



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**SUCCESSION CAUSE NO. 96 OF 2009**

**ALFRED KIPRUTO KERICH .....DECEASED**

**AND**

**WINFRED CHEKEMOI KERICH .....PETITIONER**

**VERSUS**

**RECHO CHEPKEMEI KERICH.....1<sup>ST</sup> RESPONDENT**  
**ROBERT KIPKIRUI RUTO.....2<sup>ND</sup> RESPONDENT**  
**KENNETH CHERUIYOT RUTTO.....3<sup>RD</sup> RESPONDENT**  
**MELLIOT CHERONO NAID NOI.....4<sup>TH</sup>**  
**RESPONDENT**

**RULING**

The record in this cause shows that ALFRED KIPRUTO ARAP KERICH, (*the deceased*), died intestate on 7<sup>th</sup> November 2007 in Kapsoit in Kericho aged 70 years. It is alleged that he left several parcels of land which constitute his estate and which include land title Nos. 1/R 23128 (182 acres); 1/R 92991 (0.3ha); Kericho/Kipchirchurui/ 20 (5acres) and motor vehicles, shares and businesses. The deceased also left a widow and sons and daughters.

On 3/12/2009, **Winfred Chepkemoi Kerich** who described herself as the deceased’s first born daughter applied by way of a Petition under section 26 of the The Law of Succession Act (cap160) seeking provision as a dependant. Section 26 of The Law of Succession states:

***S 26 “Where a person dies after the commencement and 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 effected by his will or by gift in contemplation of death, or the law relation 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.”***

It is alleged that, besides Winfred Chepkemoi Kerich, the deceased had four other dependants, namely, Janet Chepkoech Kerich, Helen Chepkorir Kerich, Lily Chelangat Kerich and Nicholas Kiprono Rutto.

No petition for a full or limited Grant of letters of Administration with or without a will annexed has been filed hitherto.

On 15<sup>th</sup> June 2010, Winfred Chepkemoi Kerich filed a summons under **sections 45 and 46 of the Succession Act, Cap160**, seeking an order to stop Messors Recho Chepkemoi Kerich, Robert Kipkurui Rutto, Kenneth Cheruiyot Rutto and Melliot Cheron Naid Noi from intermeddling with the estate.

**Section 45 (1)** of the **Succession Act** provides:

*S45 “Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”*

Duty is imposed on the police by **section 46 (1) of the Succession Act** to report to the provincial administration of the death of any person and upon receipt of such report of death the personnel in the Provincial Administration are required to take steps to protect the estate of the deceased. **Section 46(1), (2) (a) & (b)** provides:

*46(1) Whenever it becomes known to any police officer or administrative officer that any person has died, he shall, unless aware that a report has already been made, forthwith report the fact of the death to the assistant chief of the sub-location or to the chief or administrative officer of the area where the deceased had his last known place of residence.*

*2 Any person to whom a report is made under sub-section (1) shall-*

*(a) at the request of any person who appears to have a legitimate interest in the estate of the deceased; or*

*(b) if no application for representation in respect of the estate has been made within one month after the date of the death of the deceased.*

**Section 46 (5)** of the **Succession Act** imposes duty on the provincial administration to report to the Public Trustee the fact of death of the deceased and the steps taken pursuant to **section 46 (supra)**.

In the said application, Winfred Chepkemoi Kerich avers that the Respondents have moved to subdivide land No. 631/1453/4 which is part of the estate of the deceased. They have been trying to subdivide without success in the past, it is alleged.

The affidavit in reply to the application purportedly sworn on an unknown date by Rober Kipkurui Ruto in defective. The record shows that land No L.R. No. 1453/4 has transferred as a gift to Robert Kipkurui A. Ruto, Melliot Cheron Naid Noi, Kenneth Cheruiyot A. Rutto, and Nicholas Kiprono A. Rutto in September 2007, about two months before the deceased died. It seems that messrs Robert Kipkurui Ruto, Melliot Cheprono Naid Noi, Kenneth Cheruiyot A. Rutto, and Nicholas Kiprono A. Rutto are the proprietors of the said land title No. 631/1453/4 and were so registered before the death of the deceased. It is therefore not part of the estate of the deceased. The record however shows that Winfred Chepkemoi Kerich contends that the property was transferred by the deceased to the said transferees to be held in trust for all the heirs of the deceased.

On 29<sup>th</sup> June 2010, messrs Recho Chepkemoi Kerich, Robert Kipkurui Rutto, and Melliot Cheron Naid Noi, filed objection under section 68 of the Law of Succession Act objecting to the making of a grant of representation to the estate of Alfred Kiprono Kerich allegedly as sought in the petition of Winfred Chepkemoi Kerich filed in the High Court at Kericho on 3<sup>rd</sup> December 2009. But what was filed on 3<sup>rd</sup> December 2009 was not a petition for a Grant of Letters of administration as alleged. It was a petition by a dependant under **section 26 of the Law of Succession Act**. The objection is quite misplaced as it is made in a vacuum in that no petition for Letters of Administration exists.

There is no administrator or Executor in the estate of the deceased, Alfred Kipruto Arap Kerich, whether legal or **de son tort**. The Law of Succession under **section 45 (1)** makes intermeddling with an estate of a deceased person unlawful and an offence under **section 45 (2) (supra)**. As there is neither an Executor

nor an administrator in the estate of the deceased who can be put to task or be required to provide for a dependant, the application by Winfred Chepkemoi Kerich would appear to be misplaced but no more than the objection by messrs Recho Chepkemoi Kerich, Robert Kipkurui Rutto, and Melliot Cheronoi Naid Noi is. The latter, who claim to be entitled to apply for the Grant of Letters of Administration, have not done so and yet they have filed what amounts to “*anticipatory objection*” to the making of a Grant.

Miss Nyige, learned Counsel for Winfred Chepkemoi Kerich urged the court on 29<sup>th</sup> June 2010 to have the respondents cited for intermeddling with the estate of the deceased which her client showed in her affidavit sworn on 1<sup>st</sup> of June 2010 as comprising land title No L.R. 631/1453/4.

The replying affidavit purportedly sworn by Robert Kipkurui Ruto in reply to the application is defective as it has no date on which it was purportedly sworn. I hereby strike it out on that ground.

The first problem with regard to the application by Winfred Chepkemoi Kerich is that there is no administrator or executor who is responsible for the estate of the deceased who can be required to provide for the applicant as a dependant, or to deal any acts of waste or intermeddling with the estate. But this is not to say that the applicant or any of the beneficiary cannot, under section 46 of the Law of Succession Act, report to the police any acts of intermeddling that constitute an offence. Moreover, the relief sought, namely, provision for the applicant qua dependant must be directed to an administrator or executor who is seized of the estate of the deceased and who would normally be required to execute the orders of the Court. The Court cannot itself administer the estate. That is the responsibility of an administrator or executor where one is appointed and in their absence, the Public Trustee.

The second problem relates to the issue as to what constitutes the estate. From the applicant’s annexures of copies of title deeds exhibited to the court, it seems the parcels of land in question were transferred by the deceased during his lifetime to some of the heirs who include the respondents. As at the time of his death, the deceased was not the legal owner of the parcels of land said to constitute the estate. It is alleged, however, that the transfer of the parcels of land by the deceased was intended to prevent creditor/s from reaching the properties. Moral issues aside, if the deceased did not die owning the properties, they cannot be said to form part of his estate and the issue of intermeddling or dependency cannot arise if the deceased did not die owning the same. As for the alleged trust, it is up to the party alleging its existence to file appropriate proceedings and to prove it.

I therefore decline to grant the orders sought and hereby dismiss the application for dependency. I also strike out the objection dated 28<sup>th</sup> June of 2010.

No doubt the parties will take appropriate steps to apply for Grant of Letters of Administration or to refer the matter to the Public Trustee or to file suit on the alleged trust. It is not for the court to advise litigants. They have counsel.

I make no order as to costs.

**DATED at KERICHO this 27day of July 2010**

**G B M KARIUKI**

**RESIDENT JUDGE**

**COUNSEL APPEARING:**

-MS Nyigei instructed by M/S Nyigei & Co. Advocates for the Petitioner/Applicant.

-Mr. Olendo instructed by M/S Otieno Ragot & Co. Advocates for the 1<sup>st</sup>, 2<sup>nd</sup> & 4<sup>th</sup> Respondents.

- Kenneth Cheruiyot Ruto, the 3<sup>rd</sup> respondent appeared in person.