



REPUBLIC OF KENYA



**In re Estate of the Late James Kimarta Ruto (Deceased) (Probate & Administration
311 of 2013) [2024] KEHC 10915 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10915 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION 311 OF 2013
RN NYAKUNDI, J
SEPTEMBER 20, 2024**

IN THE MATTER OF THE ESTATE OF THE LATE JAMES KIMARTA RUTO (DECEASED)

BETWEEN

HENRY K SANG 1ST PETITIONER

ISAAC K KEMBOI 2ND PETITIONER

AND

JAIRUS K RUTO 1ST OBJECTOR

ISAAC K KEMBOI 2ND OBJECTOR

RULING

Representations

M/s Z.K Yego Law Offices

Ms. Daisy Chepkurui & Co. Advocates

Ms. Nyekwei & Co. Advocates

1. Before me are summons for revocation dated 26th April, 2022 for determination. The 2nd Objector/
Applicant seeks the following reliefs:
 - a. Spent
 - b. This Honourable court be pleased to temporarily stay the execution and consequent activities arising therefrom, of Grant of Letters of Administration issued to the Respondents on the 27th September 2021 by this honourable court pending the inter parties hearing of this application.



- c. That the Grant of Letters issued to the Respondents herein on the 27th September, 2021 be revoked and the same be given to the 1st Objector and the applicant herein or any other person that this court may appoint.
 - d. Costs of this application be paid out of the Estate of the deceased.
 2. The summons is premised on five grounds and an affidavit in support sworn by Isaac Kemboi. The grounds are captured as hereunder;
 - a. The Respondents/Petitioners have deliberately left out one of the deceased's dependant in the distribution of the deceased estate namely: -
 - i. Isaac K. Kemboi (son)
 - b. The applicant is a child of the deceased and recognized by the law.
 - c. The Petitioners failed to disclose to the court that the car listed for distribution does not form part of the state of the deceased as it belongs to the applicant herein.
 - d. That the applicant is apprehensive that his rightful share together with his own registered motor vehicle will be taken away by other beneficiaries of the estate of their deceased father.
 - e. It is just and expedient in the circumstances that this Honourable Court do revoke the Grant of Letters of Administration on th 27th September, 2021.
 3. Following the directions of the court in its ruling dated 24th April, 2023, both the Petitioners and Objectors were under duty to give evidence on oath on matters deposed in their respective affidavits.

The Objectors' Summed up case

4. The 1st Objector, Jairus Ruto gave evidence to the effect that he is a son to the deceased with other siblings whom he named as Isaac Marta, Henry and Isaac Kemboi. He also acknowledged that his late father was married to four wives and he comes from the third household. It was the 1st Objector's evidence that when the Petitioners petitioned for Grant of Letters of Administration to administer the estate of the deceased, no notice was ever issued and served upon them to participate in the proceedings. The 1st Objector further told the court that there are two Eulogies annexed to the affidavit which are not consistent with the true facts on the family tree. He also told the court that the subject motor vehicle KAS XXXX is an asset fully procured by his brother Isaac Kemboi and it should not therefore form part of the estate. He therefore urged this court to revoke the grant so that he becomes part of the beneficiaries to inherit the estate of the deceased.
5. Similarly, in support of the objection proceedings, Isaac Kemboi gave evidence on oath relying entirely on his affidavit dated 26th April, 2022 in which he alleged in court that the proceedings initiated by Isaac Marta and Henry Sang to identify the assets and beneficiaries to benefit from the estate of the deceased are tainted with non-disclosure of material facts and misrepresentation rendering their certificate of confirmation of grant dated 27th September, 2021 fatally defective. The Objector further relied on the Eulogy of his mother, the late Elizabeth Jepketer dated 15th October, 2014 as evidence to support kinship as a biological son to the deceased and James Kimarta Ruto. He also contested the inclusion of Motor Vehicle Registration number KAS XXXX as part of free property survived of the deceased available for distribution to the rest of the beneficiaries. In his evidence, the Objector maintained that this subject motor vehicle is singularly purchased for his own benefit as indicated in the logbook annexed as an exhibit in support of the objection proceedings.



6. It was further the testimony by the 2nd Objector that during the lifetime of their late father, he was involved in facilitating his treatment when he was ailing at Moi Teaching and Referral Hospital. He vehemently denied the allegations made by the 1st Petitioner as to his paternity as a son to the deceased.

The petitioners summed up case

7. In answer to the Objections proceedings, the Petitioner, Isaac Marta on oath in addition to his earlier affidavit dated 3rd June, 2022, buttressed the facts of the case challenging the summons for revocation of grant by the Objectors. According to Isaac Marta, the so called objectors belong to a different lineage for their biological father is an uncle. Therefore, they have no consanguinity or affinity to the estate of the deceased to entitle them an inheritance. The best it can be referred to is that they are cousins to the family and not sons of the deceased. He also disputed the facts in the Eulogy being relied upon by the Objectors to prove their kinship with the deceased family. As regard the subject motor vehicle the Petitioner told the court that it is free property procured mainly for the benefit of the entire Kimarta family but unlawfully registered in the name of the Objector.
8. The Petitioner also relied on the evidence of Anthony Kibor whose evidence was to the effect that the second Objector is a cousin to the Petitioners on the basis that Mzee Ruto was his uncle. He therefore discounted the fact of the second objector being a biological son to the Kimarta family, the deceased to this estate. He stated that he is the son to Ambrose Kipsang Sitienei who was the 1st born son of Arap Moso, his grandfather, the father to the late James Kimarta Ruto, Kiprotich Sang and Susan Chemisik Sang.
9. He deposed that he knows the 2nd Objector/Applicant's biological father but rather his uncle. That the 2nd Objector/Applicant lived with their aunt's house Susan Chemisik Sang until he completed his secondary education whence he relocated to his uncle James Kimarta Ruto's second household. That the late James Kimarta Ruto and his second wife Elizabeth Jepketer Ruto are not the 2nd Objector/Applicant's biological parents as he is their nephew. He was in shock that the Certificate of Birth states James Kimarta Ruto as the 2nd Objector/Applicant's father yet he is not a biological child of the deceased.
10. He stated that the said certificate of birth was issued on 18th January, 2012 18 days before the demise of his late uncle James Kimarta Ruto who was bedridden and suffering from a brain tumor and was not in the right state of mind to give consent which demonstrates that obtained the said Certificate of Birth fraudulently as the consent of the deceased could not have been obtained. Further that in the chief's letter on record, the 2nd Objector/Applicant was not stated as a beneficiary of the deceased's estate because it is colloquially known that he is a nephew to the deceased and not a beneficiary of the deceased's estate as alleged.
11. In addition, the Petitioner also relied on the testimony of PW3, Joseph Sambu, a clan elder from the village where the deceased and his family have been residents bringing them within his administration. According to PW3, Isaac Kemboi is not a biological son to Elizabeth Jepketer for he knew his mother as Teresa Sang, a wife to the brother to the deceased. PW3's evidence was based on the long association and knowledge of the Kimarta family which spans way back to 1990. He therefore ruled out any claim of beneficial interest by Isaac Kemboi to the estate of the deceased. He deposed that the 2nd Objector/Applicant is set to inherit from his father's estate in the future and it is prejudicial to the beneficiaries of the estate of the deceased for the 2nd Objector/Applicant to unfairly inherit from the deceased's estate
12. Petitioners/Respondents Submissions
13. The Petitioners filed submissions and identified three issues for determination;



- a. Whether the deceased is the Biological father of the 2nd Objector/Applicant
 - b. Whether the application is a res judicata
 - c. Whether the Motor Vehicle Registration No. KAS XXXX forms part of the estate of the late James Kimarta Ruto
14. On the first issue, Learned Counsel Mr. Yego submitted that the 2nd Objector only went to live in the deceased's second house and that fact is well known to the family and the neighbours. Further, the applicant is yet to inherit from his late father's estate one Kiprotich Sang and therefore he wants to unjustly enrich himself. That even the chief's letter on record does not include the 2nd Objector/Applicant as a beneficiary to the estate of the deceased. On this he relied on the provisions of Section 29 of the [Law of Succession Act](#).
 15. According to learned counsel, the applicant has approached this court with unclean hands. That he is trying to mislead this court in order to unjustly enrich himself. Counsel stated that the applicant is playing a subterfuge because he does not want to submit the titles to two (2) land parcels namely Tulwet/Tulwet Block 7 (Terige) 25 and Lessos Settlement Scheme/347 to the rightful beneficiaries. That all properties forming part of the estate of the deceased have been dealt with pursuant to the Certificate of Confirmation of Grant issued by this Honourable Court on the 27th September, 2021 with the exception of the two parcels aforementioned, which titles the applicant has refused to submit to the registrar of lands for transmission of the said assets to the lawful beneficiaries of the estate of the late James Kimarta Ruto. Counsel maintained that the deceased is not the biological father of the 2nd Objector/Applicant and hence he is not the beneficiary of the deceased pursuant to the provisions of Section 29 of the [Law of Succession Act](#). On this he cited the decision in [Beatrice Ciamutua Rugamba v. Fredrick Nkari Mutegi & other](#), Chuka Succ. Cause No. 12 of 2016.
 16. Mr. Yego learned counsel further submitted that the actions of the 2nd Objector/Applicant of fraudulently obtaining a Certificate of birth is clear manifestation of how tactical and strategic he was in ensuring that he gets a share of the pie of the estate of his uncle upon his demise and later inherit from the estate of his biological father the late Kiprotich Sang.
 17. On the question of res judicata it was submitted for the Petitioners had filed summons for revocation of grant dated 11th December, 2014 seeking similar orders as in the instant application. That the 2nd Objector withdrew the said summons for revocation of grant dated 11th December, 2012 on 17th September 2018. The said summons for revocation of grant dated 11th December, 2014 and its withdrawal on the 17th September, 2018 on record. Counsel submitted that the withdrawal on the summons for revocation of grant dated 11th December, 2012 on the 17th September, 2018 by consent was on condition that the estate of the Late James Kimarta Ruto would then devolve to the lawful beneficiaries in equal share. That the Objectors withdrew their objection on their own volition. Learned relied and placed reliance on the provisions of Section 7 of the [Civil Procedure Act](#) and the decision [in Re Estate of Olela Oketch](#) (deceased) (2022) eKLR.
 18. On whether Motor Vehicle Registration No. KAS XXXX forms part of the estate of the deceased, counsel submitted that owing to the health of their late father, the family sold land and bought the subject motor vehicle so that they could rush their sick father to the hospital whenever he needed medical assistance.
 19. It was counsel's submission that by dint of the consent dated 17th September, 2019 and filed in court on 18th September, 2019 there is no doubt that the entire family knew that the motor vehicle registration number KAS XXXX was part of the estate of the deceased person. That there was no contention



whatsoever with regards to the subject motor vehicle because they had unanimously agreed to acquire the said motor vehicle for the purpose of rushing their sick father to the Hospital. Counsel further submitted that the vehicle was bought from the proceeds of sale of land known as Tulwet/Koisagat (socho) Block 1/67 which belonged to the deceased. That the family entrusted a vehicle with their relative only to find out vide this application that the vehicle has been fraudulently registered in the name of the 2nd Objector/Applicant.

20. On the part of the Objectors, the following issues were couched for this court's determination in their submissions dated 16th October, 2022:
 - a. Whether the 2nd Objector/Applicant is a child and a dependant of the late James Kimarta Rutto
 - b. Whether Motor Vehicle Registration Number KAS XXXX forms part of the estate of the deceased
21. It was learned counsel's contention that in terms of Section 3(2) as read with Section 29 of the [Law of Succession Act](#), the 2nd Objector's evidence by dint of a birth certificate produced in court as an exhibit is a biological child to the deceased. In the same breadth, the Objector invited the court to conceive and appreciate the evidence by the 1st Objector, Jairus Ruto and Ann Jepkoech who is a sister to the second objector. He submitted that notwithstanding the opposition from the Petitioners, the 2nd Objector's continuous domiciled at the property of the deceased corroborates the evidence of Jairus Ruto and Ann Jepkoech that is indeed a direct beneficiary to the estate of the deceased and therefore he should have been involved from the very beginning with the succession proceedings initiated by the Petitioners.
22. With regard to the second issue of ownership of Motor vehicle registration number KAS XXXX, learned counsel Ms. Chepkurui submitted that the asset has never been part of the estate even during the survivorship of the deceased. Further learned counsel submitted that its entry to the asset inventory of the deceased was done in bad faith on the part of the Petitioners. In a nutshell, learned counsel placing reliance in the case of Succession Cause No. 36 of 2017; [Ibrahim Hassan & Charles Kimenyi Macharia, Interested Party](#) (2019) eKLR and [In Re estate of the late Kamau Kingora](#) (2020) eKLR and Section 76 of the [Law of Succession Act](#) urged this court to revoke the certificate of confirmation of grant dated 27th September, 2021

Determination

23. Having read through the summons, the affidavit evidence, the testimonies of the witnesses and the rival submissions, two main issues reveal themselves for determination:
 - a. Whether the 2nd Objector is a beneficiary to the estate of the deceased person.
 - b. Whether Motor Vehicle Registration No. KAS XXXX forms part of the estate of the deceased.
24. The first issue for determination is that of dependency. According to the 2nd Objector, as evidenced in the birth certificate, is the child of the deceased and is recognized by law as a dependant. The meaning of dependency is defined under Section 29 of the [Law of Succession 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.”

25. The paramount consideration is whether the objector has discharged the burden of proof as stipulated in Section 107(1) of the *Evidence Act* that he was a dependant of the deceased prior to his death.
26. For one to qualify for dependency, there is a condition precedent which he/she has to establish. It requires that the person claiming dependency must prove that he/she was being maintained by the deceased immediately prior to his demise. The 2nd Objector adduced evidence of a birth certificate that was issued on 18th January, 2012, 18 days before the demise of the deceased. The Petitioners put the question the said Certificate of Birth and the mischief that can be deduced from the dates of acquisition and the date the deceased died. According to the Petitioners, the 2nd Objector procured the said Certificate of birth in a bid to inherit a share from the deceased’s estate. They maintained that the 2nd Objector is just but their cousin, being a son to the deceased’s brother.
27. In determining, the beneficiaries of the estate of the deceased, the Chief’s letter as produced by the Petitioners is another cardinal instrument that ought to be considered. The Courts have recognised the importance of an introduction letter from the area chief in succession matters. The court *in Re Estate of Ambutu Mbogori (Deceased)* [2018] eKLR noted the importance of a chief’s letter in ascertaining the deceased’s dependants as well as his properties. From the chief’s letter dated 21st August, 2012 as adduced by the Petitioners, it is evident that the 2nd Objector has not been listed as one of the beneficiaries. He has only relied on his birth certificate which has been questioned by the Petitioners and the fact that he is the custodian of the titles to the properties belonging to the deceased person.
28. In light of the above and looking at the objection proceedings broadly, there are many gaps that needs sealing on the 2nd Objector’s to this court’s satisfaction. From the manner in which he acquired his certificate of birth a few days prior to the death of the deceased to the discrepancies in the Eulogies annexed by both parties as evidence and his possession of the titles belonging to the deceased. Similarly, I have considered the evidence in the court record and on a balance of probabilities, I find that the 2nd Objector has not brought any tangible evidence to show that he was being maintained by the deceased herein. 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.”
29. Having said that, I find it proper for the Objector to submit himself to a DNA test to cast out any doubts as to his dependency. I find it to be a safe and sure route for purposes of distributing the estate equitably amongst the beneficiaries of the estate. In a south African case of *Bother v Dreyer (now Moller)* High Court of South Africa (Trans Vaal Province) Case No.4421/08(unreported) Judge J.R. Murphy stated as follows on the question of paternity;

“In short, I agree with those judges and commentators who contend that as a general rule the more correct approach is that the discovery of the truth should prevail over the idea that the rights to privacy and bodily integrity should be respected. - see Kemp. Proof of Consent or Compulsion (1986) 49 THRHR 271 at 279-81. I also take the position, and I will return to this more fully, later, that it will most often be in the best interest of a child to have any doubts about the paternity resolved and put beyond doubt by the best evidence”



30. At the heart of the present dispute is the question of paternity and from the start of it, I have been persuaded that justice will only be rendered in the circumstances of this matter if the objector takes the approach of conducting DNA.
31. On the second issue of Motor Vehicle Registration No. KAS XXXX, evidence was availed on record which ascertained that the subject motor vehicle belongs to the 2nd Objector. The Petitioners have alleged fraud in its acquisition but the same must be proved.
32. Section 109 of the *Evidence Act*, Cap 80, Laws of Kenya, places the burden of proof on the applicant as it provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.

33. In the case of *Christopher Ndaru Kagina -V- Esther Mbandi Kagina & Another* [2016] eKLR where the court stated that:

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the *Case Central Bank of Kenya LTD -V- Trust Bank Ltd & 4 Others* [26] the Court of Appeal in considering standard of proof required where fraud is alleged state that fraud and conspiracy to defraud are very serious allegations. The *onus* of *prima facie* proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges.

Further, in *Belmont Finance Corporation Ltd -V- Williams Furniture Ltd* [27] Buckley L.J said:

“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be very clear, and in such a case, it is incumbent upon the pleader to make it clear when dishonest is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegations of its dishonest nature will not have been pleaded with sufficient clarity.”

Was the subject motor vehicle registered fraudulently? the burden of proof of allegation of fraud is higher than that required in civil cases that of proof on a balance of probabilities; and lower than that required in criminal case that is beyond reasonable doubt. In *Ndolo -V- Ndolo* [2008] 1KLR (G &F) 742 the Court stated that:

“.....Since the Respondent was making serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden



of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.....”

34. I have looked at the affidavits on the basis which this litigation is founded Section 3 of the Law of Succession Act provides the legal framework on what constitutes free property. It means his/her free property that upon his demise, he/she was legally competent to freely dispose of it and irrespective of which his/her interest has not been terminated by his/her death. In the instant case, it is not in dispute that upon the death of the deceased it is apparent that the subject motor vehicle was registered in the name of the 2nd Objector. Now that the Petitioners are contesting ownership, the ball is in their coat to adduce such compelling evidence on forgery, fraud or misrepresentation.
35. In considering the material on record regarding the subject motor vehicle, I find in favour of the 2nd Objector; that the said motor vehicle should not form part of the estate of the deceased. There is ample to establish the ownership of the vehicle as belonging to the 2nd Objector. The property therefore shall not form part of the estate of the deceased.
36. Justice shall only be accorded in this matter once the status of the 2nd Objector has been confirmed as to his inclusion in the estate of the deceased and the only proper approach is to conduct a DNA test for that to be ascertained. Secondly, I am of the considered view that the 2nd Objector has not advanced any reason at all as to why he is holding on to the titles belonging to the estate.
37. The circumstances in which the 2nd Objector came to be in possession of the title documents to some of the immovable assets of the deceased is shrouded in secrecy, and lack of transparency and accountability on his part. In appraising the evidence in this case, it will not be a stretch of imagination by this court to presume that the act of holding unto the title deeds by the 2nd Objector is meant to entitle him some beneficial interest to the estate of the deceased as a direct beneficiary. It is presumed that a person whose first affection goes naturally to the persons having a blood relationship with him/her starting with the direct descendants or heirs which stretches to the ascendants of the second and third degree of consanguinity.
38. The proximity of the descendants features very prominently in the evidence canvassed by the parties before this court. It is within the intimate consanguinity and affinity of the family that the heirs thereof would decide to recognize the inheritance survived of the deceased. The assertion by the objector that he be included as the surviving dependant in the scheme of intestacy is the sought of an afterthought which is not justifiable. It matters not in our multi-ethnic and cultural society how long one has been welcomed within the ancestry home of his/her grandparents but at the time when the estate is declared vacant by reason of death, there will be no right of inheritance as a beneficiary to the intestate estate as defined under Section 29 of the Law of Succession Act.
39. Accepted within the African Customary law and culture, is that a person’s first affection goes to his direct blood relatives. It is unimaginable that a deceased would prefer was he /she to be alive to have the estate distributed to relatives as remote as the third, fourth, fifth, sixth or even the tenth generation of ordinary collaterals against his or her own widow, widower, mother of his children and the heirs with whom he/she shared a common life before dying. The spirit of the succession law as enacted even before the new constitution, retains the tendency up to today of confining in the 1st instance priority inheritance to the spouses and their issues towards whom the deceased owes legal and moral duties. The rights of survivorship and inheritance range from full ownership over all or part of the estate to the right of use.
40. It is understandable that the 2nd Objector invoked the provisions section 29 of the Act as a son to the deceased but there is intriguing or puzzling evidential material as to why the other beneficiaries have



declined to recognize his paternity. That said, I have to note from the outset that to designate the 2nd Objector as a son to the deceased without scientific evidence of the DNA, the conclusion I arrive at would be inappropriate. It is incumbent on the party alleging dependency to prove its existence as there is no presumption that any court can make with regard to the provisions of Section 29 of the Law of Succession Act.

41. Given the analysis above and in the administration of justice in this matter the following orders shall issue:
- a. Any two children of the deceased listed as the beneficiaries do avail themselves at the Government Chemist together with the 2nd objector to give samples for the sibling DNA test within 21 days from the date of this order and the costs shall be borne by the 2nd Objector.
 - b. The 2nd Objector shall avail the instruments used for registration of his birth at the Registrar of Births and Deaths, for this court's scrutiny.
 - c. The 2nd Objector is hereby directed to deposit in court all title documents in his possession belonging to the estate of the deceased within 21 days, failure to which he shall be held in contempt and after a period of 21 days, the Land Registrar, Uasin Gishu County shall be at liberty to cancel the title documents on grounds of misplacement, particularly for the two parcels of land known as Tulwet/Tulwet Block 7 (Terige) 25 and Lessos Settlement Scheme/347.
 - d. The costs of the suit shall be borne by the estate.
 - e. Status Conference on 4.11.2024

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 20TH DAY OF SEPTEMBER 2024

In the Presence of

Bornes for Chepkurui for objector

Yego for the Plaintiff

.....

R. NYAKUNDI

JUDGE

