occupying plot number 530 before she was forcefully evicted by the first house. Her late husband had made arrangements with Japhet Chumo who was to occupy parcel no. 530 in exchange with his. The averments made by Andrew Koskei were false and baseless and he could not claim to have right over the property more than her who was the legal wife.

7. She averred to have children namely:

a) Emmanuel Kimutai18 years

b) JJ.....15 years

c) SK.....12 years

d) GJ.....1 year 5 months.

8. She was aware the deceased had sold 3 acres of land to the following:

a) SK.....1 acre

b) Wilson Kogei.....1 acre

c) Joshua Kirwa Barngetuny.....1 acre. The land was sold by the deceased for his own upkeep and the entire village was aware of the same. The remaining land is 6 acres and she was entitled to them.

9. The matter for distribution proceeded to hearing by way of viva voce evidence. On 26.3.2012 the court ordered the interested party to file directions on mode of distribution. On 24.6.2013, the parties counsel gave an opening statement on the case.

EVIDENCE

Petitioner's case

10. Esther Lagat (PW1) was sworn in Nandi and she testified that the deceased was her husband and they had three issues from the marriage namely: Emmanuel Kimutai, Joyline Kiptoo and SK. His husband had plot no. 530 and 531 measuring 9 acres and 6 acres respectively. She had a co-wife by the name Tarmata Lagat, they had settled on plot number 530 with the deceased, however the children of the 1st house chased her away. S and J bought one acre, the deceased had sold 3 acres in total. The 1st wife had been given plot no. 531, Emily Rono was her daughter-in-law. She was not in agreement that only plot number 530 was the deceased property. One of her children had dropped out of school due to lack of school fees to educate them, she wanted her land so that she could re-claim them.

11. On cross-examination she stated that she has lived in Kapsoya for about 20 years and the land measures about 4 acres. She was married in 1994. Henry Chebor was already living there on the plot belonging to the 1st wife. She was chased away when she tried to settle on plot 530.

12. On further cross-examination by counsel for the interested party she testified that she knew Andrew Kogei as son of the daughter to the 1st wife. Her husband had hived off three acres of land which was not used to buy land at Kimongoch. The deceased had exchanged it with Japheth Chumo. Her husband had exchanged 6 acres of land in 530 with Japheth, there were other 3 purchasers in 530. On re-examination

he stated that Hellen Cheptum was daughter to the 1st wife who had three children. Andrew was grandson to the deceased. Japheth was chased away from 530 and Andrew occupied the land. They have never got titles to the 6 acres for Japheth and 4 acres for herself.

13. SK (PW2) testified that he had bought one acre of Nandi/Chemiso/530 for Ksh 55,000/=, an agreement was made on 22.1.2000. He entered the land on 23.1.2000 and started cultivating. On 6.6.2006 they went to the land control board and consent to sub divide into 5 portions was given. He produced letter from land control board (pex no.2), the deceased was in the process of sub-dividing when he died. The official sub-division was not done. The dispute was taken to the district tribunal who ruled that the land remains in the 5 portions of land (proceedings to the land dispute pex no. 3). He had cultivated the land for 10 years before deceased died, and he was chased out of the land by Andrew. It was reported to the police and the OCS informed them to remain in their respective parcels. Andrew cut down trees belonging to a buyer called Andrew.

14. On cross-examination by counsel for the interested party he said that a sale agreement was done in the year 2000 though it does not reflect the parcel number. Kichwen Lagat had sold the land to him. An order was issued by the court to stop any transfer of land.

15. Joshua Kirwa Barngetuny was sworn in Kiswahili, he stated that he knew Kichwen Lagat in 1999, an agreement was written at the chief's office (pex no. 4). He was claiming interest as a buyer. On cross-examination by counsel for the interested party he stated that Esther Lagat witnessed the sale agreement since she had already been given 6 acres in 530. In re-examination he stated that 1st wife was given 6 acres in 531 and 2nd wife 6 acres in 530.

16. Wilson Kiptoo Kogei (PW4) testified that he knew Kichwen Anwoto. He had sold one acre out of plot number no. 530, they wrote a sale agreement on 14.11.2001. On 26.1.2002 he sold another 0.2 acre and in 2006 he sold another half an acre. He paid all the money to the deceased. He had cultivated the land for 6 acres when he was chased away by Andrew when the deceased died. He was now occupying the second 1/2 acre of 530. On cross-examination he testified that he bought the 1st half acre from Kichwen Lagat and Esther Lagat, the deceased name did not appear. He was not a party to the 2nd agreement.

17. Japeth Chirchir Tum (PW5) testified that he knew Kichwen Lagat. Esther Jeptanui was the 2nd wife, the 1st was called Tarmata. The deceased had land measuring 5 acres which he divided into 6 and 9 acres. He sold 3 acres leaving 6 acres. Tarmata was occupying 531 whereas Esther 530 where she lived. The deceased had sold land to Simion Shikuku and Barngetuny each an acre. He was approached by the deceased to exchange land since his wives were having differences. They had recorded an agreement which is dated 2.11.2003. Before this, the 1st wife settled on 531 and the 2nd wife on 530. By this time he had already sold 3 acres of land. Esther and her children have been residing on his land plot number 520. The purchasers to the land were Simon who bought one acre, Wilson Kogei and Joshua Barngetuny. He had agreed with the deceased to exchange land and the exchange was witnessed by Musa Kirarei, Shadrack Mutai, Japeth Matutu and Joel Keino (pex no. 7), the 2nd wife went to live in his plot number 520 together with the deceased and their children and they are still residing on the said parcel to date. He still had title to the said land. The objector refused him to go into the parcel of land. The deceased was buried on parcel no. 530, Esther did not sell any land, the 1st wife had three children. The objector was married to one of the sons to the 1st wife.

18. On cross-examination he testified that the agreement did not disclose which parcels of land were being exchanged. By the time Esther was being married, Emily the objector was occupying plot no. 530. Currently Esther was occupying plot number 530 and 531. The deceased was buried on plot no. 530. On cross-examination by counsel for the interested party he said that the agreement was entered in 2003, no transfer was effected and he was not aware that Esther had sold the shamba the deceased had given her.

19. In re-examination he stated that he did not know why the deceased was buried on plot no. 530, Esther to date lived on his land.

Objector's case

20. Emily Rono (Ob 1) was sworn in Kiswahili and testified that she was the objector and she asked the court to adopt her statement recorded on 29.9.2011.

21. On cross-examination she stated that the deceased was his father-in-law, who had two wives, Tarmata was the 1st wife and she had three children amongst them, Henry Kosgei her husband. Andrew Koskei was her child and grandson to the deceased. The entire land was 15 acres comprising of plot no. 530 and 531, no. 530 was in the name of the deceased and 531 was in her name, she had title to it, 531 was 6 acres whereas 530 was 9 acres. No. 531 was transferred to Henry Kipkosgei Maiyo her husband, though it did not reflect in the title. Her son Andrew was using parcel number 530 which is 9 acres, both parcels are in the name of the deceased. Kichwen Lagat and Esther were living on parcel no. 530, however Esther was no longer living on the parcel no. 530, she was on Japeth Chumo's land, the deceased had not exchanged parcel no. 530 with Japeth's land. The exchange was not prompted by her quarrels with Esther, Tarmata and Esther had been quarreling when the deceased was alive. The deceased had sold 3 acres of parcel no. 530, it remained 6 acres and parcel no. 531 is also 6 acres. The deceased estate comprised 6 acres, her son and herself were utilizing the entire estate. The 3 acres were sold to three different people. The other purchasers were utilizing their parcels 6-7 years before the demise of the deceased, apart from Japeth Chumo who was stopped by Tarmata and her son, Andrew chased away the three purchasers, the purchasers deserve to be given their portions of land. Esther and her children did not deserve the 6 acres, she was given parcel number 531 by the deceased, her husband had died by then. She was not given any document. Her son said that Tarmata had given her parcel number 530. Tarmata had no title to parcel Number 530. She could not give what did not belong to her. Esther sold 530 that is why she shifted. She did not have any agreement to prove the same. She did not object to Esther's children getting 530 and Tarmata gets 531, Andrew was a grandson to the deceased though he could not inherit directly. He could only inherit from her. She was in court to claim her husband's share.

22. Counsel for the interested party did not cross-examine but associated himself with the evidence in chief of the objector.

Interested Party's case

23. Andrew Kibiwot Koskei (PW1) was sworn in Kiswahili. He stated that his statement recorded on 31.3.2012 be adopted as evidence of the court.

24. On cross-examination by Mr. Kibii he stated that Kichwen Lagat Anwata was his grandfather, the objector was his mother and Esther Jeptanui was his grandmother. His grandfather had two wives, Tarmata and Esther. Tarmata died in 2009, she was living on parcel number 530. Her mother lives on parcel no. 531. Esther and her husband were living on parcel number 530, she was married in 1997 and they moved in 2003 when the deceased was still alive. They went to live on Japeth Chumo's land. They learnt later that Japeth Chumo and Kichwen Lagat had exchanged land, Japeth had allowed the second family to use his land. He was not aware whether the land was still in his name. Japeth never used parcel no. 530, the deceased had sold part of parcel no. 530. He later learnt 3 acres had been sold to Simon Kiptoo, Pius Sawe and Wilson Kogei who was present in court, he bought ½ an acre and an acre, Pius ½ acre, Stephen one acre. The 1st portion was sold in 1998, the other could have been in 2003. The purchasers used the land for a while but were forcefully removed. He was living with her grandmother. He had denied the purchasers and Japeth Chumo the land to use, that the deceased had told them Simion had only paid Ksh.20,000/= yet the agreed purchase price was Ksh.55000/=. He agreed to be using 4 ½ acres of parcel no. 530, 1 ½ acres were being used by her aunt's children Hellen Cheptum who was deceased. His father had given her 0.5 acres, 3 acres were being used by her brothers. Parcel

no. 531 was being used by her mother. His grandfather had told him not to allow Japeth to utilize the land, though he did not have an agreement between his grandfather and Japeth. The title was still in his grandfather's name. Tarmata did not have any title when he gave him land. If Esther was pushed out by Japeth she could occupy 3 acres in parcel number 530, he would still use 4.5 acres bigger than the wife to the deceased. Tarmata's children were bigger than Esther's who were young. Tarmata had told him to care for her grave on the land. He denied that his mother and him wanted to take the entire land.

25. The interested party's case was closed.

26. Parties agreed to file written submissions.

Submissions

Objector's submission

27. It was her submission that she associated herself with the evidence of the interested party. The deceased had distributed parcel number Nandi/Chemoswo/530 which measured 9 acres to Tarmata Lagat to have 4.5 acres, Esther Lagat the 2nd house 3 acres and Hellen Cheptum 1.5 acres. Esther had sold off her entire 3 acres of land in plot no. 530 and bought land in Kimogoch village, thus she wanted to unjustly enrich herself.

28. The co-administrator Joel Keino was a stranger to the family.

29. Further Esther had sold her 3 acres of land to SK 1 acre, Wilson Kogey 0.5 acres, Pius Sawe 0.5 acres and Stephen Kosgey 1 acres. The petitioner was not in occupation or use of parcel no. 530. The court was urged to uphold the objection with costs.

Interested party's submission

30. It was his submission through counsel that they supported the objections case. The deceased had distributed parcel number Nandi/Chemoswo/530 as elaborated at paragraph 27 above. The 4.5 acres in parcel number 530 was given to him by his grandmother as a gift and he has been using it. A gift cannot be subject to succession. The petitioner had already sold off her interest in parcel number 530 and thus she only wanted to unjustly enrich herself.

Petitioner's submissions

31. **(The party retaliated the evidence given by the objector and the interested party)**. The petitioner had proved that PW3, PW4 and PW5 were purchasers for value a fact not disputed. PW5 had even produced a consent from the land control board and its approval dated 6.6.2006 and the tribunal proceedings. This was clear that they were entitled to their respective parcels. In **Re Estate of Gitau (deceased) [2002] 2KLR 430**, Khamoni J. expressed himself as,

“Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation of annulment of the grant which, as in this case, has nothing wrong.

While Section 76 of the Law of Succession Act should be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them.”

32. Further in **Mpatinga Ole Kamuye v. Meliyo TRipango & 2 Ors (2017) eKLR**, the court observed that under Section 71 of the Law of Succession Act, the court has to satisfy itself that the beneficiaries of the estate are legitimate beneficiaries of the estate, that there are assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution.

33. In addition, the objector and her son, the interested party were claiming ownership of all the parcels of land no. 530 and 531 excluding the petitioner and the purchasers. The deceased had died intestate and had left behind one spouse, the court has to consider the issues from the 1st house, the petitioner and her children since the 1st wife was deceased. Section 29 of the Law of Succession Act Cap 160 provides for who is a dependant. The objector being a wife to Henry Maiyo, son to the deceased and from the 1st house also qualified to be a dependant. The objectors and interested party's argument that the deceased had distributed his estate before his demise was not proved, the court was referred to **Re Estate of Lazaro Chepkaitanyi Chebii(deceased) [2019] eKLR** and **Re Estate of Joseph M'ithili M'thirua (deceased) [2019] eKLR**, where Section 40 and 35 of the Law of Succession was elaborated that there should be equality and equity in distribution of the estate of the deceased amongst dependants.

34. On whether the 1st wife had gifted the interested party 4 ½ acres of land out of Nandi/ Chemoswo/530 before her demise, the deceased widow did not own any property to gift away. There was no evidence to prove the same, the land was still registered under the deceased (Kichwen Lagat), see **The Registered Trustees Anglican Church of Kenya Mbeere Diocese v. David Waweru Njoroge (2007) eKLR**.

35. In addition to the above the interested party's interest fell under the objector who was a beneficiary. The interested party could not bypass the petitioner and her children to inherit from his grandfather while they were all alive. His case was ill-motivated and amounted to an abuse of the court process.

36. Finally, the court was urged to distribute the deceased estate of 12 acres excluding the 3 acres that he had sold to the purchasers. This was to enable the petitioner proceed with the earlier arrangement the deceased had started with exchanging the same with Japeth. It was urged that the property be shared equally between all the surviving dependants.

Analysis and determination

37. The issues that arise for determination are:

- i. Whether the grant issued by the court should be revoked
- ii. Whether the objector and interested party are dependants and therefore entitled to the estate
- iii. Which is the applicable mode of distribution

38. The objector moved to this court citing that the petitioner and Joel K. Keino had applied to be administrators to the estate of the deceased and the grant should therefore be revoked for the reason that Joel Keino was a stranger to the estate and that the petitioner had failed to disclose material information.

39. The petitioner called 5 witnesses, objector one and the interested party as well testified. From the evidence of all parties it came out clearly that the petitioner was the 2nd wife to the deceased Kichwen Lagat, the objector was wife to the son of the deceased from the 1st house, the 1st wife Tarmata was now deceased and the interested party was the grandson to the deceased and son to the objector. This was not in dispute at all.

40. The petitioner in her affidavit in support of summons for confirmation of grant of administration had stated that the deceased was survived by three children namely Edwin Kimutai, Eunice Jeptoo and SK. She further stated that the deceased further dependants were Esther Jeptanui (petitioner herself) and Emily Jebor Rono who is the deceased daughter-in-law and the objector herein. The petitioner had not hidden the fact that the objector was a dependant to the deceased. Therefore on this ground alone, the grant cannot be revoked.

41. Section 76 of the *Law of Succession Act* provides for the circumstances when grant can be revoked. The court is guided by this proviso to either annul or revoke a grant. It states as follows:

76. Revocation or annulment of grant

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.*

42. The objector and interested party have not proved any of the above and the grant cannot therefore be annulled. In **Re Estate of Mburu Gitau (deceased) [2002] ektr**, the court opined as follows:

“Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation of annulment of the grant which, as in this case, has nothing wrong.

While Section 76 of the Law of Succession Act should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and

section 76 is not one of them.”

The objector and interested party cannot complain of issuance of grant when their evidence is entirely on distribution of the estate.

Purchased land

43. The evidence from the parties also clearly shows that the deceased had two properties namely Nandi/Chemuswo/530 and 531. The objectors issue and interested party was that they were objecting to the petitioner having a portion of land in parcel no. 530. On the other hand it came up during trial that there were three parties who had purchased land and one Japeth (PW5) who had agreed to exchange his parcel no. 520 with the deceased but the same was never finalized. In such circumstances the court has to determine this first before embarking on the issue of distribution. In **Re Estate of Julius Ndubi Javan(deceased)[2018] eklr**, the court opined as follows:

“[14] *The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which prima facie valid should be determined before confirmation. See rule 41 below:-*

41. Hearing of application for confirmation

(1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.

(2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.

(3) 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 Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant. [Underlining mine for emphasis]

(4) In proceedings under subrule (3), unless the court otherwise directs, the personal representative of the deceased shall be the applicant seeking determination of the question, and the person claiming so to be beneficially interested together with the residuary legatee or other person to be appointed by the court to represent the residuary estate shall be the respondents; and the court in such proceedings shall give all necessary directions relative to the prosecution thereof including the safeguarding of the share or estate so appropriated and set aside and the provision of costs.

(5) Where the court in exercise of its power under section 71 (2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and shall appoint a date not more than six months ahead, by which time the accounts of the completed administration shall be produced to the court for its approval.

(6) Where the court, in exercise of its power under section 71 (2) (b) of the Act, instead of confirming a grant already issued directs the issue of a confirmed grant, this grant may be in Form 55.

(7) On production of the accounts in court any person beneficially entitled and any creditor may appear and be heard before the court's approval is given. (8) The approval of the accounts in court may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced. (9) On the date for approval of the accounts and on any adjourned date application may be made for an adjournment to a fixed date not longer than three months away.

44. The properties Nandi/Chemuswo/530 and 531 had been registered under the name of the deceased Kichwen Lagat Anwotot as per the certificate of search dated 21.5.2009. Titles to these land had been issued in 1998. There is on record an application for consent to subdivide parcel no. 530 into 5 portions. The objector stated that the deceased had sold the land to three purchasers (PW2, PW3 and PW4) however they were not utilizing the land since his son had chased them away. This collaborated the evidence by the petitioner that there was land that had been sold by her husband and the purchasers themselves. The entire land that had been sold was 3 acres. This will therefore not be subject to distribution of the estate. However the evidence by the interested party that the purchasers had not cleared payment of the suit land does not arise as it may as well be an issue for the Environment and Land court.

45. Infact the interested party had testified in cross-examination that the deceased had sold a portion of land in parcel no. 530. That he was in occupation of 4.5 acres of this and he would still utilize the same. (He does not seem remorseful). He however chased the purchasers away from utilizing the land when the deceased passed on. Therefore, it is clear that the 3 acres shall not be included in the estate of the deceased.

Distribution of the estate

46. On the issue of distribution, the deceased died intestate since there is no evidence that he had made a will and that prior to his demise he had legally distributed his land. The two properties are Nandi/Chemuswo/ 530 and 531 which measure 9 and 6 acres respectively. It was the evidence of the objector that before the deceased died the petitioner and her children were living on parcel no. 530 though she no longer lived on the same parcel, she was living on the land of Japeth. This corroborates the evidence of the petitioner and PW5 that the deceased wanted to exchange their land since the petitioner and the 1st wife quarreled. It was the evidence of the objector that the interested party and herself had occupied and were using the entire land.

47. The interested party testified in cross- examination that Tarmat the 1st wife was living on plot no. 530 and his mother lived on plot no.531. He further said that when the deceased was alive he moved his 2nd house to Japeth Chumo's land.

48. This leads us to the next issue:- Who are the dependants of the deceased. *Section 29 of the Law of Succession Act* defines who dependants are:

(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, grand-parents, 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;

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

49. The petitioner was a wife to the deceased as per clause 29(a) and therefore she was entitled to inherit from her husband. The objector is a daughter-in-law to the deceased and interested party is grandson from the 1st house. All are dependants.

50. The next issue is on distribution of the estate. The deceased had two houses, the 1st wife Tarmata was deceased but was survived by a daughter-in-law the objector herein. The interested party had testified that the children to Hellen Cheptum (daughter to deceased) lived on 1 ½ acres of land in parcel no. 530. Andrew Koskei the interested party and the objector had stated that the deceased had distributed land no. 530 as follows: Tarmata (1st house) 4.5 acres, Esther Jeptanui (2nd house) 3 acres and Hellen Cheptum 1.5 acres and that is how they wanted the land to be distributed. Further that since the petitioner had sold off her entire 3 acres she was not eligible to any other parcel of land. The objector and the interested party were occupying the entire Estate.

51. It is indeed sad that the petitioner being a wife to the deceased has been "disinherited" and neither the objector nor the interested party are remorseful about it. They seem to have colluded to chase away even the purchasers. *Section 29(a)* shows the petitioner is a dependant and therefore entitled to the deceased estate.

52. The court shall be guided by *Section 40 of the Law of Succession Act* on distribution of property of the deceased incases where the deceased had more than one wife.

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

53. The petitioner had opined that the property be distributed equally. The law is clear on the provision to apply. Further the court has got to exercise its discretion where need be on the mode of distribution. Parties in this case had to consider children in each house as provided by the law as was held in **Re Estate of Martin Joseph Wandera (deceased) [2019] eklr.**

54. In addition to the above, this court is also in agreement by the decision in **Re Estate of John Katumanga (deceased) [2014] eklr** where the judge held as follows:

"26. Under Section 40 of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the Law of Succession Act, the children would divide the estate equally amongst themselves. Section 40 was not designed for the circumstances of the instant estate, but it would appear more appealing for the purpose of distribution of the said estate than Section 35.

27. The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is "equally" as opposed to "equitably". This is the plain language of the provisions. The provisions are in mandatory terms – the property "shall ... be equally divided among the surviving children." Equal distribution is envisaged regardless of the ages, gender and financial status of the children.

28. Equal distribution does not always work justice, especially in polygamous situations, where the youngest child of the deceased

may be one (1) year old, while the eldest may be over fifty (50) years of age. The infant no doubt would have far greater needs than the fifty year old, who would generally have received education and has probably been settled in life by the deceased. There cannot be justice in equal distribution in such case. The fortunes of one child may be better those that of the other – one could end up in a lowly job, say a driver or office messenger or nurse or nursery school teacher, with the other becoming a commercial pilot or the Chief Executive Officer of a blue-chip company. There would be no fairness in equal distribution in such a case. The law as currently framed does not do justice in such circumstance. Ideally, equal distribution should be the principle, with some discretion left to the court to consider the circumstances of each case.

29. *The inequity in the equal distribution principle has often caused disquiet. Omolo JA in Rono vs Rono and another (2005) 1 EA 363, remarked that equal division works injustice especially in the case of a young child who is still to be maintained and educated, and generally seen through life. The appeal judge took the view that Section 40 of the Act did not provide that each child must receive the same or equal portion. That was opinion of a higher bench. Section 40 of the Act is not independent of Sections 35 and 38 of the Act, division is to be in equal portions. The plight of minor children is no doubt precarious in this scenario. The provisions cry out for amendment. In the meantime Article 53(2) of the Constitution can ameliorate the situation, by the court looking at the matter from the perspective that the best interests of the child are of paramount importance in every matter concerning the child.”*

55. The deceased had two houses and parcels of land No. Nandi/Chemuswo/531 and Nandi/Chemuswo/530. 531 was 6 acres and 530 9 acres. The deceased sold 3 acres from 530 to make it 6 acres. The said equal parcels were occupied each by one house. The deceased later moved to 520 from 530 with the Petitioner’s family and the owner of 520 (PW-5), was to relocate in my view to 530, to avoid quarrels between the two houses.

56. The deceased had therefore made good and fair arrangement of how he had intended his family to live during his life time. Disorganizing the same at this point will unfairly affect the purchasers and the owner of land Parcel No. 520, which is already occupied by the Petitioner’s family.

57. The distribution in place is therefore fair. The objector and the interested party are not disinherited and have failed to establish sufficient grounds under Section 76 of the Law of Succession Act, which would warrant revocation or annulment of the grant. The application therefore lacks merit and is dismissed with costs to the petitioner.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET via EMAIL this 30th day of April, 2020.