



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**PROBATE & ADMINISTRATION CAUSE NO. 77 OF 2009**

**IN THE MATTER OF THE ESTATE OF KIPROTICH KOMEN (DECEASED)**

**LOICE JERONO ROTICH.....OBJECTOR**

**VERSUS**

**KAPKIYAI ROTICH.....1<sup>ST</sup>PETITIONER**

**THERESA KIPROTICH.....2<sup>ND</sup>PETITIONER**

**JUDGMENT**

1. After the late **KIPROTICH KOMEN** (deceased) on the 11<sup>th</sup> of January 2007 **KAPKIYAI ROTICH** (the 1<sup>st</sup> Petitioner) and **THERESA KIPROTICH** The 2<sup>nd</sup> petitioner), petitioned for Letters of Administration Intestate over the **ESTATE OF THE LATE KIPROTICH KOMEN** in **Iten Succession Cause No. 23 of 2007**. On 14<sup>th</sup> of May 2008, they were issued with grant of letters of Administration Intestate; which was subsequently confirmed on the 13<sup>th</sup> of August 2008.

The petitioners stated that the late **KIPROTICH KOMEN** was survived by 19 dependents i.e.

<b>Kabon Kiprotich</b>	<b>1st wife</b>
<b>Theresa J. Kiprotich</b>	<b>4th wife</b>
<b>Kapkiyai Rotich</b>	<b>Son</b>
<b>Jackson K. Rotich</b>	<b>Son</b>
<b>Benjamin K. Rotich</b>	<b>Son</b>
<b>Jonathan K. Komen</b>	<b>Son</b>
<b>Dennis K. Rotich</b>	<b>Son</b>
<b>Mary J. Rotich</b>	<b>Daughter</b>
<b>Emmy J. Rotich</b>	<b>Daughter</b>
<b>Linah J. Rotich (Kosgei)</b>	<b>Daughter</b>
<b>Jane J. Rotich</b>	<b>Daughter Passed Away On 25/10/2009</b>
<b>Jepchirchir Rotich</b>	<b>Daughter</b>
<b>Loice J. Rotich</b>	<b>Daughter</b>
<b>Joyce J. Rotich</b>	<b>Daughter</b>

<b>Jebet Rotich</b>	<b>Daughter</b>
<b>WKA</b>	<b>Nephew</b>
<b>SKA</b>	<b>Nephew</b>
<b>Kigen K. Komen</b>	<b>Brother to the deceased</b>
<b>Daudi K. Komen</b>	<b>Brother to the deceased</b>

2. The assets of the the estate of the late **KIPROTICH KOMEN** were indicated as comprising the following properties:-

<b>MOSOP/METKEI/1006</b>	<b>20 ACRES</b>
<b>MOSOP/METKEI/1046</b>	<b>7 ACRES</b>
<b>MOSOP/METKEI/1169</b>	<b>1.75 ACRES</b>
<b>MOSOP/METKEI/830</b>	<b>4.25 ACRES</b>
<b>SOY/KOCHOLWO/PERCEL 203</b>	<b>2 ACRES</b>
<b>MOSOP/METKEI/841</b>	<b>21.5 ACRES</b>
<b>IRONG/SERGOIT/20</b>	<b>4.5 ACRES</b>
<b>KARONA/SOSIANI/BLOCK(CHEPLASKEI)97</b>	<b>33.075 ACRES</b>
<b>SESYA/MOIBEN/PERCEL NO. 96</b>	<b>9.7</b>
<b>IRON/SERGOIT/347</b>	<b>1 ACRE</b>
<b>IRONG/ITEN/197</b>	<b>3.8 ACRES</b>
<b>SESYA PLOT</b>	<b>50 x 100</b>
<b>MOKOIYWO PLOT NO. 11</b>	<b>100 x 200</b>
<b>MOKOIYWO PLOT NO. 12</b>	<b>100 x 200</b>
<b>SERGOIT PLOT NO. 12</b>	<b>50 x 100</b>

3. The Objector (**LOICE JERONO ROTICH**) who is a daughter of the deceased, then moved the court vide **ELDORET PROBATE & ADMINISTRATION MISCELLANEOUS APPLICATION NUMBER 395 of 2008** seeking annulment and revocation of the grant on the grounds that: -

- a. The court at Iten had no jurisdiction
- b. The proceedings to obtain the grant were defective in substance
- c. The grant was obtained fraudulently by making of false statements and concealment from the court of material facts.
- d. The grant was obtained by means of untrue allegations of facts not essential in part of law to justify the grant.

4. In her supporting affidavit, the objector deposed that the deceased had 4 wives was blessed with children namely set out as follows: -

**1<sup>st</sup> wife- KABON KIPROTICH whose children are**

- i. Kapkiyai Rotich**
- ii. Emmy J Rotrich**
- iii. Linah Rotich**

iv. Joyce Kimeli

v. Jane Rotich

vi. Jonathan Rotich

**2<sup>nd</sup> wife KOBILLO KIPROTICH (now deceased) whose children are:**

i. Jackson K. Rotich

ii. Benjamin K. Rotich

iii. Loice Rotich

**3<sup>rd</sup> wife TAPYOTIN KIPROTICH (now deceased) whose child is**

i. Mary J. Rotich

**4th wife- TERESA KIPROTICH whose children are**

vii. Viloa Jepchirchir Rotich

viii. Gladys Chebet Rotich

ix. Dennis Rotich

5. The objector is opposed to the mode of distribution pointing out that the Petitioners having made themselves the Administrators' of the estate of the deceased included strangers as beneficiaries, namely **DAVID KOMEN, KIGEN KOMEN, SKA, WA, JONATHAN KOMEN AND ESTHER RUTTO**. It was also the Objectors contention that the Petitioners concealed material facts at Iten Law courts by excluding some properties of the deceased namely **IRONG/ITEN 279, PLOT NO. 85 within SESIA FARM** and a parcel of land at **KASAR, KACHOLWO LOCATION**, within **Keiyo district**.

6. It was also the Objector's contention that the Petitioners herein did not comply with the provisions of **Rule 26 (2) of the Probate and Administration Rules** and the consent which was purportedly executed is null and void on account of the same having been made fraudulently. Further, that the Resident Magistrate's court at Iten had no jurisdiction to entertain the matter involving parcels of land worth over 10 million.

7. In response the 2<sup>nd</sup> Petitioner by a replying affidavit deposed that although the deceased was married to the named four (4) wives, the listed dependents included not only the children of the deceased but all the dependants of the deceased to wit:-

a. **Jonathan Komen; the son of the deceased born to the first house.**

b. **David Komen; brother of the Deceased.**

c. **Kigen Komen; brother to the deceased.**

d. **SA and WA; nephews to the deceased and were staying with the deceased up to his demise.**

e. **Esther Rutto; daughter in law of the deceased.**

8. The petitioners deny concealing any material facts and maintain that the Resident Magistrate sitting at Iten by virtue of **Gazette notice no. 1669** was representing the High Court for purposes of **section 47 of the Succession Act** and hence pecuniary jurisdiction did not apply.

9. At the hearing, the objector (PW1) testified before Anzangalala (J), that after the burial of the deceased, the family held a meeting which she did not attend, and as far as he knows the deceased left 16 parcels of land. The 3<sup>rd</sup> petitioner (PW2) who is from the 2<sup>nd</sup> house, testified that although under Keiyo custom, married daughters were not entitled to inheritance, **LOICE AND CHEPKORIR KIPROTICH** were given a share each, because they are unmarried. That the eventual division was done subsequent to a family meeting, where the elders pleaded for the inclusion of **S AND W**.

10. **PW3 (KIPLAGAT CHANGWONY)**, who is a neighbour to the **KOMEN** family testified that the deceased had expressed to him his wishes. He stated that he attended the meeting of October 2011, where a decision regarding the proposed mode of distribution was made as contained in the minutes of the meeting produced as Ex1. However, upon cross-examination he confirmed that there was no consensus at the meeting, and some of the participants did not sign the minutes. It was his evidence that the deceased had said the 1<sup>st</sup> house was to get a total of 21.5 acres, though he in their distribution they gave the first wife 11 acres. He also stated that 2<sup>nd</sup> house were **LOICE** hails from was to get a total of **57.75 acres**, and in particular deceased directed that **LOICE** was to get **12.5 acres**, while **JACKSON** was to get **21.5 acres**. He denied suggestions that **MARY** who was the only survivor from the 3<sup>rd</sup> house was to get **7 acres**, and he did not hear what the 4<sup>th</sup> house

was to get.

11. PW3 further stated on re-examination, that Jonathan from the 4<sup>th</sup> house had never lived on the deceased's land, but had lived with his uncles as he was born out of wedlock, and only came to live with his mother on the **TUGUMOI plot No 1006**, which had been given out to her by the deceased.

12. **PW4 (MUTAI Arap KIGEN)** echoed what PW3 stated with an exception that although **JONATHAN** had initially lived with his uncles as he was an 'out-grower', he eventually moved to live with his mother after his circumcision, and this was during the deceased's lifetime. He also explained on re-examination that the deceased had set up a homestead for each wife, and that is what they used as a guide in the distribution of the estate.

13. **BEJAMIN KIPLANGAT KIPROTICH (PW5)**, a son of the deceased confirmed that not everyone agreed with the decision made at the family meeting and the representatives of the 1<sup>st</sup> house did not sign the minutes. He belongs to the 2<sup>nd</sup> house and was contented with the mode of distribution. In counting his siblings, he excluded **JONATHAN** whom he said grew up with his uncles, and should inherit from his mother. It was his evidence that he was given only **10 acres** and not **17 acres**, while **MARY** from the 3<sup>rd</sup> house was to get **7 acres**.

14. **KABIKIYAI ROTICH (DW1)** from the 1<sup>st</sup> house, and also the eldest in the entire **KOMEN** family, urges this court to distribute his late father's estate among all the dependants, and not just the nuclear family. Upon cross-examination, he stated that their late father had wanted to share out parcel **No 1006 to JONATHAN** and give **BENJAMIN KIPLAGAT 9.85 acres** and give **him 10 acres inter vivos**, but he opposed that move.

He admitted that there were several family meetings, but the 1<sup>st</sup> resolution by the elders was opposed because it favoured the 2<sup>nd</sup> house. He however admits that each wife was settled on a specific portion.

15. He wants to have **S and W** who are their cousins, included in the distribution because the deceased took care of them after the death of their father, who was his brother. That they also included **DAUDI** (their father's younger brother) in the list of beneficiaries, because the deceased owed him some money and was demanding a cow, which they felt was equivalent to ¼ of an acre of land to be given to him. That their father had also instructed them to give his younger brother a portion of land to **USE**. On re-examination he stated that the 2<sup>nd</sup> house should be given parcel No 1046.

16. **TERESA ROTICH (DW2)** who is the deceased's 4<sup>th</sup> wife lives on 36 acres of land in **MOIBEN**. She told this court she wished the assets to be distributed so that each son gets 10 acres, although she claimed that the deceased had allocated 10 acres to **JACKSON, BENJAMIN and KAPKIGEI**.

She explained on cross examination that deceased had said he could not share to the land to the other children as they were still young, but intended to give each son 10 acres once they sat up their families.

As far as she knows, her late husband wanted each family member to have a portion to till, but he never mentioned about giving a share to **S OR W** who were his brothers sons (much as they had lived with him).

17. **DAVID KOSGEI KOMEN (DW3)**, a younger brother to the deceased testified that he had given the deceased a cow to take care of. The cow got a calf, and the deceased sold it, with a promise to give him back another cow. All he claims is a cow NOT land, although on re-examination he stated that if no cow is forthcoming, then he should be given the ¼ acre of land.

18. **DW4 (JONATHAN K. KOMEN)** says he is the last born from the 1<sup>st</sup> house and maintains that the deceased is his father. It is his testimony that:

*“until 1979, I used the names JONATHAN ROTICH, but I repeated Std 7, and changed to JONATHAN KOMEN (who is our grandfather. I lived on plot 1006 with my mother”.*

He insists that he was involved in the Keiyo circumcision ceremonies within his father's homestead, and not at his uncles' homes. His position is:

*“Let our father's property be shared equally to every child including me. There is no one claiming inheritance who is outside his family. We must include the daughters from all the three houses”.*

On cross-examination he stated:

*“From childhood I lived on parcel No 1006 with my father and mother...we proposed S gets 1 ½ acres, and W gets 3 acres.*

19. **PATRICK KURGAT (DW5)**, who has been a neighbour to the deceased on parcel **No 1006**, says he has known the deceased since his childhood, as the former worked for his father on the land. It is his evidence that the deceased begun sharing out his land to his sons in 1977, giving three of the older sons 10 acres each. He knew this because he attended a meeting called by the deceased just to listen to what he was saying. He also attended the meeting which was held in October 2011 and says there was no consensus reached.

The Petitioners contend that on 9<sup>th</sup> of October 2009 they applied for summons for confirmation of grant dated 3/09/2009, which was

consented to by the parties which was recorded in court on the 25/05/2009 the objector was included as an Administrator of the Estate of the late **KIPROTICH KOMEN** and each party was at liberty to apply for confirmation of grant.

It was the Objector's that although a family meeting was held on 8/08/2009, the members never unanimously agreed and a second meeting was scheduled on 12<sup>th</sup> of September 2009 during which meeting the Petitioners boycotted. The Objector also stated that **JONATHAN ROTICH** who is included in the list of beneficiaries is deceased, and prior to his demise the deceased ha, and sent him away to his uncles, so he is not entitled to inherit any of the deceased's property disowned him and indicated how some of his properties were to be distributed.

## ISSUES

From the submissions presented it is apparent that the issues for determination are: -

1. **Whether the two brothers to the deceased, and the two nephews should inherit any property**
2. **Whether Jonathan qualifies to be considered a dependant**
3. **Whether the assets of the estate were shared fairly among the dependants**
4. **Is there evidence that can conclusively be relied upon to support the position that the deceased had made an oral expression as to how his property should be shared out**

### The two brothers

20. The objector refers to section 35 of the **Law of Succession Act** to support the argument that if the intestate is survived by a spouse and children, then no other relative of the intestate can benefit from the estate. That any other relative making a claim to inheritance can only do so under **Section 26** of the Act for reasonable provision to be given if they can show that they were dependent on the intestate immediately prior to his death.

**Section 35 provides that:**

**Where intestate has left one surviving spouse and child or children**

**(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—**

**(a) the personal and household effects of the deceased absolutely; and**

**(b) a life interest in the whole residue of the net intestate estate:**

**Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.**

21. It is the objector's contention that if indeed the deceased's brothers were being maintained by the deceased prior to his death, then they should have moved the court accordingly for reasonable provision of the net estate. That their failure to do so, leaves only the deceased's widows and children, and she relies on the decision by Gikonyo (J) in **JOYCE KABITI M'TURUCHU versus DAVID M'NTIRITU KIAMBI [2016] eKLR** which held that the grandchildren had failed to demonstrate that they were being maintained by the deceased immediately prior to his death and did not therefore qualify to be beneficiaries.

22. The petitioners submit that evidence to the effect that the deceased **brothers KIGEN K. KOMEN AND DAUDI KOMEN** stayed with him prior to his death is not disputed, so this court should find that they are dependents under the provisions of section 29 and make a reasonable provision for them pursuant to the provisions of 27 and 28 of the Law of Succession Act. Both parties refer to **section 29 of the Law of Succession Act** which defines a dependant in intestacy succession to mean:

**(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased 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) ...**

23. It is submitted that, a dependant under **section 29 (b)** must prove that he/she was being maintained by the deceased immediately prior to his demise. That it is not the mere relationship that matters, but proof of dependency.

So far no dependency by the two brothers, immediately prior to the deceased's death has been demonstrated. Indeed **DAUDI (DAVID)** on his own admission indicated that he lived with the deceased long before his death, and he had since moved out and acquired his own property, He instead said that all he was claiming was a cow which the deceased purportedly owed him, yet there was no tangible evidence of

such indebtedness. In any event it is not clear how the petitioners were able to peg the value of one cow to be equivalent to the value of ¼ of an acre of land, and they seem to have simply plucked a figure from the abacus. As for **KIGEN**, the impression created is that he is just a joy rider, sailing on the magnanimity of his brother's eldest son. Either way, none of the two brothers meet the threshold for who qualifies as a beneficiary, and I hold that they are not entitled to inherit from the estate.

### **The two nephews**

24. The objector acknowledges that **W and S** were taken in by the deceased into his fold when they were still very young, and he lived with them and provided for them. It is submitted that at the family meeting, all the family members agreed that the two should be included as beneficiaries, since that was also the recommendation by the elders. The objector is agreeable to 2 acres being hived off from parcel No **MOSOP/METEKEI/81**, for the two nephews

25. On this limb it is submitted on behalf of the petitioners that indeed **SA and WA**, were minors when their father (**AYABEI KOMEN**) passed away and thereafter the deceased herein took them in and raised them, and maintained them even prior to his death. That giving meaning to the provisions of section 29 as well as the petitioners' proposed mode of distribution contained in Ex 1 which made 2 acres provision for each of the two nephews, this court should find that the two nephews are dependents in terms of section 29. There seems to be a consensus between the parties in this regard, and I make a finding that indeed **WA and SA** are dependants within the meaning of section 29 of the Act.

### **Whether Jonathan Komen is one of the dependants?**

26. **JONATHAN KOMEN** is rejected by the objector and her witnesses as an 'outgrower' who is not a product of their father. In-fact they claim that the deceased had chased him away from his home, and set him to go and live with his maternal uncles, and that the deceased's wishes should be respected.

That the milestones in his life of education, initiation and marriage were undertaken by one **ZAKAYO TOMNO** who was present at the family meeting. That on account of this, then he should inherit from his mother's share. It is to be noted that the said **TOMBNO** did not testify in court to confirm these claims, and it is also critical to point out that if **JONATHAN** was to be restricted to only inheriting from his mother's share, then he would forever remain in limbo as **Section 35** of the Act limits his mother's right to a life interest which would be terminated if she remarried, and she even if she does not remarry, it sets conditions as to her freedom to dispose of the property- requiring the consent of her co-trustees.

27. It is submitted by the petitioners that **JONATHAN KOMEN** qualifies as a dependant as contemplated under the provisions of section 29 of the Law of Succession Act, and the definition of who is a child is given under **section 3(2) of the Law of Succession Act** provides: -

***“(3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.”***

28. **DW4 (JONATHAN KOMEN)** is categorical that he is a son to the deceased and he was raised by the deceased. Whereas **PW3** claim that the said **JONATHAN** only joined his mother on the deceased's land after the deceased had died, while **PW4**, says he joined his mother, and lived on the deceased's land during the deceased's life time, once he underwent circumcision

**Jonathan** found support and recognition from **DW1** that he is his brother. The petitioner's counsel pointed out that no documentary proof was presented by the Objector to demonstrate that the deceased ever complained that **JONATHAN** whom he lived with was not his son.

29. In urging this court not to leave out **JONATHAN** on claims that he was born out of wedlock, the petitioners counsel makes reference to **Article 27 and 28 of the Constitution of Kenya**, which provides for non-discrimination and right to dignity, thus essentially giving children born outside marriage the same right to equality and dignity as children born within marriage. **He submits that there is an urgent need** to recognize the inherent dignity and worth of all persons; to protect those who have hitherto been marginalized and to ensure that they enjoy the human rights guaranteed to all on the same basis as others.

30. That the only way to give meaning to these constitutional provisions, is by making provisions for **JONATHAN** and the rest of the children of the deceased equally regardless of their sex, age and marital status. On this limb, I concur totally with the arguments presented by the petitioners, both as advanced under the constitutional provisions and also the Law of Succession Act. **Jonathan** is a beneficiary of the estate and is entitled to inherit on an equal footing with his other siblings.

### **Whether or not the properties of he deceased were shared fairly among the dependants?**

31. **PW3 (KIPLAGAT CHANGWONY)**, a neighbour to the deceased's family testified that he took part in two family meetings, and a final decision was made in December 2011 setting out the mode of distribution as contained in the minutes dated 22/10/1011(sic). However, on cross examination, he confirmed that there was no consensus at the meeting held in October 2011, and not everyone signed the minutes Ex 1. His position is that there should be no departure from the deceased's wishes, as that would offend Keiyo custom. It is accepted that some of the beneficiaries were opposed to the mode of distribution that had given deference to the touted Keiyo custom. It is not difficult to see that part of that opposition is because some female members were left out on account of being married. Others were considered strangers to the estate.

32. The petitioners counsel also points out that at the time of distribution of the estate, there are two widows, two nephews, the deceased's brothers and the deceased's children. Both parties are in unison that since the *Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person with regard to the distribution of his estate, then all children of the deceased are entitled to stake a claim to the deceased's estate. The objector however urges this court to find that since the*

Law of Succession does not provide that equal share among beneficiaries, it can apply equitable discretion.

33. Marriage per se for both sons and daughters does not change the fact of being born in a certain home to certain parents, and in this regard to inheritance of the parents' property, and the petitioners rely on the authority by Kimaru J in the case of **PETER KARUMBI KEINGATI & 4 OTHERS VS. DR. ANN NYOKABI NGUTHI & 3 OTHERS (2014) EKLK**. Whereby his Lordship put it this way;

***“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. ...This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which has a tendency of once in a while rearing its ugly head to be forever buried. The ghost has long cast its shadow on our legal system despite 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 those discriminative cultural practices against women be buried in history.”***

I concur with the petitioners' counsel that this court would be failing on its constitutional mandate if it was to uphold a disputed mode of distribution that is based on an open discrimination on the grounds of gender, sex and status. Since the deceased was polygamous, the first guide to the distribution of the estate is section 40 of the Law of Succession which provides that:

#### 34. Where intestate was polygamous

**(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.**

35. My difficulty here is that although both parties say that each wife had been settled on a particular portion of land, they have failed to disclose the identities of those parcels-that would have been the easiest criteria to use in deference to section 40 cited above.

36. I must also pay heed to what all family members acknowledge, that the deceased had given out 10 acres to the first three sons namely **BENJAMIN KIPLAGT, JAKSON KIPRUTO and KAPKIYAI ROTICH**-whether DW1 approved of it or not-those were gifts inter vivos, and are not available for distribution. Yet again the witnesses were economical with details as to which parcels these were.

37. I must also take into account the accepted position that **W AND S** are acknowledged as beneficiaries entitled to a reasonable portion. The objector proposes that they be given be given 2 acres jointly from parcel No **MOSOP/METEKEI/81** although no reason is given for the selection of that parcel. There is evidence to the effect that they lived with the deceased on **IRONG/SERGOIT/20** which measures 4.5 acres, I consider it reasonable and fair that the get their share from the **IRONG** parcel where they had lived with the deceased.

38. I also take into account the statements by the surviving widows who did not wish to rock the boat, and were contented with what the petitioners had proposed mode of distribution. I have perused and considered the proposals made by both parties, the proposal by the objectors is unfair as it leaves out some beneficiaries. In my view the proposed mode of distribution as set out by the petitioners in the consent **form 37** filed in court on 19th Sept 2019 (also bearing another stamp for 16<sup>th</sup> November 2009) gives an equitable and fair distribution, as it includes every dependant of the deceased including the daughters. The only departure is that **KIGEN KOMEN and DAUDI KOMEN** are removed from that list of beneficiaries, if indeed the deceased owed **DAUDI** a cow then it will be upto the administrators as representatives of the estate to decide how best to settle that debt, whether in kind or selling a portion of the residue of the estate so as to pay off the debt, and any other liabilities the deceased may have had.

#### **Whether the estate should be shared in accordance with the wishes of the deceased?**

39. There were claims that the deceased made an oral will, in the presence of different people on separate occasions. This claim has been contested to the extent of what exactly the deceased expressed as each side has presented a version that favours the position they have adapted in this matter. Was there an oral will? **Section 9 (1) of the Law of Succession Act** provides as follows: -

**No oral will shall be valid unless: -**

**(a) It is made before two or more competent witnesses; and**

**(b) The testator dies within a period of three months from the date of making the will:**

**Provided that ...**

40. I agree with the petitioners' counsel that from the wording of **Section 9 of the Law of Succession Act and Rule 13 of the Probate and Administration Rules** the date of the making of an oral will is critical. The life of an oral will, is only three (3) months, unless it is made by a mariner. The maker of the will should die within three months of its making for it to be valid.

From the evidence presented, the date when the alleged oral will was made is not disclosed in any of the affidavits on record. The persons alleged to have been present when the will was made did not swear affidavits, nor is the date mentioned in the minutes of **1/10/2011 and 22/10/2011**. Indeed, there is no telling whether the deceased died within three months of the making of the oral will thus making it impossible to ascertain its validity and the only rational conclusion to draw is that the deceased died intestate and no wishes allegedly made by him can be followed in the distribution of his estate.

**CONCLUSION**

**The grant issued and confirmed be and is hereby revoked. A fresh grant to issue reflecting the mode of distribution as stated in Form 37 filed in court on 16<sup>th</sup> September 2019 (and bearing another date stamp of 16<sup>th</sup> November 2009)**

**Delivered, Signed and dated this 25<sup>th</sup> day of October 2019 at Eldoret**

**H. A. OMONDI**

**JUDGE**