



REPUBLIC OF KENYA



In re the Estate of Nathan Kipserem Morogo (Deceased) (Succession Cause E084 of 2019) [2024] KEHC 10251 (KLR) (9 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E084 OF 2019
RN NYAKUNDI, J
AUGUST 9, 2024**

IN THE MATTER OF THE ESTATE OF NATHAN KIPSEREM MOROGO (DECEASED)

BETWEEN

**DAVID KIPROTICH MOROGO 1ST PETITIONER
ABRAHAM KIRWA MOROGO 2ND PETITIONER
EZEKIEL KIPSANG MOROGO 3RD PETITIONER
PERIS CHEPCHOGE MOROGO 4TH PETITIONER**

AND

**ALFRICK KIPKOSGEI MOROGO 1ST BENEFICIARY
BENJAMIN KIPYEGO MOROGO 2ND BENEFICIARY**

AND

**DANIEL KIPCHIRCHIR MOROGO DEFENDANT
MOSES MOROGO DEFENDANT
MILKA CHEPKOECH SAWE DEFENDANT**

RULING

1. The 1st and 2nd Petitioners being the executors of the estate of the late Nathan A.K. Morogo Alias Nathan Kipserem Arap Morogo Alias Nathan Morogo petitioned for probate for proof of oral will on 24th July, 2019. In the said petition, they deponed as follows:
 - a. The deceased died on the 3rd day of September, 1999 at Uasin Gishu memorial Hospital.



- b. The deceased was at the date of his death domiciled in Kenya and his last known place of residence was at Sugut, Uasin Gishu County.
- c. The deceased made a valid oral will on the 20th day of June, 1999, at 10:30 a.m. before the following witnesses: Philip Kitui Amisi Identity Card No. 3254184 and Eunice Maiyo. We truly believe that words used by the deceased in making his said will were as follows:

“Upon my demise, my property shall be shared among my four (4) wives and their children in the following manner:

300 acres known as Sugoi farm, being part of L.R Number 10511/2 to my 1st wife
– Martha Morogo and her children:

Mary Jeptanui Morogo (deceased)

Florence Morogo – 60 years

Abraham Morogo – 57 years

Solomon Morogo – 53 years

Ann Morogo – (married) – 52 years

Daniel Morogo – 50 years

Josphine Morogo (married) – 48 years

120 acres known as Chemalal Farm to my 2nd wife – Naum Morogo and her children:

Ruth Jelagat – 64 years

Damaris Morogo – 62 years

Lena Jepchirchir (deceased).

Samwel Morogo (deceased).

Peris Morogo – 53 years

Selly Morogo – 50 years

400 acres known as Sugoi Farm, being part of L.R. Number 10511/2 to my 3rd wife
– Sarah Morogo and her children:

David Morogo – 60 years

Simon Morogo (deceased)

Shadrack Morogo – 52 years

Peter Morogo – (deceased)

Japhet Morogo – 48 years

Viola Morogo – 47 years

Ziwa land known as Moi’s Bridge/Moi’s Bridge Block 3 (magoon)/1 and 10 acres known as Moi’s bridge/Moi’s bridge Block 3 (magoon)/1 to my 4th wife Elizabeth Morogo and her children:

Jacob Morogo – 62 years

Ezekiel Morogo – 57 years



Salina Morogo – 56 years

Benjamin Morogo – 54 years

Prisca Morogo – 45 years

Lydia Morogo – 43 years.

- d. Both at the time of making of his will and the time of his death the deceased was a farmer and a resident of Sugoi, within Uasin Gishu county.
 - e. The said oral will is not contrary to any written will which was made by the deceased at any time before or after the making of the oral will and which had not been revoked at the time of his death.
 - f. That the oral will made by the deceased was the exact replicate of what he had already implemented on the ground, save for the number of acreages, the deceased had already settled his four wives and their children in the following manner:
 - i. The 1st and the 3rd wives resided at Sugoi, Parcel Number L.R 10511/2 measuring 728 acres out of which only 274 acres are arable the rest of the acres are rocky and impenetrable.
 - ii. The deceased settled his 2nd wife and his children her son 15 acres at Chemalal Farm measuring 120 acres. The deceased died before obtaining the title deed and as such the property was registered directly in the names of Naum Morogo and her son Samwel Morogo.
 - iii. The 4th wife and her children resided at Ziwa in Plot Number Moi's bridge/Moi's bridge Block 3 (magoon)/1 measuring 120 acres. The deceased bought and transferred 10 acres to one of the children of the 4th wife, Philip Kitui Amisi.
 - iv. The rest of the dependents of the deceased reside in a 130-acre land at Jua Kali Turbo along the tarmac of Turbo Road on plot number L.R 10511/2.
 - v. That save for what is stated in the above paragraph, the deceased also had indicated specific areas where each one of his sons would construct their homes. To date each of the deceased's sons have settled according to the deceased instructions.
2. The Petitioners gave an inventory of the deceased's estate of all the assets and liabilities of the deceased at the date of his death:
- a. L.R No. 10511/2 measuring 728 acres
 - b. West Eldoret Municipality in Uasin Gishu District – L.R 10511/2
 - c. West of Eldoret Municipality in Uasin Gishu District – L.R 10511/1 measuring 60 acres.
 - d. Moi's Bridge/Moi's Bridge Block 3 (magoon)/1 Measuring 120 acres.
 - e. Eldoret Municipality Block 9/1584 measuring 0.0294 Ha. Held by the deceased in trust for Affrey Kipkosgei and Benjamin Kibiego.
 - f. Chemalal land measuring 120 acres already registered in the names of Naum Morogo and Samwel Morogo (the son of the late Mary Jeptanui Morogo – deceased's daughter).

Liabilities



Nil

3. The Petitioners further deponed that the deceased was survived by the following children and dependants:

1st Wife

Martha Morogo

Children:

Mary Jeptanui Morogo (deceased)

Florence Morogo – 60 years

Abraham Morogo – 57 years

Solomon Morogo – 53 years

Ann Morogo – (married) – 52 years

Daniel Morogo – 50 years

Josphine Morogo (married) – 48 years

2nd Wife

Naum Morogo

Children:

Ruth Jelagat – 64 years

Damaris Morogo – 62 years

Lena Jepchirchir (deceased).

Samwel Morogo (deceased).

Peris Morogo – 53 years

Selly Morogo – 50 years

3rd Wife

Sarah Morogo

Children:

David Morogo – 60 years

Simon Morogo (deceased)

Shadrack Morogo – 52 years

Peter Morogo – (deceased)

Japhet Morogo – 48 years

Viola Morogo – 47 years

4th Wife

Elizabeth Morogo

Children:



Jacob Morogo – 62 years

Ezekiel Morogo – 57 years

Salina Morogo – 56 years

Benjamin Morogo – 54 years

Prisca Morogo – 45 years

Lydia Morogo – 43 years.

Dependants

Willy Samoei – 65 years

Julia Jepngetich – 80 years

Daniel Kipchirchir – 58 years

Moses Morogo – 57 years

4. Peres Chepchoge and Ezekiel Kipsang Morogo filed a notice of objection to the petition, which was anchored on the following grounds:
 - a. That the proceedings for application of grant are defective in substance.
 - b. That the deceased herein lacked capacity to make an oral will due to illness which had irreparably compromised obliterated and destroyed his state of mind and capacity to make a valid will.
 - c. That the deceased at the time of the alleged will was aged, ailing and infirm.
 - d. That the purported oral will on the basis on which the Petition was filed was obtained through fraud and coercion.
 - e. That the purported oral will in which the petition filed was not reduced into writing immediately after the death of the deceased but rather more than 20 years from the date of death of the deceased.
 - f. That the witnesses who allege to have been present during the making of the oral will recorded the same after 20 years since the oral will was made hence must have forgotten most of what was said.
 - g. The persons alleged to have been present when the oral will was made did not swear affidavits to give evidence on oath as to what were the circumstances under which the will was made.
 - h. The minutes and date of the family meeting alleged to have taken place after the funeral of the deceased has not been mentioned and/or provided.
 - i. That the minutes of the family meeting held on the 1st day of June 2019 appointing Abraham Kirwa Morogo and David Kiprotich Morogo as the sole executors have not been provided.
 - j. That the distribution and tone of the alleged will is skewed and favours the Petitioners against the 4th House.
 - k. That the deceased at the time of ailing was under the control of the Petitioners to the exclusion of the other beneficiaries.



- l. That the Petitioners' attempts are calculated at stealing a match against the other beneficiaries and disinherit them.
 - m. That the purported will is therefore null and void under the provisions of the [Law of Succession Act](#).
5. The matter was referred to mediation and the parties recorded settlement to a larger extent but the same was set aside on 7th March, 2022
6. Having laid that background, the significant issue that has now taken centre stage is dependency. The Objectors believe they should be counted as part of the beneficiaries of the estate. They filed their affidavits of proof of dependency over the estate and the depositions are captured as hereunder:
7. The 1st defendant deponed as follows:
- a. That I am aware that sometime in the year 1963 my biological mother Jepkorir who was the deceased first born biological sister came back from Uganda looking for medical assistance from the deceased.
 - b. That I have since the time when I was young (three years) been residing and brought up by the deceased herein.
 - c. That I am also aware that when my mother passed on in the year 1963 she was laid to rest at LR No10511/2 (Sugoi), the plot belonging to the deceased.
 - d. That I received information that my biological mother passed on while I was young by deceased 4th wife Bot David herein who took care of me from my childhood.
 - e. That I started basic education alongside my other siblings (deceased's children) in 1967 then joined secondary school to the time I underwent circumcision in December 1975 together with the children of the deceased alongside the 1st Petitioner David Kiprotich Morogo among others. As per my father's tradition and customs I retain the name Morogo to date, signifying that he recognized me as one of his sons.
 - f. That in the year 1991, I got married under the blessings of the deceased who played a role as my father and paid dowry and met all the wedding expenses and my wedding was held at the same home where the deceased raised me alongside my brothers and sisters.
 - g. That the deceased thereafter showed me where I constructed my present home and where I have raised my family to date, that is the land parcel No. Turbo East/leseru Block5 L.R 10511/1(Sugoi) and have been paying land rates to date
 - h. That all along, I have fully participated in all family functions including marriage, engagements, as a child to the deceased and I have been fully recognized and continued to be recognized as a son to the deceased by all our friends, neighbours, colleagues, relatives as well as our siblings, the deceased's other children.
 - i. That I know of my own knowledge that not family members should be prejudiced if I am granted the parcel of land where I am currently residing having been showed to me by the deceased before he passed on in the year 1999.
 - j. That having been raised by the deceased, I pray that I be recognized as a legal dependant to the estate herein.
8. The 2nd Defendant/beneficiary deponed:



- a. That I am aware that sometime in the year 1963 my biological mother Jepkorir who was the deceased first born biological sister came back from Uganda looking for medical assistance from the deceased.
 - b. That I am aware, and I confirmed that, my mother Jepkorir passed on the same year 1963. She was laid to rest at her brother's (deceased's) land in Sugoi, LR No. 10511/2 (Sugoi).
 - c. That after the demise of my biological mother, Jepkorir, erstwhile my maternal uncle, fully took me under his care, I was still an infant and the deceased 1st wife breast fed me and took me as their son, I have ever since known the deceased as my father.
 - d. That in the year 1969, I started my education attending the same primary school as my brother Daniel Kipchirchir Morogo and other children of the deceased, the deceased as my father catered fully for all my education expenses and upkeep.
 - e. That I lived together with the deceased as his son, and even went for my initiation alongside his son Abraham Kirwa Morogo in 1978. As per my father's tradition and customs I retain the name Morogo to date signifying that he recognized me as one of his sons.
 - f. That I had my engagement and married my wife with participation of my parents, deceased and his wives. The deceased also paid the full dowry as per Nandicustoms.
 - g. That I received information that my biological mother passed on while I was an infant by deceased 1st wife Bot Chepchumba and 4th wife Bot David herein. Who took care of me from my childhood as deponed above.
 - h. That upon completion of my education, I joined the Kenya Air Force until the time of my colour service and I continue to be recognized as a son to the deceased by all our friends, neighbours, colleagues, relatives as well as our siblings, the deceased's other children.
 - i. That I held the position of chairman to the entire deceased family and in my position managed family functions and ceremonies with the participation and the blessings of the deceased family members.
 - j. That I have known no other family other than my father's deceased family home since my childhood (One year), and as I was growing up, I fully participated in family duties like other siblings.
 - k. That having been raised by the deceased, I pray that I be recognized as a legal dependant to the estate herein.
9. The 3rd defendant/beneficiary also had this to depon:
- a. That I am the 3rd dependant in the estate, having been married to Willy Kimeli Tuwei (deceased), who was brought up by the deceased herein Nathan Kipserem Morogo.
 - b. That I was married by the said Willy Kimeli Tuwei (deceased) in the year 1981 at their home in Sugoi and have been residing on the plot where my husband was residing until his demise.
 - c. That I have children with my deceased husband all of whom were brought up on the said plot which is part of the estate of the deceased Morogo.
 - d. That I am aware my husband's mother, Julia Chepngetich, was the deceased sister and who was also given a plot by my husband and co-dependant.



- e. That I am also infirmed by my co-dependants which information I verily to belief to be true, that my husband was brought in by the deceased when he was 4 years old and grew up under his care until when he was circumcised by the deceased in the year 1969.
 - f. That at the time of my engagement with my husband, all the dowry negotiation and payment was done by the deceased Nathan Morogo.
 - g. That it is the deceased who constructed a house for my husband.
 - h. That my husband, Willy Kimeli Tuwei was buried on the same plot where I am residing together with my children.
 - i. That I have nowhere lese to go and to call a home apart from the plot forming part of the estate herein.
 - j. That I have been residing on plot No. Turbo East/leseru Block 5 (sugoi) L.R 10511/1, measuring a total of 60 acres alongside my co-dependants herein since the time I was married.
10. The parties filed their submissions in support of their positions regarding the objection proceedings.
 11. Submissions were made by counsel on behalf of the first house. According to them, the objectors were the maternal nephews of the deceased. That in their testimony, none of them were living with the deceased prior to his death. All were grown up men with families who depend on them. Counsel submitted that the issue of adoption did not arise as there were no documents produced in support, neither were there any witnesses called. Besides the deceased was blessed with sons and daughters, it would have been very unlikely for him to adopt other children and particularly without the knowledge of his four wives. That the objectors were needy children, the deceased helped them on humanitarian grounds. In making their case, the case of *Beatrice Ciamutua Rugamba versus Fredrick Nkari Mutegi & others Chuka Succ Cause No. 12 of 2016*.
 12. It was further submitted for the 1st house that the burden of proof of dependency rests on the objectors. According to the evidence tendered is obvious that the objectors were not the biological children of the deceased, they all agreed that they were the deceased's maternal nephews and hence they do not fall under section 29(a) which basically concerns the deceased immediate family members.
 13. Finally, counsel submitted that the provisional section 29(b) is conditional, one can only qualify to be a dependant if she/he was being supported by the deceased, 2 years prior to his death. It was the objectors' own testimony that the deceased died when they were grown up persons in employment and had families who depended on them. That according to section 29(b) any other person ought to prove dependency. They concluded that the Objectors were not dependants as per the provisions of Section 29.
 14. The Objectors on the other hand filed submissions dated 30th November, 2023. The relied on their affidavits in support of dependency together with its annextures. It was submitted that the 1st and 2nd having been brought into the family of the deceased at their tender age and the 3rd dependant having been married to Willy Kimeli Tuwei whose mother was a sister to the deceased, are all within the meaning of "dependant" under Section 29 (b) Cap 160. They urged the court to make a finding that the three dependants are entitled to be counted as such and that they should benefit from the estate of the deceased more particularly plot No. Turbo East/leseru Block 5 (Sugoi) L.R 10511/1 measuring 60 acres.



Determination

15. Having heard this matter and considered the oral testimonies and affidavit evidence as well as the written submissions, the issue that needs settlement first is that of dependency. Once that is done, the estate of the deceased should then be equally and fairly distributed among all other beneficiaries. Should the objectors be considered as beneficiaries of the estate?
16. It is trite that whoever desires any court to give judgment as to any legal right or liability, depending on the existence of fact which he asserts, must prove that those facts exist.
17. Pursuant to the provisions of Section 107 of the *Evidence Act*, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.
18. The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”
19. Therefore, it is a foundational principle of law that a litigant bears the burden or onus of proof in respect of the propositions he asserts to prove his claim. In the instant case, the objectors bear the burden of proving that they were or are dependants of the deceased and therefore they are entitled to benefit from his estate.
20. The cardinal principle in this succession cause is whether the objectors are dependants of the deceased.
21. The petitioners claim to be wives, sons and daughters of the deceased while the objectors claim to be nephews of the deceased and as such dependents. The deceased has died intestate and has left behind four wives and a number of children. The *Law of Succession Act* (Cap 160 Laws of Kenya) to be referred to as the Act gives the court discretion to determine the person or persons to whom the grant of letters of administration shall be issued under Section 29 of the Act. In intestate administration.
22. Section 66 of the Act provides the yardstick on appointment of legal representatives: -

“Preference to be given to certain persons to administer where deceased died intestate. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in



the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

23. The laws of succession are not universal and tend to be tainted by different sheds of local customs and beliefs of the people. Morton, Jr, has identified three salient principles which he considers pertinent to every law of succession: ‘should aim, first, to consider the wishes of the former owner; second, to secure adequate provision to his family and those dependent on him; third, to promote the equalization of fortunes, it being manifestly out of keeping with democratic ideas for the State to foster the concentration of wealth’. (See James M. Morton, Jr (2015): The Theory of Inheritance. Harvard Law Review, Vol. 8, No. 3 (Oct. 25, 1894), pp. 161-167)

24. The meaning of dependency is defined under Section 29 of the Act. It provides: -

“

- “(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased’s parents, step-parents, grand-parents, 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; and
- (c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

Section 26 of the Act provides:

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his, will or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable, provision for that dependant, or that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”

25. Section 27 of the same Act provides that “In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependants, or to make such other provision for him by way of periodical payment or a lump sum, and to impose such conditions as it thinks fit.



26. Section 28 states that “In considering whether any order should be made under this part, and if so what order, the court shall have regard to -
- (a) The nature and amount of the deceased's property;
 - (b) Any past, present or future capital or income from any source of the dependant;
 - (c) The existing and future means and needs of the dependant;
 - (d) Whether the deceased had made any advancement or other gift to the dependant during his lifetime;
 - (e) The conduct of the dependant in relation to the deceased;
 - (f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
 - (g) The general circumstances of the case, including, so far as can be ascertained, the testator's reason for not making the provision for the dependant.
27. In the case of *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others* [2016] eKLR, it was observed that “a dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.”
28. It is settled law that Section 29 of the *Law of Succession Act* provides for different categories for dependants: Thus
- Section 29(a) provides that a dependant means wife (s), former wife(s) and children whether or not they were being maintained by the deceased prior to death.
- Section 29(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.
- Section (c) provides that where the deceased was a woman, the husband if he was being maintained by her prior to her death.
- Section 29 illustrates that only the wife/wives and children of the deceased are out rightly entitled to the deceased's estate. All other relations (Section 29b and C) need to prove that they were being maintained by the deceased. Upon proving that you are dependant, you are required to apply to court for provision out of the net estate.
29. In re-Estate of *MMuthania Mwendwa (Deceased)* (2016) eKLR the petitioner (son of the deceased) sought to include his children as dependants of the deceased estate. However, he did not provide any evidence that his children, the deceased's grandchildren were being maintained by him prior to his death. Consequently, the court held that it is not the mere relationship that matters but proof of dependency.
30. It is not in dispute that the objectors were nephews to the deceased person. They have stated as much in their affidavits of proof of dependency over the estate. That their biological mother was the deceased's first born biological sister and upon her death, she was laid to rest at her brother's (deceased's) land in Sugoi, LR No. 10511/2 (sugoi).



31. The 1st defendant deponed that he has been brought up by the deceased persons since he was three years. He stated that he has been to school together with the children of the deceased and has always maintained the name Morogo as per traditions and customs. In the year 1991 when he was getting married, it is the deceased who took up the role of a father and paid dowry and met all the wedding expenses and the said wedding was held at the same home where the deceased raised him alongside his brothers and sisters. Better yet, that the deceased showed him where he could construct his present home and where he has raised his family to date. The parcel of land being land parcel No. Turbo East/leseru Block 5 L.R. 10511/1(Sugoi) and have been paying land rates to date. He therefore believes that he is part of the family as much as the other beneficiaries are. That he has all long being recognized as the son of the deceased by all their relatives, friends, colleagues and neighbours. He indicated that no family members would be prejudiced if he is granted the parcel of land where he is currently residing having been shown to him by the deceased before be passed on the year 1999.
32. The 2nd Objector's averments were not any different. According to him, their mother passed on when she had come to the country for medical assistance from the deceased in the year 1963. She was laid to rest at the deceased's land in Sugoi. He deponed that upon the demise of his mother, the deceased's 1st wife breast fed him and took him as their son and since then he has only known the deceased as his father. In the year 1969, he started his education and the deceased catered fully for all his expenses as any father would. He also had his engagement and married his wife with the participation of his parents, deceased and his wives. The deceased also paid the full dowry as per the Nandi customs. Finally, he stated that he has known no other family other than the deceased's family since his childhood. He therefore believes that he is a beneficiary to the deceased's estate.
33. The 3rd Objector also gave his account in supporting the fact that her husband was a beneficiary to the estate. She deponed that she is a dependant in estate, having been married to Willy Kimeli Tuwei (deceased), who was raised by the deceased. She stated that they wedded with the said Willy Tuwei in the year 1981 at their home in Sugoi and have been residing on the plot where his husband was residing until his demise. It is within her knowledge that her husband was brought in by the deceased when he was 4 years old and grew up under his care until when he was circumcised by the deceased in the year 1969. The dowry negotiations during her marriage were done by the deceased person and that it is the deceased who constructed a house for his husband and the husband was buried on the same land where she is residing with her children. She stated that she has been residing in plot known as Turbo East/leseru Block 5 (Sugoi) L.R. 10511/1, measuring a total of 60 acres alongside her co-dependants herein since the time she was married. The Petitioners admitted that the Objectors were nephews to the deceased and that they had been residing within parts of the estate as decreed by the deceased during his lifetime. It is also on record that the Petitioners acknowledged that the deceased's estate has remained to be the place in which the objectors have called home since their tender years. It is also not disputed that the biological mother during her demise was buried in one of the portions of the deceased's land. Therefore, by that lineage, the Objectors are and ought to be counted as part of the deceased's estate.
34. A person claiming to be a dependant must prove such dependency in the degrees provided for under Section 29 of the [Law of Succession Act](#).
35. The test for dependency was addressed by the court in the case of *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others* [2016] eKLR where it was observed as follows;
- “ a dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.”



36. The Objectors have told the court that after the demise of their mother, the deceased took them in as his own children and catered for all their needs including school fees. That even after they became of age, it is the deceased who paid for their dowry for them to marry and even allocated them their respective pieces of land where they could erect their houses of residence, which they have been living in ever since. It is with such facts that the objectors identify themselves as beneficiaries of the estate of the deceased.
37. The *Judicature Act*, Cap 8 Laws of Kenya under Section 3(2) made provision for application of customary law in appropriate circumstances. Section 3(2) of the Act provides as follows:
- “The High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”
38. Under Section 3(2) of the *Judicature Act*, where both parties are subject to customary law the courts are enjoined to be guided by the customary law of the parties to the extent that the same was not repugnant to justice and morality.
39. It is customarily very prevalent for men to take care of their siblings especially their sisters as well as their siblings’ children as it happened in this case. It is nothing new and that is why section 29 of the *Law of Succession Act* acknowledges this fact by listing over and above the nuclear family, other members of the extended family that can also inherit/benefit from the estate of a deceased. This is a common practice in Kenyan communities to take over and take care of the less fortunate members of their families such as widows and single mothers we therefore cannot purport to ran away from these facts as this is the African customs and culture of acting in the best interest of one’s siblings.
40. As a matter of emphasis, When the late Nathan Morogo received his sister and her children he took them as his own, enrolled them in school, got them birth certificates and enfolded them into his household. Furthermore, even when his sister died he continued to look after her children including allowing one of his wives to breastfeed the minor children who were left motherless. He further buried his sister within his own household and was there as a father for his nephews including during important events of their lives such as enrolling them in schools, getting them birth certificates, giving them his surname, helping them get wives by providing the dowry. He never at any one time, from the evidence tendered before this court, not regard them as his own children.
41. It is clear from the evidence tendered before this court that the objectors have occupied this land with the full knowledge and consent of the deceased and that they have even built homes on it. At no one time did the deceased evict or attempt to evict them from the land. He was aware they had nowhere to go to. Further there is no evidence before this court that there has been any attempt by anyone to sue / evict the objectors from the land. Furthermore, their mother was buried by the owner of the land the late Nathan Morogo on this land.
42. I therefore concur with the submissions by counsel for the objectors that the objectors are indeed the beneficiaries of the estate of the late Nathan Morogo and as such should be able to inherit the parcel that had already been given to them and that they have already developed upon.
43. Having heard the evidence for either party, I have no doubt in my mind that the Objectors have established substantively that they have been part of the deceased’s family. Besides categorizing them as nephews to the deceased, the Petitioners have not disputed the averments raised by the Objectors. Yes,



the objectors are nephews of the deceased but it is not lost to this court that these are beneficiaries who were taken in by the deceased at infant stages and raised to adulthood. Therefore, in the letter and spirit of Section 29 of the *Law of Succession Act*, I am of the considered view that they qualify as dependants to inherit respective shares excised by the deceased during his lifetime and legitimately so those parcels have been under the control and benefit of the Objectors. The exact formulation of this case is that where a person holding title to property is subject to an equitable duty to convey to another on the ground that he would be unjustly enriched if he were permitted to retain it in essence a constructive trust arises in this transaction between the deceased and the objectors. It is the administrators' obligation to perform the duty of transmitting the parcels of immovable property assigned to the objectors to fulfil the wishes of the deceased.

44. The Objection succeeds in its entirety with no orders as to costs.

DATED AND SIGNED AT ELDORET THIS 9TH DAY OF AUGUST, 2024

R. NYAKUNDI

JUDGE

