In re Estate of Kigen Cheboi Kipchorsoi (Deceased) (Succession Cause 141 of 1991) [2023] KEHC 3719 (KLR) (2 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3719 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 141 OF 1991

RN NYAKUNDI, J

MAY 2, 2023

IN THE MATTER OF

CHRISTOPHER KIPYEGO A. KIGEN ..... 1ST PETITIONER

ALFRED KIMUTAI LAGAT ALIAS MICHAEL KIGEN ..... 2ND PETITIONER

JUDGMENT

1. On 19th November, 2020, the Objector herein filed summons for revocation and or annulment of grant seeking orders that: -

    1) That the grant of letters of Probate of written Will to Christopher Kipyego A. Kigen and Alfred Kimutai Lagat alias Michael Kigen issued on 28th February, 1992 be revoked or annulled.

    2) That the costs of the application be cost in the cause.

2. The application is premised on the grounds therein and it is further supported by the affidavit sworn by Sanieko Kigen on 18th November, 2020.

The Objector's /Applicant's Case

3. The star witness in central to this proceedings is PW1 RTD justice of the Supreme Court as he then was who testified that the testator Kigen Cheboi approached him on 7th August 1990 to revoke all former Wills and testamentary dispositions of his estate to the heirs. He further acknowledged that the testator was his long term friend whom they shared a common heritage in culture, language, or other applicable customs. He therefore found it fit to be part of the making of his Will even though at the time he was no longer in private legal practice but worked as a Judge of the High Court in Nyeri. He testified further that though the Will is substantially authored in English, without any certificate of translation it was due to the advantage that they both spoke Keiyo dialect. He stated that the text and the content of the testamentary is as thump printed by the testator co-signed by self and witnessed by one George Kibor Katui. He tendered in evidence the impugned Will as captured on the 7th of August 1990.

4. The objector Sanienko Kigen (PW1) gave evidence as the 3rd wife of the deceased Kigen Cheboi. She reckoned that the deceased in his lifetime was polygamous and happened to be the occupier of the 3rd house. It was her evidence that the deceased was a registered owner of various parcels of land to state but a few namely: Irong/Kitany/173 & Irong/Kitany/175 And Tembeleo/ Elgeyo Border Block 13(Kaplogoi)/31, Tembeleo/Elgeyo Border Block 13(Kaplogoi)/31, IRong/ Kitany/721.722,723,724,725 and 726. In addition, she stated before court that the deceased left behind 14 dependants who are entitled to inherit the estate in equal shares. She further went ahead to allege that the Respondents have been perpetuating fraud and intermeddling of the estate to the disadvantage of other beneficiaries. She further told the court that the deceased never left any valid Will on disposition of his estate as claimed by the Respondent.

5. Next witness to the objection proceedings was Gladys Jepchirchir Cheruiyot. In a sworn evidence she identifies herself as the daughter to the deceased and a dependant with right of inheritance. In line with PW1 she told this court that the deceased having passed away on 28th day of July 1991 was survived by four (4) wives and an estate of many assets. According to the testimony of Gladys Jepchirchir at the time of the deceased's death he was advanced in age on how about 87 years. She further testified that not only was the deceased of advanced age, but he was also ailing, frail and with symptoms of mental infirmity. Similarly she also told the court that the deceased was illiterate and could neither write or communicate in English or Swahili language. On that ground alone, she stated that the purported Will being touted as last testamentary is a forgery and may have been written through coercion and duress from the Respondents petitioners. It was her prayer that the Will be declared Null and Void.

6. The objectors further deposed that this instant cause was premised on a Will allegedly signed by her late husband. That the grant herein was issued pursuant to an undated petition. The Applicant contends that the Petitioners herein did not comply with all statutory and procedural requirements provided for under law in the Succession Act before obtaining the grant of probate.

7. The Objectors further contends that the Petitioners herein failed to disclose the following facts which are material to this cause;

    1) That the deceased herein left other dependants who were not listed in the affidavit in support of the petition.

    2) That the estate of the deceased was comprised of four households being; -

        a) 1st House

            i. Terik Kigen

            ii. Toyoi Kimondi

            iii. Tuitoek Lucas Kigen

            iv. Alfred Lagat Kigen

        b) 2nd House

            i. Soti Kigen

            ii. Toyoi KipKurgat

            iii. Christopher Kigen

            iv. Petroline Kotut

            v. Josephat Kigen

vi. David kigen

c) 3rd House

i. Sanieko Kigen

ii. Mary Kigen

iii. Joseph Kigen

iv. William Kigen

v. Salina Kigen

vi. Grace Kigen

d) 4th House

i. Jane Kigen

8. The Objectors further deposed that at the time of his death, the deceased had several parcels of land in Uasin Gishu and Elgeyo Marakwet which the Petitioners herein have secretly begun transferring to themselves without a proper certificate of confirmation of grant. The Objectors maintains that at time when the alleged Will was made, the deceased herein was over 87 years old, was visually challenged and ailing and could not move alone without assistance. According to the Objectors, the deceased could not have signed the Will or even comprehend what a Will was nor figure out what was written in English language. Finally, the Objector deposed that there is no certificate of translation to show that the deceased understood the contents of the Will.

The Petitioners'/Respondents' Case

9. In response to the Objector's case, the Petitioners herein Christopher Kigen, and Micheal Kigen filed two Replying Affidavits both dated 27th January, 2021 which formed the substratum of the rejoinder to the contestation on the grant of the probate dated the 28th February, 1992 and later confirmed on 27th August 1998. In a nutshell there twin evidence can be summarised as follows:

10. DW1 Christopher Kigen vehemently opposed the narrative being created by Sanienko and Gladys objectors to the making of the Will by the deceased. It his testimony that the deceased before his demise disposed all his estate by way of a testamentary prepared voluntarily before retired Justice Tunoi. That as executors of the Will with his brother Micheal Kigen on 6th November 1991 the petitioned for grant of probate in the High Court of Kenya at Eldoret vide Gazette Notice 5728 dated 29th November 1991. In adherence to the petition both sought leave of the court to be issued with the grant of probate dated 28th February 1992 with a certificate of confirmation of grant dated on 7th August 1998. In Christopher's testimony the objection filed by Sanieko and Gladys under Section 76 of the *Law of Succession Act*, is vexatious, frivolous and an abuse of the court process that it was good for dismissal. Apparently, from the sworn evidence of Alfred Kimuta Lagat alias Micheal Kigen the answer to the objection is in tandem with the testimony of the co-executor Christopher Kipyego Kigen. That is what the law calls Mutatis Mutandis. In summary the characteristic features of their case against the objectors can be summarised by the following statements:

11. That the deceased herein was their father and that before his death he left behind a Will dated 7th August, 1990. That the deceased herein provided for all beneficiaries in his Will and that most of the properties were bequeathed to the grandchildren of the deceased. That the Certificate of Confirmation of Grant was issued on 27th August, 1998 and that no objection was raised until this instant summons were filed. That the estate of the deceased herein was distributed as per the Will based on the confirmed

grant. That before the grant of letters of administration was issued, the same was duly published in the Kenya gazette of 6th November, 1991 and thus any objection was to be brought within (30) days of publication. That after the demise of the deceased, his Will was read in the presence of all the family members, including the Objector herein. That the whole family has always recognised and respected the wishes of the deceased as expressed in the written Will including the sons and the grandchildren of the Objector. Further that the children and grandchildren of the Objector were provided for and everybody was satisfied by the way distribution was done which was in accordance with the written Will. That they petitioned for the letters of administration herein in accordance with the deceased's Will and followed the law and due process. That the Objector herein is dishonest, untruthful and biased whose ulterior motives is to create disharmony in the family as distribution was done and the beneficiaries have transferred what was bestowed unto them by the deceased's written Will.

12. At the close of both the objectors and petitioners case, legal counsels took the liberty to file their brief submissions on appreciation of the law as applied to the facts of the claim.

13. Learned Counsel Mr. Kibii for the Objectors, filed his submissions revolving around the questionable probate certificate of confirmation of grant, the distribution of the estate and the discrimination of some of the beneficiaries of the estate. Learned counsel contended that various aspects of the alleged Will cannot stand the test of the Law as prescribed by the Succession Act. In buttressing the submissions in support of the objection to the making of the Will learned counsel cited and laid upon the following legal provisions and principles thus: Rule 54(3) of the Probate Administration Rules, Meru Succession Cause No 462 of 2007 in re-Estate of Arthur Kibera M,baichu (Deceased) [2019] eKLR, In Nairobi Succession Cause 26 of 2012 Re – Estate of Solome Wangari Ngungi (Deceased) [2017] eKLR, In Eldoret succession Cause 200 OF 2012 Chepkerich v Murei &Another (Succession Cause 200 of 2012) [2022]KEHC 3115 (KLR) (27 June 2022) , Meru Succession Cause No 474 OF 2011 in re Estate of M, Muremera Iris Muguna (Deceased) [2018] eKLR, Meru Succession Cause No 462 of 2007, In RE Estate of Arthur Kibera M'maichu (Deceased) [2019] eKLR

14. Learned counsel emphasised that the testate succession on inheritance looked at from the general principles on construction of a Will strongly fails on the threshold of the law as prescribed in the Succession Act. It follows therefore from the foregoing principles and the circumstances of evidence that the deceased died intestate so submitted learned counsel.

15. Whereas On the part of the Petitioners leaned counsel Mr.Tunoi's submissions he contended that there is no evidence of fraud in the making of the Will and the onus of proof vested with the objectors has not been discharged for the court to grant the reliefs stipulated under Section 76 of the Act. Learned counsel primarily among others relied on the following authorities: R.G Patel v Lalji Makani [1957] EA 314, Vijay Marjaria v Nasingh Madhusingh Darba & Another [2000] eKLR, Ndolo v Ndolo[2008] eKLR (G&F) 742 and Christopher Ndaru Kagina –vs- Esther Mbundi Kagina &Another [2016] eKLR

16. This was to contradistinguish learned counsels for the Objector principles discussed in the following cases: In re Estate of Arthur Kibera M'baichu (Deceased) [2019] eKLR, In re Estate of Salome Wangari Ngungi (Deceased) [Supra] , In re Estate of M'Muremera Iria Muguna (Deceased) [Supra] eKLR, In re Estate Kipkosgei Arap Moita (Deceased) [2020] eKLR, Re Estate of GKK (Deceased) (Supra) and finally in the case of Rahab Nyakangu Waithanji v Fredrick Thuku Waithanje (Supra) eKLR to anchor their arguments on the testamentary capacity and validity of the Will made by the deceased on 7th August, 1990.

Determination

17. I have carefully considered the summons before me, the response thereto, the oral evidence of the witnesses tendered and the submission filed by the respective counsels. The only issue for determination is: -

a) Whether the critical threshold of the making a Will was met in this instant Cause?

18. A Will is the means by which a person exercises his or her testamentary freedom to bequeath his or her estate without relying on intestacy rules of probate. The validity of a will is dependent on, the capacity of the testator to make a will at the material time and compliance with the formal requirements for the making of a will.

19. The threshold of the essentials of testamentary capacity were laid out in the case of Banks v Goodfellow [1870] LR 5 QB 549 as cited with approval in the case of Vaghella v Vaghella:

> " a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made."

Section 5 of the *Law of Succession Act*, deals with capacity to make a will of testation. The relevant provisions state as follows -

5(1) . ... any person who is sound of mind and not a minor may dispose of his free property by will ...

(2) ...

(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

(4). The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.

20. It's a lifetime expectation to the beneficiaries that with any of the beneficiaries that with any of the parents time on earth comes to an end, his or her property would pass to then intestate or testate. In Kenya the *law of Succession Act* specifies the guidelines on the making of an oral or written WILL. The law comes into effect in 1981 and may be its time the provisions on WILLS is modernized to take into account of the charges in society, technology and medical understanding that have taken place since the era of its enactment.

21. As seen in Section 5 of the Act at the heart of the making of the WILL its capacity of the testator. Thus the ability one must demonstrate to make a WILL to dispose his or her estate passing it over to the heirs or succeeding generation of dependants. From the legal framework the maker of the WILL must be above 18 (Eighteen years) and of sound mind commonly known as mental capacity. There is an irrebuttable presumption that the cognitive ability for an aged testator with literacy on making of the WILL may be incapable to perform the act, or make a decision as to the survivorship of the estate in his or her sunset years. Notwithstanding anything contained in the Succession Act as to the conditions

precedents in the making of the WILL the I am minded to state that competence and or capacity of a testator to dispose of his or her estate ought to be satisfied and provided for as a preamble to the instrument. It is also not prejudicial for the author of the WILL to personally inform the testator the legal requirements stipulated in the law before commencement of putting the intention in black and white as a last testamentary.

22. The principle on interpretation of a WILL is depended upon compliance with the law. The persuasive case law in Trump International Golf Club Scotland Ltd v Scottish Ministers [2015]UKSC 74.[2017] ALL ER 307. [2016] 1 WLR (AT 33) it states that: "there is a modern tendency in the law to break down divisions in the rules on the interpretation of different kinds of documents, both private and public, and to look for more general rules on how to ascertain the meaning of words. I particular, there has been a harmonization of the interpretation of contracts, unilateral notices, patents and also testamentary documents. A person piercing any testamentary document has to bring himself within the characterized elements in the case of Marley v Rawlings [2014] UKSC 2. [2014] ALL ER 807 [2015] AC 129. Lord Neubeger said "When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words. (a) in the light of (i)the natural and ordinary meaning of those words (ii) the overall purpose of the documents, (iii) any other provisions of the documents (iv) the fact known or assumed by the parties at the time that the documents was executed and (v) common sense, but (b) ignoring subjective evidence of any party's intention. When it come to interpreting WILLS it seems to me that the approach should be the same. Whether the documents in question is a commercial contract or a WILL, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context"

23. Its therefore incumbent of counsel or solicitor or any such person recognized in law to aid the testator in making the last testamentary to require as to the soundness of the mind before accepting instructions to draw the test of the proposed WILL. The law requires that there should be sound disposing mind both at the time when the instructions for the WILL are given and when the WILL is executed. However, if it appears that the making of the WILL the testator was of sound mind at the time of drawing the WILL that is a sufficient not invalidate it on grounds of capacity.

24. In the instant objection, the question of sanity of the testator is being contested as illustrated by the evidence of Sanienko and Gladys. The two objectors known as 1st degree dependents in their sworn affidavits tested in court under cross –examination stood their ground on the testators lack of testamentary capacity. That therefore called upon executor Christopher & Micheal propounding the WILL to prove that the testator was of sound disposing mind at the time when he made his WILL. In this respect the test in the Banks v Good fellow Is still good law as captured in the following extract.

> " Here then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense become perverted by mental disease, if in same suspicion or a version take the place of natural affection, if the reasons and judgement are losts and the mind becomes a prey to insane delusions calculated to interfere with and disturbs its function, and to lead to a testamentary disposition, due only to their baneful influence. In such a case it is obvious tht the condition of the testamentary power fails, and that a WILL made under such circumstances ought not to stand"

25. A general power of capacity challenge here refers to the test as to whether the testator understood the solemn duty of making voluntary testamentary conceive and understand the information relevant to the decision making process. Further the capacity to use the information or weigh it in the process of making of the decision to dispose off the estate by way of a WILL. Regarding the allegations of

capacity, it's on record that the objectors invited the court to take judicial notice of the age of the testator alleged to be on or about 90 years. This brings into perspective the Kenyan male life expectantly as at 2020 was held to be 67 years. Whereas in the 1990s male life expectantly was pegged at 57 -42 years. The poetic estimate of a lifespan of a mankind in the Book of Deuteronomy 31:2 34:7 and Psalms 90:12 is to number your days are a right at 70 years. The effect of incapacity in the making of the WILL is therefore significant and necessary given the above scenarios in the event a beneficiary raises the question of capacity as it is the case now. A careful inquiry ought to be undertaken by the court to strike a balance to safeguard testamentary freedom against abuse of the process by self-interest dependants.

26. From the affidavit evidence and testimony in court by the objectors which was also subjected to cross examination, the testator as reflected in the WILL did not appreciate the extent of the estate both movables, immovable and cash receivables. This averments is clearly consonant with the affidavit of one Christopher Kigen dated 1/10/1991 and filed in court on 24/10/1991. In paragraph 6 of the aforesaid affidavit the petitioner as executer deposed of the Estate comprising of the immovable property particularized as Land, movables, in the form of machineries (tractors) motor vehicle and cash at various specific Banks within Kenya.

27. There are two observations to make in respect of this piece of evidence. The first is tht the impugned WILL never adequately, captured proper particulars of the set properties survived of the deceased. The sole and decisive test expressed in Banks (Supra)and in Re estate of Arthur Kibera M'baichu(Supra)in the later case the court held: "The estate of the deceased is also well defined and he administers the same to persons known to him and who for all intent and purpose are the rightful beneficiaries. I however find that the deceased mentioned plot No. mentioned plot No Nturukuma/221 which belongs to M' Ikiugu Mtuaruchiu in his WILL as opposed to Nturukama 231 which the petitioner avers was the property bequeathed to the 2nd objector. This is not mere defect" (See also Re- Estate of GKK [2013] EKLR).

28. The court of Appeal in Re-Estate of Gatuthu Njuguna (DCD) [1998] eKLR in construing the issue of capacity stated: "As regards the testator's mental and physical capacity to make the will, the law presumes that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind, in this case the applicant .... However, paras 903 and 904 of Volume 17 of Halsbury's Laws of England show that, where any dispute or doubt of sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity, and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of testator's capacity is one of fact which can be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that, if the objector produces evidence which raises suspicion of the testator's capacity at the time of execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof and the burden then shifts to the person settling up the will to satisfy the court that the testator had the necessary capacity."

29. I noted the view that the spirit of the law commands the testator to possess the capacity to be able to understand the extent of his or her estate. That is being capable of recalling the extent of one's estate does not mean having to be able to give a precise valuation. In constraining the purported WILL both the text and the context deals with generalities as to the existence of free property to bequeathed to the heirs upon his demise as envisaged under Section 3 of the *law of Succession Act*.

There are substantial differences in this objection proceedings as pleaded by the executors in there affidavit and the textual description by the testator in the impugned WILL. One cannot be said to have had an overreach proposition in line with the observations made in the case of Wood v Smith [1993] CL 90 at 106 where the court held as follows in a case where the testator did not understand the extent of his estate " That the testator really was confused and did not have sufficient capacity properly to comprehend the real extent of his estate" A further inference to be drawn from the contents of the impugned WILL is on the general power of dispositions. The power of disposition by WILL is provided for under the law of Succession. The testator in the making of the WILL cannot do so whimsically capriciously or in total disregard of the law under the ambit of testamentary freedom. The interests in the making of the WILL are those only crated and recognized by law and is therefore limited by the extent of the testators interest's in the property the subject matter of disposition. The questionable WILL denotes that the specified immovable of estate of the testator had no titles he purported to dispose of. If then he knew he had no titles and what exactly belongs to him, how on earth could he dispose of unsurveid land to the named beneficiaries. The question is whether the testator did possess good titles for life on those properties to exercise testamentary disposition. in my view the errors or mistakes or omission on the face of the records of the purported WILL bring to the fore cognition and mental state of the testator at the time of issuing instructions to RTD Justice of the Supreme court (Philip Tunoi). The overwhelming gleaned from the evidence presented before court is of a tortuously case of a testator who acted more capriciously under the guise of testamentary freedom to take a harsh view of his birthed dependents to deprive of their rightful share of the estate. What must have happened to the usual bond of natural love and affection towards his family on 7/9/1990 as he thumb printed on the last testamentary instruments before the drafter of the WILL. It's not in dispute that the testator cohabitated and held himself to the public as a head of polygamous family of four wives, sons and daughters. How did fall prey to these inclinations of only recognizing disposal of the estate to Josephat, Christopher, Tuktok, David, Micheal, Williams and wife Jane in exclusion of the rest of his survivorship. In that case, the exclusion of the rest of his family is sufficient ground for this court to rule he lacked capacity. In the case of the estate Kipkosgei Rap Moita [2020] EKLR it was held In the Re- Estate of GKK (Deceased) 2013) eKLR it was stated: " In addition to having testamentary capacity, a testator must know and approve the contents of his WILL. A testator will be deemed to have known the contents of his WILL if he is aware of its contents and understands the terms. Approvalis seen form the execution of the WILL and in John Kinuthia Githinji vs Githua Kiarie Camp: Others, Civil Appeal No 99 of 1988. It was held that it is essential to the validity of the WILL tht the at the time of its execution, the testator should have known and approved its contents...section 5(1) of the Law of Succession Ct embodies the principle of testamentary freedom by providing that any person is capable of disposing of his property by WILL so long as he is of sound mind. Testamentary capacity has been described as the testator's ability to understand the nature of WILL making. This test was set by Cockburn CJ IN Banks vs Good fellow where he stated as follows: " He must have a sound and disposing mind and memory. In other words, he ought to be capable of making his WILL with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the objects of his bounty and the manner it is to be distributed between them." The question I pose to ask is whether the deceased a sound and disposing mind and memory? Was he capable of understanding of the nature of the process in which he was engaged in? Did he have a good recollection of the property he intended to dispose of, and of the persons who are the objects of his bounty? If that was the case, then why is it that he left out some of the properties including shares at Kibwari Tea Estate and houses in Eldoret without an indication as to what he wished to be done to them? This position was confirmed by the petitioner See also in the case of the Tanzanian Court of Appeal in Vaghella v Vaghella [1999] 2 EA 351) where it was stated that the validity of a WILL derives form testamentary capacity of the testator and from the circumstances

attending to its making. The circumstances attendant to the making of the WILL in this instance suggests that the deceased's mental capacity was not 100%. From the evidence on record the deceased purportedly singled out two beneficiaries who were not provided for and did not give any reason. From the evidence ofPW1 the claims that Kibor Bungei was left out because he had been given property inter vivos but he squandered it all. As for Cornelius, the only rational inference to draw is that the petitioner feels he benefitted from education abroad, which ought to more than compensate his quest for earthly possession: that is why he keeps harping about the objector being the scholar in the family. The claims that their better economically endowed brother Henry, purchased land for the objector is not supported by any evidence, but even if that was true, it would not disqualify the objector form inheriting a share in his father's estate...There is also the issue as to whether the deceased appended his thumbprint on the documents, and did he understand the contents since the same was written in English, and it is admitted he was illiterate"

30. Testator is envisaged by the law to have a memory to recall the several properties acquired and beneficiaries who may be fitting objects of his or her bounty and also an understanding to comprehend their relationship to self and their legitimate claims upon him or her (See Banks case supra).

31. The difficulties in this area of the law revolve around: first whether the testator's intention realized in the WILL can be held to be validated in circumstances which he deprives the entire estate or substantial part of it to the known beneficiaries and bequeaths it to total strangers or discriminates some of his or her dependents. Is it the letter and spirit of the law that the testator is at liberty to invoke the power of testamentary freedom to disinherit his or her children/spouses as the case may be to gratify his spite or charities. The material facts of this case cannot escape the guidelines in in comparative jurisprudence in Perrin v Morgan 1943 A.C 399. Where Lord Romer stated " In many of the cases to be found in the books the court is reported to have said that the construction it has put on a WILL has probably defeated the testator's intention. If this means, as it ought to mean, that the court entertains the strong suspicion to which I have just referred, I i.e. that the testator did not mean what he has plainly said) no sort of objection can be taken to it, but if it means that the court has felt itself prevented by some rule of construction from giving effect to what the language of the will, read in the light of the circumstances in which it was made, convinces it was the real intention of the testator, it has misconstrued the WILL. My Lords, I do not of course, intend to suggest that well settled rules of construction are to be disregarded. On the contrary, I think that they should be strictly observed, but they ought to be applied in a reasonable way. It is, no doubt of great importance to lawyers and others engaged in the preparation of WILLS tht they should have the certainty of knowing that certain well-known words and phrases will receive from the court the meaning that the court has to generations past attributed to them. Much confusion and uncertainty would be caused if this were not were not so. The rules of construction, in other words, should be regarded as a dictionary by which all parties, including the courts, are bound, but the court should not have recourse to this dictionary to construe a word or a phrase until it has ascertained from an examination of the language of the whole WILL when read in light of the circumstances, whether or not the testator has indicated his intention of using the word or the phrase in other than its dictionary meaning-whether or not, in other words to use another familiar expression. The testator has been his own dictionary. I have thought it desirable to make these remarks, however elementary and obvious they may seem to be as I have noticed in some of the reported cases on WILLs A tendency on the part of the court to pay more attention to the rules of construction than to the language of the testator"

32. This text in Perrin case (supra) invites the courts to a pragmatic approach in eschewing the testamentary instrument which does not reflect the testators intention without taking the interpretation to unchartered waters.

33. In the language of the law as it stands at the moment I do not think so. In my considered the provisions of Article 27 & 45 of *the constitution* as read holistically with Section 38 & 40 of the *law of Succession Act* its crystal on the critical issues raised by the objectors. Unfair discrimination under the law of succession comes with it an unfair impact on its victims. The case in point will be widows rights to inheritance and daughters within the scheme of consanguinity and affinity. It is sufficient for the purpose of this judgement to say that a testator who hides himself or herself within the canons of testamentary freedom to deprive the heirs their inheritance can easily be held to be in breach of Article 27 of *the Constitution*. We have now come of age to particularly call for a paradigm cultural shift for the promoters of African Customary Law to impress the principles of equality and prevention of unfair discrimination against women and girls on inheritance rights. The right modeled along the formulation that married daughters have no stake to any shares to the testators or intestate estate will easily be assessed as repugnant to justice and morality. *The constitution* of Kenya articulates the nature and meaning of sex based discrimination and it lays out the government obligations to eliminate discrimination and achieve substantive equality. Such discrimination cannot therefore be allowed to be promoted by the various ethnic culture and customs. At what point is the testator permitted to dispose of the estate vide the making of a WILL and in giving effect to his or her intention leaves the beneficiaries in despair against arrays of hope. The enjoyment of the rights on inheritance set forth in the succession Act as secured are intended to be transmitted to the beneficiaries without discrimination. So does the spirit of the law in the making of the WILL advocate for differential treatment between two class of dependents who are in analogous situation or birthright. Will there be an objective justification for that differential treatment? Obviously going by *the constitution* imperative the answer is in the negative, in relation to the denial of widows and daughter's inheritance because the testator was exercising his or her testamentary right to bequeath his or her estate to whoever he/she wishes to grant the benefit. It is always necessary for the court to look at the question of comparability in the context of the measure taken by the testator in his or her lifetime and the commitment to make provision for the survival rights of the heirs and the comparable situation when he or she takes the liberty to make the WILL and end up to deprive them of any rights to livelihood to the estate. I ask any sensible man gifted with a family in his lifetime whether it is an Act of divinity to pierce his estate whenever he speaks in the form of a final testamentary to leave the residual net estate to some other persons and the rest of his bloodline are left destitute.

34. The point is brought up more clearly by Section 3(2) of the *judicature Act* which renders customary law which is repugnant to justice and morality or inconsistent with *the constitution* or any written law not applicable. My understanding of section 5 of the *law of Succession Act* was to give an opportunity to the testator to distribute his or her estate by applying the model of a last testamentary. On the other hand since the WILL is a product of the law it cannot be seen to transgress the provisions on inheritance in the same statute. From this observation, Section 40 of the Act is very clear on the guidelines where an estate is that of a polygamous family. The position therefore immediately prior to the making of the WILL or coming into operation, the shares or interest accrued by the beneficiaries shall not be defeated absolutely by a testamentary drafted by the testator which in all purposes and intents is unconscionable.

35. I am afraid from the facts of this case there are various fundamental omissions in the purported WILL which renders it prima facie questionable. Firs, from the four corners of the instrument the testator did state with a degree of certainty on the nature and specifics of the estate capable of being disposed of to the beneficiaries. Secondly, the form of construction deducible in the various clauses paints a picture of some kind of ambiguity as to form and text on disposition of the estate. Thirdly, the description of the estate on both movable and immovable, seems to be classified by generalities. Fourth, without imputing that this court is capable of being a mind reader, the textual aspects of the WILL shows that

the testators intention lacked clarity to bring the instrument within the scope of Section 5 of the *Law of Succession Act*. It is also noteworthy to mention that despite the WILL making provision for the testator to be interred at Cbebior when his time on earth comes to an end that apparently was never the case. Do we then say that the executors of the WILL had a choice to administer the probate estate capriciously or at whim in contravention of the intention of the testator. In considering this testamentary and taking the armchair of the testator the circumstances demonstrate that the claim by the objector on delusions or disorder associated with age, or ailments impacted negatively on his capacity to execute the eagerness he had in making the WILL.

36. The Objector herein is challenging the testamentary capacity of the deceased herein at the time of making the Will. The Will's validity is questionable as when it was purportedly made the deceased was aged (87) years. The Objector argues that the deceased did not possess the requisite soundness of mind for purposes of making the impugned Will as he was also in poor health and visually challenged. The burden of proof in the first instance lies upon the person alleging lack of capacity. Once it is established to the satisfaction of the court that in fact the testator was not of sound mind then the onus is shifted to the person propounding the Will to prove the existence of mental capacity. In the instant cause however, the Objector did not produce any medical report or call any professional witness to prove that at the time when the deceased herein was making the impugned Will, he was too ill to understand what he was doing and thus his testamentary capacity at the time was impaired. Having found so, I cannot therefore hold that the deceased lacked the requisite testamentary capacity on 7th August, 1990.

37. The Objector has also called into question the circumstances under which the Will was made which she says ought to raise suspicion that the Will was not the product of the deceased's intentions or wishes as he could not remember all his assets and even though he was a polygamous man, he only made provision a few beneficiaries.

38. In addition to having testamentary capacity, a testator must know and approve the contents of this Will. A testator will be deemed to have known the contents of his Will if he is aware of its contents and understands the terms. Approval is seen from the execution of the Will and in John Kinuthia Githinji v Githua Kiarie & Others, Civil Appeal No. 99 of 1988, it was held that it is essential to the validity of the Will that at the time of its execution, the testator should have known and approved its contents.

39. The law on knowledge and approval of a Will is found in Section 7 of the *Law of Succession Act* which provides that;

> " A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been adduced by mistake is void."

40. Where a person who plays the central role in the making of the will, that is other than the testator himself/herself, takes a substantial benefit under the will; the role of the Court is to scrutinize the evidence carefully so as to be satisfied that the maker of the Will did indeed know and approve the contents of the document before he/she signed it.

41. Suspicion would arise for instance in cases where the principal beneficiary under the will is the person who suggested the terms of the will to the maker, or wrote the document himself, or took the testator to an advocate of his own choice, among others.

42. From the evidence adduced before Court it clear that the deceased did not speak English or Kiswahili but Keiyo language. Further it is also not in dispute that the deceased could not read or direct. A cursory perusal of the Will as evidence on record reveals that the impugned Will herein was drawn in English.

43. During the hearing PW1 Hon. Rtd. Justice Tunoi, conceded that he did not have a Certificate of translation to show that at the time of making the Will the contents of the Will had been explained to the deceased. Rule 54(3) of the Probate and Administration Rules provides that where the testator is blind or illiterate or will is signed by another person by the direction of the testator or where it appears to be written in a language in which the testator is not familiar evidence is required before the will is admitted to probate. Rule 54 makes it mandatory for the Court to satisfy itself that the testator had knowledge, by requiring an affidavit showing that the contents of the will had been read over and explained to appear to be understood by the testator immediately before the execution of the Will.

44. From the evidence tendered by all parties it is clear that the deceased was illiterate, he did not how to read and write however, the Will in testament was drawn in English. An issue arising is that the deceased could not have attested the said will as she could not understand the contents therein. I find it would have been diligent on the part of PW1 Hon. Rtd. Justice Tunoi, who drew the said will to also draw up a Certificate of translation to indicate that the contents of the said will had been read out to the deceased in a language he understands and he had attested to the same. This was not done.

45. At this juncture I must point out that a Will is a legal instrument and thus it ought not be in contravention with the provisions of the law. It must in fact be drawn within the parameters of the law. With the that in mind, it is my view that all legal practitioners should be a position explain to a testator in detail the pre-requisites of writing a Will.

46. The Objector main contention is drawn from the fact that the deceased herein was a polygamous man having married (4) wives and had children from the respective houses save for the 4th house but only made provisions for the 4 wife and a few of his beneficiaries leaving out the rest during the making of the impugned Will.

47. In James Maina Anyanga v Lorna Yimbiha Ottaro & 4 others [2014] eKLR where court held that

> " Failure to make provision for a dependant by a deceased person in his will does not invalidate the will as the court is empowered under Section 26 of the *Law of Succession Act* to make reasonable provision for the dependant."

48. It is true that the deceased had a freedom to dispose of his estate in a manner that was suitable to him. The freedom is the essence of testate succession, and the fact that the will did not provide for some beneficiaries does not, and cannot, invalidate the Will.

49. However, my reading of the will dated 7th August, 1990 indicates that the deceased herein indeed only made a provision for some of his beneficiaries but excluded others. It is not disputed that the deceased was a polygamous man having married five (5) wives. Further, it is not in contention that the Objector is not only a beneficiary of the deceased but one of the deceased's wives and equally ought to have benefited from the estate of the deceased. It is very suspicious that the deceased outrightly having lived as a polygamous man at the age of 87 suddenly decides to draw a Will that left out some of his beneficiaries more so one his widows with ultimate fate of his actions amounting to her being evicted from her matrimonial home a dwelling place, she occupied during the lifetime of the deceased.

50. What is even more suspicious in this matter is that at the time when the Petitioner was petitioning for the grant of Probate with Will annexed in this matter. The following parcels of land were listed as the deceased's assets:

    a. Title No. Elgeyo/Marakwet/Irong/Kitany/175

    b. Title No. Irong/Kitany/173

c. 20 acres on LR No. 1561/1

d. 30 acres on LR No. 4490

e. 20 acres on LR No. 9272

f. 10 acres on LR No. 8489/1

g. Share in motor vehicle registration KLS 837

h. Share in a television set- make Philips

i. Share in a Tractor Plough

j. Share in Tractor Tiller

k. Share in Trailer

l. Share in water tank – capacity 2400 litres

m. Share in Harrow

n. Share in a Wheat Planter

o. Share in a Maize Planter

p. Share in Tractor Registration No. KUM 340

q. 40 head of cattle

r. Savings in Standard Bank Ltd Eldoret A/C No. 01/2/01/52949/100/4

s. Savings in Kenya Commercial Bank Ltd Eldoret A/C No. 170-005-795

t. Savings in National Bank of Kenya A/C No. 404-037-321

u. Savings in Trans National Bank Ltd Eldoret A/C No. 003-0100429-001

v. Savings in Kenya Commercial Bank Ltd Iten A/c No. 175-040-032.

51. From my perusal of the Will it is evident that the deceased was not specific in terms of what his estate comprised of. The assets that were categorically listed by the Petitioners herein at the time of petitioning for the grant of probate with Will annexed are not the same assets that were listed by the deceased herein. In the impugned the deceased talks of money in various banks and even further talks of the milk account and all cash at Iten bank without specifically mentioning in detail the respective account numbers to that effect. I cannot help but wonder for instant which exactly is the bank at Iten that the deceased was talking about. He also talks of all machinery but also fails to specifically mention the machines in question. He also devolves some cattle and directs that the remainder thereof shall be shared equally to his grandchildren but fails to specifically point out the exact number of cattle in question. The deceased also devolves various parcels of land to some of the beneficiaries. However, there are no proper land reference numbers to that effect.

52. Flowing from the above it clear that the deceased herein did not understand the contents of the impugned Will. Although he made an attempt to devolve his assets the same was done in vague manner. Did the deceased herein really understand the contents of is Will? I doubt I must say.

53. From the totality of the evidence presented before this Court, I am persuaded that there is insufficiency on the attestation. I find that therefore the Will dated 7th August, 1990 has not met the formal

requirements Section 5 & 11 of *Law of Succession Act*. Having navigated through this proceedings it is not lost to the court that the jurisdiction of the Probate Court on 27th August 1998 issued a certificate of confirmation of grant to the executers Christopher Kigen and Alfred Kimutai Lagat alias Micheal Kigen following their petition based on the impugned grant. However notwithstanding that position I have considered all the relevant evidence available and then drawing such inferences from the totality of the matter, I am of the considered view that the executers propounding the WILL have not discharged the burden that the testator knew and approved the contents of the instrument put forward as a valid testamentary to distribute the net estate to the beneficiaries. I am not persuaded that this court should exercise discretion to perpetuate a last testamentary of the testator clearly tainted with illegality, incapacity, unfairness, inequality & discrimination guaranteed by Article 27 of *the constitution*, Section 38 & 40 of the *Law of Succession Act*.

54. Having already found that the deceased herein lacked the testamentary capacity to make the Will dated 7th August, 1990 it therefore follows that the Grant of Probate made on 19th October, 2009 and issued to the Petitioner herein cannot therefore stand and is hereby revoked.

54. Accordingly, I hereby order that;

i. The Will of the deceased on record, executed on 7th August, 1990 is invalid.

ii. The deceased is declared to have died intestate and his estate is subject to distribution in accordance with the provisions of Section 40 of the *Law of Succession Act*.

iii. The grant of probate of written Will made to Christopher Kipyego A. Kigen and Alfred Kimutai Lagat alias Michael Kigen issued on 28th February, 1992 is hereby revoked.

iv. Against this background in compliance with Section 83(h) (i) of the Act an order is hereby made for the executers to produce to the court a full and accurate account of the completed administration of the estate within 60 days from today's date. To monitor compliance status conference is hereby scheduled on 3/7/2023.

v. Each party shall bear their own costs.

It is ordered so.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF MAY , 2023.

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R.NYAKUNDI

JUDGE