



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Joseph Kipkemoi Limo (Deceased) (Succession Cause
E040 of 2021) [2025] KEHC 1623 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1623 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E040 OF 2021
RN NYAKUNDI, J
FEBRUARY 21, 2025**

IN THE MATTER OF THE ESTATE OF THE LATE JOSEPH KIPKEMOI LIMO (DECEASED)

BETWEEN

RUTH CHEPKOSGEI LIMO 1ST PETITIONER

RICHARD KIPCHIRCHIR LIMO 2ND PETITIONER

AND

FAITH CHEMUTAI LIMO BENEFICIARY

AND

KAREN JEROP CHESOO INTERESTED PARTY

JUDGMENT

Representation:

M/s Kenei & Associates Advocates LLP

M/s Kilomenn Advocates

1. This matter concerns a succession dispute over the estate of the late Joseph Kipkemoi Limo, who passed away testate on 20th September, 2020. The principal controversy centres on several parcels of land and other assets, with the applicant, Faith Chemutai Limo, a biological daughter of the deceased, seeking to have certain properties subjected to the rules of intestacy despite the existence of a will dated 25th January, 2020.
2. The case presents various pertinent questions regarding joint tenancy, the doctrine of survivorship, and the court's jurisdiction in matters involving both succession and land disputes. At its core lies the contention between the applicant's claim for provision as a dependent under the *Law of Succession Act* and the respondents' assertion of joint ownership rights over the disputed properties.



3. The matter is further layered with prior land transactions executed during the deceased's lifetime, including amalgamations, subdivisions, and transfers to third parties, as well as the deceased's own pending inheritance from his father's estate. These interconnected elements require careful examination of both succession law principles and property rights under the *Land Registration Act*.
4. The applicant approached this court vide summons dated 4th August, 2021 essentially seeking that some of the properties forming part of the estate should be subjected to the rules of intestacy. She sought orders as follows:
 - a. Spent
 - b. Spent
 - c. Not granted
 - d. Not granted
 - e. The parcels of land being land title numbers Sergoit/Elgeyo Border Block 1(Beliomo) 461, 462, 463, 464, 465, 467, and 489 be included in the list of free assets of the deceased herein forming part of the estate and the same be distributed under the Rules on intestacy.
 - f. The beneficiary/applicant herein, Faith Chemutai Limo be provided for as a dependant from the assets forming part of the estate of the deceased herein pursuant to the provisions of sections 26 and 29 of the Law of Succession.
5. The summons is based on grounds that:
 - a. The beneficiary/Applicant herein is a biological daughter of the deceased herein.
 - b. The deceased herein allegedly died leaving a Will dated 25th January, 2020.
 - c. The deceased owned several assets at the time of his death which include; Land Title numbers Sergoit/Elgeyo Border Block 1(Beliomo) 369 and Sergoit/Elgeyo Border Block 1 (Beliomo)370, Tractor registration number KTCB 797U, money in Bank Accounts at Stanbic Bank and Co-operative Bank and shares at Limo Primary school.
 - d. The above-mentioned parcels of land being title numbers Sergoit/Elgeyo Border Block 1(Beliomo) 369 and Sergoit/Elgeyo Border Block 1(Beliomo) 370 are resultant subdivisions of Land title number Sergoit/Elgeyo Border Block 1 (Beliomo) 363 which was gifted to the deceased herein by his father, the late Edward Talam Limo.
 - e. That the deceased herein did not distribute the parcels of Land being Title Numbers Sergoit/Elgeyo Border Block 1(Beliomo) 369 and Sergoit/Elgeyo Border Block 1(Beliomo) 370 hence these assets need to be distributed under the rules of intestacy.
 - f. That the deceased at paragraph 14 of the alleged Will directed to be buried on his property being land title Sergoit/Elgeyo Border Block 1(Beliomo) 370 and indeed he was buried thereon and this goes to confirm that indeed the said he was buried thereon and this goes to confirm that indeed the said property was existing at the time of the deceased's burial.
 - g. Surprisingly the above-mentioned parcels of land were amalgamated and subsequently subdivided in a clandestine manner resulting in several parcels being land titles numbers Sergoit/Elgeyo Border Block 1 (Beliomo) 461,462,463,464,465,467, and 489 now registered under the names of the deceased and the 1st petitioner/respondent herein.



- h. It remains a mystery to date how the deceased's assets were amalgamated and subdivided after his death.
 - i. That there is every reason to believe that the alleged deceased will must have been manipulated to create an impression that the deceased did not own the above-mentioned parcels of land with the sole intention on the part of the petitioners/Respondents to remove the said assets out of the estate of the deceased.
 - j. The Petitioner/Respondents herein and their advocates are the beneficiaries of the mysterious amalgamation and sub-division of the above-mentioned parcels of land.
 - k. That the Petitioners/Respondents have continued to utilize and appropriate the estate assets for their own benefit to the exclusion of the Beneficiary/Applicant herein creating an environment of discrimination and unfairness in the estate.
 - l. That the amalgamation and sub-division of the above-mentioned parcels of land are acts of fraud on the part of the Petitioners/Respondents.
 - m. The beneficiary/applicant herein was not bequeathed anything from the estate of the deceased under the alleged will and no explanation was given by the deceased under the Will or any other testamentary instrument.
 - n. That the Beneficiary's/Applicant's interests will be jeopardized if an order for her provision as a dependant under the Law of Succession is not made at this stage.
 - o. That the provision purportedly made in favour of the beneficiary/applicant under the alleged Will is untenable since it refers to a speculative distribution in a separate and distinct estate.
 - p. That if indeed the deceased excluded the Beneficiary/Applicant herein in the distribution of his assets, he must have been coerced or unduly influenced by the Petitioners/Respondents and their advocates to do so noting that they were actually present at the time of execution of the alleged Will and had knowledge of the distribution prior to the reading of the Will.
 - q. That there is now an imminent risk that the above-mentioned deceased's assets may be removed from his estate to the detriment of the bona fide beneficiaries.
 - r. The Beneficiary/Applicant herein will be disinherited of her deceased father's estate causing an irreparable harm if the instant application is not heard urgently and the orders sought herein granted.
6. The Petitioners in response filed grounds of opposition dated 17th August, 2021 raising the following grounds:
- a. That the summons dated 4th August, 2021 on prayers 3 and 4 fail the test in *Giella v. Cassman Brown & Co. Ltd (1973) EA 358*.
 - b. That the summons dated 4th August, 2021 on prayer 5 offends the Principle of Survivorship on jointly owned property.
 - c. That the summons dated 4th August, 2021 on prayer 6 fails the test in section 26 and 29 of the *Law of Succession Act*.
 - d. That the summons dated 4th August, 2021 is an abuse of the Court process unmerited and should be dismissed.



7. The interested party also put in a replying affidavit opposing the summons in its entirety. Her deponements are reproduced as hereunder for purposes of proper context and record:
- a. That I am the registered proprietor of the property known as Sergoit/Elgeyo Border Block 1 (Beliomo)/489.
 - b. That I understand that the deceased Joseph Kipkemoi Limo died on 20th September, 2020.
 - c. That the firm of Kalya Advocates had a long standing relationship with the deceased in other matters not the subject matter of this cause, being Eldoret High Court Probate and Administration Cause Number 40 of 2018, In the Estate of Edward Talam Limo, in which the deceased was a beneficiary.
 - d. That the said firm had been appointed by the deceased to represent him in the said matter and various other matters not in the subject matter of this suit.
 - e. That as a result of the advocate-client relationship established between the deceased and the firm of Kalya advocates, the said property being Sergoit/Elgeyo Border Block 1 (Beliomo)/466 was assigned by the deceased on 18th November, 2019 during the lifetime of the deceased, to Mr. Wilson Kalywa and myself, in our capacities as Advocates acting on his behalf, with a view of settling the Advocates legal fees.
 - f. That following the transfer, a certificate of title was issued on 18th November, 2019 in our joint names.
 - g. That the said property was further subdivided on 2th July, 2020, into two out part of it being Sergoit/Elgeyo Border Block 1 (Beliomo)/489.
 - h. That the property known as Sergoit/Elgeyo Border Block 1 (Beliomo)/489 therefore did not form part of free property of the deceased, at the date of death, liable to be distributed in his estate as alleged by the applicant.
 - i. That contrary to the allegations by the applicant, the said property was not dealt with as alleged after the deceased's death.
 - j. That both the transfer made on 18th November, 2019 and subdivision made on 20th July, 2020 was done while the deceased was alive, at a point where the deceased himself would have an opportunity to address a dispute if any had arisen.
 - k. That no evidence has been produced to point to the fact that the deceased confided in the applicant to address any such dispute between myself and the estate.
 - l. That although the applicant has accused the deceased advocates exerting coercion and undue influence, neither of these charges have not been particularized nor has evidence been led to support these allegations.
 - m. That as such, any dispute touching on the said property is one whose jurisdiction is reserved for the land and Environment Court.
 - n. That the applicant is neither an executor nor an administrator to the estate of the deceased and therefore lacks the locus standi to bring such a suit on behalf of the estate.
8. Ruth Chepkosgei Limo in further response filed a replying affidavit on her behalf as the 1st Petitioner and on behalf of the 2nd petitioner whose details are highlighted verbatim as hereunder:



- a. That I have read the contents of the summons dated 4th August 2021, the supporting affidavit sworn on 4th August 2021 by Faith Chemutai and had the same explained to me by my advocate on record W.K. Kalya Esq and having understood the import and tenor thereof now wish to respond thereto as follows: -
- i. From the onset, I wish to state the summons dated 4th August 2021, the affidavit in support of urgency sworn on 4th August 2021 by Faith Chemutai filed herein are fatally and incurably defective, bad in law, an abuse of court process, misconceived and as such ought to be struck out/or dismissed.
 - ii. Without prejudice to the foregoing, I aver that the beneficiary/applicant is not deserving of any of the orders sought in the summons dated 4th August 2021.
 - iii. The deceased Joseph Kipkemoi Limo died on 20-09-2020 leaving a valid will dated 25-01-2020.
 - iv. My children, the Applicant and I were invited by an email dated 4-01-2021 by Advocate J. K. Chesoo on behalf of the firm of M/S Kalya & Co Advocates.
 - v. The Applicant, I and my children were present on 7-01-2021 at 10:00 am when the Last Will and Testament of Joseph Kipkemoi Limo was read out and the Applicant expressed her satisfaction with the provisions made to her in the will.
- b. That in response to paragraph 5, 6, 7, 8, 9 and 10 of the supporting affidavit, I wish to state as follows: -
- i. Land Title number Sergoit/ Elgeyo Border Block 1 (Beliomo)/369 measuring 0.404 Ha and Land Title Number Sergoit/ Elgeyo Border Block 1 (Beliomo)/370 measuring 36.16 Ha were registered on 29-10-2015 jointly in my name and Joseph Kipkemoi Limo (Deceased).
 - ii. On 14-08-2019 Land Title number Sergoit/ Elgeyo Border Block 1 (Beliomo)/369 measuring 0.404 Ha and Sergoit/ Elgeyo Border Block 1 (Beliomo)/370 measuring 36.16 Ha were amalgamated together to form Sergoit/ Elgeyo Border Block 1 (Beliomo)/456 measuring 36.564.
 - iii. On 18-08-2019 the register of Land Title number Sergoit/ Elgeyo Border Block 1 (Beliomo)/369 and Land Title number Sergoit/ Elgeyo Border Block 1 (Beliomo)/370 were closed.
 - iv. On 8-10-2019 land parcel number Sergoit/ Elgeyo Border Block 1 (Beliomo)/456 measuring 36.564 ha was subdivided into 7 parcels that is Sergoit/ Elgeyo Border Block 1 (Beliomo)/461, 462, 463, 464, 465, 466 and 467 and as at that time, the said new titles were registered jointly in my name and Joseph Kipkemboi Limo (dcd) and thus, consequently land parcel Sergoit/ Elgeyo Border Block 1 (Beliomo)/456 measuring 36.564 Ha was closed on 5-11-2019.
- c. After subdivision of Sergoit/ Elgeyo Border Block 1 (Beliomo)/456 measuring 36.564 Ha, Joseph Kipkemboi Limo (dcd) and I dealt with the following properties: -
- i. The firm of Kalya & Co Advocates had a long standing relationship with the deceased and me in other matters not the subject of this cause being Eldoret HC P & A 40 OF 2018, In the Estate of Edward Tallam Limo which the deceased was a beneficiary.



- ii. The deceased and Wilson Kiplagat Kalya the Managing partner of Kalya & Co Advocates were further old boys of Alliance Boys High School and good friends for over 30 years.
- iii. The deceased appointed the firm of M/S Kalya & Company Advocates to represent him in the said matters and various matter not the subject of this suit.
- iv. As a result of the Advocate- Client relationship established between the deceased and Wilson Kiplagat Kalya practising through the firm of M/S Kalya & Company Advocates entered into a retainer agreement dated 3rd December, 2018.
- v. The property being Sergoit/ Elgeyo Border Block 1 (Beliomo)/466 was assigned by the deceased on 18-11-2019, during the lifetime of the deceased, to Mr. Wilson Kiplagat Kalya and Karen Jerop Chesoo in their capacities as Advocates acting on his behalf, with a view of settling the Advocates legal fees.
- vi. Following this transfer, a Certificate of Title for Sergoit/ Elgeyo Border Block 1 (Beliomo)/466 was issued on 18-11-2019 in the joint names of Mr. Wilson Kiplagat Kalya and Karen Jerop Chesoo.
- vii. I am informed that Sergoit/ Elgeyo Border Block 1 (Beliomo)/466 was partitioned into 2 parcels Sergoit/ Elgeyo Border Block 1 (Beliomo)/489 registered in the name of Karen Jerop Chesoo and Sergoit/ Elgeyo Border Block 1 (Beliomo)/488 registered in the name of Mr. Wilson Kiplagat Kalya.
- viii. Consequently, the property Sergoit/ Elgeyo Border Block 1 (Beliomo)/489 did not form part of free property of the deceased, at the date of death, liable to be distributed in his estate as alleged by the Applicant.
- ix. On 20-06-2017, the deceased and I sold and received full consideration for the Land Title No. Sergoit/ Elgeyo Border Block 1 (Beliomo)/463 to Wesley Kiprono Kipkosgei.
- x. On 5-11-2017 the deceased and I sold and received full consideration for Land Title No. Sergoit/ Elgeyo Border Block 1 (Beliomo)/462 to John Kibet Tanui and Sylvia Chelagat Chepkwony.
- xi. The transfer made on 18-11-2019 and subdivision made on 20-07-2020 were done while the deceased was alive, at a point where the deceased would have an opportunity to address a dispute if any had arisen.
- xii. The sales made on 20-06-2017 and 5-11-2017 were done while the deceased was alive, at a point where the deceased would have an opportunity to address a dispute if any had arisen.
- xiii. Land Title No. Sergoit/ Elgeyo Border Block 1 (Beliomo)/ 462 measuring 0.404 Ha in the joint names of John Kibet Tanui and Sylvia Chalagt Chepkwony and Sergoit/ Elgeyo Border Block 1 (beliomo)/ 463 measuring 0.404 Ha in the name of Wesley Kiprono Kipkosgei did not form part of the free property of the deceased, at the date of his death, liable to be distributed in his estate as alleged by the Applicant and the allegations by the Applicant, that the said property was dealt with as alleged after the deceased death is false.



- xiv. It is inappropriate and violation of Article 25, Article 40 and Article 50 (1) of *the Constitution* of Kenya, 2010 on the right to fair hearing for the Applicant to litigate on Land Title No. Sergoit/ Elgeyo Border Block 1 (Beliomo)/ 462 measuring 0.404 Ha in the joint names of John Kibet Tanui and Sylvia Chalagat Chepkwony and Sergoit/ Elgeyo Border Block 1 (Beliomo)/ 463 measuring 0.404 Ha in the name of Wesley Kiprono Kipkosgei without the knowledge of the registered owners.
- xv. There is no evidence to point to the fact that the deceased confided in the Applicant to address any such dispute between the parties named in her application and the estate.
- d. In response to Tractor registration number KTCB 797U the same is registered in the name of Joseph Kipkemoi Limo (Deceased), NIC Bank, and myself. This tractor is charged to NIC bank and I am solely servicing the loan.
- e. In response to Bank Account at Stanbic Bank and Cooperative Bank I am not aware of the said accounts as I do not have details of the said accounts and further in the will dated 2-01-2020 Joseph Kipkemoi Limo (Deceased) did not specifically indicate the account numbers.
- f. That in response to paragraph 11, 12 and 13 of the supporting affidavit, I wish to state that Land Title number Sergoit/ Elgeyo Border Block 1 (Beliomo)/370 measuring 36.16 Ha was amalgamated on 14-08-219, two years before the death of Joseph Kipkemoi Limo (deceased).
- g. That in response to paragraphs 14 and 15 of the supporting affidavit I wish to state as follows;
 - i. Land Title No. Sergoit/ Elgeyo Border Block 1 (Beliomo)/461 measuring 0.809 Ha was jointly registered in the name of Joseph Kikemboi Limo and Ruth Chepkosgei Limo.
 - ii. Land Title No. Sergoit/ Elgeyo Border Block 1 (Beliomo)/464 measuring 32.14 Ha was registered in the name of Joseph Kikemboi Limo and Ruth Chepkosgei Limo before, but is currently registered in my name after I deleted the name of the deceased after he passed on.
 - iii. Land Title No. Sergoit/ Elgeyo Border Block 1 (Beliomo)/465 measuring 0.404 Ha is currently registered in the name of Ruth Chepkosgei Limo.
 - iv. Land Title No. Sergoit/ Elgeyo Border Block 1 (Beliomo)/467 measuring 0.404 Ha Ha is jointly registered in the name of Joseph Kikemboi Limo and Ruth Chepkosgei Limo.
 - v. I am informed by W.K.Kalya Esq which information I verily believe to be true that all properties registered jointly in my name and the name of Joseph Kipkemoi Limo as at 20-09-2020 shall vest in me absolutely by virtue of the doctrine of survivorship and shall not be distributed under the rules of Intestacy as postulated by the Applicant.
 - vi. That Section 60 of the *Land Registration Act* provides: "If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of death delete the name of the deceased tenant from the register by registering the death certificate.
 - vii. Although the applicant has accused the deceased advocates of exerting coercion and undue influence, neither of these charges have not been particularized. Nor has evidence been led to support these allegations.



- h. That on locus of the Applicant to seek orders on the land titles particularized in the summons I aver as follows:
- i. I and the 2nd Petitioners have been issued with Grant of Probate herein.
 - ii. I have further been issued with Grant of Letters of Administration Ad Litem in Eldoret Ad Litem Cause No. Hcpfa No. 24 of 2020 on 9-12-2020 to prosecute Joseph Kipkemoi Limo interest in Eldoret HCP&A No. 40 of 2018.
 - iii. The Applicant is neither an Executor nor an Administrator to the Estate of the deceased and therefore lacks the locus standi to bring such a suit on behalf of the estate.
- i. That on jurisdiction of the Hon. Court to cancel the titles herein I am informed by W. K. Kalya Esq which information I verily believe to be true that this honourable by virtue of Article 162 (2) (b) of *the Constitution* of Kenya 2010 as read with Section 13 of the Environment Land Court Act, 2012 (Cap 12A), and Section 60 of the *Land Registration Act* does not have jurisdiction to hear and determine prayer 3 & 4 of the summons.
- j. That in response to paragraph 16 and 17 of the supporting affidavit, I have been advised by my Advocates on record which advise I verily believe to be true that a perusal of page 4 of the will dated 25-01-2020 the applicant was bequeathed 10 % in the share of in Estate Of Joseph Kipkemoi Limo (Deceased) from the Estate Of Edward Talam Limo (Deceased) in HC P & A 40 of 2018, thus her allegation that she has not been bequeathed anything is untrue and misleading to this honourable court.
- k. That I am a stranger to the allegations of paragraph 18 and 19 of the supporting affidavit and put the Applicant to strict proof to the contrary.
- l. That on the application made under Section 26 of the Succession Act I am informed by W.K.Kalya Esq which information I verily believe to be true:
- i. Prior to distribution in the estate of Edward Talaam Limo it is impossible to establish the Joseh Kipkemoi Limo net estate.
 - ii. Section 26 governs provisions for dependant not adequately provided by Will. The Applicant has not lead evidence to demonstrate the inadequacy.
 - iii. The Applicant is a graduate currently employed with Moi Teaching and Referral Hospital, a woman of means and living in her own home within the gated community of Hazina Estate.
 - iv. The Applicant is further married Ken Kiptoo Orgut a son from the wealth family of Kipkurui Chesire Orgut's whose estate worth over Kshs. 500,000,000 has been distributed by this Hon. Court in Eldoret HCP&A No. 74 of 2012.
 - v. The deceased adequately provided for the Applicant in his Will dated 25-10-2020 and she has a source of income.
 - vi. The Applicant has not brought tangible evidence to convince the Court she was maintained by the deceased immediately prior to his demise as required by Section 29 (b) and (c).
 - vii. The application for reasonable provision is premature and ca only be determined at the time of confirmation of grant of Probate.



- m. That it will therefore be in the interest of Justice that the application now before court be dismissed.
9. On January 29, 2024, the beneficiary filed yet again another application that substantially mirrors the substantial application as highlighted above. This new application raises predominantly identical issues to those presented in the original filing. The application seeks the following relief from the court:
- a. Spent
 - b. Spent
 - c. The beneficiary/Applicant, Faith Chemutai, is hereby allowed to utilize a portion measuring 15 acres of land title number Sergoit/Elgeyo Border Block 1 (Belioimo) 464 pending distribution of the estate.
 - d. The Uasin Gishu County Land Surveyor to demarcate and mark out the above portion of 15 acres from Land title number Sergoit/Elgeyo Border Block 1(Belioimo) 464 just for the purpose of the above utilization.
 - e. Costs of the application be provided for.
10. The summons is based on grounds that the beneficiary herein is a biological daughter of the deceased herein and was dependent on him due his lifetime. That deceased herein allegedly died leaving a Will dated 25th January, 2020. The applicant further contends that the deceased owned several assets at the time of his death which include; Land Title Numbers Sergoi/Elgeyo Border Block 1 (Belioimo) 369 and Sergoit/Elgeyo Border Block 1 (Belioimo) 370, Tractor registration number KTCB 797U, Money in Bank Accounts at Stanbic Bank and Co-operative Bank and shares at Limo Primary School which are currently under the control and use of the petitioners/Respondents.
11. The above-mentioned parcels of land being Title numbers Sergoit/Elgeyo Border Block 1(Belioimo) 369 and Sergoit/Elgeyo Border Block 1 (Belioimo) 370 are resultant subdivisions of Land title number Sergoit/Elgeyo Border Block 1(Belioimo) 363 which was gifted to the deceased herein by his father, the late Edward Talam Limo.
12. It is a further ground that the deceased herein did not distribute the parcels of land being title number Sergoit/Elgeyo Border Block 1 (Belioimo) 369 and Sergoit/Elgeyo Border Block 1(Belioimo) 370 hence these assets need to be distributed under the Rules of intestacy.
13. That the deceased at paragraph 14 of the alleged Will directed to be buried on his property being Land title number Sergoit/Elgeyo Border Block 1 (Belioimo) 370 and indeed he was buried thereon and this goes to confirm that indeed the said property as existing at the time of the deceased's burial.
14. That surprisingly, the above-mentioned parcels of land were amalgamated and subsequently subdivided in a clandestine manner resulting in several parcels being land title numbers Sergoit/Elgeyo Border Block 1(Belioimo) 461, 462, 463, 464, 465, 467, and 489 now registered under the names of the deceased and the 1st Petitioner/Respondent herein as tenants in common.
15. That the cumulative acreage with respect to the above-mentioned parcels of land is approximately 100 acres hence sufficient for use by all the bonafide beneficiaries.
16. That the Petitioners/Respondents have continued to utilize and appropriate the estate assets for their own benefit to the exclusion of the beneficiary/applicant herein creating an environment of discrimination and unfairness in the estate hence the need for intervention by this Honourable court to ensure equity among the beneficiary pending distribution of the estate.



17. That the Beneficiary/Applicant has been consigned of a life of destitution and unending financial struggles due to the deprivation of subsistence benefits from the estate of her deceased father.
18. In response to the application, both the interested party and the Petitioners filed replying affidavits and the highlights are captured as hereunder:
19. Karen Chesoo Jerop swore an affidavit and deposed that:
 - a. I am the registered proprietor of the property known as Sergoit/elgeyo Border Block 1 (Beliomo)/489
 - b. The orders restraining the Petitioners/Respondents from cultivating the property are not enforceable in respect to the property Title Number Sergoit/Elgeyo Border Block 1 (beliomo)/489 as the property does not form part of the free estate of the deceased neither is it registered in the name of the Petitioners/Respondents.
 - c. I confirm that I am in possession of the property known as Sergoit/Elgeyo Border Block 1 (Beliomo)/489 and have been cultivating maize food crops from the year 2018 to date.
 - d. That the applicant has not demonstrated to court that the property is liable to be wasted, alienated or damaged by action of the Interested Party to warrant an order of injunction.
 - e. That neither has the applicant has not demonstrated that I have threatened or intend to remove or dispose of the property in circumstances affording reasonable probability that the applicant will or may be obstructed or delayed in the execution of whatever decree may be passed in relation to the suit property.
 - f. That if an order of injunction is issued it will only serve the purpose of frustrating my occupation and enjoyment of my rights over the property.
 - g. That the order sought to allow the applicant to plough the property including property number SERGOIT/ELGEYO BORDER BLOCK 1 (BELIOMO)/489 will amount to determining the matter at an interlocutory stage, be evicting me, without giving the benefit of the matter proceeding to hearing.
 - h. That on a balance of probabilities tilts in my favour since I am the registered proprietor and in possession of the property, yet the applicants claim has not materialized.
20. The 1st Petitioner swore a replying affidavit as well on behalf of the 2nd Petitioner opposing the application in its entirety. According to the Petitioner, the instant application is sub judice in that the applicant is seeking similar orders as those sought in the application dated 4th August, 2021, yet the application dated 4th August, 2021 is yet to be heard and determined.
21. The 1st Petitioner further deposed as follows:
 - a. Land title number Sergoit/Elgeyo Border Block 1 (Beliomo)/369 measuring 0.404 Ha and Land title number Sergoit/Elgeyo Block 1 (Beliomo)/370 measuring 36.16 Ha were registered on 29-10-2015 jointly in my name and Joseph Kipkemoi Limo (deceased).
 - b. On 14-082019 Land title number Sergoit/Elgeyo Border Block 1 (Beliomo)/369 measuring 0.04 Ha and Sergoit/Elgeyo Border Block 1 (Beliomo)/370 measuring 36.16 Ha were amalgamated together form Sergoit/Elgeyo Border Block 1 (Beliomo)/456 measuring 36.564.



- c. On 18-08-2019 the register of Land title number Sergoit/Elgeyo Border Block 1 (Belimo)/369 and Land Title number Sergoit/Elgeyo Border Block 1 (Belimo)/370 were closed.
 - d. On 8-10-2019 land parcel number Sergoit/Elgeyo Border Block 1 (Belimo)/456 measuring 36.564 Ha was subdivided into 7 parcels that is Sergoit/Elgeyo Border Block 1 (Belimo)/461, 462, 463, 464, 465, 466 and 467 and as at the time, the said new title were registered jointly in my name and Joseph Kipkemboi Limo (deceased) and thus, consequently land parcel Sergoit/Elgeyo Border Block 1 (Belimo)/456 measuring 36.564 Ha was closed on 5-11-2019
22. She further deposed that after sub-division of Sergoit/Elgeyo Border Block 1 (Belimo)/45 measuring 36.564 Ha, the deceased and her dealt with the following properties:
- a. The firm of Kalya & Co. Advocates had a long standing relationship with the deceased and her in other matters not the subject of this cause being Eldoret HC P&A of 2018, In the Estate of Edward Tallam Limo which the deceased was a beneficiary.
 - b. That the deceased and Wilson Kiplagat Kalya the managing partner of Kalya & Co. Advocates were further old boys of Alliance Boys High School and good friends for over 40 years.
 - c. The deceased appointed the firm of Kalya and co. Advocates to represent him in the said matter and various matter not the subject of this suit.
 - d. As a result of the Advocate-Client Relationship established between the deceased and the firm of Kalya & Co. Advocates entered into a retainer agreement.
 - e. The property being Sergoit/Elgeyo Border Block 1 (Belimo)/466 was assigned by the deceased on 18-11-2019, during the lifetime of the deceased, to Mr. Wilson Kiplagat Kalya and Karen Jerop Chesoo in their capacities as advocates acting on his behalf, with a view of settling the advocates legal fees.
 - f. Following this transfer, a certificate of title for Sergoit/Elgeyo border block 1 (Belimo)/466 was issued on 18-11-2019 in the joint names of Mr. Wilson Kiplagat Kalya and Karen Jerop Chesoo.
 - g. That Sergoit/Elgeyo Border Block 1 (Belimo)/466 was partitioned into two parcels Sergoit/Elgeyo Border Block 1 (Belimo)/489 registered in the name of Karen Jerop Chesoo and Sergoit/Elgeyo Border Block 1 (Belimo)/488 registered in the name of Mr. Wilson Kiplagat Kalya.
 - h. Consequently, the property Sergoit/Elgeyo Border Block 1 (Belimo)/489 did not form part of free property of the deceased, at the date of death, liable to be distributed in his estate as alleged by the applicant.
 - i. That on 20-06-2017, the deceased and her sold and received full consideration for the Land Title No. Sergoit/Elgeyo Border Block 1 (Belimo)/463 to Wesley Kiprono Kipkosgei.
 - j. That on 5-11-2017 the deceased and I sold and received full consideration for Land Title No. Sergoit/Elgeyo Border Block 1 (Belimo)/462 to John Kibet Tanui and Sylvia Chelagat Chepkwony.
 - k. The transfer made on 18-11-2019 and sub-division made on 20-07-2020 was done while the deceased was alive, at point where the deceased would have an opportunity to address a dispute if any had arisen.



- l. That the sale made on 20-06-2017 and 5-11-2017 was done while the deceased was alive, at a point where the deceased would have an opportunity to address a dispute if any had arisen.
 - m. The sales made on 20-06-2017 and 5-11-2017 did not form part of the free property of the deceased, at the date of death, liable to be distributed in his estate as alleged by the applicant and the allegations by the applicant, the said property was not dealt with as alleged after the deceased death.
 - n. There is no evidence to point to the fact that the deceased confided in the applicant to address any such dispute between myself and the estate.
23. She deposed that the Land title Sergoit/Elgeyo Border Block 1 (Beliomo)/461, Sergoit/Elgeyo Border Block 1 (Beliomo)/464, Sergoit/Elgeyo Border Block 1 (Beliomo)/465, Sergoit/Elgeyo Border Block 1 (Beliomo)/467 which as at 20-9-2020 was registered jointly in both her name and the deceased will eventually by virtue of the doctrine of survivorship be transferred into her name.
 24. She averred that a land parcel jointly owned by virtue of joint tenancy does not form part of the estate of Joseph Kipkemoi Limo (deceased) therefore the same will not be distributed under the rule of intestacy.
 25. In further response, she deposed that although the applicant has averred that the suit parcels were subdivided in a clandestine manner, neither illegality/unlawfulness has been particularised therein nor has evidence been led to support these allegations.
 26. That by virtue of section 13 of the Environment and *Land Act* this Hon. Court does not have jurisdiction to hear and determine allegations of fraud as regarding the subdivision of Sergoit/Elgeyo Border Block 1 (Beliomo) 456.
 27. That the principle of jus accrescendi providing for the right of survivorship with regard to joint tenancy excludes the property known as Sergoit/Elgeyo Border Block 1 (Beliomo) 464 from forming part of the estate herein.
 28. That any claim over Sergoit/Elgeyo Border Block 1 (Beliomo) 464 and challenge of ownership thereto is subject of the Land and Environment Court and out of the jurisdiction of this court.
 29. According to deponent, vide the Will dated 25-01-2020 the applicant was bequeathed 10% in the share of in Estate of Joseph Kipkemoi Limo (deceased) from the estate of Edward Talam Lim (deceased) in HC P&A 40 of 2018, thus her allegation that she has not been bequeathed anything is untrue and misleading to this honourable court.

Petitioner's written submissions

30. Learned Counsel Ms. Kessei filed written submissions on behalf of the Petitioners in which she gave a background of the suit and identified the following issues for determination:
 - a. Whether the properties known as Sergoit/Elgeyo Border Block 1 (Beliomo) 461, 462, 463, 464, 465, 466 AND 489 formed part of the free estate of the deceased?
 - b. Whether this court has the jurisdiction to grant the orders sought and whether the preliminary objection dated 17th August, 2021 is merited.
 - c. Whether the applicant should be provided for under section 26 of the *Law of Succession Act*.
 - d. Who should pay the costs of the application?



- e. Whether this court has jurisdiction to hear disputes on ownership of land protected under Section 60 of the [Land Registration Act](#) (The Principle of survivorship)?
31. Learned Counsel in addressing the first issue of whether the properties known as Sergoit/Elgeyo Border Block 1 (Beliomo) 461,462,463,464,465,466 and 489 formed part of the free estate of the deceased, submitted that while the Applicant had averred these properties belonged to the deceased and formed part of the estate's assets, evidence adduced during cross-examination proved otherwise.
32. Ms. Kesei pointed out that during examination-in-chief, the Applicant sought to be given 20 Acres from what she claimed was her father's estate. However, during cross-examination, the Applicant confirmed through green cards presented to court that these properties were jointly owned by the deceased and 1st Petitioner, both prior to and after amalgamation. Counsel emphasized that the amalgamation, subdivision, and subsequent transfers were executed in 2019 while the deceased was alive, with the owners exercising their full rights to amalgamate, subdivide or alienate the properties.
33. It was submitted for the petitioners that the Will was duly propounded by the maker thereof and the witness thereof who confirmed the validity thereof. That both PW1 and PW2, being the maker of the Will and the witness did testify that the deceased did not distribute the said properties in his Will as they were not available for distribution since they were not free properties.
34. On the question of joint ownership, Ms. Kesei extensively relied on the case of Isabel Chelangat V Samuel Tiro Rotich & 5 Others (2012) Eklr, which provided the definitive distinction between joint ownership and land held in common. Through this authority, Counsel elaborated on the four unities essential for joint tenancy: the unity of possession, the unity of interest, the unity of title, and the unity of time.
35. On the matter of property registration and joint ownership, Ms. Kesei submitted that the Applicant's reliance on green cards and search certificates to dispute joint ownership constituted a clear legal error. In support of this position, Counsel cited the Court of Appeal case of In re Estate of Gwonda Kebate, Kebate Kebate, Ondande Kebate & Onchere Kebate (Deceased) (Civil Appeal 108 of 2019) [2024] KECA 784 (KLR), where the court established that joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show they are to take distinct and separate shares.
36. Moving to the critical issue of whether the suit properties formed part of the estate vis-à-vis the principle of survivorship/jus accrescendi, Ms. Kesei argued that under the doctrine of survivorship, these properties passed to the surviving joint tenant, being the 1st Petitioner/Respondent, pursuant to Section 60 of the [Land Registration Act](#). To reinforce this position, Counsel relied on the scholarly work of W. M. Musyoka in his book "Laws of Succession," specifically citing page 3 which addresses property passing upon death through survivorship in cases of joint tenancies.
37. Further supporting her argument, Ms. Kesei cited the case of Mwangi Gakuri v Bernard Kigotho Maina & another [2016] eKLR, emphasizing that the interest of the deceased would fuse with the interest of the 1st Respondent, thereby making it unavailable for distribution as part of the Estate. The principle was further expounded in Isabel Chelangat v Samuel Tiro (2012) eKLR, where the court explicitly stated that a joint tenancy cannot pass under will or intestacy when there is a surviving joint tenant.
38. On the jurisdictional question, Ms. Kesei submitted that the court lacked authority to grant the orders sought on two fundamental grounds: firstly, the principle of jus accrescendi excluded the jointly owned properties from this cause, and secondly, the court could not cancel title deeds of third parties without their involvement in the proceedings as it would offend principles of natural justice and constitutional



- rights. To support this position, Counsel relied on *Mariam Mathias Mwasi Vs Rama Adam (2020) eKLR*, where the court held that the High Court lacks jurisdiction to determine land disputes.
39. Ms. Kesei drew the court's attention to the fact that the deceased was an administrator in the estate of the late Edward Tallam Limo by virtue of being his son and a beneficiary. She emphasized that since that estate is yet to be confirmed, it makes it impossible for the deceased's estate to be confirmed or any property to be apportioned, as most of the property in the estate is a share of the deceased from his late father's estate. Counsel submitted that the Applicant was "jumping the gun" by instituting these proceedings prior to the conclusion of succession cause in the deceased's father's estate.
 40. Furthermore, Ms. Kesei pointed out that the deceased died testate leaving behind a valid will dated 25th October 2020, where he had outlined his dependents including the Applicant. Counsel emphasized that under the will, the Applicant would receive 10% of the net estate of his father's inheritance from her grandfather. Ms. Kesei noted that as per Section 28(f) of the *Law of Succession Act*, the deceased has other dependants who are beneficiaries in his estate, who have also been provided for and are patiently waiting for the estate to be ascertained.
 41. Significantly, Ms. Kesei submitted that some of the properties (specifically Sergoit/Elgeyo Border 1(Beliomo)462 and 463) are registered in the names of third parties and were so registered prior to the death of the deceased, hence are not free properties to be subjected to succession. She emphasized that these third parties have been in occupation and possession of said parcels since 2017 when they purchased them from the deceased and 1st Respondent at a consideration.
 42. Regarding the application of Section 26 of the *Law of Succession Act*, Ms. Kesei pointed out that the Applicant, being a graduate employed at the prestigious Moi Teaching and Referral Hospital and owning several properties including a home within a gated community of Hazina Estate in Kapsoya within Eldoret Town, was not suffering any hardship. Furthermore, Counsel noted that the Applicant's late husband, Ken Kiptoo Orgut (deceased in 2024), had recently inherited properties from his father's multi-million estate vide ELDORET HC P&A No. 74 of 2012. To strengthen this argument, Counsel cited the case of *Beatrice Ciamutua Rugamba V Fredrick Nkari Mutegi & 5 others (2016) eKLR*, which established that dependency must be proved, not merely claimed.
 43. In her final submissions, Ms. Kesei relied on several significant authorities to reinforce her position. She cited the case of *In re Estate of Nzoluye Kisuke alias Daudi Nzoluye Kisuke (Deceased) [2022] Eklr*, where Justice G V Odunga held that the court should not interfere with the deceased's clear intentions. She further urged the court to be guided by the Court of Appeal decision in *Ndirangu v Ndirangu (Civil Appeal 141 of 2019) [2022] KECA 1296 (KLR)*, which established that a court can only interfere with a deceased's wishes in exceptional circumstances, particularly where the will fails to provide adequately for a dependant.
 44. Ms. Kesei strengthened her argument by citing *Sisilia Mwikali Kirwa v H C & another [2015] eKLR*, emphasizing that where a deceased left behind a valid will, the estate cannot be administered or distributed as an intestate estate. Consequently, she submitted that the Uasin Gishu county land surveyor cannot be ordered to demarcate any portion from Sergoit/Elgeyo Border Block 1 (Beliomo) 464 for utilization by any alleged beneficiary of the estate of Joseph Kipkemboi Limo (deceased) as that property doesn't form part of his estate.
 45. On the matter of costs, Ms. Kesei cited the case of *Narok County Government Vs Livingstone Kunini Ntutu & 2 Others (2018) eKLR*, highlighting that costs follow events but remain at the Court's discretion. She prayed that the costs of the Application be awarded to the Petitioners/Respondents.



46. In her conclusion, Ms. Kesei systematically outlined several key points: that the will is valid with no dispute over it; that only free properties can be subjected to succession; that the properties in question were jointly owned and fall under Section 60 of the *Land Registration Act*; that the principle of survivorship operates to remove jointly owned property from succession law operation; and that the High Court lacks jurisdiction to determine land disputes including cancellation of titles of third parties mentioned adversely but not before court.
47. Ms. Kesei emphasized that by virtue of the evidence presented, the Applicant is not destitute as she is working at MTRH, has a home at Hazina estate, and inherited part of a multimillion estate from her father-in-law. She maintained that the court cannot substitute the wishes of the deceased through its discretion unless in exceptional circumstances.
48. Finally, Ms. Kesei urged the court to be persuaded that no cogent reason had been provided by the applicant to warrant altering the contents of the will/wishes of the deceased. She submitted that the instant application is not merited and ought to be dismissed forthwith with costs to safeguard the 1st Respondent's and 3rd parties' right to property as guaranteed under Article 40 of *the constitution* as read with other relevant land legislations.

Analysis and determination

49. The tapestry of this succession dispute unfolds against a backdrop of intergenerational wealth transfer and careful estate planning. At its core lies the estate of Joseph Kipkemoi Limo, who departed this world on 20th September, 2020, leaving behind not only material assets but also complex questions about the intersection of testamentary freedom and filial obligation. The matter before this court presents a unique confluence of circumstances - a valid will, jointly held properties, pre-death transfers, and most notably, the deceased's own pending inheritance from his father's estate.
50. The applicant, Faith Chemutai Limo, approaches this court seeking to subject certain properties to intestacy rules despite the existence of her father's will dated January 25, 2020. Her petition, grounded in her status as a biological daughter of the deceased, raises fundamental questions about the balance between testamentary freedom and familial provision. The matter assumes additional layers of complexity due to its intersection with another succession cause - that of the deceased's father, Edward Talam Limo, which remains pending before this court as Eldoret HC P&A 40 of 2018. This intergenerational succession framework becomes particularly significant as the deceased's will specifically allocates to the applicant a portion of his anticipated inheritance from his father's estate, creating a carefully structured provision that spans across both succession matters.
51. Having carefully considered the pleadings, evidence, and submissions presented, the following issues crystallize for determination:
 - a. Whether the properties known as Sergoit/Elgeyo Border Block 1 (Beliomo) 461, 462, 463, 464, 465, 466, and 489 formed part of the deceased's free estate available for distribution.
 - b. Whether this court has jurisdiction to entertain disputes concerning land ownership and registration in the context of succession proceedings.
 - c. Whether the applicant's claim for provision under Section 26 of the *Law of Succession Act* is sustainable in light of the specific testamentary provision made for her in the deceased's will.
 - d. Whether the doctrine of survivorship applies to the jointly held properties and the consequent implications for their distribution.



- e. Whether the court should interfere with the deceased's testamentary wishes in the circumstances of this case.
52. These issues, while distinct, are interconnected threads in the larger fabric of this succession dispute. Their resolution requires careful consideration of not only the legal principles governing succession but also the practical implications of the pending distribution in the senior Limo's estate.

Whether the properties known as Sergoit/Elgeyo Border Block 1 (Beliamo) 461, 462, 463, 464, 465, 466, and 489 formed part of the deceased's free estate available for distribution.

53. This question is fundamental to the entire succession process, as only assets that formed part of the deceased's free estate at the time of death can be subject to distribution, whether under testamentary disposition or the rules of intestacy. The determination requires careful examination of the properties' ownership status, the timing and nature of various property transactions, and the legal implications of joint ownership arrangements.
54. Section 3 of the *Law of Succession Act* defines an "estate" to mean the free property of a deceased person, while "free property" in relation to a deceased person is defined to mean the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death. In *In re Estate of Job Ndunda Muthike (Deceased) (2018) eKLR* the court (Odunga J) while expounding on the said section stated that:

"It is therefore clear that any property which the deceased was not legally competent freely to dispose during his lifetime and in respect of which his interest had been terminated by his death cannot form part of his estate and cannot be the subject of an application for confirmation of grant."

55. The properties in contention present a complex web of transactions and ownership arrangements that require careful scrutiny. The evidence before this court reveals that the original parcels (Sergoit/Elgeyo Border Block 1(Beliamo) 369 and 370) underwent significant transformations through amalgamation and subsequent subdivision while the deceased was still alive, resulting in seven distinct parcels. Three of these parcels were alienated to third parties through sale and transfer prior to the deceased's death, while the remaining properties continued to be held jointly with the 1st Petitioner. The applicant's challenge to these transactions raises three distinct legal questions: first, the validity and effect of the joint ownership arrangement; second, the legal status of pre-death transfers to third parties; and third, whether any of these properties remained part of the deceased's free estate at the time of his death, thereby becoming subject to succession law.
56. A meticulous examination of the record reveals that these transactions were executed during the deceased's lifetime, at a time when he retained full legal capacity to manage and dispose of his properties as he deemed fit. The chronology of events is particularly instructive. The transfers of Land Title Numbers Sergoit/Elgeyo Border Block 1(Beliamo) 462 and 463 were completed in 2017, approximately three years before the deceased's passing, with the property records confirming full consideration was received for these sales. Similarly, the transfer of Property 466 to the advocates in November 2019 was executed pursuant to a formal retainer agreement, representing a legitimate settlement of legal fees for services rendered.
57. The court notes with particular significance that during the period when these transactions were undertaken, no evidence has been presented to suggest that the deceased lacked capacity or was under any form of duress or undue influence. Indeed, the evidence demonstrates that the deceased continued to actively manage his affairs, including executing his will in January 2020, several months after the last



of these property transactions. The applicant's assertion that these transfers were "clandestine" cannot be sustained in light of the documented timeline and the formal nature of the transactions, all of which were properly registered and recorded in accordance with the [Land Registration Act](#).

58. It is a fundamental principle of property law that a person of sound mind has the absolute right to dispose of their property during their lifetime as they see fit. I share the view that transactions completed during a person's lifetime, absent evidence of incapacity or fraud, must be respected even in the context of subsequent succession proceedings. The properties transferred to third parties through valid sales and the settlement of professional fees therefore ceased to form part of the deceased's estate prior to his death.
59. Consequently, this court finds that Properties 462, 463, and 466 (subsequently subdivided into 488 and 489), having been validly transferred during the deceased's lifetime, cannot form part of his free estate available for distribution. These properties were effectively alienated through legitimate transactions, with the transfers completed and registered while the deceased was alive and competent to make such dispositions. As highlighted earlier, it is evident that only properties owned by the deceased at the time of death can form part of his estate for succession purposes.

Whether this court has jurisdiction to entertain disputes concerning land ownership and registration in the context of succession proceedings.

60. The duty of a probate court is to identify the estate of a deceased person, identify the lawful beneficiaries to the estate and distribute the same to the beneficiaries. In *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR Musyoka J. elucidated this role as follows:

“.....The [Law of Succession Act](#), and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”

61. This court, sitting in its probate jurisdiction, is vested with the singular mandate of ensuring the orderly distribution of a deceased person's estate to their rightful heirs. While this function is essential to the administration of justice, it operates within clearly defined constitutional boundaries. [The Constitution](#) of Kenya 2010, through Article 162(b), explicitly established the Environment and Land Court as the specialized forum for adjudicating disputes concerning land ownership and property rights. In the present case, the documentary evidence before this court, including land registry records, transfer instruments, and registration certificates, provides a clear and uncontested chronology of property transactions executed between 2015 and 2019, all during the deceased's lifetime. These transactions were properly documented, registered, and where applicable, supported by consideration. The applicant has not produced any evidence to impeach the validity of these transactions or to substantiate the allegations of impropriety. In such circumstances, where the documentary record is clear and uncontroverted, there exists no genuine dispute requiring adjudication by the Environment and Land Court.
62. It is noteworthy that the applicant has not produced any documentary evidence to challenge or impeach the validity of the property transactions executed during the deceased's lifetime. The green cards and official land registry records presented before this court unequivocally demonstrate the chronological progression of these transactions - from the initial joint registration to subsequent



transfers, all of which were completed while the deceased was alive and competent to make such dispositions. In particular, the transfer instruments, consideration receipts, and registration documents for properties 462, 463, and 466 remain unchallenged by any contrary evidence. The applicant's allegations of "clandestine" dealings remain precisely that - mere allegations unsupported by any documentary proof that would warrant this court's intervention or necessitate its downing of tools for lack of jurisdiction. The clear and uncontroverted nature of the documentary evidence reinforces this court's position that these property matters, having been properly executed and documented during the deceased's lifetime, do not present genuine disputes requiring adjudication by the specialized land court.

63. The inescapable conclusion is that this court, in its probate jurisdiction, lacks the requisite authority to adjudicate disputes concerning the validity of land transactions or to make determinations about property ownership. Such matters fall squarely within the exclusive jurisdiction of the Environment and Land Court as established under Article 162(b) of *the Constitution* of Kenya 2010.

Whether the applicant's claim for provision under Section 26 of the *Law of Succession Act* is sustainable in light of the specific testamentary provision made for her in the deceased's will.

64. The law upholds testamentary freedom as a fundamental principle, empowering testators to distribute their property according to their wishes. Under Section 5 of the *Law of Succession Act*, any mentally competent adult has the authority to bequeath their free property through a valid will.
65. This testamentary discretion is subject to one key limitation: the obligation to make reasonable provision for dependants. The courts maintain oversight specifically in this area and may intervene if a testator fails to adequately provide for their dependants as required by the *Law of Succession Act*. Beyond this specific requirement, the courts generally respect and uphold the testator's expressed wishes regarding the distribution of their estate. This reflects the understanding that testators possess intimate knowledge of their family circumstances, relationships, and the specific needs of potential beneficiaries, making them best suited to make these important decisions about their estate.
66. Section 26 of the *Law of Succession Act* provides as follows:

“Where a person dies after the commencement of this Act, 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 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.”

67. The Court in *Erastus Maina Gikunu & Another vs Godfrey Gichuhi Gikunu & Another* [2016] eKLR observed as follows:

“...it is important to say here that, although there is this freedom, Section 26 of the Act enjoins the testator to make reasonable provision for his dependants. The court is permitted, on application and where it is satisfied that the testator has not done so to intervene by making what it deems reasonable provision. The desire of society to protect the family of a testator is the main reason for, not only allowing testamentary freedom, but also imposing certain limitations and protection against disinheritance.”



68. This limitation of a testator’s testamentary freedom was also discussed by this Court in *Kamene Ndolo v George Matata Ndolo* [1996] eKLR. The Court had this to say:

“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. The responsibility to the dependants is expressly recognized by Section 26 of the Act...”

69. Upon careful analysis of the evidence before this court, it becomes apparent that while the deceased exercised his testamentary freedom in making the will dated 25th January, 2020, the question that demands judicial consideration is whether this testamentary disposition meets the threshold of reasonable provision as contemplated under Section 26 of the *Law of Succession Act*. The law as earlier highlighted, while respecting testamentary freedom under Section 5, simultaneously imposes a duty on testators to make reasonable provision for their dependants. It is instructive to note that reasonable provision does not necessarily equate to equal distribution, but rather requires an equitable arrangement that takes into account the size of the estate, the number of beneficiaries, and their respective circumstances. In the present case, while the applicant has received a specific bequest of 10% of the deceased’s anticipated inheritance from his father’s estate, this provision must be evaluated against the backdrop of actual assets available for distribution and the applicant’s demonstrated needs as a dependant. The court’s role in such circumstances is to carefully balance the testator’s expressed wishes against the statutory obligation to ensure reasonable provision for dependants, intervening only where the evidence establishes that the testamentary disposition falls short of this requirement. This approach ensures that while testamentary freedom is preserved, it is exercised responsibly with due regard to familial obligations that survived the testator’s death.

70. Having examined the totality of circumstances in this case, the court finds the testamentary provision made for the applicant to be reasonable and adequately structured. Several factors support this conclusion. First, the 10% allocation from the deceased’s inheritance in his father’s estate (Eldoret HC P&A 40 of 2018) represents a carefully considered provision that ensures the applicant’s participation in the family’s intergenerational wealth transfer. Second, evidence adduced before this court demonstrates that the applicant is a well-educated professional and has additional financial security through her late husband’s substantial inheritance from his father’s estate. Third, when evaluated against the documented size of the available free estate and the legitimate claims of other dependants, the provision appears proportionate and equitable. The court notes that reasonable provision under Section 26 does not mandate equal distribution but rather requires appropriate allocation based on the specific circumstances of each dependant. In this instance, the deceased appears to have exercised his testamentary discretion judiciously, taking into account both his obligations to provide for his dependants and their respective financial circumstances. Consequently, this court finds no compelling basis to interfere with the deceased’s testamentary wishes under Section 26 of the *Law of Succession Act*, as the provision made for the applicant meets the threshold of reasonableness required by law.



Whether the doctrine of survivorship applies to the jointly held properties and the consequent implications for their distribution.

71. The principle of survivorship, also known in law as *jus accrescendi*, stands as one of the foundational doctrines governing joint tenancy in property law. This principle establishes that upon the death of one joint tenant, their interest automatically and immediately passes to the surviving joint tenant(s), operating independently of any testamentary disposition or rules of intestacy. The doctrine's application is not discretionary but automatic, representing a defining characteristic that distinguishes joint tenancy from other forms of co-ownership. This implies that the property is not up for distribution as the surviving tenant is now the new owner. The property will only be up for distribution upon the demise of the new sole owner, and even then, this property would only be the subject of the Estate of this new owner. This is the hallmark of the principle of *jus accrescendi* which provides for the right of survivorship.
72. This finding was affirmed by the Court in the case of *In re Estate of Johnson Njogu Gichohi (Deceased) Succession Cause No. 112 of 2016 [2018] eKLR* where L.W. Gitari J held as follows: -

“ 13. Section 60 of the *Land Registration Act* provides:

“If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of death delete the name of the deceased tenant from the register by registering the death certificate.”

This means that where property is in the names of joint owners, upon the death of one of them, the surviving owner automatically becomes the owner upon presenting the evidence of death of the joint tenant i.e death certificate to the registrar. The property automatically passes to the surviving joint tenant. This principle of survivorship over jointly owned property operates to exclude the property from the *Law of Succession Act* upon the death of one of the joint tenants. I am in agreement with the holding by Achode J. – *Mwangi Gakuri – v- Bernard Kigotho Maina & Another, H. C NBI. Succ. Cause No. 2335/2011* where she stated:

“Property is capable of passing upon death other than by will. It may pass by survivorship..... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship..... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants....”

18. My view is that as the objector and the deceased were joint owners, the objector as the surviving joint owner was entitled to acquire ownership without being subjected to the process of intestacy. In the case of *Isabel Chelangat –v- Samuel*



Tiro(2012) eKLR, the principle of survivorship also known as ‘jus accrescendi’ was expounded where it was stated:

“A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities.” The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant as long as there is a surviving joint tenant as the right of survivorship takes precedence.”

By the principle of survivorship land owned jointly passes automatically to the surviving owner when one dies without the need to file a Succession Cause. W. M. Musyoka in his book *Laws of Succession* at page 3 states as follows:-

“Property is capable of passing upon death other than by will. It may pass by survivorship..... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship..... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants.”

73. In applying these principles to the present case, the court finds that the jointly held properties, specifically Sergoit/Elgeyo Border Block 1 (Belioimo) 461, 464, 465, and 467, have already vested in the 1st Petitioner by operation of law. This vesting occurred automatically upon the deceased's passing, independent of and superior to any testamentary provisions or claims under the *Law of Succession Act*. The registration of these properties in joint tenancy created a special property relationship that, by its very nature, was designed to avoid the succession process through the operation of the survivorship principle.
74. This legal consequence flows not from any act of succession or distribution but from the inherent nature of joint tenancy itself. The properties thereby ceased to form part of the deceased's free estate and fell outside the scope of assets available for distribution in these succession proceedings. These properties would only become subject to succession law upon the eventual passing of the 1st Petitioner, at which point they would form part of her estate rather than the current estate under administration. This position aligns with established jurisprudence and serves to protect the integrity of joint tenancy arrangements while providing certainty in property relations.
75. Given the clear weight of judicial authority and the unambiguous evidence before this court regarding the joint tenancy of the specified properties, the inescapable conclusion is that these assets cannot form part of the current succession proceedings. The doctrine of survivorship has operated to vest absolute ownership in the 1st Petitioner, and this court's role is simply to recognize this legal reality rather than to make any determination about their distribution. The applicant's claims regarding these properties, while understandable from the perspective of seeking provision from her father's estate, cannot override the operation of this well-established principle of property law. The court must



therefore decline to include these properties in any consideration of the estate's assets available for distribution, as they have, by operation of law, already passed to the surviving joint tenant.

Whether the court should interfere with the deceased's testamentary wishes in the circumstances of this case.

76. Section 8 of the *Law of Succession Act* provides for forms of wills. It stipulates that a will may be made either orally or in writing. From the pleadings, it is not in dispute that on 25th January, 2020 the deceased bequeathed his property to his beneficiaries by way of a written will.
77. The formal requirements of validity of a written will are stipulated in section 11 of the *Law of Succession Act*. It states –

“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.”

78. Having scrutinized the evidence before this court, I am satisfied that the will dated 25th January, 2020, meets all the formal requirements prescribed under Section 11 of the *Law of Succession Act*. The will was duly executed by the deceased in the presence of witnesses who attested to his mental capacity and voluntary disposition. Moreover, the evidence reveals that the will-making process was conducted with meticulous attention to legal formalities, with the testator's signature properly placed and witnessed in accordance with statutory requirements. Of particular significance is the fact that the applicant herself was present at the reading of the will on 7th January, 2021, where she expressed satisfaction with its provisions. The court finds no credible evidence to support allegations of undue influence or coercion; rather, the will appears to reflect the careful and considered testamentary intentions of a father who sought to provide for his dependants. This court therefore upholds the validity of the will as a true expression of the deceased's testamentary wishes.

79. For the foregoing reasons, this court makes the following orders:
- a. The application dated 29th January, 2024, seeking demarcation and utilization of a portion of Land title number Sergoit/Elgeyo Border Block 1(Beliomo) 464 is hereby dismissed.
 - b. The court affirms that Properties 462, 463, and 466 (subsequently subdivided into 488 and 489), having been validly transferred during the deceased's lifetime, do not form part of the deceased's free estate available for distribution.



- c. The court declares that Properties Sergoit/Elgeyo Border Block 1(Beliomo) 461, 464, 465, and 467, being held in joint tenancy at the time of the deceased's death, have vested absolutely in the 1st Petitioner by operation of the doctrine of survivorship and are therefore not available for distribution in these succession proceedings.
- d. The testamentary provision made for the applicant, allocating her 10% of the deceased's inheritance from his father's estate (Eldoret HC P&A 40 of 2018), is upheld as reasonable provision under Section 26 of the *Law of Succession Act*.
- e. Each party shall bear their own costs

80. Orders accordingly.

DATED AND DELIVERED THROUGH CTS AT ELDORET THIS 21ST DAY OF FEBRUARY 2025

.....

R. NYAKUNDI

JUDGE

