In re Estate of Kibor Arap Talai (Deceased) (Succession Cause 50 of 2014)
[2025] KEHC 12747 (KLR) (17 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12747 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 50 OF 2014

RN NYAKUNDI, J

SEPTEMBER 17, 2025

BETWEEN

NANCY JEPKURUI TALAI ..... 1ST PETITIONER

JOSHUA TALAI KIBOR ..... 2ND PETITIONER

AND

IRENE TALAI ..... 1ST OBJECTOR

COLLINS KIPKOECH TALAI ..... 2ND OBJECTOR

EUNICE JEBET TALAI ..... 3RD OBJECTOR

MOSES KIPTANUI MUGE ..... 4TH OBJECTOR

MILKA CHEMELI MULEI ..... 5TH OBJECTOR

SAMMY KIPRONO TALAI ..... 6TH OBJECTOR

ISAIAH KIPKEMEI RONO ..... 7TH OBJECTOR

JUDGMENT

1. The deceased herein passed on 2nd August, 2012 and after citation proceedings, the parties agreed to have the following parties file for grant of letters of administration: Nancy Jepkuruti Talai & Joshua Kipkosgei Talai to represent the 1st house and Irene Jeptanui Talai & Collins Koech Talai to represent the 2nd house. According to the Petition, the deceased was survived by the following persons/ beneficiaries:

    a. Tapyotin Kibor – 1st Widow (deceased)

    b. Nancy Jepkurui Talai (Adult)

    c. Grace Jemutai Ngeno (deceased)

d. Joshua Kipkosgei (adult)

e. Walter Kibor Talai (deceased)

f. Francis Kigen Talai (deceased)

g. Irene Jeptanui Talai – 2nd widow

h. Collins Kipkoech

i. Mercy Jeruto

j. Tony Kipchirchir

k. Shanis Jepngetich Talai – Grand daughter

l. Kevin Cheboi Talai – Grandson

m. Alice Chepkosgei – Granddaughter

n. Tecla Cherotich Ngeno – Granddaughter

o. Geoffrey Cheruyot – Grandson

p. Charles Kiptarbei Ngeno – Grandson

q. Philip Kurgat Ngeno – Grandson

r. Caroline Chelangat – Granddaughter

s. Emily Chepleting – Granddaughter

t. Jerry Kiprop – Grandson

u. Mercy Jeruto – Granddaughter

v. Boaz Kiprop – Granddaughter

2. Further that the deceased left the following properties:

a. Peugeot 404 – KSG 064

b. Peugeot 504 – KVD 780

c. Bedford Lorry – KSL 034

d. Bedford trailer – KCR Z 1145

e. Isuzu double cabin – KAZ 697V

f. 2 Nafields – KCY and KCQ94

g. Massey Furgerson – D20

h. Ford 5610 – KXH 001

i. Ford 5610 – KYM 965

j. Ford New Holland – KAT 397E

k. Case International – KAM 318

l. Coble Harrow 20 disk (international)

m. Light Harrow (international)

n. Two (2) Rotary Mowers (John Deer)

o. Maize Planter (international)

p. Wheat Planter (John Deer)

q. Road Motor Grader

r. Mud Scooper Grader

s. 2 Ploughing Discs (Massey)

t. 2 Mould boards

u. Reversible plough Ramsons

v. Chaff Cutter

w. Water Buzzer and trailer

x. Ramsons Harrow

y. One mould board

z. Chaft Cutter

aa. Lethe Molding machine

ab. Timber planning machine

ac. Timber cutting bench

ad. Welding machine

ae. L.R. No. 7991/Kesses Farm Uasin Gishu,

af. Plot No. 62 (Lelan Marakwet),

ag. Plot N. 112 (Lelan Marakwet former Eric's farm)

ah. Plot No. 64 (Talai centre Building – system bar building, stage view Hotel Building, Kerio Hotel Building, vision 2030 building, splendid/chambers building, Mega Pub/Restaurant.

ai. Plot No. 65 where Safaricom, Zain (Airtel) and YU have constructed boosters, Pork Butchery, Kaptich's Tuiy'ois plot

aj. Plot No. 138; Kurji Ramji

ak. Plot No. 60 (Talai Market) i.e. Peacock Hotel, Mwangaza Hotel and Butchery, Chemist, Florida Building

al. New houses on Plot No. 127

am. Cash from 100 acres' farm i.e. Kshs. 7,500,000/=.

an. The Bank Account at Kenya Commercial Bank Eldoret A/c No. 110-252-1531, and A/C NO. 110-189-5152.

3. The petition also indicated that the liabilities left by the deceased were Kshs. 100,000/=.

4. On 4th November, 2020, Moses Kiptanui Muge filed an objection to the making of Grant on the following basis:

    a. Francis Kigen talai is the son of the deceased and as such a beneficiary of his estate.

    b. That Kibor Arap Talai was the registered owner of LR. No. 7991 Kesses Farm, Uasin Gishu farm.

    c. That at the time of his death, the said deceased Francis Kigen Talai was married to Eunice Jebet Rono who is the administrator of her deceased husband's estate.

    d. That on the 7th November, 2012, Eunice Jebet Rono sold a quarter an acre (1/4) portion of land referred to as LR NO. 7991 plot numbers 56 to the Objector under the terms of sale of land agreement dated 7th November 2020.

    e. That a quarter of an acre portion of the parcel of land No. LR. No. 7991 Kesses Farm, Uasin Gishu farm does not form part of the deceased's property as it had been transferred to Moses Kiptanui Muge on 7th November, 2012.

    f. That in the event that the property is included in the deceased's estate, the applicant and the entire family stand to suffer irreparable loss and damage.

5. Geoffrey Kipkemei Cheruiyot, Emily Jelagat Lagat, Carolyne Jepleting Ng'eno, Tecla Jerotich Ng'eno, Philip Kipkurgat Kemei, Alice Chepkosgei Ng'eno and Charles Kemei Ng'eno swore affidavits to the effect that they are grandchildren to the deceased and they are entitled to a share allocation to their mother Grace Jemutai (deceased) who was the first born daughter of the deceased.

6. The dispute centers on two opposing positions regarding the deceased's estate. The first position maintains that a valid Will was executed by the deceased, and consequently requests the revocation of the Grant of letters of administration intestate previously issued to Nancy Jepkurui Talai and Joshua Talai.

7. The second position challenges the Will's validity on two grounds: first, asserting that the deceased lacked testamentary capacity at the time of execution, and second, noting that certain properties are conspicuously absent from the Will, raising questions about its completeness and authenticity. Furthermore, forensic evidence from Chief Inspector Daniel, a document examiner, indicates that the signatures on the Will do not match authenticated signatures of Kibor Arap Talai, suggesting that the deceased did not personally execute the disputed Will. Nancy Jepkurui Talai filed a further affidavit attaching medical documentation to demonstrate that the deceased was sick as at the time of the alleged Will in question in this succession.

8. The parties filed written submissions in support of their various positions, which submissions I have summarized as hereunder:

1st Objector's submissions

9. Learned Counsel Ms. Chepseba appearing on behalf of the 1st Objector started by presenting the genesis of the case. That the deceased died on 2nd August, 2012, leaving behind two spouses: Tapyotin Kibor Talai (1st wife, now deceased) who had five children, and Irene Jeptanui Talai (2nd wife) who had three children. The Petitioners moved the court for a Grant of Letters of Administration Intestate,

which was gazetted on 22nd May, 2015. The Objectors raised objections to this grant on grounds that they were not involved in the succession proceedings.

10. In submitting for the 1st Objector, counsel couched the following issues for determination:

    a. Whether the will dated 13th February, 2006, is valid

    b. How should the deceased's property not reflected in the will be distributed.

    c. How should the deceased's estate be distributed with or without a will

11. On the first issue, learned Counsel Ms. Chepseba submitted on behalf of the 1st Objector that the deceased executed a valid will on 13th February, 2006. Counsel argued that the will meets all the requirements of a valid written will. She contended that the validity of a will depends on two principal factors: the capacity of the testator to make a will and compliance with formal requirements.

12. Counsel noted that in this case, the formal requirements of the will are not contested. What is in contention is the capacity of the deceased to make the will. Counsel referred to Section 5 of the *Law of Succession Act*, which deals with capacity to make a will and testation.

13. In support of this argument, counsel cited the decision in Banks vs. Goodfellow (1870) LR 5 QB 549, which established the essentials of testamentary capacity. In the said case, it was held that a testator must understand the nature of the act and its effects, understand the extent of property being disposed of, comprehend claims to which he ought to give effect, and have no disorder of mind that would poison his affections or pervert his sense of right.

14. Counsel also referred to Section 7 of the *Law of Succession Act*, which provides that a will made through fraud, coercion, undue influence, or mistake is void. The 1st Objector's counsel explained how fraud, coercion, undue influence, and mistake would invalidate a will.

15. In further support, counsel cited the case of John Kinuthia Githinji vs. Githua Kiarie and others civil appeal number 63 of 1984, which established that where a will appears properly executed by a person of age and sound mind, a presumption of due execution arises, but that presumption may be displaced by evidence. Counsel cited several other cases including Vijay Chandrakant Shah vs. The Public Trustee, Mwathi vs. Mwathi and another, and others to establish principles regarding suspicious circumstances in will execution.

16. Counsel argued that the burden of proof lies with the person alleging lack of capacity according to case law, citing Karanja and another vs. Karanja (2002) 2 KLR 22 and In the Matter of the Estate of James Ngengi Muigai. Counsel submitted that the Petitioners had not discharged this burden of proving the testator lacked capacity.

17. The formal requirements of a valid will were outlined by counsel as stipulated in Section 11 of the *Law of Succession Act*, including requirements for the testator's signature, placement of signature, and attestation by competent witnesses. Counsel submitted that the will presented meets these conditions.

18. Counsel further argued that Section 5 of the *Law of Succession Act* gave the deceased freedom of testation to dispose of his property as he pleased. That the fact that a will leaves out some children should not be grounds for invalidation, as the aggrieved party has remedy under Section 26 of the *Law of Succession Act* rather than nullification of the will.

19. The 1st Objector submitted that the deceased died partially intestate because while executing his will, he left out some properties which form part of his estate. These properties include Lelan/kabiego/62, Lelan/kabiego/112, Plot No. 64 (talai Centre Building), And Plot No. 60 (talai Marakwet).

20. Counsel referred to Section 3 of the *Law of Succession Act*, which defines free property as property that the deceased was legally competent to dispose of during his lifetime and in respect of which his interest has not been terminated by his death.

21. Counsel noted that the deceased was polygamous and referred to Section 40 of the *Law of Succession Act*, which governs distribution of property in intestate unions. The provision states that in polygamous situations, the intestate estate shall be divided among houses according to the number of children in each house, counting any surviving wife as an additional unit.

22. Counsel calculated that since the deceased left behind two widows (one deceased) with the first widow having five children and the second having three children, there would be a total of ten units for distribution purposes. Counsel submitted that the estate should be distributed equally among these ten units.

23. In support of this position, counsel invoked Article 27 of *the Constitution* of Kenya 2010, which enshrines the principle of equality. Counsel also referred to several cases dealing with discrimination in inheritance, including the Matter of the Estate of M'ngarithi M'miriti Alias Paul M'ngarithi M'miriti (Deceased) [2017] eKLR, where Justice Gikonyo emphasized that discrimination based on gender or sex in inheritance is prohibited.

24. Counsel cited Rono vs. Rono [2008] 1 KLR 803, which was against discriminatory practices against women in inheritance and made reference to CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women). Further, counsel referenced Stephen Gitonga M'murithi vs. Faith Ngiramurithi [2015] eKLR, which affirmed that Section 38 enshrines the principle of equal distribution to surviving children irrespective of gender and marital status.

25. Counsel submitted that regardless of whether a valid will exists, the estate should be distributed equally among beneficiaries in accordance with Article 27 of *the Constitution* and Sections 35, 36, 38, and 40 of the *Law of Succession Act*.

26. In support of this position, counsel cited a judgment by Justice Musyoka in Re Estate of Francis Andachila Luta (Deceased) (Succession Cause No. 875 of 2012), which outlined how assets should be distributed in polygamous situations according to Section 40.

27. Counsel also noted the provisions of Rule 73 of the Probate and Administration Rules, which states that nothing in the Rules shall limit the inherent power of the court to make orders necessary for the ends of justice.

28. In conclusion, the 1st Objector submitted that:

    a. The will executed by the deceased on 13th February, 2006, is valid and the property captured therein should be distributed according to the deceased's wishes.

    b. The properties not captured in the will (Lelan/kabiego/62, Lelan/kabiego/112, Plot No. 64, And Plot No. 60) should be distributed equally among the deceased's beneficiaries pursuant to Section 40 read with Section 38 of the *Law of Succession Act*.

    c. In the event the will is declared invalid, the court should distribute the deceased's estate equally among rightful beneficiaries following intestacy rules.

Interested party's submissions

29. The interested party filed written submissions dated 16th December, 2024. Learned Counsel Chesire submitted on behalf of the interested party that the succession cause was commenced by the petitioners

regarding the administration and distribution of the estate of the late Kibor Arap Talai. Counsel stated that the deceased passed away on 8th February, 2012, at Kesses within Uasin Gishu County in Kenya. At the time of his demise, counsel noted that the deceased was married to two wives: Tapyotin Kibor Talai (now deceased) and Irene Jeptanui Talai.

30. Learned Counsel Chesire submitted that the interested party filed an application dated 29th September, 2023, seeking to be enjoined in the proceedings, which the court subsequently allowed. Counsel contended that the interested party is the legal first wife to the late Francis Kigen Talai, who was the son of the late Kibor Arap Talai whose estate is the subject of these proceedings.

31. Counsel argued that the third Objector was actually the second wife to the late Francis Kigen Talai. Counsel submitted that a betrothal ceremony was held at the interested party's father's homestead on 13th January, 1990, at Kabimoi, Eldama Ravine Sub-county, Baringo County, where she and the late Francis Kigen Talai were anointed with ceremonial creams and fat in accordance with Tugen and Marakwet customary laws of marriage.

32. Counsel further stated that the ceremony was hosted at the interested party's parents' homestead with the relatives of her late husband in attendance, including Margaret Kipkosgei, the wife of the second administrator, Joshua Talai.

33. Learned Counsel Chesire submitted that when the interested party and her late husband got married, they both worked with Kenya Commercial Bank. After their marriage, she was authorized by the deceased Kibor Arap Talai to reside in his homestead after he had built a house for his second wife in another part of the Talai estate, while her mother-in-law lived in Lelan in Elgeyo Marakwet.

34. Counsel contended that the interested party's late husband, Francis Kigen Talai, later surreptitiously decided to cohabit with Eunice Jebet Rono (the 3rd Objector) at her brother-in-law's kitchen, and by the time of his demise, he had not built any house for her. Counsel submitted that the 3rd Objector built a house for herself after the death of Kibor Arap Talai from proceeds acquired from the illegal sale of Kibor's estate.

35. Counsel argued that the interested party does not deny that the 3rd Objector is the second wife to Francis Kigen Talai but states that no betrothal ceremony occurred between her and the deceased husband. Counsel categorically stated that the interested party attended the burial ceremony of her late husband, though the authors of his obituary did not name her as his widow.

36. Learned Counsel Chesire submitted that the evidence tendered before the court does not point to the fact that the interested party is not a beneficiary/dependant in the estate of the late Kibor Arap Talai. To the contrary, counsel argued that a majority of the other beneficiaries, including the administrators, agree and confirm that the interested party is the first wife to the late Francis Kigen Talai who was the son of the late Kibor Arap Talai.

37. Counsel contended that as such, the interested party is entitled to a share of the estate of the late Francis Kigen Talai once the same is ascertained from the estate of the late Kibor Arap Talai as per the provisions of the *law of Succession Act* Cap 160 laws of Kenya and *the Constitution* of Kenya 2010.

38. In conclusion, Learned Counsel Chesire submitted that it would be in the best interest of justice that the interested party be recognized as the first widow to the late Francis Kigen Talai who was the son of the late Kibor Arap Talai. Secondly, counsel prayed that she must be granted her rightful share to the estate of her late husband as per laws established. Counsel indicated that the interested party is amenable to a share duly agreed on by the Petitioner/Respondent.

Petitioners' submissions

39. Learned Counsel gave a background of the matter and submitted that Tapyotin Talai (1st Wife) got married to the late Kibor Arap Talai in the year 1947 when Kibor Arap Talai (deceased) had just graduated from Thogoto Teachers College and was employed in African Government School Tambach but had not acquired any wealth at all. They worked very hard together between the years 1947 to 1981 such that by the year 1981 they had acquired each and every wealth or property which today forms the Estate and is the subject of dispute in this Court.

40. The Administrators from the 1st house through counsel submitted that the 2nd wife Irene Jeptanui Talai got married to the late Kibor Arap Talai in the year 1987, wherein Irene Jeptanui came and just landed on a bed of roses, but it is so unfortunate that now she demands to be given half of the properties and wealth which she did not work for, this is totally un-fair and un-acceptable.

41. Learned Counsel submitted that the year 1947 when Kibor Arap Talai (deceased) had just graduated from Thogoto Teachers College and was employed in African Government School Tambach but had not acquired any wealth at all, Tapyotin Talai (1st Wife), started living in the school compound where life was very difficult because they had absolutely nothing. Tapyotin Talai (1st Wife) and Kibor Arap Talai (deceased) started farming from where they made money and started buying pieces of lands and investing in various businesses.

42. The Administrators from the 1st house submit that in 1959 mzee Kibor Arap Talai got an interdepartmental transfer to become the senior chief of Lelan location (marakwet). Tapyotin Talai (1st Wife) and Kibor Arap Talai (deceased) continued farming from where they then put all their earnings together, bought Lelan farm at Kesses in Eldoret where they started planting pyrethrum and potatoes. They also kept merino sheep and Sahiwal cattle. They continued working very hard to be able to educate their children and save a little money.

43. Counsel highlighted that Tapyotin Talai (1st Wife) was working at principal's office in Tambach Government School. In 1967 Kibor Arap Talai who was then working in the North Rift Settlement Board brought news home that there was an advert by the Kenya Government that the land L.R. 7991 was being sold to any willing African. The two sold some of the sheep and cattle which were being bred at the Lelan farm and put together all the money and bought the land. Tapyotin Talai (1st Wife) and Kibor Arap Talai (deceased) continued farming at Lelan (Marakwet) and Kesses farms at Eldoret where they kept dairy Cows, beef Cows, merino sheep and also planted maize, wheat and trees.

44. The Administrators from the 1st house submitted that L.R No. Lelan/Kabiego/112 was acquired through a public auction in 1981 long before the objector Irene Jeptanui Talai got married to the late Kibor Arap Talai in the year 1987. Irene Jeptanui later got married into this home in the year in 1987 but now she demands the properties and wealth which she did not work for or contribute to their acquisition in any manner.

45. The Administrators from the 1st house submitted that the objector is claiming the pieces of lands which she never participated in their acquisition at all, yet she has in her sole possession, land measuring 5 acres of land, known as Title No. Pioneer/Nigeria Block 1(EATEC/155), which the deceased bought for her so that she could and live there away from what was acquired by Tapyotin Talai, the first wife.

46. Counsel submitted that L.R. Lelan/Kabiego/62 was acquired in 1959 when the late Kibor Arap Talai was senior Chief in Lelan location from Tambach African Government School. Irene Jeptanui was not yet born so she should not lay claim on this land which she did not contribute in the process of acquiring at all.

47. It is submitted for the petitioners that the deceased did not leave a will for the following reasons:

    a. That the deceased did not have the requisite capacity to make a Will at the time he is alleged to have made a will dated 13th February, 2006.

    b. The purported will, only deals with one piece of land, that is Land.L.R. acquired in 1972, and Generalization of Machineries', meaning if the deceased ever made that will, he lacked the capacity to understand what he was doing and therefore could not remember many other vast properties of the Estate such as; L.R. Lelan/Kabiego/62, acquired in 1971, L.R. Lelan/Kabiego 112, acquired in 1981, Title No. Pioneer/Nigeria Block 1(EATEC 155) (Lelan Marakwet), Plot No. 112 (Lelan Marakwet former Eric's farm), Plot No. 64 (Talai Centre Building- System Bar Building, Stage View Hotel Building, Kerio Hotel Building, Vision 2030 Building, Splendid/Chambers Building, Mega Pub/Restaurant, Plot No. 65 where Safaricom, Zain(AirTel) and YU have constructed boosters, Pork Butchery, Kaptich's Tuiy'ois plot, Plot No.138, Kurji Ramji, Plot No. 60(Talai Market) i.e., Peacock Hotel, Mwangaza Hotel and Butchery, Chemist, Florida Building, New Houses on Plot No.127, Cash from 100 acres farm i,e Kshs.7, 500,000/=, The Bank Account at Kenya Commercial Bank Eldoret A/C No: 110-252-1531, and A/C NO. 110-189-5152, Slaughter/Slab.

    c. The Administrators from the 1st house submit that the signature purporting to be the deceased on the alleged Will was forged.

48. Learned Counsel made reference to Section 5(3) of The Law of the *Law of Succession Act* and submitted that the deceased did not leave a valid Will as he did not have the requisite capacity to make a Will at the time he is purported to have done so for the following reasons:

    a. It is not disputed the deceased suffered from a Hypertension due to Congestive Cardiac Failure, read with medical documents in Further Affidavit sworn on 30th October, 2024 by Nancy Talai & Joshua Talai filed in Court on 11th November, 2024, this caused him to lose his power of recollection and understanding what he was doing.

    b. The documents examiner report dated 24th November, 2025, by C I Daniel Gutu, Petitioners exhibit "A1" produced on 17th October, 2022,

49. On an argument of forgery counsel cited the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo Nairobi CACA No. 128 of 1995, where the Court of Appeal stated that the charge of forgery or fraud is a serious one, the standard of proof required of the alleger is higher than that required in ordinary civil cases, that is proof upon a balance of probabilities, but certainly not beyond a reasonable doubt as in criminal cases.

50. Further, that a Will shall be declared void if it is forged and that the burden of proving forgery lies with the person alleging it. Counsel submitted that in discharging this burden, the documents examiner report dated 24th November, 2025, by C I Daniel Gutu, Petitioners exhibit "A1" produced on 17th October, 2022, the findings by the documents examiner were not challenged where the known signature of the Kibor Arap Talai on his Kenya Nation Identify card and Logbook KGN, completely differed with the signature on the alleged will dated 13th February, 2006, so that the signature on the alleged will dated 13th February, 2006, is nothing but a forgery.

51. Counsel submitted that it is extremely odd and not-acceptable that the objectors who alleged had a will waited from the year 2013 when the citation was filed in Court, all the way to September, 2016 to ask the Court to propound the alleged will. About 90% of properties forming the Estate are not in

the purported will and the purported will does not exhaustively described such as the properties and not specific.

52. Counsel submitted that there is overwhelming evidence that the purported will dated 13th February, 2006 is a forgery obtained by fraud and it ought to be declared as void.

53. On the question of intermeddling, learned Counsel made the following submissions:

    a. Irene Jeptanui, the second wife converted a lot of properties owned by the estate to her use and enjoyment illegally and unlawfully without any grant of probate and letters of administration or distribution of the Estate, for example, Talai center building in Eldoret and plots in that same center. The buildings were constructed using money acquired jointly by Tapyotin Kibor and Kibor Arap Talai.

    b. Irene Jeptanui, the second wife further intermeddled with the Estate by illegally collecting and utilizing money from payments made to Irene Jeptanui (2015) by Eaton Tower Kenya LTD, over Airtel Booster No.1464 at Moi University Main Campus "Site ID.KEG TOO760, Site Name: Moi University, Kshs. 116,923.03

    c. Irene Jeptanui illegally collects rent from buildings of Kibor Talai estate of over Kshs.160 million to date. These includes rents from: i. Co-operative bank (not yet quantified). ii. Post office (not yet confirmed). iii. Telephone mast (Safaricom, Airtel and Yu telecommunications) Airtel mast (monthly pay Ksh116,933.03*72 months=8.4 million (from July 2012-July 2018) Document showing payments are available. She lied to Airtel company that she was the only surviving widow of the late Kibor Talai hence collected the money. iv. Safaricom (not yet qualified). v. Yu (not yet qualified).

    d. That Irene sold maize planted on 100 acres of land planted by Kibor Talai just before his death in August 2012 which she sold at an amount worthy 7.5 Million. She has been ploughing the whole potion for the years 2013, 2014 and 2015 hence getting 7.5 million each year.

54. Learned Counsel submitted that it is only fair that as this Honourable Court consider the issue of distribution of the assets, Irene Jeptanui and her house holds should get a maximum of 200 Acres of the total land parcels remaining, while the rest be given to the 1st Wife (Tapyotin Kibor) and her house hold. The building and other properties should be distributed in a manner that this objector gets ten per centum of the remaining properties such as buildings, while the 1st house gets 90% of the buildings and other properties.

1st & 2nd Objectors' submissions

55. Learned Counsel Mr. Omusundi in submissions dated 5th September, 2024 started by giving the background of the case. He submitted that the deceased bequeathed most of his properties in his last will by:

    a. Sharing parcel of land known as L.R 7991 equally among his two wives

    b. Directing that plots adjacent to Moi University be sold and proceeds shared equally between the two wives.

    c. Bequeathing all monies in various bank accounts to be shared equally between the two wives.

    d. Stipulating that farm machineries and implements were not to be shared since each wife already had her own

56. Counsel argued that it would be dishonest for some beneficiaries to dispute the clear terms of the will, which distributed properties equally among dependents according to law and Marakwet culture and traditions.

57. Counsel submitted that on 20th May, 2009, the deceased gifted some properties to his second wife Irene Jeptanui Talai (Plot No. 65 on L.R No. 7991) and to his daughter Nancy Chepkirui Talai (100 Acres surrounding where she had constructed her permanent home within L.R No. 7991). Counsel argued that under Section 42 of the *Law of Succession Act*, these gifted properties should not form part of the estate available for distribution.

58. Counsel contended that the properties not listed in the Will should be distributed equally between the two houses following the formula established by the deceased in his will. Counsel further submitted that the distribution should take into consideration the current occupation, possession, and utilization of the parcels of land by the beneficiaries to eliminate further disputes.

59. Counsel addressed the Petitioners' claims that certain parcels of land were matrimonial property solely acquired by the deceased and his first wife. Counsel argued that:

    a. The *Matrimonial Property Act* of 2014 should not be imported into probate and administration processes.

    b. The Petitioners failed to prove the alleged contribution to the acquisition of property as required by the Supreme Court in JOO v MPO.

60. In conclusion, Counsel submitted that it would be in the best interest of justice to distribute both the testate and intestate estate of Kibor Arap Talai equally between the two houses (of the late Tapyotin Talai and Irene Jeptanui Talai) as per the wishes expressed in the deceased's last will and testament.

3rd Objector's written submissions

61. Learned counsel Ms. Nderitu for the beneficiary, Eunice Jebet Rono, opened the submissions by providing context concerning the estate of the deceased. Counsel noted that the petitioners had sought letters of administration intestate over the estate, highlighting that the deceased left behind two families as beneficiaries, with several members now deceased.

62. Counsel submitted that after the petition was filed, objections were raised by Irene Talai and Walter Kibor Talai on grounds that the deceased had executed a will dated 13th February 2006, which necessitated a hearing on the objections.

63. With respect to the first objector's case, learned counsel submitted that Irene Talai testified as being the second wife of the deceased, married while the first wife (Tapyotin) had five children. Counsel elaborated that according to Irene's testimony, she lived in Kesses farm while the first wife lived in Lelan until 1990 when the first wife joined her in Kesses. Counsel further noted that Irene testified that the deceased was a teacher, senior chief, and farmer who owned three parcels of land: one at Kesses-LR 7991 (purchased in 1968) and two at Lelan (Lelan/Kabiego/62 and Lelan/Kabiego/112, purchased in 1970 and 1981 respectively).

64. Learned counsel explained that Irene contended she was born in 1968 and thus was young when these properties were acquired, hence did not contribute toward their purchase. Counsel further submitted that Irene claimed the deceased left a will dated 13th February 2006, drafted by Advocate Paul Birech, which was not read to the family upon his demise, with copies later obtained from the advocate's office. According to counsel, Irene testified that alongside the will were deed of gifts and declarations given by

the deceased to some beneficiaries, with Irene allegedly gifted plots no. 60, 64, and 65, and Joshua Talai gifted plots 57 and 58. Counsel noted that Irene prayed for the estate to be distributed as per the will.

65. In support of the first objector, counsel submitted that William Arap Sigei testified as having known the deceased for over 40 years as a neighbour at Kesses. According to counsel, William stated that Kibor had two wives and, as a Kipsigis, explained that their customs dictated property be distributed among houses/wives in equal shares, not according to the number of children. Counsel added that William testified these customs were similar to other Kalenjin tribes including Marakwet, which was the custom of the deceased.

66. Learned counsel further submitted that Sutel Chelang'a Talai testified that the deceased was his uncle who had married two wives, and explained that according to Marakwet customs, if a man had two wives, his properties were to be divided equally amongst the houses, with property going to children only if there was no wife.

67. Counsel presented that Advocate Christopher Mitei produced the will dated 13th February 2006, to which he was a witness, drawn by Birech Ruto & Company Advocates. Counsel detailed that according to Mitei's testimony, the will distributed the deceased's properties with LR No. 7991 to be shared equally between the two wives, each to take care of her children with her share; each wife to retain their own machinery; all monies in various banks to be shared equally; all plots adjacent to Moi University to be disposed of with proceeds shared equally; each wife to retain cows under her management; and both wives appointed as executors of the will.

68. With regard to the second objector's case, learned counsel submitted that Milka Chemeli Mulei, widow to Walter Talai (deceased), testified that she had two children with Walter and that her late husband had told her that Kibor Arap Talai had left a will expressing wishes to have his properties distributed according to the will. Counsel noted that Milka produced a marriage certificate, limited grant of letters of administration ad litem, death certificate, and eulogy to support her case.

69. Concerning the petitioners' case, counsel submitted that Chief Inspector Daniel, a forensic document examiner with DCI with 14 years' experience, testified that on 24th November 2015, their offices received documents from DCI Eldoret to ascertain whether the signatures belonged to the deceased. Counsel emphasized that after examination, it was Daniel's opinion that the signatures were made by different authors, meaning Kibor Arap Talai did not sign the will. Counsel noted that Daniel produced a document examiners report dated 24th November 2016, and that the document examiner was not cross-examined by the objectors, leaving his evidence uncontroverted.

70. Learned counsel submitted that John Kati Musambi testified knowing the deceased as his farm manager from 1981-1993, stating that the deceased had two wives but most properties were acquired by the deceased and his first wife before the second wife was married in 1987. Counsel elaborated that according to John's testimony, the properties were bought from proceeds of sheep and cows sold to Kenya Meat Commission and from sale of pyrethrum, maize, potatoes, and beans.

71. Counsel presented that Caroline Jepkogei, who substituted the first wife (Tapyotin Talai) who passed away during the case, testified that there was no will left by the deceased nor gifts given before his demise. Counsel noted that Caroline contended the first house deserved a bigger share than the second house since Tapyotin Talai and her late husband had acquired most properties before the second wife married. Counsel added that Caroline testified the second wife had benefited from the estate to the exclusion of other beneficiaries by selling properties after the deceased died.

72. Learned counsel submitted that William Ayabei Kiptanui testified knowing the deceased and his first wife since 1954, stating they engaged in large-scale farming dealing with Sahiwal cows, sheep, potato farming, and used the proceeds to acquire properties.

73. Counsel presented that Nancy Talai testified there was no valid will left by the deceased who therefore died intestate. Counsel elaborated that according to Nancy, despite being served with a citation and entering appearance, the objectors only mentioned the will in their summons application in 2015. Counsel detailed Nancy's argument that the will did not meet requirements of a valid will as the deceased lacked capacity due to his health status, only mentioned cattle, machinery, and LR 7991 yet had other properties, did not mention all beneficiaries, and there was a document examiners report indicating the will was a forgery. Counsel added that Nancy testified the deeds of gifts were made after execution of the alleged will, were not amended to reflect the gifts, and the gifts were not transferred from the deceased to beneficiaries.

74. To structure her submissions, counsel identified five issues for determination.

75. On the first issue, learned counsel submitted that the rightful beneficiaries were as listed in the chief's letter at page 732 of the common bundle, comprising both families of the deceased.

76. Regarding the second issue, counsel argued that the deceased lacked capacity to make a valid will, noting he was 89 years old when making the alleged will in 2006, only bequeathed one property despite having several assets, and did not list all beneficiaries. In support of this argument, counsel cited Section 5(3) of the *Law of Succession Act* and the case of re Estate of Margaret Njambi Thuo (Deceased) [2019] eKLR which laid down requirements for formation of a valid will.

77. On the third issue, learned counsel contended that there was no valid will for reasons including the deceased's lack of capacity, evidence that his signature on the will was a forgery as proven by the document examiner's uncontroverted report, subdivision of LR 7991 for gifts to beneficiaries, and families being unaware of the will until the objectors mentioned it in their 2015 summons application despite having been served with citation in 2013.

78. Addressing the fourth issue, counsel argued that the deeds of gifts presented were invalid as they were not perfected, crystallized, or consummated to benefit the beneficiaries as required by Section 42 of the *Law of Succession Act*. In support of this argument, counsel cited the cases of Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 others [2021] e KLR and Nyaga v Kangeri (Civil Appeal 19 of 2020) [2023] KEHC 21054 (KLR).

79. On the final issue of estate distribution, learned counsel submitted that since there was no valid will, the estate should be distributed according to Section 40 of the *Law of Succession Act*, which provides for equal distribution among surviving children. However, counsel argued that the court should exercise discretion to give the first house a bigger share since the first widow contributed more to property acquisition before the second wife married. In support of this position, counsel cited the cases of Scolastica Ndululu Suva v Agnes Nthenya Suva (2019) e KLR, In re Estate of Zakayo Mulei (Deceased) (Civil Appeal 61 of 2018) [2022] KEHC 13153 (KLR), Nyaga v Kangeri (Civil Appeal 19 of 2020) [2023] KEHC 21054 (KLR), and Muiruri v Muiruri (Civil Appeal 192 of 2019) [2023] KEHC 2284 (KLR).

Analysis and determination

80. Having carefully considered the pleadings, evidence adduced, and submissions advanced by all parties, this Court now embarks on the solemn task of determining the rightful distribution of the estate of the late Kibor Arap Talai. The deceased, who passed away on 2nd August 2012, left behind a substantial

estate comprising agricultural lands, commercial properties, motor vehicles, farm equipment, and financial assets. He was survived by two houses; the first consisting of his now-deceased first wife, Tapyotin Kibor Talai, whom he married in 1947, and her five children; and the second consisting of his second wife, Irene Jeptanui Talai, whom he married in 1987, and her three children.

81. At the heart of this dispute lies the question of whether the deceased left a valid will dated 13th February 2006, which purportedly directed an equal division of certain properties between his two houses. Absent a valid will, the Court must determine the appropriate distribution of the estate according to the intestacy provisions of the *Law of Succession Act*, taking into account the circumstances surrounding the acquisition of properties, the contributions of respective parties especially the share as claimed by the petitioners who claim a substantial contribution by the 1st wife, and the interests of justice.

82. The primary questions for determination are as follows:

a. Whether the deceased executed a valid will dated 13th February, 2006

b. Whether properties allegedly gifted inter vivos should be excluded from the estate.

c. How the estate should be distributed?

83. Section 8 of the *Law of Succession Act* provides for forms of wills. On the formal requirements of validity of a will, the law is in section 11 of the *Law of Succession Act*. It states: -

> " 11. No written will shall be valid unless-
>
> (a) The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
>
> (c) The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of 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."

84. On the question of the will's validity, the Court observes that the 1st Objector maintains that the deceased executed a valid will on 13th February, 2006, meeting all formal requirements under Section 11 of the *Law of Succession Act*. Advocate Christopher Mitei testified that he witnessed the execution of this will, which was drawn by Birech Ruto & Company Advocates. According to this will, the deceased's property LR No. 7991 was to be shared equally between his two wives, with each wife retaining their own machinery, and all monies in various banks to be shared equally between them.

85. The Petitioners, however, have challenged this will on several grounds. Primarily, they contend that the deceased lacked testamentary capacity due to his medical condition of Hypertension due to Congestive

Cardiac Failure, which they argue caused him to lose his power of recollection. The Petitioners have provided medical documentation in a Further Affidavit sworn on 30th October, 2024, to substantiate this claim. Moreover, they have presented evidence that the signature on the purported will was forged. This evidence comes in the form of a document examiner's report dated 24th November, 2025, by Chief Inspector Daniel Gutu, which concluded that the signatures on the will do not match authenticated signatures of Kibor Arap Talai.

86. The Court notes that the document examiner's testimony was not challenged through cross-examination by the Objectors, leaving this expert evidence uncontroverted. Chief Inspector Daniel, with 14 years of experience as a forensic document examiner with the DCI, testified that after examining the signatures on the will against known signatures of the deceased, it was his professional opinion that the signatures were made by different authors, meaning Kibor Arap Talai did not sign the will in question.

87. In re Estate of Samuel Ngugi Mbugua (Deceased) [2017] eKLR, the court was of the view that:

> " The allegation that the said signature was not that of the deceased amounts to a claim that the signature was forged or that fraud was exercised in the procurement of the alleged will. That is to say that someone other than the deceased had affixed that mark on the will with the intent of passing the same as the signature of the deceased. Forgery is a criminal offence. The applicant is in fact imputing criminal conduct on either the person propounding the will or those who were involved in the operation that is purported to have been its execution. The burden of proving forgery lies with the person alleging it. In Elizabeth Kamene Ndolo vs George Matata Ndolo Nairobi Court of Appeal civil appeal number 128 of 1995 it was stated that the charge of forgery or fraud is a serious one, and the standard of proof required of the alleger is higher than that required in ordinary civil cases."

88. In examining the purported will's validity, this Court is guided by the principle articulated in In re Estate of Erwin W Schlueter (2000) Supreme Court of Wyoming, No. 98-311, where the Supreme Court of Wyoming referred to Matter of Estate of Buchanan: "Mere proof that the decedent suffered from old age, physical infirmity and chronic, progressive senile dementia when the will was executed is not necessarily inconsistent with testamentary capacity and does not alone preclude a finding thereof, as the appropriate inquiry is whether the decedent was lucid and rational at the time the will was made." In the present case, however, the Petitioners have provided medical evidence demonstrating that the deceased suffered from Hypertension due to Congestive Cardiac Failure, which they assert affected his cognitive abilities. More significantly, the Court has before it uncontroverted expert testimony from a qualified document examiner that the signature on the will does not match the deceased's authenticated signatures. The failure by the Objectors to challenge this expert evidence through cross-examination leaves a compelling finding that the purported will was not signed by the deceased.

89. As a matter of emphasis, if a Will, rational on his face is shown to have been executed and attested in the manner prescribed by the *Law of Succession Act* it is presumed in the absence of the evidence to the contrary that it was made by a person of competent understanding. This is what the Court had to say in Nutt v Nutt [2018] EWHC 851 (Ch) thus the law regarding the burden of proof involves the following elements:

SUBPARA 1.

The burden is on the person seeking to establish the Will ('the propounder') to establish capacity;

SUBPARA 2.

Where a Will is duly executed and appears rational on its face, then the Court Will presume capacity;

SUBPARA 3.

An evidential burden then lies on the Objector to raise a real doubt as to capacity;

SUBPARA 4.

Once a real doubt arises there is a positive burden on the propounder to establish capacity.

90. The legal principles applicable to the issue of whether the deceased knew and approved of the contents of the Will are set out in the case of Gill v Woodall [2011] Ch 380; Thus:

> " Knowing and approving of the contents of one's Will is traditional language for saying that the Will was 'represented [one's] testamentary intentions. The Court has to consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the contents of the document which is put forward as a valid testamentary disposition. The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive, nor do they raise a presumption."

91. In all those circumstances the evidential material instrumental in discharging the burden of proof to make a case stronger to rule on this validity of the Will remains wanting and therefore the purported Will of the Deceased is invalid on the grounds of testamentary capacity that he did so at the time for it to pass the legal threshold to be applied in the disposition of the estate.

92. The *Law of Succession Act* under Section 7 provides that a will made through fraud is void. In the present case, the validity of the purported will has been directly challenged with substantial evidence. The Petitioners have discharged their burden of proving forgery through the production of the forensic document examiner's report, which remains uncontroverted. Furthermore, the will's incomplete nature in only addressing a small fraction of the deceased's substantial estate, leads this Court to conclude that the purported will dated 13th February, 2006 is not authentic and therefore not valid.

Whether properties allegedly gifted inter vivos should be excluded from the estate.

93. On the law regarding gifts inter vivos, I am content to cite the case of Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR where Nyamweya J stated that:

> " In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa).
>
> For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 32 to 51.

In Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

"Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do."

94. In the present case, the 1st and 2nd Objectors claim that on 20th May, 2009, the deceased gifted certain properties to his second wife Irene Jeptanui Talai (Plot No. 65 on L.R No. 7991) and to his daughter Nancy Chepkirui Talai (100 Acres surrounding where she had constructed her permanent home within L.R No. 7991). They further contend that under Section 42 of the *Law of Succession Act*, these gifted properties should not form part of the estate available for distribution.

95. For a gift inter vivos to be valid and enforceable, it must be complete and not merely rest on promise or unfulfilled intention. As noted in Halsbury's Laws of England, where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise.

96. In this case, while deeds of gifts were allegedly executed, the evidence before this Court indicates that these gifts were not perfected through registration or transfer of the properties to the alleged donees. Nancy Talai testified that the deeds of gifts were made after execution of the alleged will, were not amended to reflect the gifts, and the gifts were not transferred from the deceased to the beneficiaries. Importantly, no documentary evidence has been presented to show completion of these gifts through proper registration or transfer.

97. This Court finds that the alleged gifts inter vivos to Irene Jeptanui Talai and Nancy Chepkirui Talai were not completed during the deceased's lifetime, as they rested merely on unfulfilled intention without the necessary legal formalities being completed to transfer ownership. As such, these properties cannot be excluded from the estate available for distribution and must be considered part of the deceased's estate to be distributed according to the law of intestacy.

How should the estate be distributed?

98. Having determined that the deceased did not leave a valid will and that the alleged gifts inter vivos were not perfected, this Court must now determine the appropriate distribution of the estate according to the intestacy provisions of the *Law of Succession Act*.

99. Section 40 of the *Law of Succession Act* provides for the distribution of property in polygamous situations. It provides:

> "a. 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 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.

b. 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."

100. In the present case, the deceased was survived by two houses; the first consisting of his first wife, Tapyotin Kibor Talai (now deceased), and her five children; and the second consisting of his second wife, Irene Jeptanui Talai, and her three children.

101. The question that arises, however, the question of spousal contribution is whether a strict application of Section 40 would produce an equitable result given the circumstances of this case, particularly considering the evidence regarding the acquisition of properties and the respective contributions of the two houses.

102. The Court notes with great interest the evidence presented by the Petitioners that the first wife, Tapyotin Kibor Talai, married the deceased in 1947 when he had just graduated from Thogoto Teachers College and had not acquired any wealth. The evidence shows that Tapyotin and the deceased worked together between 1947 and 1981, during which period they acquired most of the properties that now form the estate. The Court also notes that Irene Jeptanui Talai married the deceased in 1987, after most of the properties had already been acquired.

103. The application of spousal contribution principles in succession matters presents a fundamental conceptual challenge that courts are yet to adequately address. When we speak of allocating property based on spousal contribution, we encounter the logical paradox that property cannot, in law, be allocated to a deceased person. The deceased, having no legal personality, cannot hold beneficial interests or exercise proprietary rights. What the Court of Appeal in Esther Wanjiru Githatu v Mary Wanjiru Githatu effectively did was recognize that certain property interests crystallized during the deceased's lifetime through the resulting trust doctrine, but this raises profound questions about the retrospective application of equitable principles to estates already vested in the deceased at death. The resulting trust, if it exists, must have existed during the marriage, not as a post-mortem creation by judicial decree. This distinction is crucial because it determines whether we are recognizing pre-existing rights or creating new ones through judicial intervention.

104. The most troubling aspect of applying differential distribution based on spousal contribution lies in its discriminatory effect on children from different houses. While Article 27 of *the Constitution* prohibits discrimination, the Githatu approach inevitably creates a hierarchy among children based purely on which wife their deceased father married first and the timing of property acquisition. Children from the second house, through no fault of their own, would then automatically find themselves with reduced inheritance simply because their mother entered the family after certain properties were acquired. Like I said in another decision concerning the same issue, it is in the similitude of leaving the rest of the dependants to scavenge.

105. How can we reconcile constitutional equality with a system that rewards some children more generously based on maternal contribution they neither made nor controlled? This creates a form of inherited disadvantage that runs counter to fundamental fairness principles and potentially violates Article 27 of *the Constitution*.

106. As country, and in my humble view we are therefore yet to have a crystallized direction on this question of spousal contribution in matters succession, which would potentially invite or provoke the application of the *Matrimonial Property Act*, 2014, and with the current jurisprudence around the issue of spousal contribution, it is required that the party alleging contribution should strictly prove through documentary evidence such as bank statements etcetera.

107. In Githatu, the Court of Appeal accepted general testimony about business management and farming without requiring quantifiable evidence of actual financial input or detailed accounting of returns on investment. The 1st house in this case equally gave an account of how dedicated the 1st wife was and how that led to the deceased acquiring more properties even before the second wife came into the picture. The questions I still ask myself while considering this issue are; What then constitutes sufficient evidence of contribution? Must it be financial records, or can witness testimony suffice? Should courts require expert valuation of non-monetary contributions? The absence of clear standards creates uncertainty and inconsistency. The Supreme Court's guidance in JOO v MPO regarding burden of proof in contribution claims demands rigorous evidence, yet succession courts would appear to apply relaxed standards that would not survive scrutiny in matrimonial proceedings.

108. The path forward requires acknowledgment that current jurisprudence contains irreconcilable tensions that cannot be resolved through selective application of precedent. While the Court of Appeal's decision in Githatu v Githatu remains binding precedent that this Court must follow, its application must be tempered by constitutional principles of non-discrimination and children's rights. Any resulting trust analysis must therefore be conducted with extreme rigor, requiring clear evidence of specific financial or quantifiable non-financial contributions that can be directly linked to property acquisition. General assertions of joint effort, without more, in my humble view should not suffice to displace the mathematical certainty provided by Section 40 of the *Law of Succession Act*. Moreover, courts must consider whether recognizing spousal contribution claims creates disproportionate disadvantage to children from other houses, and whether such discrimination can be justified under the limitations clause in Article 24 of *the Constitution*. The goal should be achieving equity without sacrificing equality, recognizing legitimate spousal contributions while protecting the inheritance rights of all dependants regardless of maternal status or marriage timing.

109. Having carefully weighed the competing legal principles, constitutional imperatives, and factual circumstances presented, this Court finds itself at the intersection of binding precedent and evolving jurisprudence on spousal contribution in succession matters. While the Court of Appeal's decision in Esther Wanjiru Githatu v Mary Wanjiru Githatu establishes that succession courts may consider resulting trust claims based on spousal contribution, the application of such principles must be balanced against constitutional equality and the legitimate expectations of all beneficiaries. The evidence before this Court demonstrates a clear temporal distinction between the marriages and property acquisition periods that cannot be ignored, yet the translation of such evidence into differential distribution requires careful consideration of all circumstances, including the current occupation patterns, utilization of properties, and the practical implications of any distribution formula on the welfare of dependants from both houses.

110. In the end, the following orders do abide:

    a. The purported will dated 13th February 2006 is declared NULL and VOID.

    b. The alleged gifts inter vivos are declared INVALID and INEFFECTIVE.

    c. All parties shall within fourteen (14) days file the comprehensive proposed modes of distribution detailing the exact acreages, identification of current occupants and users of each property, including the basis and duration of such occupation.

    d. The matter shall be mentioned on 2nd October, 2025 to confirm compliance and for further orders.

111. Orders accordingly.

DELIVERED VIA CTS AND EMAILS, DATED AND SIGNED AT ELDORET ON THIS 17TH DAY OF SEPTEMBER, 2025

.....

R. NYAKUNDI

JUDGE

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