



REPUBLIC OF KENYA



**In re Estate of Kipsongok Arap Ruto (Deceased) (Probate & Administration
61 of 2021) [2024] KEHC 5161 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5161 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
PROBATE & ADMINISTRATION 61 OF 2021**

JR KARANJA, J

MAY 16, 2024

RULING

1. The Petition for Letters of Administration with written will respecting the Estate of the Late Kipsongok Ruto Sisiton, also known as, Kipsongok Rutto or Kipsongok Arap ruto or Kipsongok A. Ruto was filed in court on 25th February 2021 by the three Petitioners herein i.e. Joseph Kiplagat Rutto (First Petitioner), Philemon Kiprop Songok (Second Petitioner) and Mary Jelagat Tuwei (Third Petitioner) in their capacity as the Administrator/ Trustee of the written will.

It is indicated in the petitioner that the deceased was married to two wives during his lifetime. These were Rael Jepkuto Ruto (deceased) and Naum Jebor Ruto.

The first and third Petitioners belonged to the house of the first wife (Rael) as son and daughter-in-law of the deceased while the second petitioner belonged to the house of the second wife (Naum) as son of the deceased.

2. The estate property comprised of land parcels described as Nandi/ Kipkarren Salient/112 and Nandi/ Kipkarren Salient/113.

In the annexed Will, Parcel No. 112 was bequeathed to the deceased's sons Joseph K. Songok, David Songok and the deceased's daughter-in-law, Mary Tuwei. Parcel No. 113 was bequeathed to the deceased's Second Wife, Naumy Ruto to share equally amongst the sons and daughter-in-law of the Second house.

The petition showed that the deceased had seven (7) children with his first wife and five (5) children with his second wife. Each house consisted of one daughter-in-law, wives of the departed sons of the deceased, one in each house. Whereas, the first house had three (3) sons and four (4) daughters, the second house had four (4) sons and one (1) daughter.

3. Although the petition referred to the aforementioned parcels of land as the only assets belonging to the deceased available for distribution to the beneficiaries the annexed Will referred to a third additional asset being five (5) acres of land at Kamagut in Uasin Gishu.



This parcel was according to the Will dated 4th December 2006 bequeathed to Joseph K. Songok, David Songok and Mary Tuwei to share equally. The three of them belong to the first house of the deceased.

After the usual pre requisites, including gazettelement of the application for grant on the 16th July 2021 the grant of probate of the written Will was issued to the three Petitioners on the 27th January 2022 and on the 24th June 2022 they filed the summons for confirmation of grant dated 21st June 2022 which was signed by the first and third Petitioners. The Second Petitioner did not sign the summons and instead filed an affidavit dated 28th July 2022 protesting the summons for confirmation of grant.

4. The Second Petitioner's major complaint is that the proposed mode of distribution of the deceased's estate by the first and third petitioners is intended to defraud and disinherit the other beneficiaries and that the first and third petitioners are relying on a purported will which is highly contested as it does not meet the threshold of a valid will in that it is not in the presented form and is not attested by two witnesses. Further, the Will does not nominate or appoint two executors (See, paragraphs 5, 6 and 7 of the affidavit).

The Second Petitioner contends that the proposed mode of distribution is unequitable to the deceased's beneficiaries in the second house. He thus implies that the proposed distribution is skewed against the deceased's second house and in favour of the deceased's first house such that the first house is to be allocated Land Parcel No. Nandi/Kipkaren Salient/112 and the five acres of land in Uasin Gishu while the second house is to be allocated only Land Parcel No. Nandi/ Kipkaren Salient/113.

5. The Second Petitioner's suggested mode of distribution is specified in paragraph 10 of the protest affidavit to the effect that all the three parcels of land should be distributed equally between the two houses of the deceased.

The second petition implies that the distribution of the estate should proceed as if there was no Will or valid Will made by the deceased or that this is an intestate rather than a testate succession, hence his proposal and indeed, the deceased's second house proposal on the manner in which the entire estate should be distributed among all beneficiaries from both houses of the deceased. The said proposal is that Parcel No. Nandi/Kipkaren Salient/112 comprising of fifty one (51) acres be distributed equally between the two houses at 25.5acres each and land Parcel No. Nandi/Kipkarren Salient/113 measuring 21 acres be distributed equally between the two houses at 10.5acres each.

That, the five (5) acres of land in the county of Uasin-Gishu be also distributed equally among the two houses of the deceased at 2.5acres each.

6. This court, having carefully considered the impugned summons for confirmation of grant and the protest in respect thereof on the basis of the supporting grounds and the rival submissions, holds the opinion that the protest turns on the validity or otherwise of the written Will allegedly made by the deceased on the 4th December 2006. Whereas the 2nd Petitioner/ Protestor/ Objector contends that the Will is not lawfully valid to be relied upon for purposes of the distribution of the estate property, the Respondents/Petitioners 1 and 3 contend otherwise and imply that the protest was not made in good faith given that there has never been a dispute over possession and occupation of the deceased's parcels of land for over a period of fifty (50) years other than a dispute which emerged in the year 2005 and was immediately resolved by the family members.



7. Section 3 of the *Law of Succession Act* defines a Will to mean: -

“the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of part II and includes a codicil.”

Part II of the Act deals with Wills and Section 8 of the part provides that a Will may be made either orally or in writing.

In this case, the subject Will is the written Will dated 4th December 2006 and annexed to the petition for letters of administration with written Will annexed dated 25th February 2021.

It may be noted that the deceased died within five (5) years or so of the making of the Will. He died on 5th August 2011 while the Will was allegedly made on 4th December 2006. It may also be noted that the petition was made on 25th February 2021 about ten (10) years after the death of the deceased

8. Section 11 of part II of the Succession Act, provides that: -

“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 acknowledgment of his signature or make, or of the signature of that other person, and each of the witness 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.”

9. Under the provisions of Section 5 of part II of the Act; every adult citizen has an unfettered testament any freedom to dispose of his or her property by Will in any manner he or she sees fit. However, like in all freedoms, such freedom must be exercised with responsibility to ensure that all persons who depended on the Testator during his lifetime are not kept out or disinherited in the distribution of his estate.

In such circumstances, the law by dint of Section 26 of the *Succession Act* may step in and make provision for those dependants who may have been disinherited or about to be disinherited. In that way, it may be said that the testamentary freedom given by Section 5 of the Act may be limited in special circumstances (See *Ndolo Vs. Ndolo* (2008) 1 KLR (G & F) 142.

10. The Second Petitioner implies in his protest that if the grant is confirmed in terms of the alleged Will then some of the deceased’s dependants would be disinherited. He also implies that the deceased did not have the capacity to make the Will due to his old age of ninety one (91) at the material time and his frail health which interfered with his normal way of thinking, so much so that he could not re-collect his properties and beneficiaries or that he was unduly influenced to make the Will. However, there was no evidence from the protestor to establish the alleged innuendos. In any event, on the question of the



Testator's capacity to make a will, what matters most is the soundness of mind and not the particular state of bodily health (See, *Bank Vs. Goodfellow* (1969 – 70) 5KLR QB 459).

11. Section 6 of the Succession Act provides that a person may appoint an executor or executors of the Will. This is not a mandatory requirement. So the failure to nominate or appoint an executor of the Will would not be fatal to the validity of the Will. However, someone will need to be appointed to administer the estate and that is why this petition was made for Letters of Administration with written Will annexed. Ironically, the relevant Gazette Notice being Gazette Notice No. 7160 of 16th July 2021 did not indicate as much and was misleading in so far as it indicated that the application or petition was for a grant of letters of administration intestate which thereby implied that this succession cause proceeded on the basis of intestate rather than testate succession.
12. Although this court would find that the impugned Will was essentially valid it would nonetheless allow and sustain the Second Petitioner's protest for reasons that some of the deceased dependants particularly from his second house would be disinherited if the grant is confirmed on the basis of the Will. Further, the misleading gazette notice erroneously indicated that this was an intestate succession thereby raising doubt as to the validity of the grant of probate issued herein on 27th January 2022 and by extension the competence of the impugned summons for confirmation of grant dated 21st June 2022.

However, pursuant to rule 73 of the *Probate and Administration Rules*, and as may be necessary for the ends of justice the grant of probate may not be revoked on account of procedural errors and lapses, but the summons for confirmation of grant may not be allowed at this juncture. The parties ought to go back to the drawing board and come up with a mutual agreeable mode of distribution notwithstanding the existence of the Will prior to taking out fresh summons for confirmation of grant or amending the existing summons. They may also agree to adopt the Will wholly or with modification.

Ordered accordingly.

DELIVERED AND DATED THIS 16TH DAY OF MAY, 2024

**J. R. KARANJAH,
JUDGE**

