REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 369 OF 2004

IN THE MATTER OF THE ESTATE OF GIDEON SAWE KIPKESSIO (DECEASED)

PAUL KORIR SAWE.............................1ST PEITIONER

HARRON KIPKOECH SAWE..........2ND PETITIONER

VERSUS

SALINA SAWE...OBJECTOR

JUDGMENT

1. The petitioners **(Paul Korir Sawe)** and **(Harron Sawe**) petitioned for and obtained grant of probate in their capacity as children of **Gedion Sawe Kipkessio** who died domiciled at **Saroiyot farm**. They contended that the deceased left a written will. The two were confirmed as administrators of the estate on 6.2.2006

2. The applicants **Salina Cherubet Sawe, John Sawe and Christine Terigin Sawe** moved this court by summons dated 21st June 2006 for revocation of the grant.

3. The same was based on the grounds that the purported will on the basis of which the grant of probate was issued was not proved, the will is null and void under Section 7 of the Law of Succession Act and the same was issued through fraud, and the grant was obtained through concealment of information from the court. The application is supported by an affidavit sworn by **Salina Cherubet Sawe** who averred the petitioners failed to disclose that the deceased had two wives **Tele Bot Kiboliny and Elizabeth Sawe**. That **Tele Bot Kiboliny** had five children namely:

i. William K. Sawe-male now deceased

ii. Charles K. Sawe-male now deceased

iii. Salina Sawe-daughter

iv. John Sawe-Son

v. Christine Sawe-Daughter

4. The deceased's sons i.e. **William K. Sawe and Charles Sawe** were married to **Edna Sawe and Rhoda Sawe** and had **6** children. On the other hand, **Elizabeth Sawe** had **10** children namely:

i. Paul Korir

ii. David Rotich

iii. Jonathan Sawe

iv. Everline Cherono

v. Christopher Sawe

vi. Haron Kipkoech

v. Sally Jepchumba

vi. Matthew Kiptok

5. The deceased had two parcels of land **namely Nandi/Cheptil/138 measuring 37 acres, and 50 heads of cattle.** That at the time of his demise, the two houses were residing on parcel No L.R No. 7730/8 situated at Saroiyot in Uasin Gishu measuring 149 acres but upon the demise of their father the petitioners took the larger share of the property, claiming that the deceased had left a will. They contend that the deceased was aged **80 years** and was ailing, therefore he could not have prepared a will. Further the advocate who drew and attested the will was blind as at that time.

6. In response Paul Korir Saw one of the petitioners swore an affidavit stating that the advertisement in the gazette notice was made inviting anyone who had an objection to issuance of a grant. That his father (deceased) indeed married **Tele Obot Kibolony** in 1951and they had two sons **William Sawe** and **Charles Sawe** who have since died. Then **Tele Obot** left his father and had the applicants with another husband. She went to live at **Ndalat Settlement Scheme** until her death in **1974** and was buried there, after deserting the deceased for **16** years. **William Sawe's wife Edna** left him while they lived with their mother at **Ndalat**. **William** and **Charles** returned to live with their father in **1979.** The applicants herein came to live with their half-brothers who took care of them. **Emily Jepleting** is named as the daughter of **Sally Kerich** who was the sister of **Rhoda Sawe**, wife of **Charles Kimaru Sawe**. He disowns **Emmy Jepng'etich** saying she is not their relative at all.

7. It is his contention that the applicants were the children born by their mother after she left the deceased. Further, that at the time of making the will, the deceased was **75 years** yet he died aged **76 years** in **2002**. Thus any bequest, legacy, device or allocation to the applicants was only on humanitarian grounds since the applicants were strangers to the deceased.

8. In addition that the applicants were disrupting the administration of the estate, they had filed other proceedings i.e **Succession Cause no. 365 of 2004 and Miscellaneous cause no.183 of 2006.**

Evidence

Objectors case

9. At the hearing, **Salina Cherubet (PW1),** adopted her recorded statement on which she was cross-examined. She stated that she was born in 1963 in Ndalat which was part of Kabiyet and insisted that her father was **Gideon Kipkessio Sawe**. When she was born her mother lived with the father in **Cheptil** and denied suggestions that her mother moved to **Transmara**, saying her mother died and was buried in **Cheptil** in **1978**, not **Ndalat**. She explained that under the **Nandi** custom a married woman could not be buried at her parent's home. She also said that it was not true that her mother separated from the father in **1954** since she was born in 1963.

10. That after her mother's death they moved to live with their step-mother in **Saruiyot** which land was given to her. The deceased was taking care of her children and educating them. She had been given land at **Saruiyot centre** but the 2nd house sold the land off and she had to go back home. She told this court that all her siblings lived with her parents at **Cheptil** and although her mother had lived at **Saruiyot**, when she begun ailing, she moved to **Cheptil**.

11. It was also her evidence that **Emily Chepngetich** was daughter to **Charles Kimaru Sawe's** daughter, but she did not know **Sally Kerich**. Further, that **Charles** was married to **Edna** and they had 6 children but she was chased away when he died. She contested the will which only gave her only one acre, saying the deceased was not literate, he used to thumbprint. Upon being shown bank slips purportedly signed by the deceased, PW1 stated she was not sure if the same was her father's. In re-exam she stated she had not been given any share in the **Cheptil** property.

12. **George Kirui Tarus (RW2**) who was the area Chief from **1996-June 2017** testified that the dispute went to him when the family could not agree. A meeting was held on **3.12.2003** during which all the children from the **2nd house** attended. stated as follows;

13. That in company of the village elders deliberated upon the distribution of the deceased estate comprised in two parcels of land herein.

14. That the elders agreed to distribute the deceased estate as follows; the 1st house was to take 37 acres at Cheptil in Nandi County plus the additional 33 acres at Saruyoit farm totalling to 70 acres.

15. That the 2nd house was to be given 115 acres from the land parcel at Saruyoit.

16. That the foregoing distribution was agreeable to both families only the 2nd house to make a u turn after a few days and consequently rejected the foregoing proposed mode of distribution.

17. That he later referred the two families to the District Officer.

18. That while at the District Officer's offices, the 2nd house notified the District Officer that the Will was being prepared at the advocate's office. The said Will was eventually availed at the 3rd meeting.

19. Elijah Kiptoo Rotich, an elder and the vice Chairman of the council of elders of Kipchamo location testified as follows;

20. That he attended the meeting at the Chief's office to deliberate on the deceased estate.

21. That the widow of the deceased confirmed in the meeting that the deceased had not left behind any Will.

22. That at the said meeting the 2nd house had agreed to take 115 acres at the Saruyoit farm while the 1st house was to take 37 acres at Cheptil farm plus the additional 34 acres at Saruyoit farm.

23. The issue of a will was not raised during the meeting, it only came up at the District Officer's office and each time they said the same was not ready and he doubted if the same ever existed. He knew the deceased was not literate.

24. In re-exam he said that the children of the 1st house came to live with the 2nd family when their mother died and they have been living in the same homestead. According to him, the children all belonged to the deceased.

Petitioner's case

25. **Paul Kipkorir** (DW2) only recognizes **Charles Kimaru and William Sawe** as the deceased children but not the objectors. He came to know **Salina** in **1990**, as a child from the 1st house. It is his evidence that all the other named children of the 1st wife (whom he referred to as out-growers) lived with Charles Kimaru. He confirms that their father had land in Cheptil (42 acres) but the 2nd house has 37 acres, and Seruiyot (149 acres) where Selina was given an acre by their father, whilst Rhoda (wife to Charles) was given 2 acres. He remaining acreage is occupied by the 2nd house.

26. He maintains that his father had drafted a will which was prepared by **Kamata** advocate, and the same was witnessed by **Olbara and Stephen Ngetich**. **He acknowledges that their father had problems with his eye sight, but he could see, and that although he did not know how to read, he could write. Further.** He was not present when the deceased wrote the will, and confirms that his father's signature only appears on one page of the document. He justifies the skewed mode of distribution inthis statement:

> ***"According to Nandi custom, the daughters who do not get married get less-ok I can't tell why my father decided to give John 1 acre only. I got 26 acres. Charles was given 2 acres, but I can't tell why. My father favoured me because I used to take fertilizer and milk to him."***

27. In re-exam he said that the 1st wife left in **1956 for Kilgoris**, and they never lived in **Cheptil** nor was anyone was buried there, insisting that the 1st wife was buried in **Ndalat** at her parent's home. He then states that the 1st wife left in 1954, and insists that **Salina, John and Christine** were not his father's children.

28. **Ernest Korir Olbara (DW3)** who described the deceased as his very good friend stated that the deceased wrote the will which he witnessed, although the deceased was not literate, he had taught himself to write his name. He was certain that the deceased was in good health. However, the deceased did not tell him that some children were not his. He also confirmed that the deceased had two wives. In re-exam he testified that he found the will already prepared, and he did not see the advocate signing the will.

Objectors Written Submissions

29. The objectors point out that the estate relates to two properties **Uasin Gishu LR No. 7739/8 measuring 149 acres and Nandi Cheptil/138** measuring **37 acres**. They aver that the 2nd house has the following beneficiaries/dependants.

i. Paul Korir

ii. David Rotich

iii. Jonathan Sawe

iv. Everline Jerono

v. Christopher Sawe

vi. Haron Kipkoech

vii. Sally Jepchumba

viii. Mathew Kiptok

30. The deceased males from the 1st house are survived by wives Edna Sawe and Rhoda Sawe. The children are:

i. Emmy Jepngetich

ii. Jane Jemutai

iii. Emily Jepleting

iv. Barnabus Tirop

v. Sila Chirchir

vi. Meshack Kiplagat

31. The two families were residing on parcel **no. L.R 7730/8 measuring 149 acres,** however the 2nd house took a bigger share of the land and has denied the 1st house from cultivating.

32. The objectors submit that although the petitioners contend that Salina Sawe, Christine Sawe and John Sawe were born out of wedlock, but they have not tendered any scientific evidence, thus they are entitled to inherit the deceased property. They maintain that they were residing on the deceased land **L.R No. 7730/8 measuring 149 acres** with their late mother-in-law **Tele Bot Kibolony,** the deceased never evicted them from the land. From the will, the allocation of land to **Salina Sawe** and **John Kerich** is an indication that they are the deceased beneficiaries and dependants under **section 26 of the Law of Succession Act** as read with section **27, 28 and 29.** In ***Morris Mwiti Mburugu v. Denis Kimanthi M'Mburugu*** [2016] eKLR, the court in arriving at the distribution was guided by section **38, 26 and 28 of the Law of Succession Act.** The deceased had taken all the children into his care, regardless of whether some were his biological children.

33. Further it was argued that the deceased did not execute the will, and the same was an afterthought. Initially the two houses had agreed to share the two parcels of land where the **2nd house was to get 115 acres in respect of Saruyoit L.R 7739/8 measuring 149 while the 1st house was to get the entire Nandi/Cheptil/138 measuring 37 acres with 33 or 34 acres of the Saruiyot land**. They questioned the veracity of the signed will pointing out that the deceased used to thumbprint as evidenced by the Certificate to the Correction of the name at the Land's registry filed in court on 23rd July 2012. The will is also faulted as the maker did not signed on all the pages and the drawer did not file any statement. The will is described as falling short of **Section 11 of the Law of Succession Act,** In ***Re Estate of G.K.K (Deceased)*** [2013] eKLR , ***"From a clear reading of Section 11(C) of the Act, to be present at the signing means that the witness must be capable of seeing the testator sign the will and thereafter attest to that fact."***

34. The court was urged to find the will a forgery and invalid, and distribute the deceased estate intestate in accordance with **Section 40 of the Law of Succession Act Cap 160 Laws of Kenya** and in accordance to the number of children/dependants from each house.

35. It is pointed out that the purported will executed on **19.7.2001** totally disinherited some beneficiaries and others were given very little. The 1st house was given 5 acres whereas the 2nd house 149 acres. The 1st house was not allocated any portion of land in **parcel no. Nandi/Cheptil/138** and were only given **5 cows**. In ***Ndolo v. Ndolo***, **Nairobi C.A No. 128 of 1995**, the Court of Appeal stated that in regard to **section 5 of the Law of Succession Act,** a testator's exercise of freedom on how he disposes his property, in exercising that freedom, he has to ensure that he does not hurt those for whom he was responsible during his or her lifetime.

36. In addition, the court was reminded that all children of the deceased including the daughters who are married are entitled to inherit from their parents. See ***Mary Wangari Kihika v. John Gichuhi Kinuthia & 2 Ors*** [2015] eKLR, ***Eliseus Mbura M'Thara v. Harriet Ciambaka & Anor*** [2012] eKLR and in ***Peter Karumbi Keingati & 4 Ors v. Dr. Ann Nyokabi Nguithi*** [2014] eKLR.

37. They proposed for the following distribution. The land in **Nandi/ Cheptil/138 measuring about 37 acres.**

A. 1st House

1) William K. Sawe(deceased, his family) -3 acres

2) Charles K. Sawe(deceased, his family)-3acres

3) Salina Sawe-adult daughter-unmarried-3 acres

4) John Sawe(deceased, his family)-3 acres

5) Christine Sawe-adult daughter, married- 3acres (total acreage 15 acres)

B. 2nd House

1. Elizabeth Sawe-Widow-2.4 acres

2. Paul Korir Sawe-adult son-2.4 acres

3. David Kimeli- adult son-2.4 acres

4. Richard Maiyo-adult son-2.4 acres

5. Mathew Kibitok-adult son-2.4 acres

6. Harron Kipkoech-adult son-2.4 acres

7. Christopher Kiprutto-adult son-2.4 acres

8. Everline Jerono-adult son-2.4 acres

9. Sally Jepchumba-adult daughter-2.4 acres(22 acres)

38. The proposed mode of distribution for land **L.R 7739/8 measuring 149 acres**

C. 1st House

1. William K. Sawe

2. Charles K. Sawe(deceased, his family)-1 2acres

3. Salina Sawe-adult daughter-unmarried-12 acres

4. John Sawe(deceased, his family)-12 acres

5. Christine Sawe-adult daughter, married-11 acres(total 59 acres)

D. 2nd House

1. Elizabeth Sawe-Widow-9 acres

2. Paul Korir Sawe-adult son-10 acres

3. David Kimeli- adult son-10 acres

4. Richard Maiyo-adult son-10 acres

5. Mathew Kibitok-adult son-10 acres

6. Harron Kipkoech-adult son-10 acres

7. Christopher Kiprutto-adult son-10 acres

8. Everline Jerono-adult son-10 acres

9. Sally Jepchumba-adult daughter-10 acres (total 89 acres)

E. The A.I.C Church- 1 acre.

Petitioner's submissions

It was their submission by the petitioners that the deceased had mental and physical capacity to execute a will, and he took care of all his dependants. They maintain that the deceased had no history of illness prior to writing his will, insisting that the will was valid in accordance with section **5 of the Law of Succession Act**. The objectors did not prove their allegations as provided in section 5(4) of the Law of Succession Act, that the deceased was under the control of the petitioners. The objectors also alleged that the advocate who prepared the will was blind, the Law Society of Kenya on 26.2.2012 confirmed that they did not have records he was blind. The witnesses to the will were his business partners and not family members. In addition the objectors were not children to the deceased since they were born long after the 1st wife deserted the deceased and they were only given the share of land on humanitarian grounds.

40. Further that, the will was a true copy of the testamentary of the deceased and there was no provision in the Law of Succession Act that a person is required to provide equally for his beneficiaries or dependants. The objectors were not disinherited by the deceased. Finally, they urged that the objectors had failed to establish sufficient grounds to warrant grant of the orders sought and urged the court to dismiss the same.

Analysis and determination

41. The issues that arise for determination are as follows:

i. Whether the objectors from the 1st house are beneficiaries or dependants of the deceased, and are therefore to inherit the deceased's property/estate?

ii. Whether the Deceased left a valid Will?

iii. Whether the impugned Will disinherited some of the beneficiaries?

iv. Whether the objectors were adequately provided for in the will.

42. The objectors complaint is that the members of the first house had been given a lesser unfair share of the deceased property yet they were also beneficiaries. Also, that the deceased never left a will, and the grant which was granted was issued irregularly. That the deceased died intestate since the existence of a will never arose when they met at the chief's office to resolve the problem at hand and that the same came up at the District Officer's office.

43. The petitioners allege that the objectors are not children of the deceased. In her testimony **Salina Sawe** testified that she was the daughter to the deceased and that their mother had five children in total with the deceased, a fact disputed by the petitioners. Indeed, the petitioners' witness **Ernest Korir** testified in court that the deceased had never told him that some children were not his. The funeral euology booklet for burial of the deceased indicates that he had 12 children, 9 sons and 3 daughters. The chief's letter dated **16.12.2004** indicates the objector Salina Cherubet as one of the children of the deceased. Christine Sawe is not named as one the deceased children, however in the affidavit for citation she is named as one of the deceased daughters which lists the deceased had four daughters-(NB there are many inconsistencies on the number of children the deceased had, from the affidavits and the chief's letter. Its not clear who is who)

44. Mr Nabasenge, on behalf of the objectors submits that the Petitioners have not tendered evidence and / or scientific evidence in terms of **DNA profiling** to demonstrate that the said **Salina Sawe, Christine Sawe and John Sawe** are not the biological children of the deceased.

45. Further, that in any event, it is not in dispute that at the time the deceased died, the said **Salina Sawe, Christine Sawe and John Sawe** were residing on the deceased land being land parcel **No. L.R No. 7730/8, measuring 149 acres situated within Uasin Gishu County** together with their late mother **Tele Bot Kibolony**, and the deceased. In view of this, then even if the named individuals were not the deceased's biological offsprings, he had accepted and adopted them as his children.

46. Counsel argues that this is apparent given the fact that the T**ele Bot Kibolony,** (the mother to Salina Sawe, John Sawe and Christine Sawe) died in the year **1974** way before the deceased herein (**Gideon Kipkesyo)** died on **6th October 2002** but he did not evict the said children from their mother's matrimonial home. That they stayed in the said home situated on land parcel **L.R No. 7730/8 measuring 149** acres till the demise of their father the late Gideon Kipkesyo Sawe.

47. It is also argued that inasmuch as the petitioner has alluded that the deceased had divorced the 1st house, there is no evidence placed on record to prove the same. Of significance is that the 1st petitioner in his statement has acknowledged that the said beneficiaries, Salina **Sawe, John Sawe and Christine Sawe** lived with the deceased and that **Salina Sawe** was given an acre of land on humanitarian grounds and that Christine Sawe was left out because she was neither a dependant nor a beneficiary of the deceased.

48. That despite all that, the petitioners have not stated on what grounds **John Kerich Sawe** was also bequeathed 1 acre of land in the said impugned will if he was not the deceased's beneficiary

49. This court is urged to find that they are therefore qualified to be dependants pursuant to section 26 of the Law of Succession Act as read together with sections 27, 28 and 29 of the Act. And therefore they are entitled to inherit the deceased property.

50. A large portion of what the petitioners say regarding the paternity of the objectors is speculative. That since the 1st wife had left the deceased at some point in their relationship, and stayed away for many years, then the children she during that period of estrangement were not sired by him. While that may be probable, it is not fool-proof-for who knows the ways of a bear once it has tasted the original honey comb? Certainly the deceased's sons would not know what he released from his quiver or when. The ultimate would have been scientific evidence in the form of **DNA** to establish paternity-that did not happen in this case!

51. However, as **Mr Nabasenge** correctly puts it, even assuming that the deceased had not sired the objectors, when their mother returned from her sojourn, the deceased accepted her, and allowed her to live with all her off-springs on his land which they tilled. It therefore follows that the deceased in-fact provided them by allowing them to find shelter and food on his land. They fit in with the definition of who qualifies to be a dependant as set out **in section 29 of the Law of Succession Act:**

> ***"For the purposes of this Part, "dependant" means—***
>
> > ***(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; and***
> >
> > ***(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."***

52. In the instant case it is apparently clear that the children from the 1st house depended on the deceased during his lifetime and are not only dependants but beneficiaries of the deceased estate. I concur with Mr Nabasenge that submissions that the deceased had taken all the children

of the 1st house into his family regardless of whether some of them were his biological children or not. In light of section 28 of the Law of Succession Act, the deceased property is vast. **Land Parcel L.R No. 7730/8** is measuring **149 acres** while **Nandi/Cheptil/138** is measuring **37 acres.** The total acreage is therefore **186 acres**. There is no justifiable cause and or reason as to why the 2nd house could be bequeathed with the entire total acreage of 186, (According to the Will, 2nd house is getting 144 acres from LR 7730/8, out of 149 acres. While from Nandi/Cheptil/138, 2nd house is getting 42, acres). This means literally that the 1st house was left with nothing.

53. I hold and find that **ALL** the beneficiaries from the 1st house are duly entitled to inherit the deceased property not only as dependant but as beneficiaries.

54. On the issue as to the validity of a will, the court is guided by section **5(1) of the Law of Succession Act** which prescribes the freedom of the testator as follows:

> ***"(1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.***
>
> ***(2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.***
>
> ***(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.***
>
> ***(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges."***

55. Section 5(3) above states that a person who makes a will is taken to be of sound mind at the time of executing the will. The objectors argued that the deceased was unwell and therefore he could have been coerced to making the will. However, the petitioners relied on section 5(4) to urge that the burden of proof was upon the objectors to show that the deceased was unwell thus probability was high that he could have been coerced and was under the control of the petitioners. The influence made the deceased give a greater share to the 2nd house and very little to the 1st house. The petitioners witness **Ernest Korir** stated that he was called by the deceased to go and witness the signing of the will though he arrived when the same had been prepared. He further averred that the deceased was in a good state of mind.

56. The court is guided by section 7 of the law of Succession act which outlines what can vitiate the validity of a will. It provides as,

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

57. In view of the above section, the objectors argued that the petitioners influenced the deceased to making of a will. There was no evidence adduced by the objectors to validate their claim. In ***James Maina Anyanga v. Lorna Yimbiha Ottaro,*** Nku HC**Succession Cause No. 1 of 2002** on undue influence, the court held that:

> ***"undue influence connotes an element of coercion or force, that the deceased did not exercise his free will in writing his will and was pressured by other forces. Such external pressure must be forceful and intended to coerce him into acting out of fear or involuntarily. The onus is on the person who alleges the existence of undue influence to prove the same."***
>
> **Also in *Mwathi v. Mwathi* (1995-1998) 1 EA 229 the court held that, "*… undue influence occurs when a testator is coerced into making a will or some part of it that he does not want to make. Undue influence is proved if it can be shown that the testator was induced or coerced into making dispositions that he did not really intend to make."***

In my view the issue of undue influence does not fins a footing.

58. Did the deceased make the contents of the will? The objectors raised an issue regarding attestation of the will. **Section 11** provides for the requirements that make a will valid. It provides as, "***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."***

59. The will is question was made on **19.7.2001** by the deceased and was witnessed by **S.K Ngetich and Ernest K.Olbara** who appended

their signatures. The advocate who drafted the same also signed the same. The death certificate indicates that the deceased died on **6.10.2002**, a year after he had prepared his will. The objectors argued that the deceased was not a literate person to have signed the will, since he usually used thumb prints. However, the petitioners brought bankslips to show that he used to sign which fact was disputed by the objectors who also availed the certificate of correction of name which indicated that the deceased had put his thumb print. The main question to settle as to meet the requirements of section 11 (c), is whether the witnesses were present and saw the deceased signing the will. In **Re Estate of G.K.K (Deceased] [2013] eKLR, Nrb HCSCause No.1298 OF 2011** Lenaola J. (as he then was) observed as follows:

> ***"99. From a clear reading of Section 11(c) of the Act, to be present at signing means that the witness must be capable of seeing the testator sign the Will and thereafter attest to that fact. The witnessing is to the signature of the testator and cannot be anything else. In Re Colling (1972) 1 WLR 1440, it was held that if a witness left the room before the testator completed his signature, the attestation will also be invalid. I agree and in my view, the attestation of a Will validates the testator's signature and in this case, the witnesses allegedly saw the deceased sign one page of a document and they also signed one page of the same document. I have seen the Will which has been produced as evidence in this Court, and each of the 18 pages bears the signature of the testator but the witnesses signatures appear on the jurat page which is page 12 thereof.***
>
> ***What page did the deceased sign in the presence of the witness? When did he sign all the other pages if they saw him sign only one page? Did they really see him sign the jurat page to authenticate the Will? It has also not been explained to the Court why the testator failed to sign the last three pages of the document which has the annexed photocopies of the building place for his intended mausoleum. It is also not clear why the plans are photocopies and not originals given that the Will produced in Court is the alleged original document. For these reasons alone, I find that the deceased failed to make and execute the Kahari Will of 20th July 2006 in accordance with the provisions of Section 11 of the Law of Succession Act and I am unable to find it as valid. I say so despite my findings on all other factors that may otherwise have validated the Will. [Emphasis Added].***

Is the will a forgery, and were the purported witnesses thereto part of the fraud? This is critical in light of the objector's claims that the deceased was illiterate, to the extent that he never could put pen to paper, but used to affix his thumb print as a signature. Was the will in question was a forgery that was intended to disinherit the 2nd house? Section 7 of the Law of Succession Act is titled **"Wills caused by fraud, coercion, importunity or mistake"** and provides as follows:

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

Ernest Olbara's testimony is that he accompanied the deceased to the advocate's office as a witness to the will. He stated:

> ***"…The advocate read out the contents of the will and I think he signed the will. He must have signed the will in my presence. He asked each one of us to sign as witnesses. Mzee Gideon signed. I cannot remember whether the advocate signed the will- I cannot remember whether he signed in our presence…Ok I'll say I did not see the advocate signing the will…"***

It must not be lost to anyone that the witnesses were to see the deceased as the maker of the contents of the will append his signature-not witnesses to the advocate who drew up the will. Although on the face of the evidence presented, there is nothing to confirm that the will is forged, what makes the contents of the will questionable is not just the skewed content in terms of distribution, which literally disadvantages the objectors, but even the fact that despite claims by the petitioners that it existed all along, the fact of its existence remained a secret, not to be disclosed, until some wise bird whispered to them that the same ought to be made known to the District Officer. This doubt as to the veracity of the will is fortified by the fact that there is nothing to prove that the signatures purported to be that of the deceased were made by his own hand. There is also no explanation as to why even after appending a written signature on the purported will, he later elected to append his thumb print on the transfer documents.

This is why the objectors are so suspicious about the bona fides of that document, which doubt, this court shares.

60. The other issue on the mode of distribution of the property as indicated in the will. It is not disputed that the estate comprised of **Uasin Gishu LR No. 7739/8** which measured **149 acres** and **Nandi/ Cheptil/138,** which measured **42 acres** in total. The will and the objectors' affidavit indicate that the deceased gave **Saroiyot AIC Church 1 acre of land** –this is not disputed by both parties. The will shows the objector **Salina Cherubet** received **1 acre** of land. The objectors point out in their submissions that the petitioners in their fraudulent acts of forging the Will, despite disowning the objectors, bequeathed **Salina Sawe** and **John Kerich Sawe** an acre of land each, which they say is a clear demonstration that the said individuals are not only dependants of the deceased but beneficiaries.

61. The petitioners relied on section 5(1) of the Act to urge that the deceased was at will to share out his land as he wished and the objectors could therefore not say they were given a smaller share when it was his will. The law does not support the petitioners' contention. **Section 28 of the Act** states:

> **Circumstances to be taken into account by court in making order. In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—**
>
> **(a) the nature and amount of the deceased's property;**
>
> **(b) any past, present or future capital or income from any source of the defendant;**
>
> **(c) the existing and future means and needs of the dependant;**

(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;

(e) the conduct of the dependant in relation to the deceased;

(f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

(g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

62. The objector Salina testified that she was being taken care of by the deceased and not by his late brother Charles as alleged by the petitioners. She was also cultivating the land she had been given-that was land for her use, it in no way meant that she would not be entitled to inherit anything else from the deceased's estate. The above cited section of the law gives a guideline on the factors to be taken into account in the mode of distribution, even if an argument were to be advanced that the deceased had a right to distribute his property as he pleased. The deceased property was large and it could be apportioned well to cater for all the dependants and beneficiaries. The mode of distribution preferred in the contested will is un-proportional and unjustified given the fact that the two houses are involved.

63. **Land Parcel No. L.R NO. 7739/8 measures 149 acres, yet the 2nd house was given a total acreages of about 144, and the 1st house got a total acreages of about 5 acres.**

With regard to land parcel registration **No. Nandi Cheptil/138 measuring 37 acres,** the purported will allocated the same as follows:

1. Paul Korir Sawe (Petitioner) 4 acres (Adult son from 2nd house)

2. Daivid Kimeli 4 acres (Adult son from 2nd house)

3. Richard Maiyo 4 acres (Adult son from 2nd house)

4. Mathew Kibitok 15 acres (Adult son from 2nd house)

5. Harron Kipkoech 5 acres (Adult son from 2nd house)

6. Christopher Kiprutto 5 acres (Adult son from 2nd house)

7. Elizabeth Sawe 5 acres (Widow from 2nd house)

64. This gives the total acreages allocated is **42 acres** yet the said parcel of land measures **14.97 Ha**. which is equivalent to **37 acres**. (as reflected in the copy of the title).

Once again the 1st house was not allocated any portion of land in respect of land parcel **Nandi/Cheptil/138**.

65. In addition, the 1st house was given **5 cows**, **where Rodah Chepkering is to get 2 cows**, **Salina Cherubet 1 cow and John Kerich 2 cows.**

It is clear that the purported Will herein cannot stand the test of the law since it did not provide for all the beneficiaries/dependants. There is no justifiable reason why the beneficiaries from the 1st house were denied inheritance and that some of them got so little as compared to the beneficiaries from the 2nd house.

I draw from the case of **Gulzar Abdul Wais v Yasmin Rashid Ganatra & Another [2014] eKLR, H.C at Meru Succession Cause No. 290 of 2010, at paragraphs 50 to 53** where Lesitt (J) stated as follows:

> ***"…The counsel relied on Ndolo v Ndolo Nairobi. C.A No. 128 of 1995. In that case the Court of Appeal, commenting on a testator's exercise of freedom to dispose of his/her property as provided under section 5 of the LSA, and the responsibility required under section 26 of the LSA in the exercise of that freedom expressed itself thus:***
>
> > ***"This court must, however, recognize and accept the position that under the provisions of Section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by Will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime."***
>
> ***51. The responsibility to the dependants is expressly recognized by Section 26 of the LSA which provides as follows:***
>
> > ***"where a person dies after the commencement of this Act and in so far as succession to his property is governed by the provisions of this act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate by his Will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the Will, gift and law is not such as to make reasonable provision for that dependant, order that***

such reasonable provision, as the court thinks fit, shall be made for that dependant out of the deceased's net estate."

52. This Section clearly puts limitations on the testamentary freedom given by section 5. So that if a man by his Will disinherits his wife, or child who was dependent on him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife or child.

53. I am guided by the cited case. The legal position is clear that failure to provide for a beneficiary in a Will does not invalidate a Will. This is because the court is empowered to under section 28 of the LSA to make reasonable provision for the dependant in exercise of its discretion. Section 28 of Law of Succession Act provides that the court should have regard to:

"In considering whether any order should be made under this Part, and if so what order, the court shall have regard to —

(a) The nature and amount of the deceased's property;

(b) Any past, present or future capital or income from any source of the defendant;

(c) The existing and future means and needs of the dependant;

(d) Whether the deceased had made any advancement or other gift to the dependant during his lifetime;

(e) The conduct of the dependant in relation to the deceased;

(f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any Will;

(g) The general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant". [Emphasis added]

Consequently, even if there exists a valid will. The mode of distribution is so skewed as to render the same discriminatory, and the beneficiaries from the first house literally disinherited

66. The argument that under Nandi culture daughters are not entitled to inherit from their father rings hollow, and an attempt to treat them as mere objects of sympathy to be given a small portion on humanitarian grounds, makes a mockery to the constitutional principle of equality before the law, and justice for all. Indeed, in the case of **Mary Wangari Kihika v John Gichuhi Kinuthia & 2 others [2015] eKLR,** Muigai (J) observed as follows:

"18. This Court has found it necessary to emphasize an important point that is related to the above point; that all children of the deceased, including the daughters who are married, are entitled to inherit. One of the grounds on which the Respondents relied on in seeking to dismiss the Applicant's summons for revocation of the grant was that the Applicant and her sisters were married and it was the deceased's will to have the suit property only distributed to his sons and unmarried daughters. It is therefore useful to clarify the fact that Section 29 of the Law of Succession Act Cap 160 does not discriminate beneficiaries on any grounds, be it gender or marital status. On the contrary, it defines dependants as including the children of the deceased without any adverse distinction. This position is well established in our legal system and has consistently been restated in our jurisprudence. In the case of Eliseus Mbura M'Thara v Harriet Ciambaka and Another [2012] eKLR, Lesiit J stated that:

The Law of Succession Act does not discriminate between gender in matters of succession or inheritance. Under the Law of Succession Act and indeed under the Constitution a child is a child and every person has equal rights under the law irrespective of gender. The Law of Succession Act does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person.

67. As pointed out by Mr Nabasenge, the above position has been reaffirmed in the case of **Peter Karumbi Keingati & 4 Others v Dr Ann Nyokabi Nguithi [2014] eKLR,** where Kimaru J debunked much of the myth and disingenuous logic that underlies arguments that are typically advanced in a bid to disinherit unmarried daughters. He held as follows:

As regard to the argument by the Applicants that married daughters ought not to inherit their parent's property because to do so would amount to discrimination to the sons on account on the fact that the married daughters would also inherit property from their parent's in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that the court will grapple with during distribution are the issues anticipated by Section 28 of the Law of Succession Act. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried.

This ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come

for these discriminative cultural practices against women be buried in history".

68. Even if the will was to be found to have been properly executed it fails to meet the guidelines set out in **section 28** was not strictly followed, therefore some beneficiaries received more and other so little compared to the acreage of land. In view of the above holdings the impugned will and the proposed mode of distribution is set aside set aside I proceed to make provision for all the dependants and/or beneficiaries equitably in accordance with the law. Having been a polygamous set up I am guided **by section 40 of the Law of Succession Act of section 40 of the Law of Succession Act Cap 160 Laws of Kenya** which states as follows;

> **"40. (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".**

69. I therefore distribute the land parcels herein between the two houses subject to the number of children/dependants from each house as follows:

Saruyoit L.R 7739/8 measuring 149 acres.

A. <u>1st House</u>

1. **Wiliam K. Sawe (deceased, his family) - 12 acres.**

2. Charles K. Sawe (deceased, his family – 12 acres

3. Salina Sawe – adult daughter unmarried – 6 acres

4. John Sawe (deceased, his family) – 12 acres

5. Christine Sawe - adult daughter, married – 4 acres.

(Total acreage for the 1st house, 46 acres)

B. <u>2nd House</u>

1. Elizabeth Sawe – widow – 8 acres (to have a life interest)

2. Paul Korir Sawe – adult son – 12 acres

3. Daivid Kimeli – adult son – 12 acres

4. Richard Maiyo – adult son – 12 acres

5. Mathew Kibitok – adult son – 12 acres

6. Harron Kipkoech – adult son – 12 acres

7. Christopher Kiprutto – adult son – 12 acres

8. Everline Jerono – adult son – 12 acres

9. Sally Jepchumba - adult daughter – 12 acres.

(Total acreage for the 2nd House, 102 acres.)

C.The AIC Church – 1 acre

No. Nandi Cheptil/138 measuring 37 acres,

<u>1st House</u>

1. Wiliam K. Sawe (deceased, his family) - 3 acres.

2. Charles K. Sawe (deceased, his family – 3 acres

3. Salina Sawe – adult daughter unmarried – 3 acres

4. John Sawe (deceased, his family) – 3 acres

5. Christine Sawe - adult daughter, married – 1 acre.

(Total acreage for the 1st house, 13 acres)

B. 2nd House

1. Elizabeth Sawe – widow – 2.4 acres

2. Paul Korir Sawe – adult son – 2.9 acres

3. Daivid Kimeli – adult son – 2.9 acres

4. Richard Maiyo – adult son – 2.9 acres

5. Mathew Kibitok – adult son – 2.9 acres

6. Harron Kipkoech – adult son – 2.9 acres

7. Christopher Kiprutto – adult son – 2.9 acres

8. Everline Jerono – adult son – 2.9 acres

9. Sally Jepchumba - adult daughter – 1.3 acre.

(Total acreage for the 2nd House. (Approximately 24 acres)

The costs of this cause shall be borne by the petitioners

Delivered, Signed and Dated this 14th Day of August 2019 at Eldoret

H. A. OMONDI

JUDGE