



**In re Estate of Nicholas Kipchumba Mberia (Deceased) (Succession Cause 106 & 319 of 2010 (Consolidated)) [2024] KEHC 8418 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8418 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 106 & 319 OF 2010 (CONSOLIDATED)  
SM MOHOCHI, J  
JULY 11, 2024  
IN THE MATTER OF THE ESTATE OF NICHOLAS KIPCHUMBA MBERIA (DECEASED)**

**BETWEEN**

**JOHN KIPKORIR MBERIA ..... PETITIONER**

**AND**

**JENIFFER MBERIA ..... 1<sup>ST</sup> OBJECTOR**

**FRANCISCA JEPKOSGEY MBERIA ..... 2<sup>ND</sup> OBJECTOR**

**GLADYS CHEMUTAI ..... 3<sup>RD</sup> OBJECTOR**

**RULING**

1. Before Court for determination are three objections and a protest regarding the estate of the deceased herein who died on the 4<sup>th</sup> of November 2008.
2. The Petitioner filed Nairobi Succession Cause No. 319 of 2010 on 24<sup>th</sup> February, 2010 with annexed will dated 10<sup>th</sup> July, 2008. Out of this cause, there was;
  - i. The 1<sup>st</sup> Objector's objection dated 30<sup>th</sup> May, 2011 and filed on 3<sup>rd</sup> June, 2011; and
  - ii. The 2<sup>nd</sup> and 3<sup>rd</sup> Objector's Objection dated 8<sup>th</sup> October, 2018 and filed on 30<sup>th</sup> November, 2018.
3. The 1<sup>st</sup> Objector filed Nakuru Succession Cause No. 106 Of 2010 and as regards this cause the Petitioner filed an Affidavit of Protest against Confirmation of the Grant dated 1<sup>st</sup> April, 2011 and filed on 4<sup>th</sup> April, 2011;
4. The two causes were then consolidated by the Consent dated 31<sup>st</sup> October, 2011 and on 14<sup>th</sup> June, 2012 the Court ordered a stay of operation of the grant issued to the 1<sup>st</sup> Objector on 21<sup>st</sup> July, 2010



pending the determination of the validity of the will. The 2<sup>nd</sup> and 3<sup>rd</sup> Objectors filed objection to the consolidated cause dated 10<sup>th</sup> May, 2024 on 11<sup>th</sup> July 2023.

5. The Court *vide* the ruling delivered on 30<sup>th</sup> January, 2024 deferred the determination of the Objection to Making of Grant and answer to Petition filed by the 1<sup>st</sup> Objector on 3<sup>rd</sup> June, 2011 and the subject of validity of the annexed Will as the same had an impact on the objections that were filed thereafter and directed that the other objections would all be determined together. The Court further ordered that the status Quo be maintained. The Petitioner was also directed to file ownership documents in Court of all the properties listed in his Petition.

### **The Petitioner's Case**

6. The Petitioner instituted succession proceedings in Nairobi and annexed the Will dated 10<sup>th</sup> July, 2008 where it is alleged that the deceased has already distributed his estate and appointed him the executor of his estate.
7. As regards the validity of the Will, it was the Petitioner's assertion that the Will of the deceased met all the legal requirements and argued through his Witness Mr. Wislon Kalya, advocate that any properties that might have been left out would be dealt with under the law of intestacy. The witness testified that the deceased gave out instructions while at Hospital which he typed and went back with his secretary one Doris Oswago and both witnessed the Will after details were read out to the deceased.
8. It was stated that it was the deceased who gave out details of his properties and leaving out LR numbers does not invalidate the Will and that it was sufficient that the deceased knew the acreage and described all his properties well. It was his contention that the deceased being in hospital at the time of making the will did not denote incapability.
9. As regards the Succession cause filed by the 1<sup>st</sup> Objector, it was the Petitioner's Protest that he was surprised that the Petitioner went ahead to obtain Letters of administration despite the fact that her advocated *vide* letter dated 16<sup>th</sup> March, 2010 had been notified that the Petitioner Petition for Probate had been filed in Nairobi and that he had not consented to issuance of the Grant issued to the 1<sup>st</sup> Objector.
10. On the issue of the properties listed by the Petitioner and those in the Will where the ownership has been challenged, the Petitioner contended that the 1<sup>st</sup> Objector was aware of the wishes of the deceased and had already left the home established on land Nandi/Chepterit/1191 together with her children prior to the demise of the deceased and has been living in Kericho Block 4/302. He denied that there are any vested interests for the Applicant in property Nandi/Chepterit/1191 and thus it forms part of the estate where the Petitioner's brother moved in as per the Will. He also questioned her ownership of property known as Nandi/Chepterit/446 as he annexed an affidavit sworn by the deceased on 20<sup>th</sup> May, 2004 where he deponed to have lost the title. That it is not known how the 1<sup>st</sup> Objector Obtained the title deed.
11. He argued that together with his brother, they took over management of the tea farm during the deceased ailing period and not the 1<sup>st</sup> Objector.
12. With respect to the Objection by the 2<sup>nd</sup> and 3<sup>rd</sup> Objectors, he swore a response filed on 11<sup>th</sup> July, 2023 where he is alleging that the Supporting Affidavit is not executed or commissioned. He also stated that no copies of birth certificates or identity cards or DNA results were attached to prove paternity. He averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Objectors are fraudsters who never lived with the deceased or visited the deceased during his illness and are not in a position to determine his state of mind or his signature.



13. That the marriage of the deceased to Maria Mberia cannot be proved as no marriage certificate was attached and the document purporting to be in support of the customary marriage is not dated and lacks the place of marriage. That at the time of death the deceased was married to the Petitioner's mother under the Christian marriage laws. His argument was that there are many irregularities which cannot be regarded as technicalities

### **1<sup>st</sup> Objector's Case**

14. The 1<sup>st</sup> Objector filed her Objection and Answer to the Petitioner's Petition challenging the validity of the Will and the ownership of properties listed by the Petitioner. She claimed that the deceased was a well-educated man and a retired Provisional Commissioner who understood how a Will was made.
15. According to the 1<sup>st</sup> Objector, the will was vague and fake on the following grounds that: -
- i. On the day the Will was executed, the deceased was too ill and lacked the mental and physical capacity to understand what he was doing;
  - ii. It did not bear the identity card number of the deceased;
  - iii. Does not specifically and accurately describe the properties the deceased was disposing and bequeathing to various beneficiaries;
  - iv. It bequeathed properties purchased, owned and developed solely by the 1<sup>st</sup> Objector, that is, Nandi/Chepterit/446, Nandi/Chepterit/1191 and Kericho LR. No. 631/20/1
  - v. The deceased in his Will at paragraphs 2 (a), (d) and (f) as well as paragraph 3 and 4 bequeathed the following properties to his dependents yet they belonged to third parties;
    - a. 15 acres of land in Chepterit bequeathed to the Petitioner;
    - b. Plot in Kapsoya to his daughter Mary Chemindil Mberia;
    - c. Motor vehicle registration number KAG 324 J Nissan Sunny to be used by the family and motor vehicle registration number KRB 194 Volvo saloon bequeathed to Margaret Birgen, his sister;
    - d. Plot in Kericho town bequeathed to the 1<sup>st</sup> Objector, Nancy Jepkemboi Mberia and Jackline Jerotich Mberia;
  - vi. Did not provide for the 1<sup>st</sup> Objector as a widow and her two daughters thereby disinheriting them;
  - vii. At paragraph 2 (e), the deceased did not have a son by the name Patrick Kimutai Mberia but one Patrick Kimutai Chumba;
16. In her answer to Petition for Grant sworn on 2<sup>nd</sup> of June and filed on 3<sup>rd</sup> June, 2011 she deposed that the Affidavit of the Petitioner and the Will contain the following properties registered in the names of third Parties and annexed the official searches:
- a. Kitale Municipality Block 16/188 to Wilson Chemno Boinett
  - b. Nandi/Chepterit/446 belonging to the Objector
  - c. Nandi/Chepterit/140 belonging to Sirikwa County Council
  - d. Nandi/Lessos Settlement/642 belonging to Eliud Kipsang Bitok



- e. Motor Vehicle registration number KRB 194 Volvo belonging to Joseph Ngatia
  - f. Motor Vehicle registration number KAG 342J Nissan Sunny belonging to Bread Ltd.
17. The 1<sup>st</sup> Objector also faulted the Petitioner for failing to disclose to Court of the Objection filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Objectors in 2018 in Nairobi succession Cause No. 319 of 2010.

### **2<sup>nd</sup> And 3<sup>rd</sup> Objectors' Case**

18. The 2<sup>nd</sup> and 3<sup>rd</sup> Objectors' objections dated 8<sup>th</sup> October, 2018 and the second one, (consolidated) is dated 10<sup>th</sup> May, 2024 and supported by the affidavit of Jepkosgei Francisca sworn primarily contend that the 2<sup>nd</sup> and 3<sup>rd</sup> Objectors are daughters of deceased with his second wife Maria Maberia who died on 4<sup>th</sup> May, 2014.
19. According to the deponent, the deceased was survived by Jeniffer Chepkurui Mberia (widow) and seven children namely;
- i. Patrick Kimutai Mberia,
  - ii. John Kipkorir Mberia,
  - iii. Jepkosgei Fransisca,
  - iv. Gladys Jemutai,
  - v. Mary Chemindi Mberia,
  - vi. Nancy Jepkemboi Mberia; and
  - vii. Jackline Jerotich Mberia.
20. That in her bid to initiate succession proceedings at the Kapsabet Chief Magistrate's Court she came to learn of Nairobi Succession Cause No. 319 of 2010 consolidated with, Nakuru Succession Cause No. 106 Of 2010 and further that the deceased had left behind a will appointing John Kipkurui Mberia as the executor.
21. The 2<sup>nd</sup> and 3<sup>rd</sup> Objector contend that the Petitioner instituted succession proceedings without the consent of the other beneficiaries and the annexed will is vague and invalid as it completely disinherits two children of the deceased from his second wife. That the process is fraudulent as it concealed some beneficiaries of the estate and the fact that consent to making of Grant was not obtained from all beneficiaries with the aim of disinheriting them.
22. She prayed that together with the 3<sup>rd</sup> Objector they be appointed as co-administrators and be included as beneficiaries of the estate of the deceased.

### **Analysis**

23. This Court had in Paragraph 54 of its Ruling dated 30<sup>th</sup> January 2024 directed and ordered that the last will and testament dated 10<sup>th</sup> July 2008 appears to have met the requirements under section 11 of the *law of Succession Act*, it will however be premature to decide on the validity of the Will or the fate of the beneficiaries left out in the Will. I therefore direct that;
- a. That Parties do file their responses to the Objection filed on 11<sup>th</sup> July, 2023 within 14 days and thereafter parties file and exchange submissions to the 2<sup>nd</sup> and 3<sup>rd</sup> Objector Applications within 30 days from this decision;



- b. The status quo be maintained;
  - c. The Petitioner shall file copies Ownership Documents of the listed properties in his Affidavit in support of the Application for Grant of Probate; and
  - d. That there shall be no order as to costs.
24. This Court was then to determine the following questions fleshed from the objection:
- a. If the succession proceedings are fraudulent as it conceals the existence of the true beneficiaries and Dependents of the estate and the consent to the making of grant was not obtained from all bona-fide beneficiaries?
  - b. If the will purportedly executed by the deceased is fake and vague as the said NICHOLAS KIPCHUMBA MBERIA (deceased) at the date alleged to have executed, was so ill and indisposed such that he was not in a mental and physical position to know what he was doing?
  - c. If the said will was not executed by the deceased and objectors herein shall invite handwriting expert to verify the authenticity of the Signatures?
  - d. If, the deceased identity Card is not indicated in the will and the effect on the will?
  - e. If the deceased was an educated man and a retired Provincial Commissioner well versed with how a valid will is written?
  - f. If the 1<sup>st</sup> and 2<sup>nd</sup> Objectors are the true lawful daughters of the Deceased Nicholas Kipchumba Mberia sired with the deceased 2<sup>nd</sup> Wife namely Maria Mberia (now deceased) and domiciled at Oldoldol village within Nandi County and have been omitted from the Application for grant in the consolidated succession cause.
  - g. If the will and making of grant as a whole disinherits the 1<sup>st</sup> and 2<sup>nd</sup> Objectors?
  - h. The Role of the Respondents in disinheriting the 1<sup>st</sup> and 2<sup>nd</sup> Objectors?
25. Upon considering the Objection dated 10<sup>th</sup> March 2023, the Response to the Objection dated 18<sup>th</sup> March 2024, the annexed exhibits in support, the Objectors Written Submissions dated 11<sup>th</sup> March 2024 I am persuaded that the objection fails and that the same is without merit.
26. It is settled law that Section 29 of the Law of Succession Act provides for different categories for dependants:
- i. Thus, Sub-section (a) provides that; a dependants means wife (s), former wife(s) and children whether or not they were being maintained by the deceased prior to death.
  - ii. Sub-section (b) further provides that dependants include, deceased's parents, step parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half-sisters as were being maintained by the deceased immediately, prior to his death.
  - iii. Sub-section (c) provides that where the deceased was a woman, the husband if he was being maintained by her prior to her death
27. Francisca Jepkosgey Mberia and Gladys Chemutai have failed to satisfy the provisions of Section 29(a) or (b) demonstrate by evidence that they were daughters of the deceased.



28. As I have held elsewhere, consent of beneficiaries in petitioning for a probate of grant with will annexed (testate) is unnecessary, under the circumstances.
29. Under Section 5(3) & (4) of the Law of Succession Act, the testator is deemed to be of sound mind, and it is upon Francisca Jepkosgey Mberia and Gladys Chemutai to show otherwise, which I note that, they have equally failed, to demonstrate that the deceased was not in a mental and physical position to know what he was doing when he executed his written will on the 10<sup>th</sup> July 2008.
30. As regards to the Validity of the Will of the Deceased 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 10<sup>th</sup> July 2008 the deceased bequeathed his property to his beneficiaries by way of a written will.
31. 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.’
32. The document under probate as a written will was executed by the deceased and attested by two witnesses. The contents, form of the written will and the capacity of the deceased to bequeath his property as he wished has not been challenged by the objector with evidence. Therefore, for all intents and purposes the written will of the deceased 10<sup>th</sup> July 2008 was considered to be his valid last will and testament at that particular time, to forthwith commence execution of the will by distributing the estate to the various parties bequeathed.
33. With regard to the fraudulent role of the Petitioner in instituting a petition for grant of probate, this Court finds the same to be without basis or fault as he is the executioner named in the will and that the Objectors have not presented any evidence in support of fraud.
34. The Discrepancy of details of assets and or ownership thereof was an issue the Court invited the Petitioner to address but he elected not to. The Executor shall be expected to gather the assets of the deceased, establish ownership, as he undertakes the transmission and the Court is thus not constrained from declaring its validity.
35. Whereas the will distributed most of the deceased’s properties, a few properties were (allegedly) not included in the will. This means that the Assets deceased’s estate (if any) not included in the will



being administered as an intestate estate with will annexed. In the absence of an agreement by the beneficiaries, the only equitable way of distributing the properties that the deceased did not include in the will is to adopt the rules of intestacy in accordance with Section 38 of the *Law of Succession Act*.

36. The cross application dated 31<sup>st</sup> March, 2010 by the 1<sup>st</sup> Objector in Nakuru Succession Cause No. 106 of 2010 fails owing to the validation of the deceased' last will and testament.
37. In the premise, the Objection by the 2<sup>nd</sup> and 3<sup>rd</sup> Objectors dated 10<sup>th</sup> May 2023 to making of a grant, is without merit and the same is accordingly dismissed. The Petition for Probate of the deceased's written will filed on 24<sup>th</sup> February 2010 is found to have merit and is allowed with the following orders: -
- i. That the Will executed by the deceased herein dated 10<sup>th</sup> July 2008 be and is hereby declared to be valid Will of the deceased.
  - ii. Mr. John Kipkorir Mberia the Executor, shall be issued with a grant of probate of letters of administration with Will annexed.
  - iii. That distribution of the deceased's estate be and is hereby ordered to in terms of the deceased's Will dated 10<sup>th</sup> July 2008.
  - iv. Any Asset or class of Assets (if any) forming part of the Deceased estate but left out by the deceased's will dated 10<sup>th</sup> July 2008, shall be subject to intestacy rules be distributed in accordance with Section 38 of the *Law of Succession Act*.
38. This Court is persuaded to order the objectors shall pay the costs of the Application.
- It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 11<sup>TH</sup> DAY OF JULY 2024.**

**MOHOCHI S.M.**

**JUDGE**

