In re Estate of the Late Kireger Kuto (Deceased) (Succession Cause 74 of 2015) [2024] KEHC 12306 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12306 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 74 OF 2015

RN NYAKUNDI, J

OCTOBER 11, 2024

IN THE MATTER OF THE ESTATE OF THE LATE KIREGER KUTO (DECEASED)

BETWEEN

JONAH KIBET RUTTO ..... 1ST OBJECTOR

ANNA CHEPKORIR KURO ..... 2ND OBJECTOR

AND

PHILIP RUTTO ..... 1ST PETITIONER

DANIEL KIPLAGAT ..... 2ND PETITIONER

RULING

1. By a Chamber Summons application dated 19/12/2023 and filed on 20/12/2023, the Objectors/ Applicants seek the following orders;

    1. Spent.
    2. Spent.
    3. That the Objectors/Applicants herein be apportioned/awarded their portions after hearing and determination of this matter
    4. That cost of this application be provided for.

2. The application is premised on the grounds therein and it is further supported by the Affidavit sworn by Jonah Kibet Rutto on 19/12/2023.

3. He deponed that the Objectors/Applicants are entitled to a total of 80 acres comprised in all that land parcel known as BAYETE FARM, LR /TULWET/KESSES/BLOCK 6 (BAYETE0 plot numbers 30, 68 & 69 and KAPTUKTUK FARM LR/TEMBELIO/EGEYO BORDER/ BLOCK 10 (Kaptuktuk

B) Plot No. 422 left behind by KIREGER KUTO (Deceased) that was to be given as gifts to Objector/Applicants in contemplation of his death, that the deceased died on 8/7/2005 leaving behind 4 widows, adopted children and biological children, that they are the adopted children of the deceased who took them to stay with his 2nd wife Christina aka Rebecca Jematia Kuto together with their other adopted sisters Sara Jemeli Kuto, Grace Jemutai Kuto and Salina Jepkinyor Kuto where the deceased took care of them since childhood under Nandi Customary law as the said wife was never blessed with children of her own, that the deceased herein died before effecting transfer of the said portion in favour of them, that the proceedings herein were instituted without the knowledge and participation of the Objectors, that the deceased died before giving out the said portions that they are entitled to and subsequently effecting the transfer to them, that the Respondents have been illegally and or maliciously excluded as beneficiaries albeit having been known to have beneficial interest in the estate of the deceased by virtue of being some of the deceased's adopted children thus leading to a miscarriage of justice, that the Administrators/Respondents concealed and/or misrepresented material facts to the trial Court with the intention of disinheriting the Objectors/Applicants thus leading to a miscarriage of justice, that unless appropriate orders are issued, the Objectors/Applicants risk losing their investments, that in light of the above therefore, there is need for preservatory orders to be issued to preserve the substratum of the Objection proceedings.

The Response

4. In response to the application, the Respondents filed a Replying Affidavit sworn by Philip K. Rutto, the 1st Respondent on 12/02/2024.

5. He deponed that the Objectors' application is bad in law, incompetent, misadvised, baseless, frivolous, scandalous, an afterthought and an outright abuse of the due process of the Court as it does not disclose any reasonable cause of action to warrant the prayers sought, that the application is premised of falsehood, generally tainted with dishonesty and misrepresentation of facts which is a deliberate move by the Objectors/Applicants to obstruct the course of justice , that the deceased herein died intestate on 8/07/2005 leaving behind (4) widows and (22) children, that as per the Chief's letter issued to them, it is only the (4) widows and the (22) children who are the rightful beneficiaries to the deceased's estate, that neither of the Objectors/Applicants is child of the deceased whether adopted or biological as alleged, that the Applicants are not entitled to any portion of the deceased's estate as they are neither children, beneficiaries or dependants of the deceased thus have no colour of right to lay claim over the deceased's estate, that he is the biological father of the 1st Objector/Applicant and no given point did the 1st Objector become an adopted child of the deceased, that he personally raised the 1st Objector until that time when he attained the age of majority and as for the 2nd Objector, she unknown to him as well as to the entire family of the late Kireger Kuto.

6. He further deponed that the said Christina Rebecca Chematai (now Deceased) was his step-mother who only had one child namely, Sarah Chemeli and at no given point did he ever see her with any adoptive child, that upon the demise of his step-mother, Christina Rebecca Chematia, the family sat down and came up with her eulogy listing all her children, including step-children, and no where were the two names of the Objectors mentioned as being children of the said Christina as alleged, additionally when his step-mother who was the deceased's 3rd widow, Mary Tapkili Taplot Kutto, died in year 2020, the family of Kireger Kuto sat down and drafted her eulogy listing all her children, including the step-children as may be seen therein and there was no mention of the Objector's names under the deceased's children which is a confirmation that the Objectors are not by any means the children of the late Kireger Kuto.

7. He contended that the Succession Cause herein has always been conducted in an open matter and all the beneficiaries of the deceased's estate have always been engaged in the process as this is a matter that was even referred to mediation and during the mediation session all the beneficiaries were present, engaged and came into a mutual agreement, further due process was followed and a gazette notice was published on the 22/05/2015 vide Notice No. 3729 hence the Objectors cannot allege that they were never aware of the same, that there was no misrepresentation of facts and/ or concealment whatsoever as the area Senior Chief himself vide his letter of 10/12/2014 confirmed to this Court all the beneficiaries of the deceased's estate as he had pointed out earlier that 1st Objector is his biological son whom he personally raised and educated thus one wonders how he miraculously became his brother whereas the 2nd Objector is a total stranger to the estate, that the Law of Succession is very clear on who a beneficiary of a deceased estate is and the degree and as it is the Objectors herein do not fall within the list.

8. He deponed further that this Cause had been concluded back in the year 2021, vide the ruling of Honourable Justice E. Ogola thereby confirming the mode of distributing and putting the Succession Cause to rest, that once a grant is confirmed , as is in the case herein, there is nothing that remains to be objected to and as such the Objectors' application is bad in law, lacks merit and should be dismissed with costs ab-nitio, that this instant application offends the provisions of Section 68 of the *Law of Succession Act* as well as Rule 17 (1) of the Probate and Administration Rules.

9. He reiterated that the 1st Objector/Applicant has never lived with the deceased in this suit at any given point and that he is the one who raised, educated and even gave him part of his parcel of land measuring 3 acres to enable him develop and settle with his family but instead he subsequently sold the whole portion and left, that at no point did the deceased ever give any portion of his land to the Objectors/Applicants, that no material facts were hidden or misrepresented by the Petitioner during the whole process of this Cause and as a matter of fact the mode of distribution was agreed on openly and in the presence of all the beneficiaries and with the assistance of a Court annexed mediator, that the application herein is full of misrepresentation of facts, is brought in bas faith, lacks merit, is an afterthought and not in the best interest of justice, that the present application is therefore an abuse of the Court process as the same is vexatious, scandalous, frivolous and unmerited and therefore is not deserving of any of the orders sought, that the Objectors/Applicants herein are not entitled to the prayers sought whatsoever.

The Evidence

10. PW1 Peter Cheplel Kimaiyo Rotich, gave his sworn testimony and stated that he was born in 1949 and he is a Kalenjin of the Nandi sub-tribe and therefore he understands the Nandi customs and practices. He adopted his witness statement dated 7/6/2024 and then proceeded to testify that child adoption in the Nandi community entailed a ceremony known as kerwach wherein an adopted child undergoes a ceremonial head shaving together with his adoptive parents and the two sets of hair are mixed together and then they are placed in a cow shed. He told the court that the child is then given a new name by the adoptive parents and he takes their surname. He further testified that it is the adoptive parents who are then responsible for the upbringing of their adoptive child and they the child's when the child gets to age of marriage and that the child is never returned to his to his biological parents and the said child is meant to continue the lineage of his adoptive parents and he inherits from them. He told the Court that in Nandi customs, adoption was only done by a family that had no child.

11. In cross-examination PW1 confirmed that he was present at the mediation meeting and that he was the one that chaired the clan meeting, he was a tribesman and was sent by the chief. He stated that he is not aware that Johan was given over to Christina's house.

12. PW2 Philip Arap Ruto, prayed that the contents of his Replying Affidavit and witness statement dated 7/6/2024 be adopted as part of his evidence in Chief. He testified that he has never given out Jonah for adoption and that he is son whom he, himself brought up. He further testified that no kerwach was ever done for Jonah since he was never given up for adoption. He told the Court that he is the one who paid dowry for the Objector's wife as well as the Objector's school fees from primary to secondary until he completed his schooling. He also told the court that the Objector is not entitled to a share of the estate herein as the Objector is his son and thus can only benefit from him as the father. He stated that Samwel Suerey is his brother and child to the deceased as evidenced by the Chief's letter.

13. In cross-examination, PW2 confirmed that his father had (4) wives, the spouses were blessed with children and there were spouses who did not have children with the deceased, that is the 2nd and 3rd spouse did not have children of their own. He confirmed that Samuel Suerey is his brother who is considered as a beneficiary in the 3rd House. He stated that the 2nd House only has one child called Sarah. He also told the Court that he paid Johan's dowry as his son and that he is the one who paid school fees for Jonah. He told the Court that Jonah is his biological child and that Anne Chepkorir Kuto is not a daughter to the deceased from the second house.

14. PW3 Abraham Kibirech Chumba, gave his sworn testimony that he was born in the year 1932 and that he understands Nandi customs and practices. He then adopted his witness statement dated 7/6/2024 and proceeded to testified that the deceased herein was his blood brother and as such he knows the family very well. He told the Court that he is aware that the deceased had children, both male and female, totalling to (22) children. He also told the Court that he knows the 1st Objector, Jonah as the son too Philip, the 1st Petitioner and he even identified the 1st Objector, Jonah in Court and stated that he is very much aware that the 1st Objector 's parents and both alive. He further testified that the Objector was never adopted by the deceased herein as there was no ceremony that was ever conducted and it is the 1st Petitioner who has all along taken care of the 1st Objector. He told the Court that the Objector is not entitled to inherit from the estate herein as it related to his grandfather.

15. In cross-examination PW3 confirmed that there adoption in Nandi culture and Customary Law, that there is a ceremony called kerwach but the same has never happened in the family and they never gave out any child to a family. He told the Court that Jonah had no need to be adopted.

16. DW1 Jonah Kibet Rutto, testified that he is a resident of Mobundoi. He works with Mega House. In this respect he filed an Objection and a Supporting affidavit and prayed it be admitted as part of the evidence in chief. He told the Court that he was born in 1968 in Burnt Forest and that his parents are Philip Ruto and Mary Ruto. He further testified that in 1970 there was sale of Ziwa Land and his biological parents, discussed with his grandfather and they sold it. He told the Court that the 4500 was equal to one share of 25 acres and his father Philip relocated with Mary and Mary is his biological mother. He told the Court that his grandfather looked for money to pay again and his father borrowed Kshs.15,000 guaranteed by the grandfather. He stated that, that chapter closed and money was to be paid to Christina, his step-grandmother and Christina purchased further parcels of land and they were next to his biological father, Christina purchased further parcels to total 74 Acres and there was a house and she wanted to retire, she used to stay in Nairobi and she adopted two daughters; Grace Chemtai and Anne Chepkorir.

17. He further testified that in 1970 his grandfather and Philip his biological father moved Christina from that house and she stayed with his mother in 1973. He stated that Christina moved him and the two girls to her house and his father continued to also undertake his business. He told the Court that in 1974, there was a calamity one of his sisters got pregnant and there was a conflict his father impregnated the daughter of Christina. He further testified that he stayed with Christina and he used to take care of

the housework she continued adopting other children and they were six of them in that homestead of Christina and they were farming all land and he started being supported by the grandparents and they all used the name of the grandparents. He stated that he performed well and his grandparents took him to school, they paid all his school expenses and it was declared that he marries and bring up children taking his lineage and not the biological lineage. He told the Court that his grandfather took him an engagement and his grandparents paid the dowry and he gifted him 37. He told the Court that he did not have a good relationship with his father and that he has been living on the land, 37 acres. He told the Court that his grandfather distributed the parcels of land according to houses and he distributed 80 acres to each house and the houses are still occupying the parcels of land. He told the Court that the dispute involved inheritance and that he is the son entitled to the share of the deceased estate and that Samuel is older than him by 2 years and that he spent all his life at the house of Christina.

18. In cross-examination DW1 confirmed that his parents are Philip Ruto and Mary Ruto and that the said Philip is a biological son of the late Kreger Ruto the total number of children Kreger had total 27 the children born of the deceased were 27 in number. Reference is made to a chief's letter which names the children as 22 in number and there was no contrary Chief's letter which gives a variance in the number. He conceded that he has not annexed any different letter. He reiterated that he was adopted by Kreger but conceded that there was no ceremony of adoption. He further stated that the deceased paid his welfare and numerous expenses including school fees. He stated that the Succession proceedings are in respect of revocation of grant and there was mediation involving all the family members and in the mediation there was no mention of him being entitled to a share of the estate and that he appeared for the mediation. He reiterated that he was adopted by the deceased and that he was brought up by Christina Chematia, the 2nd wife of the deceased and that his mother Chematia passed on in 2017 and he did not attend the burial and the family sat down and came up with the Eulogy and all the children of the deceased were listed in the Eulogy but that is not conclusive. Reference was made to the Eulogy of Christina Chematia and he confirmed that his name does not appear anywhere. He further stated that Sarah was the 1st wife of Kireger and that she passed on in 2011and the family also came up with burial programme and the deceased's Eulogy indicates Jonah Kibet as a grandson and she was his grandmother. He further stated that if Chematia was alive she would have inherited from the share of her husband's property and that she had 2 children in total and the children have not filed witness statements. That the late Kireger died intestate he did not make a Will.

The Submissions

19. Parties also filed submissions. The Objectors/Applicant filed their submissions dated 9/08/2024 while the Petitioner/Respondents filed theirs dated 3/09/2024.

The Objectors'/Applicants' Submissions

20. In regard to whether or not the Objector was adopted by the deceased and therefore became part and parcel of the 2nd House, Learned Counsel for the Objectors submitted that the Objector testified that there is no formal ceremony in an adoption of a minor within the family set up in as far as the Nandi Custom is concerned. Counsel added that the Objector sought to rely on the evidence of Dr. Kebenei Kiprop an expert in Nandi, Culture and Tradition whom in his affidavit dated 7/07/2024 explains in paragraphs *7*, *8*, *9* that in a polygamous marriage, a wife without children can adopt from her husband's relatives of her own relatives and there is no ceremony conducting for handing over of the child and it the father and the mother of child who do the handing over.

21. Counsel submitted further that the witness Kebenei Kiprop has explained in his book Bororietab Nandi Kaburwo at page 211 that kerwach which the Respondents were referring to involved a foreigner

who was being adopted in to the Nandi family or tribe. Counsel urged that notwithstanding the witness Abraham Kibirech Chumba during cross-examination indicated that kerwach was a serious ceremony which could not be performed on a family member like Samuel Suerey of the Objector. Counsel therefore submitted that kerwach was not applicable in the setting of the Objector and none ought to have been performed . Counsel added that the other issues of relevance would be schooling and marriage of the Objector and there would be no documentary evidence necessary as this are events that took place more than 20 years ago, they were undocumented and the Court need to believe the Objector and rightly so for the sole reason that when the wife if the 2nd house passed away, the Respondents blocked him and the other adopted children of the 2nd House from attending her burial. Counsel argued that the hostility and exclusion was a well-choreographed narrative, pre-meditated and meant to remove them from any right as against the 2nd House and that this is the same scheme which is being perpetrated in this Honourable Court. Counsel added that, why would uncles and parents exclude a grandson from attending a burial of a step-grandmother, given that this is a grandson who was old enough and mature, married with children. Counsel urged the Court to find that the Objector is truthful and hold that he was adopted as a son in the 2nd House. In the alternative, Counsel submitted that the Applicant's evidence would establish a relationship of a dependant.

22. With regard to whether the Objector should inherit from the estate of the deceased, Counsel submitted that the Court having made an affirmative answer in the previous issue then it follows without doubt that the Objector is a beneficiary falling in the 2nd House and should benefit therefrom.

23. Regarding costs, Counsel submitted that costs according to the *Civil Procedure Act*, shall follow the event a successfully party is entitled therefrom, however this being a family matter, Counsel urged that the Court should allow each party to bear their own costs.

The Petitioners' Submissions

24. With regard to whether the Objectors/Applicants herein are children of the deceased. Counsel for the Petitioners submitted that from the 1st Objector's testimony, it is evident that he alleges to be a child of the deceased. Counsel maintained that it is however trite law that whoever alleges must prove. Counsel cited Section 109 of the *Evidence Act* and further submitted that the *Law of Succession Act* (Cap. 160) of the Laws of Kenya provides clear guidelines on who qualifies as a beneficiary or dependent of a deceased's estate and that according to Section 29 of the Act, a "dependent" includes the wife or wives, or former wife or wives, and the children of the deceased, whether or not maintained by the deceased prior to his death.

25. Counsel argued that despite the 1st Objector merely alleging that he is an adopted child of the deceased herein, he has failed to adduce evidence to that effect, he admitted in his testimony that there was no adoption ceremony done for him and further affirmed that he has not called any witness to corroborate his testimony that he is an adopted child of the deceased.

26. Counsel urged that PW1, Pw2 and PW3 (all who, as the court may have witnessed, are respectable senior members of the society) all testified and informed this court that child adoption in the Nandi community entails a ceremony known as kerwach which involved shaving of the child's head and those of his adoptive parents. However, that ceremony was never done for the Objector herein, as he himself confirmed on oath and that as this court was also informed by PW1, if a child is adopted as per the Nandi customs, his name is to be changed so that he acquires a name given by his adoptive parents and also acquires his adoptive parent's surname, however, that never happened to the 1st Objector, that the 1st objector as may be noted from his name has his father's name as the surname (the 1st Administrator's name "Ruto") thereby confirming that no change of name was ever done hence no adoption ever took

place. Counsel added that it was also testified that during the adoption ceremony, it is the biological parents of the child that give away the child to be adopted to his adoptive parents that PW2 who is the biological father to the 1st Objector, however, informed this court on oath that he has never given him out for adoption and no adoption ceremony was ever done for his son, the 1st Objector, PW3 confirmed this position by stating that to the best of his knowledge, the 1st Objector has never been adopted by the deceased herein and no adoption ceremony has ever been done.

27. Counsel further submitted that PW2 and PW3 testified on oath that the deceased had 22 children, both male and female, and the Objector is not amongst them, the Objector on cross examination alleged that the deceased had 27 children and he was amongst the children, the Objector however confirmed that he did not have any documentation/ evidence to confirm that position, not even a Chief's letter and that this Court will note and appreciate that on record is an unchallenged Chief's letter dated the 10/12/2014 and as per the Chief's letter dated 10/12/2014 addressed to the Registrar Eldoret High Court, the Chief has introduced the family of the late Kireger Kuto by listing all the wives and children and nowhere is the Objector's name listed, the Objector equally affirmed on cross examination that his name was not listed among the 22 children in the said Chief's letter and further testified by confirming that he has not availed any Chief's letter to the contrary. Counsel urged the Court to be guided by the holding in Re Estate of Kiptanui Simatwa (Deceased) (Succession Cause 28 of 2016)[2023] KEHC 22371 (KLR) (19 September 2023).

28. Counsel submitted that the Objector stated that he was adopted and raised in Christina Rebecca Chematia (Bot Kipteimet)'s house, however, no evidence was produced to corroborate the allegations, this he confirmed in cross examination that he had not produced any evidence, the objector stated that the said Christina died in the year 2017 and he confirmed that his name was not listed as a child of the said Christina in her eulogy/burial program which basically confirms that he was not her child and Will by the said Christina Rebecca Chematia equally does not list the Objector as a child. Counsel maintained that it is only evident that the Objector was never adopted nor raised by neither the said Christina nor the deceased herein and that the 2nd Objector, as already stated, called no witness in support of her claim. Counsel maintained that the 1st Objector, even though he claimed that he was adopted by the deceased, he failed to produce conclusive proof of this allegation. Counsel urged the Court in dismissing this claim to be guided by the case of In Re the Estate of Rumuri Kireri (Deceased) [2014]eKLR.

29. With regard to the Objectors expert witness Kebenei Kiprop the author of "The History and Culture of the Nandi Community (Bororietab Nandi Kaburwo", Counsel submitted that it should not be lost that the said expert witness never testified in court at all despite being given priority on several occasions to testify either physically or online and as such his purported expert witness statement or excerpt remains mere allegations which was never put to the test of the cross-examination and as such his evidence is inadmissible. Counsel submitted that be that as it may, looking keenly on the said excerpt on Kerwach - Citizenship Provision it talks about all the Nandi bororosiek being reluctant in settling any male immigrant except kapchepkendi chebolol with a big bag that enable them accept immigrant settlement within that bororiet. Counsel maintained that there is no link between the matter at hand and the said book or excerpt, the matter before this honourable court is on adoption and not immigrant whether wealthy or not. Counsel urged the court to disregard the said book and excerpt as the same is distinguishable from the current facts herein. Counsel further maintained that any book or article the purported expert book is not strange to literary criticism and the Respondents were denied that opportunity when the said purported expert witness failed to testify before this honourable court and as such we humbly urge this honourable court to disregard the same.

30. Counsel urged that there is no material evidence confirming that the objectors/applicants herein were ever adopted by the deceased herein, the objectors are therefore not children of the deceased, the 1st Objector remains to be the 1st Administrator's child as testified by PW1, PW2 and PW3 and thus a grandchild of the deceased whereas the 2nd Objector is a stranger to the estate, furthermore, no evidence has been brought forth by the 1st Objector herein, or any of them, that the Objectors were maintained and/or dependant to the deceased immediately prior to his death as envisaged under Section 29 of the *Law of Succession Act*, Cap. 160 as such it is in the best interest of justice to the estate herein and all the beneficiaries thereto that the said Objection be dismissed with costs to the Administrators and all Respondents herein as justice must not only be done, but must also be seen to be done.

31. Counsel added that based on the evidence and facts on the court record after a lengthy mediation session that culminated into a mediation settlement agreement that was adopted and confirmed as grant by your brother Hon. Justice Ogola, it is quite clear that the Objectors have no locus to object to the said grant and the same ought to be dismissed because the 1st Objector is only a son to the 1st Administrator herein and is not a son to the deceased and/or was he being maintained and/or dependent on the deceased immediately prior to his death (no iota of evidence has been tendered to that effect). With respect to the 2nd Objector, Counsel submitted that the same is a total stranger not only to the Administrators but all the Respondents herein and the estate at large and that the Application herein is therefore lacking in merit and should be dismissed in its entirety with costs.

32. Regarding whether the application dated 19/12/2023 is merited, Counsel submitted that from the face of the Objectors' application dated 19/12/2023, they were seeking for 4 prayers, however, prayer 1 was already dispensed with whereas prayer 2 has been overtaken by events as it was made in the interim pending the hearing and determination of the application therefore, the only prayers remining are prayer 3 and 4 which seek to apportion the deceased's estate to the objectors and costs of the application respectively.

33. Counsel reiterated that the Objector's herein are not children of the deceased as was alleged, the 1st Objector, as a matter of fact, is a grandson to the deceased and his parents are all alive and as to the 2nd Objector, she remains to be a stranger to this estate as she did not even appear in court or give her testimony. Counsel added that having stated and shown that the objectors/applicants are not children of the deceased herein, there also being no evidence that the deceased was maintaining any of them immediately prior to his death, it is thus our submission that the objectors are not beneficiaries of the estate herein, they can therefore not claim a share of the estate herein and thus prayer 3 of the instant application is unmerited and should not be allowed. Counsel cited, Justice W. M. Musyoka held in the Matter of the estate of Veronica Njoki Wakagoto (Deceased)[2013] eKLR in that regard.

34. Counsel urged that having established that the 1st Objector, Jonah Kibet Ruto, is a child to the 1st Administrator who is a biological child to and a beneficiary of the estate of the deceased herein, the 1st Objector being a grandchild of the deceased cannot inherit or get a share of his grandfather's estate when his father is already a beneficiary to the same estate. Counsel cited the case of re Estate of Imoli Luhatse Paul (Deceased)[2021]eKLR,

35. Counsel argued that the Objectors are not in any way entitled to any fraction of the estate herein. Counsel maintained that the instant application lacks merit and is an abuse of court process and should thus be dismissed and the Administrators be allowed to proceed with the distribution of the estate as per the Certificate of Confirmation of Grant confirmed on the 19/11/2021 and issued on the 10/6/2024 and which certificate has not been challenged.

36. Regarding who should bear the costs of this application, Counsel submitted that the law provides that costs do follow events and a successful party is usually awarded costs as compensation for trouble taken through in having to prosecute a case or defend themselves. Counsel urged that the Objectors/Applicants should be ordered to pay costs of this instant application.

37. In conclusion, Counsel submitted that it is quite baffling that the 1st Objector/Applicant, is trying to turn against his aged biological father and claiming that he is his brother. Counsel argued that the Objectors'/Applicants' allegations having not been substantiated that is there being no proof that the objectors were adopted by the deceased herein or were maintained by the deceased immediately prior to his death, the instant application should be found to be lacking in merit and be dismissed in its entirety. Counsel added that the 1st Objector being the biological son of the 1st Administrator, has no claim to the estate of the deceased as he was never adopted according to Nandi customary law as claimed by him neither is there proof of any maintenance. Counsel argued that the 2nd Objector has failed to establish any relationship with the deceased and thus has no legal standing to claim any part of the estate, that the application is without merit and should be dismissed in its entirety to allow the distribution and winding up of the estate as per the Certificate of Confirmation of Grants issued herein.

Analysis and determination

38. Having appreciated the parties' pleadings, the oral evidence and their respective submissions, I find that the only issue that arises for determination is whether the Objectors/Applicants are entitled to inherit from the estate of the deceased herein by virtue of being his adoptive children or otherwise.

39. The undisputed facts of the Cause herein is that the deceased, KIREGER KUTO was a polygamous man having married (4) wives with whom he had several children with.

40. The Objectors' case is that they are children of the deceased by virtue of being adopted by the deceased's 2nd wife one, Christina aka Rebecca Chematia Kuto (Deceased) and thus they are entitled to inherit from the estate herein. The Petitioners, on the other hand confirmed that the deceased herein was indeed a polygamous man having married (4) wives with whom he had (22) children. The Petitioners however maintained that the Objectors are not children of the deceased biological or otherwise. The 2nd Petitioner maintained that the 1st Objector is his biological son and at no point has he ever given him up for adoption and thus not a son to the deceased person whereas the 2nd Objector is a total stranger to the estate herein. The 2nd Petitioner confirmed that the said Christina Rebecca Chematia (Deceased) was his step-mother who only had one child namely, Sarah Chemeli and at no given point did he ever see her live with any adoptive child. The Petitioner's position is that the 1st Objector is a grandson of the deceased and thus cannot inherit from the estate herein by virtue of his father being alive.

41. The question that then this Court is called to answer at this point is whether indeed the Objectors are adoptive children of the deceased and therefore entitled to inherit a stake in his estate.

42. In the instant proceedings, the Objectors centred the question of adoption on Nandi customs. They in fact based their arguments on writing of one Dr. Kebenei Kiprop, whom they intended to call as an expert witness on the issue. However, during the hearing the said Dr. Kebenei Kiprop never appeared in Court to testify with regard to the issue and as such his evidence is of no probative value to this Court. The Court cannot thus, on its own motion examine the findings and the writings by the said Dr. Kebenei Kiprop without him availing himself before this Court. The Respondents equally were afforded an opportunity to cross-examine him on his writings and findings.

43. Be that as it may, the Objectors maintain that they are the children of the deceased having been adopted by one of the deceased's widows being Christina Rebecca Chematia (Deceased). From the pleadings on

record the Objectors however failed to supply the Court with any cogent proof that they were indeed adoptive children of the deceased. Surprisingly so, the 2nd Objector herein never appeared before this Court to defend her claim as being one of the children of the deceased.

44. From a cursory look at the pleadings before this Court, it is evident that the 1st Objector and the 1st Petitioner herein are related by virtue of being father and son. An even more intriguing aspect of this case is that the 1st Objector wishes to be regarded as the deceased's son instead of his real father's son. The 1st Petitioner has however denied all the allegations by the 1st Objector in view of him having been adopted by the deceased. The 1st Petitioner has in fact affirmed that the 1st Objector is his son and that no give point did he ever give him up for adoption as alleged.

45. Without a doubt the 1st Objector is a beneficiary in the estate herein by virtue of him being a grandson to the deceased. Section 26 of the *Law of Succession Act* is very clear in terms of who ranks in priority when it comes to succession matters. Over years, Courts have indeed developed profound jurisprudence with regard to the issue surrounding grandchild in intestate matters. Section 39 of the *Law of Succession Act* makes grandchildren heirs in intestacy, where their own parents, who are biological children of the deceased, are dead. Section 41 of the *Law of Succession Act* is the provision that enables grandchildren to step into the shoes, of their own parents, and to step into those shoes they need not take out letters of administration.

46. In re Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR (Musyoka J), that a grandchild of the deceased was not entitled directly to the estate of their late grandfather in intestacy, so long as their own parents, being children of the deceased, were alive and were taking their rightful share. The argument was that such a grandchild would take indirectly through her own parents. The Court went on to state that a grandchild would be entitled to inherit directly from the intestate of their grandparent where his or her own parent, the child of the deceased, was dead, and, therefore, not available to take their share directly. In such case, the grandchild would be entitled to take directly by virtue of section 41 of the *Law of Succession Act*, Cap 160, Laws of Kenya. In re Estate of Florence Mukami Kinyua (Deceased) [2018] eKLR (T. Matheka J), the court pronounced a grandchild to be a direct heir to the intestate estate of their grandparent, where his or her own parents have predeceased the grandparent, or, should I add, the parent dies before the estate is distributed. The court asserted that such a grandchild steps into the shoes of the deceased parent so as to take the share that such parent would have taken from the estate of the grandparent's estate. See also Cleopa Amutala Namayi vs. Judith Were [2015] eKLR (Mrima J).

47. In Re Estate of Wahome Njoki Wakagoto (2013) eKLR, the Court held that;

> " Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents."

48. From the foregoing, it is clear that grandchildren can only inherit directly from their grandparents where the grandchildren's own parents are dead. In this case the 1st Objector's father, Philip K. Rutto, the 1st Petitioner is alive and as such, the 1st Objector cannot purport to inherit directly from the

deceased whereas his father is still alive. The person who is entitled to inherit directly so from the deceased in this Cause is the 2nd Petitioner and not the 1st Objector.

49. It is elementary that the 1st and 2nd Objectors as applicants to this succession cause on inheritance lack capacity to directly seek and agitate for their rights to accrue from the estate of their grandfather. Capacity goes to the root of every cause of action and a person who has iron cast case will not be heard on the merits of his/her case where she is unable to satisfy the court that she has the capacity to maintain the claim on inheritance to secure judgement as expressly stated in Section 107(1), 108 and 109 of the *Evidence Act*. Kenyan culture and customs view children as members of either their fathers' or mothers' lineage and this is dependent upon whether the biological parent falls within the dimensional definition single fatherhood or motherhood. The idea of a family extends beyond its conjugal members. That is when a family is defined under the larger web of Relationships in which all members have a common ancestor either male or female. One's familial relationship with members one's extended family may be as important and in some cases more important that one's relationship with one's spouses and children. From ancestry, an African family prouds itself by identifying the consanguinity and affinity to various generations defines as the first, second and third degree etc. Traditionally and customarily, lineages in many multi-ethnic African societies, are bastions of emotional and financial support to the class of extended families who sometimes by definition of the socio-economic status they are not endowed with adequate resources to support the welfare and best interest of the child. It is in that fabric of extended family lineages can pay for education, maintenance, dowry for the male child eligible to marry and start a family, support on entrepreneurship of any of the members within that family cycle. This definition of extended family beyond the nucleus birthed children of one's biological parents provides a social safety net for the members of one's lineage.

50. This is the empirical question in which the objectors led by Jonah Rutto, to the effect that he was taken in at a very early age to the wife of the late kireger Kuto as her own, biological child notwithstanding the existence of his parents as reminisced of his father Philip Rutto. Having listened to the evidence of the objectors and the Petitioners on this issue of inheritance, it is conclusive that tribal customs of the late Kireger Kuto are Patrilineal analogously defining blood kinship as flowing through their paternal but not maternal bloodlines. In this generational customary framework of Patrilineal norms, the estate of Kireger Kuto devolves to his children who are considered his bloodline kinship.

51. The reading in and reading down of the *Law of Succession Act* on intestate succession giving it a purposeful interpretation was enacted to alter perceived adverse effects of this traditional norms especially on grandchildren claiming a share of the heritage from their Grandfather. The extent of support on dowry or education accorded the objector Jonah Rutto by his grandfather or his wife, are consistent with Patrilineal lineage social safety nets. Remarkably, it does not automatically accrue inheritance rights. The *Law of Succession Act* in the first instance roots its context and text of Intestate estate inheritance rights on rights of spouses and children dependent upon the form of their marriage and on their lineage traditions. The *marriage Act*, 2014 in its widest sense describes the marriage legal systems as monogamous or polygamous and can be legally varied under Civil, Christian, Hindu, Islamic and one based on customary traditions of the various ceremonies effected by our multifaceted cultural society. It is instructive to note that customary varies across ethnic groups, with each tribe having curated intricate body of rules, obligations and norms to govern inheritance rights and other related rituals. These family ties in which the objection proceedings are underpinned fails the threshold of the statute on distribution of the estate to the objectors.

52. The material facts of the case which are not in dispute are demonstrative of one analogous finding that the lead objector in his capacity as a grandchild to the deceased can only receive a share of the estate from his biological father Philip Rutto, a son to the Kireger Kuto.

53. The objector on the other hand contends in his witness statement and oral evidence on oath that he was adopted by the wife of the late Kireger Kuto and therefore entitled equitably of the intestate estate which is to be distributed among all the beneficiaries equitably. My answer to that assertions is that on grounds of capacity, the standard of proof required of him on a balance of probabilities has not been discharged and his claim remains in doubt and on an uncertainty frame with the choice of this court to exercise discretion to have it rejected in its entirety. The growing importance of the nuclear family brings with it, its own logic of justice that the surviving spouse and the children of the deceased be compensated under Section 38 and 40 of the Act before any likelihood or legitimate expectation of a benefit from the estate to be apportioned with or shared by any member of the extended family.

54. In my view, there must be compelling and substantial circumstances of such a nature to qualify as a condition precedent for the larger family cycle to be entitled to a share in the intestate estate. Thus to me it will be a travesty of justice to allow uncles, in-laws, grandchildren claiming lineage to the deceased to continue depriving the surviving spouse and children of what they are legally entitled to under *the Constitution* and the *Law of Succession Act*. In fact, my interpretation of the *Law of Succession Act* was enacted to deal with such situations where surviving spouse(s) and children are protected from being deprived of a share in the intestate estate. It is desirable when interpreting and construing Section 29(b) of the Act that customary law is given a purposive interpretation that the court does not countenance any attempt to deprive the nucleus family of what they are legally entitled to of their late husband properties which he diligently, carefully and anxiously worked for, having only his children as the first line of benefit. As illustrated in the book of Numbers 27:7-18, one gets a glimpse of the set of values and governance deployed when God commanded the children of Israel that if a man dies he shall pass the inheritance to the children may it be daughters or sons alike. However, if a man dies and has no son, then he causes his inheritance to pass to his daughter. If he has no daughter, then he shall give his inheritance to his brothers, if he has no brothers then he shall give his inheritance to his father's brothers and if his father has no brothers, then he shall give his inheritance to the relative closest to him to his family and he shall possess it. This typology of inheritance has similarities to the provisions of the *law of succession Act* and also customary law particularly on the question of consanguinity.

55. Without any tangible evidence of proof of dependency, this Court cannot make a finding that the 1st Objector was a dependant of the deceased. It is trite law that he who alleges must proof and this case, the 1st Objector notion that there would be no documentary evidence necessary as the events herein took place more than 20 years cannot hold water. During the hearing save for mentioning that the deceased took care of his welfare, paid his school fees and even paid his for his dowry, the 1st Objector was not able to table any material proof whatsoever to support these allegations.

56. Based on the facts, I have determined that the Objectors herein are not the deceased's biological or adoptive children, and as such, they are not entitled to any portion of his estate. The true and ascertained beneficiaries to the estate herein are known and they have been adequately provided for in accordance with the law.

57. In the premises, the Objectors'/Applicants', Application dated 19/12/2023 lacks merit and is hereby dismissed. This being a matter involving members of the same family there shall be no orders as to costs.

58. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF OCTOBER 2024

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R. NYAKUNDI

JUDGE