REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

MISC.SUCCESSION CASE NO. 1 OF 2018

IN THE MATTER ESTATE OF GANO EDEMA BARSO (DECEASED)

TAGAYE HUSSEIN EDEMA.....PETITIONER/RESPONDENT

VERSUS

HUSSEIN EDEMA BARISO.....OBJECTOR/APPLICANT

JUDGMENT

The late GANO EDAMA BARSO died on the 27th of November 2015 aged 73 years old. The petitioner TAGAYE HUSSEIN EDEMA petitioned the Principal Magistrate court vide Succession Cause Number 5 of 2016 seeking letters of administration intestate. A grant was issued on the 20th of January 2017. The objector HUSSEIN EDEMA BARISO filed an application dated 11th December 2017 seeking the revocation of the grant on the grounds that the same was obtained by making of false statements and concealment of material facts to the courts as well as through the use of defective procedures. On 5th March 2018 the objector filed an application before this court seeking to have the succession cause pending before the Magistrate court transferred to the High Court. Parties filed a consent dated 19th March 2018 whereby the application by the objector was allowed and the matter was transferred to this court. The consent was adopted as an order of this court on 21st of March 2018. On 17th April 2018 directions were given whereby the matter was to proceed by way of oral evidence. The objector became the plaintiff while the petitioner is the defendant. Two witnesses testified for the objector/plaintiff while three witnesses testified for the petitioner/defendant.

I do wish to state at the outset that at times courts are in dilemma as to whether the decision should be in form of a ruling or a judgment. The objection is brought by way of an application. My view is that once the Court opts to determine the application by way of oral evidence and proceed to consider the objector as the plaintiff and the petitioner as the defendant and take witness testimonies, then the decision of the Court should be in form of a judgement. Where parties opt to determine the summons for revocation of the grant by way of affidavits and submissions (both oral and written), then the Court's decision should be in form of a ruling.

PW1 HUSSEIN EDEMA BARISO is the plaintiff. He testified that he is not related to the defendant. He has known the defendant for over ten years. The defendant used to be his employee. The defendant stole the plaintiff's identity card and had himself registered using the plaintifff's names. It is his evidence that the deceased was his younger brother. Their father was called EDEMA BARISO. The plaintiff used to work with the ministry of agriculture but has now retired. On 29th January 1970 he purchased land from one MASANJA. At that time the law did not allow one person to own two pieces of land. He had another land namely plot number MARSABIT/MOUTAIN/442 and therefore could not register the land he bought from Masanja in his name. He registered the land in the names of the deceased. He lived on the land he bought from Masanja for thirteen years and then moved to Marsabit town. He left the plot with his father who lived there for twelve years. The plaintiff then transferred his father to Marsabit town and left the plot with the deceased. It is the plaintiff's further evidence that the deceased was not married. The deceased used to live on a plot near SAKU and at times he used to live with the plaintiff. The deceased is closer to the plaintiff than the defendant. The defendant unlawfully took the ownership documents and claimed the land. During the colonial period one could not be allowed to own two plots. By the time he entered into the sale agreement Kenya had obtained its freedom but the colonial law was still in existence.

The plaintiff denied that part of the land was given out for a mosque before the deceased died. Together with the deceased they sold a portion of land to one ZEINAB DIMA. He further denied that the deceased sold a plot measuring 100 by 100 feet to HUSSEIN BUNGE. When the deceased died, the defendant took the title deed, the deceased's identity card and money. The plaintiff reported to the police that the defendant had taken away the deceased's property. According to him the deceased did not leave any will. The deceased was sick for three days only. While taking him to hospital in Meru the deceased died on the way. He brought him back and they buried him. He trusted his late brother and that is why the land was registered in the deceased's name. The deceased used to work for the Marsabit County council but was later dismissed from employment.

PW2 ELISHA DANIEL GODANA is a business man in Marsabit town. He knows the parties herein. He told the court that the plaintiff

bought land from one MASANJA MALIYA BIBI. Due to the colonial law that was in force in the 1970s the land was registered in the deceased's name. PW2 was a counselor for Marsabit central that time. The deceased was not married and used to stay with the plaintiff. It is the plaintiff who is nearer in terms of consanguinity than the defendant. The deceased used to depend on the plaintiff. PW2 signed the sale agreement between the vendor and the deceased in 1970. The vendor is now deceased as well as other witnesses. The plaintiff's name is not on the sale agreement. The plaintiff is the elder brother to the deceased. The land was bought for Kshs. 800. There was an order by the Colonial District Commissioner to the fact that each individual was to have only one plot since agricultural land was scarce. There was no legislation to that effect but the order was enforced and used to be followed by the residents. The plaintiff had another plot at GARMA TARBA. The defendant used to drive the plaintiff's tractor.

DW1 TAGAYO HUSSEIN ADEMA is the defendant. He knows the plaintiff. The deceased was his uncle. The plaintiff's father and his grandfather were brothers. He applied for letters of administration and had the grant confirmed. He indicated that the deceased left a will. He is named in the WILL as a beneficiary of the deceased's estate. The WILL was witnessed by IBRAHIM BUNGE, HUSSEIN IBRAHIM and GARAMO KHAISA. He used the WILL to file a succession cause. After the grant was confirmed he applied to have the land transferred into his name. He is now the registered owner of plot number MARSABIT/MOUTAIN/341. He was living with the deceased and has lived on the land for a long time. He lived on the land even before he got married. The deceased allowed him to build a house on the land. The plaintiff was there and never complained. He used to plant beans, maize and miraa on the land. He had another plot which he sold and used the proceeds to build a house on the land. The deceased did not object to the sale of part of the land to ZEINAB DIMA. He was born in Ethiopia and his father is called CHARO TASAMA. The deceased was not married and had no children. The plaintiff's father and the deceased's father are brothers. The plaintiff procured an identity card for him. HUSSEIN BUNGE IBRAHIM bought part of the land from the deceased. Part of the land was donated to a mosque. It is the plaintiff who went for him in Ethiopia when the defendant was only seven years old. The deceased's father is called GENO TASAMA while the plaintiff's father is called EDEMA BARISO. The two were brothers and he saw them before they died. When he filed the succession cause he indicated that he is the deceased's son. He is not the deceased's biological son. The plaintiff is his uncle. The house on the land has six rooms. The deceased used to work at the Marsabit town council. He was not present when the WILL was drawn. It is the deceased who gave him the **WILL**.

DW2 JOHN BUNGE CHANGO is a businessman. He knows both parties. The defendant used to drive the plaintiff's tractor. He used to live in Moyale when he was still young. The deceased also used to live in Moyale. The plaintiff's father and the deceased's father are brothers. The deceased was not married and had no child. He used to work with the Marsabit county council as a cess collector. The deceased then left employment. The deceased and the defendant used to live at the plaintiff's place. The land in dispute initially belonged to MZEE MASANJA. He later heard that the deceased bought the land. ZEINAB DIMA bought a portion of the land. **HUSSEIN IBRAHIM BUNGE** who is his son also bought a plot on the land and started building a house. The deceased told him that he had no child and wanted to give land to the defendant. The deceased also told him that the defendant is his brother 's child. DW2 witnessed the will. The land in dispute belongs to the deceased. The deceased was older than him. The deceased used to have a small mabati house beside the road when he was working for the Marsabit county council. The defendant was born in Ethiopia. The **WILL** was prepared elsewhere and was told to sign. He did not see the deceased sign the **WILL.**

DW3 HUSSEIN BUNGE IBRAHIM is DW2's son. His work is construction of houses. He built a house for the deceased. The house stalled and the deceased wanted to sell a portion of his land measuring 100 by 100 feet. He offered to buy the land. He paid the deceased part of the money in cash totaling Kshs.400,000. The balance of Kshs 300,000 was paid in form of materials for the deceased's house. The agreement to buy the plot was done in June 2015. The deceased died in September 2015. He has not obtained a title deed for the portion he bought. He also witnessed the deceased's WILL. It is the deceased who asked him to sign the **WILL**. The defendant's father and the deceased are brothers.

The court summoned the area chief. DAVID MULATO DONCHE. The chief was sworn and informed the court that the deceased was the owner of plot number 341. The deceased was a blood nephew to the defendant. He wrote a letter dated 7th march 2016 allowing the defendant to file the succession cause. He has known the defendant since 1992. He saw the defendant being brought up at the plaintiff's home. The deceased also lived at the plaintiff's home. The defendant was born in Ethiopia and was brought up by the plaintiff. The deceased and the defendant's father are brothers. His father was a neighbor to the plaintiff. The plaintiff's father is a brother to the deceased's father. The father to the plaintiff is called EDEMA. The father to the defendant was called CHARO. CHARO'S father and the deceased's father were brothers. Their father was called TASAMA and he used to live in Ethiopia. TASAMA is a brother to EDEMA (plaintiff's father).

Mr. Ondari counsel for the plaintiff submit that the plaintiff bought plot number Marsabit/mountain/341 from one MASANJA MALIYA BIBI and had it registered in the name of his late brother GENO EDEMA BARSO. The plaintiff stayed on the land before leaving it to his father. The deceased was staying with the plaintiff. There is no blood relationship between the petitioner and the deceased but there're is blood relationship between the deceased and the plaintiff. The two are brothers. The petitioner indicated in the petition before court that he is the deceased's son yet the letter from PW4, the area chief, indicate that he is a blood nephew. It is further submitted that the deceased was a dependant to the objector. The objector is the nearest in blood relationship to the deceased. Section 39 of the law of succession act favors the objector.

It is also contended that the deceased did not leave a WILL and died intestate. The purported **WILL** is not a will within the law. It is a forgery and fake. It does not comply with section 11 of the Law of Succession Act. None of the witnesses knew where the testator was when he signed the **WILL**. It is not clear where the WILL was made. PW3 Hussein Bunge Ibrahim and **PW2 JOHN BUNGE CHENGO** were interested parties in the property and therefore not competent witnesses. It is therefore clear that the grant was obtained through the making of the false statement and concealment from the court of material facts. The procedure used to obtain the grant is defective. The **WILL** was brought to court after the succession cause had been filed. The petitioner did not seek the consent of the objector. Counsel relies on the case of **PRISCICAH MUTHONI WAHOME and BEATRICE NYOKABI GATHURI –V- JOHN MUENJE WAHOME**. Nyeri High Court **Succession cause** No. **196 of 2005**. Counsel also relies on the case of Estate of **KRISHNA KUMAR BHATT (DECEASED)**, Nairobi **HCC No. 3221 of 2013.**

Mr. Biwott, counsel for the petitioner, submit that the petitioner is a blood nephew to the deceased. The deceased was the sole registered proprietor of plot number MARSABIT/MOUTAIN/341. The deceased used to work for the county council of Marsabit. He purchased the

piece of land in 1970 from one MASANJA MALIYA BIBI. The land was registered in the deceased's name. On 15th August, 2002 the deceased sold a portion of the land to one ZEINAB DIMA BARE. He later sold a plot to HUSSEIN BUNGE. All this time the plaintiff was aware of the transactions. The deceased was the first registered owner of the land in question. The contention by the plaintiff that during the colonial time the natives were allowed to own only one parcel of land is not true. Kenya attained its independence in 1963 and by 1970 the colonial laws were not applicable. The deceased was a cousin to the objector and the two are not brothers. The petitioner is the immediate blood nephew of the deceased and was named by the deceased as the one to inherit his estate upon his death. The deceased took the petitioner as his son since he had no child. The plaintiff witnessed the transactions involving ZEINAB DIMA. The written will is valid and has all the components and ingredients of a good will. The objector has not tendered any evidence capable of ousting the WILL. The objection is frivolous and is intended to deny the petitioner his rightful entitlement. The petitioner holds the title to the land by way of transmission.

The dispute herein raises the following issues for determinations:

1. Whether the deceased died testate or intestate.

2. Who is the deceased's beneficiaries.

3. Whether plot number MARSABIT/MOUTAIN/341 belonged to the deceased or the plaintiff.

4. How should the deceased's estate, if any, be distributed.

The Petition before the Principal Magistrate Court was filed on 7th November, 2016. The Petition was brought through the use of form No.80 of the Probate and Administration forms which form provides for Petition for letters of Administration intestate. The will was annexed to the Petition. Form 79 of the Probate and Administration forms provides for petition of letters of Administration with written WILL annexed. The defendant's petition states as follows:

"**The deceased died intestate domiciled in Kenya Marsabit**"

The Petition was filed by the firm of Biwott Korir and Co. Advocates. It is not clear to me why the defendant's advocate preferred form No.80 instead of 79 while presenting the petition If indeed the deceased died testate.

I have perused the WILL and observed that there are two versions. There is no codicil but the same document. The first version gives the narration by the testator. It gives the description of the property as a plot measuring 1.62 hectares and six rooms self-contained house located at Kiwanja Ndege area this being plot number Marsabit/Mountain/341. At the bottom of the document there is a single signature which is meant to be that of the deceased. The will is undated.

The second version is dated 9th September, 2015. It gives the deceased's name at the top and the defendant's name. The first version has only the deceased's photograph and that of the defendant. The format of wording of the two documents is totally different. The second version has names of witnesses. The first witness signed on 9th September while the other two signed the **WILL** on 10.09.2019. The second version was signed by the deceased above his name whereas in the other version the deceased's signature is at the very bottom. The second version has the words "**Dear Sir/Madam**." Its not clear to whom the document was being addressed.

Section 11 of the Law of Succession Act states as follows:-

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 the 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 (***emphasis added)***

Under the above Section, it is not necessary that the witnesses to a **WILL s**hould sign it at the same time. However, a minimum of two witness must have seen the testator sign the **WILL** or the person authorized by the testator sign the will in their presence. DW2 testified that he did not see the deceased sign the **WILL**. The **WILL** was taken to him for his signature. DW2 does not know how the **WILL** was prepared and where it was prepared. According to DW2 he signed the **WILL** on the same date it was prepared. This cannot be true. The **WILL** is dated 9th September, 2015 while DW2 signed it the following day on 10th September 2019.

DW3, Hussein Bunge Ibrahim testified that he did not see the deceased sign the **WILL.** He stated as follows during cross examination.

> **"When the WILL was brought to me the late GENO had already signed. I didn't see the deceased signing the WILL. I**

was not present when the photos on the WILL were taken."

It is therefore clear to me that the two alledged witnesses, DW2 and DW3 did not see the deceased sign the **WILL**. DW2 is the father to DW3. The purported **WILL** was therefore not properly witnessed as required by section 11 of the Law of Succession Act. The other witness, Garamo, did not testify. It is not clear when the deceased signed the **WILL.**

Given the different versions of the purported **WILL** and taking into account the fact that the Succession cause was filed as one involving an intestate estate, I am satisfied that the deceased did not leave any **WILL**. The purported **WILL** is an afterthought. It is part of the defendant's zeal and burning eager to inherit the deceased's estate. The **WILL** is just but a forgery and cannot be allowed to pass as a valid **WILL**.

The next issue is who are the deceased's beneficiaries? It is not in dispute that the deceased was not married and left no child. The only known relatives of the deceased are the two disputants. While testifying the plaintiff stated that he did not know the defendant who is not related to him. At paragraph 6 of the affidavit in support of the application for the revocation of the grant the plaintiff states as follows:

6. **THAT, the applicant herein is my adopted son, and when he was filling this succession, he did not disclose this fact to the Court.**

Paragraph 3 of the same affidavit reads as follows:-

3. **THAT the deceased is my biological brother.**

It is the plaintiff's evidence that the defendant has no blood relationship with the deceased and that the plaintiff is nearest in consanguinity to the deceased compared to his adopted son.

While filling the Succession cause, the defendant did not make any reference to the plaintiff. In his replying affidavit sworn on 16th April, 2018 the defendant states at paragraph 5 as follows:

5. THAT in reply to paragraph 6 of the supporting affidavit it is not true that I am the adopted son of the applicant, it is within any knowledge that I am the nephew of both the deceased and the applicant but I was staying with the deceased as his son since he didn't have children of his own and when he started ailing he wrote a will bequeathing me his entire estate a fact well known to the applicant.

This Court summoned the former area chief of Dakabaricha location. It is his evidence that he saw the defendant being taken to the plaintiff's compound. The defendant was brought up by the plaintiff. The deceased also used to live with the plaintiff. According to the Chief, the defendant is a nephew to the deceased. The defendant's father, Charo, was a brother to the deceased (Geno). The deceased's father was a brother to Edema who is the plaintiff's father. It is therefore clear to me that the plaintiff is related to the deceased. Equally, the defendant is also related to the deceased. The deceased lived with the plaintiff and he died while being treated by the plaintiff. The plaintiff's contention that he is a blood bother to the deceased is not true. The two could be cousins. The defendant is not the deceased's son. According to the chief, the defendant is a nephew to the deceased. The chief's evidence is that the deceased's was a brother to the defendant's father. The effect of this contention is that the accused called the deceased his uncle and is a nephew to him.

Section 39 of Cap 160 states as follows: -

1. Where an intestate has left a surviving spouse or children, the net intestate shall devolve upon the kindred of the intestate in the following order of priority-

a. Father, or if dead

b. Mother, or if dead

c. Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

d. Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

e. The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares

2. Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into Consolidated Fund.

It is my view that Section 39 only provides for the order of priority in the event that a deceased has left no spouse or child. The section does not exclude the relative named below the one appearing above. That is to say where the deceased has only left his parents, the deceased's father is not entitled to inherit the estate to the exclusion of the deceased's mother or brothers and sisters. The concise oxford Dictionary (12th edition) defines the word "priority" as follows:

The fact or condition of being regarded as more important; thing regarded as more important than others.

It is unfortunate that none of the parties herein was willing to explain to the Court their true relationship with the deceased. The evidence of the Chief is from a third party who may be right or wrong. The defendant's father lived in Ethiopia and the Chief seems not to have met him. Equally, the deceased's father and the plaintiff's father seems to have lived in Ethiopia. The evidence by the Chief can only be taken as establishing a blood relationship between the deceased and the two parties herein.

In the case of **MATHEKA & ANOTHER V MATHEKA, (2005)I KLR 455**, the Court of Appeal held as follows:

> 4. **When a deceased has died intestate, the Court shall, save as otherwise expressly provided, have a final discretion as to the person or person to whom a grant of letter of administration shall, in the best interest of all concerned, be made, but shall, without prejudice to that discretion accept as a general guide the following order of preference:**
>
> **a) Surviving spouse or spouse, with or without association of other beneficiaries;**
>
> **b) Other beneficiaries entitled on intestacy, with priority according to the respective beneficial interests as provided by part V of the Law of Succession Act;**
>
> **c) The public trustee, and**
>
> **d) Creditors**

The plaintiff alledges to be a blood brother to the deceased while on his part the defendant initially claimed to be the deceased's son. None of the parties were willing to summon the chief as their witness. Each claims to be closer to the deceased in terms of consanguinity than the other. I have read the witness statements for both parties. The plaintiff partly states as follows:

> **I am Hussein Edema Bariso. Am a Burji from Moyale (Kenya). Tagaye Hussein Edema is also a Burji from Ethiopia. On the year 1994 he immigrated from Ethiopia to Kenya and met me. He is not related to me at all. But come from one community (Burji Kenya). Burji Ethiopia.**
>
> **We got to know each other and decided to assist by giving him a job at my home. He was still under eighteen and without an identity card.**

On his part the defendant partly states as follows:-

> **I am TAGAYE HUSSEIN EDEMA. Born in Marsabit and I live in Marsabit, I am married with 7 children**.
>
> I ***knew GANO EDEMA BARISO as my younger father who is brother to my father, the father to HUSSEIN EDEMA and father to GANO EDEMA is the same. GANO was brought up by*** EDEMA **as an adopted son, HUSSEIN EDEMA brought me up while l was young and told me that he was going to take me to school at 7 years old, instead he made me to be his shamba boy. He then procured for me a Kenyan National Identity Card which he did not give to me but kept it himself. After some years as I was walking in town I was arrested and taken to Court. When I was asked where the National Identity card was I stated that it was kept by Hussein Edema. It was thent hat he surrendered the National Identity card to my wife who later conveyed it to me.**

From the above information, it is not clear whether the deceased's father and the plaintiff's father were brothers. If that is the case, then the defendant is also a nephew to the plaintiff

In view of the parties contradicting evidence and taking into account the fact that the two parties herein are the only known relatives of the deceased, I do find that the two parties are the only beneficiaries of the deceased's estate.

The third issue is whether plot number Marsabit/Mountain/341 belonged to the deceased or the plaintiff. The plaintiff alledges that he bought the plot and had it registered in his brother's name since at that time no one individual was allowed to own more than one plot. This contention is supported by his witness, PW2, who was the area Councillor when the plot was bought. The plaintiff contends that he already had plot number Marsabit/Mountain/442 as per his witness statement. The sale agreement dated 29.1.1970 indicate that the vendor is Masanja Maliya Bibi while the purchaser is Geno Edema. PW2 and two others witnessed the sale agreement. The plaintiff's name is not on the sale Agreement. He did not witness the agreement.

The defendant annexed a search dated 1st November, 2016 for plot number 341. The title deed was closed upon sub-division and new plot numbers 1388 – 1389 were created. The date of the submissions is not indicated. The plaintiff produced a search for plot number 1388. The title was opened on 4.4.2013 and a title deed was issued. By

this time the deceased was alive. A restriction was registered on 16.4.2016 stopping any dealings until succession involving the proprietor's death is done. The question which comes to my mind is how was the sub division done on 4.4.201? How could the deceased alledgely do a WILL in 2015 and bequeath plot number 341 of the defendant yet he knew that he had already sub-divided the land? Where is the other title number 1389.

In his replying affidavit sworn on 16th April, 2018, the Petitioner/defendant states at paragraphs 2 and 3 as follows:-

> 2. **THAT I am the registered owner of MARSABIT/MOUNTAIN/1388 of approximate area 1.21ha.**

3. THAT I acquired the same by way of transmission and pursuant to a grant of letter of administration in the aforesaid succession case No.5 of 2016.

In his evidence in chief, the defendant testified that he got the grant confirmed before the Magistrate's Court. He also stated that he has a certificate of confirmed grant which he produced as his 3rd exhibit. The record shows that the defendant's 3rd exhibit is the grant of letters of administration issued on 20th January, 2017. The record of the Principal Magistrate's Court does not show that an application for confirmation of the grant was made. There is no copy of confirmed grant on record. I called for a copy from the defendant's counsel and what was produced is the same grant issued on 20th January 2017.

It is therefore clear to me that the defendant colluded with the lands office and had the land transferred into his name. He states in his affidavit that he is the registered owner of plot number 1388 measuring 1.21Ha. The search for this plot shows that it is 0.41 hectares and by 17th November, 2016 it was still registered in the names of the deceased. The transfer forms which enabled the defendant to obtain title by way of transmission were equally not produced. The defendant conveniently failed to produce his alledged title for plot number 1388. The lands office is equally not free from blame. The grant issued by the Principal Magistrate's Court does not indicate any plot number. How could it be used to transfer the land to the plaintiff? Does the Land Registrar know that the grant required confirmation and have the deceased's estate clearly stated on the confirmed grant.

From the evidence on record, I do find that the plaintiff is not the owner of plot number Marsabit/Mountain/341. Although the sale agreement of 29.1.1970 does not indicate the plot number, the evidence of both the plaintiff and the defendant proves that it is the plot that was bought from Masanja Maliya Bibi that turned out to be number 341. The plot was illegally sub-divided by the defendant without orders of the Court. The deceased bought the land as he used to work for the County Council of Marsabit.

The last issue is how should the deceased's estate be distributed. The defendant testified that here is a house on the land. Although the defendant informed the Court that he also contributed towards the construction of the house after he sold his plot at the Shrine area, this contention clearly contradicts his purported **WILL**. The first version of the **WILL** describes the deceased's properties as a plot measuring 1.62hectares and 6(six) rooms self contained house. The 2nd version of the **WILL** states as follows:-

"I hereby give my sincere will in case of death over my properties with the following description i.e 1.62 hectares of land, a self contained house of 6 rooms to my next of Kin Tagaye Hussein Edema (my relative) of Identity card No.9560225 aged 43 years, married and blessed with 6 children".

If by 9th September, 2015 when the purported **WILL** was drawn the six roomed house already existed, when did the defendant assist in building the house? My own conclusion is that it is the defendant who drafted the **WILL** through the assistance of his two witnesses as he alledges that he is illiterate. His own document confirms that the house belonged to the deceased and was to be inherited by him. Therefore the house on the land does not belong to the defendant. DW3 testified that the deceased was building a house and ran out of funds.

I do find and hold that the deceased's estate comprise of plot number Marsabit/Mountain/341 together with the six roomed house standing thereon.

The dispute herein involves a request by the plaintiff to have the grant nullified or revoked. Each of the two parties is claiming exclusive ownership of the deceased's estate. It would be imprudent for this Court to simply proceed with the issue of nullification of the grant and postpone the issue of distribution of the estate to another hearing. The Court's position is that each party would like the estate to be distributed to him. If one of the parties was found not to have had any blood relationship with the deceased, the Court would have distributed the estate to one of the parties only. Having found that both parties are related to the deceased and having taken the evidence of each party, I do find that the Court is well placed to distribute the deceased's estate.

Both parties agree that one Zeinab Dima bought a plot from the deceased. The extent of the plot has not been explained. The plaintiff denies that the deceased sold a plot measuring 100ft x 100ft to Hussein Bunge(DW3). The defendant also contends that there is another portion that was meant for a Mosque. The original plot number 341 is 1.62hectares. This is about four acres of land. What was sold is less than one acre subject to any evidence to the contrary. I believe even the portion meant for the Mosque can be accommodated within one acre leaving three acres and the house available for distribution.

The defendant is occupying the house on the land together with his family of seven children and a wife. It would be unfair to remove the defendant from the house. It is clear to me that even before his death, the deceased left the defendant living in the house.

Doing the best I can, I do distribute the deceased's estate as follows:

i. **0.62 hectares including the six roomed house to the defendant Tagaye Hussein Edema.**

ii. 0.60 hectares to the plaintiff Hussein Edema Barso.

iii. The remaining portion to be distributed to Zeinab Dima, Hussein Ibrahim Bunge as well as the Mosque.

iv. The land registrar Marsabit to cancel the title deeds for plot numbers 1388 and 1389 and restore the land into the deceased's name and thereafter have it distributed as per the above terms.

It is also clear to me that the two cannot come together and become joint administrators. I do find that the plaintiff has proved that the grant herein was obtained through concealment of material facts as well as through defective procedures. The procedure used combines both

testate and intestate process. The only logical conclusion I can make is to have the grant nullified as prayed herein. The grant was not confirmed and the alleged transmission of the land to the defendant is illegal. I do appoint the Objector as the Administrator of the deceased's estate. A certificate of confirmed grant to issue in the above terms. Parties shall meet their respective costs.

Dated, Signed and Delivered at Marsabit this 19th day of June, 2019

S. CHITEMBWE

JUDGE