



**Togom v Rotich (Probate & Administration 180 of 2009)  
[2023] KEHC 18512 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18512 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
PROBATE & ADMINISTRATION 180 OF 2009  
JRA WANANDA, J  
JUNE 16, 2023**

**BETWEEN**

**ELIUD CHERUIYOT TOGOM ..... OBJECTOR**

**AND**

**HELLEN CHESANG ROTICH ..... PETITIONER**

**RULING**

1. Before the Court is the Summons dated 12/11/2009 and filed by the Objector on the same date. The Summons seeks revocation or annulment of the Grant of Probate of Written Will issued herein on 22/06/2009. The Petitioner is the Objector's step-mother.
2. The background of the Application is that one Samuel Kiptogom Kiprotich (hereinafter referred to as "the deceased"), a resident of Kapsoo, Nandi South died on 18/07/2006. 3 years later, on 10/07/2009, the Petitioner, claiming as a widow of the deceased, applied to be issued with a Grant of Probate of Written Will. She annexed a copy of a Will dated 16/08/2002 which she alleged to have been made by the deceased and by which the deceased bequeathed his property as set out therein. A perusal of the said Will together with the Petition reveals that the deceased was a polygamous man who had in his lifetime, married 3 wives, including the Petitioner who gave birth to 9 children and one Emily Jeptarus Rotich who predeceased the deceased but left behind 8 children. From the same documents, it can be deduced that the 3<sup>rd</sup> wife, one Cheburgei Chebo Kabelyo separated from the deceased in the 1960s without any children. On this fact, at Paragraph 6 the Will, it is stated as follows:

“At the time of making this testament, Cheburgei Chebo Kabelyo is not my wife as she left me in 1960 without any children. She distributed her utensils and clothes and now stays in her seven acre farm in Rongai”

3. The said Cheburgei Chebo Kabelyo was not therefore included in the Petition as a wife or dependent or as constituting a “third house” in the state.



4. After the usual legal procedures, including gazettelement, were complied with, on 22/06/2009 the Court issued the Grant of Probate of Written Will referred to above. By the said Will, the Petitioner and the Objector (the said Emily Jeptarus Rotich's son) were appointed joint executors. However, in the Petition, the Petitioner applied to be, and was, appointed the sole Administrator.
5. As aforesaid, and before the Grant could be confirmed, on 12/11/2009 the Objector filed the said Summons seeking revocation or annulment thereof. The grounds alleged were that there was substantial and material non-disclosure on the part of the Petitioner hence the Grant was obtained fraudulently by making false statements and that the proceedings to obtain the Grant were done clandestinely without the knowledge of the other beneficiaries.
6. In his Supporting Affidavit, the Objector deponed that the properties left behind by the deceased had never been the subject of a dispute between the heirs/beneficiaries but there was now likelihood of adverse interference by the Petitioner, the Will was bereft of the requisites of a valid Will, he is challenging the legality of the Will as the time it is alleged to have been done, the deceased was labouring under serious sickness, that it will be just and fair that the Court declares the Will invalid.
7. Subsequently, on 14/10/2010, the Objector's siblings (other children of the said the late wife, Emily Jeptarus Rotich's) filed Affidavits supporting the Objector's Application for revocation and/or annulment of the Grant.
8. On 12/11/2010, through his newly appointed Advocates, Messrs Ngala & Co. Advocates, the Petitioner filed an Affidavit in Reply. He denied the allegations made by the Objector and deponed that the deceased made a valid Will, all his wishes are set out therein, prior to the institution of this Probate Cause, the Objector was notified to participate and be enjoined as a co-Petitioner but he declined, the Petitioner has not deviated from the Will and she will safeguard the interest of all the survivors/beneficiaries, the Petitioner will distribute the estate strictly in terms of the Will, the Petitioner made all material disclosures and the Grant was properly issued, there are no false statements and the inventory of assets given in the Petition is not misleading or wrong, the proceedings are proper.
9. On the same day, in support of the Petitioner, the Petitioner's children also filed Affidavits opposing the Objector's Summons for revocation.
10. On 23/05/2011, the Objector filed a Further Affidavit. He deponed that the land parcel No. Nandi/Kaboi/37 listed as part of the estate by the Petitioner is not registered in the deceased's name, the Petitioner had not disclosed that parcel No. Nandi/Kaboi/427 has a cattle dip on it which is a community water project having been donated by the deceased, the Petitioner is entitled to 1 acre of land out of parcel No. Nandi/Kaboi/427 given to him by the deceased prior to his death, one Robert Sawe occupies parcel No. Nandi/Kaboi/427 a fact which has not been disclosed, there is no disclosure that there is tea growing which tea belongs to the 1<sup>st</sup> house (Objector's family), there is no confirmation of the 48 acres shown in the Will, the deceased's share with KTDA and Kaptumo Multipurpose Society Ltd have not been disclosed. He then declared that he would contest the Will since he doubted its authenticity having been in the custody of the Petitioner's Lawyer.
11. On 8/02/2016, Messrs Arap Mitei & Co. Advocates came on record for the Objector.
12. The dispute was subsequently referred to Mediation. The same however collapsed and by her letter dated 9/09/2020, the Mediator returned the matter to Court for hearing and determination.
13. No action seems to have taken place thereafter thus causing the Court to suo motu issue several successive Notices to the parties to appear in Court for Mentions. Pursuant thereto, finally the parties attended Court on 23/05/2021, they were directed to file Submissions on the Application. However,



this order was not complied with even after several subsequent Court attendances and the matter again went quiet. Eventually, the Petitioner's Counsel filed his Written Submissions on 21/09/2022 but the matter again remained dormant.

14. Again, the Court suo motu issued further notices which culminated into the Mention date of 20/03/2023. On that date, only the Petitioner's Counsel attended Court. Still, no Submissions had been filed on behalf of the Objector. Considering the age of the matter, I directed that I would proceed to deliver a Ruling on the Application with or without the Objector's Submissions.
15. A consideration of the above history raises the presumption that the Objector, if "he is still around" and in good health, must have lost interest in the Application. Since he filed the Application in the year 2009, 13 years have lapsed and yet he has not prosecuted the same.

### **Petitioner's Submissions**

16. In his Submissions, the Petitioner's Counsel stated that the estate comprises of the properties, Nandi/Kaboi/374, Nandi/Kaboi/375, Nandi/Kaboi/427 whose acreage totals approximately 89.5 acres, shares in Kibwere Tea Estate and money in joint account. He added that the deceased's Will was executed by the deceased and his two witnesses 4 years prior to his death, Section 11 of the [Law of Succession Act](#), Cap. 160 stipulates the essentials of a valid Will, validity of a Will is largely dependent on the capacity of its maker and whether it was made in its proper form, capacity in essence refers to soundness of mind, the party alleging absence of sound mind on the part of the testator must prove, unsoundness of mind refers to inability of the testator to understand what they are doing at the precise moment as was discussed in the English case of *Banks v Goodfellow* (1870) LR 5 QB 549, the Objector in his Affidavit purports to imply that the deceased was sickly at the time of signing the Will, he has however not attached any evidence to prove this allegation, it is also not clear whether there was any coercion, threats or undue influence at the time the deceased made his Will, the Objector has therefore not presented anything substantive to create the impression of suspicious circumstances surrounding its making, a perusal of the Will indicates that the testator made his last testament in the presence of two independent witnesses, one of whom is a practicing Advocate.
17. Counsel added that in petitioning for a Grant of Probate of written Will, the Petitioner listed all children to the deceased, including the Objector, who was also listed to be an executor of the Will, the Objector however refused to co-operate thereby forcing the Petitioner to institute this Succession Proceedings, in her Affidavit, the Petitioner indicates her agreeableness to the Objector being enjoined as an executor to the Will following the wishes of the deceased.
18. Counsel submitted further that, as regards distribution of the estate, the deceased catered for both houses and all children, the Petitioner and her children were bequeathed land parcel Nandi/Kaboi/427 measuring approximately 44 acres together with 5 cows while the Objector and his siblings were bequeathed both land parcels Nandi/Kaboi/374 and Nandi/Kaboi/375 measuring approximately 45.5 acres and 5 cows at their boma, including catering to the needs of one handicapped child, a sister to the Objector, this distribution was fair in the circumstances, additionally, the deceased in exercising his free will, personal wishes and intentions regarding the disposition of his property took care of all his beneficiaries, if indeed the distribution as per the Will is unfair owing to the arguments by the Objector in his Affidavit, he ought to have applied to the Court for reasonable provision under Section 26 of the [Law of Succession Act](#), the deceased operated a joint account with the Petitioner at the time of obtaining Grant of Probate of Written Will, the Petitioner seeks to respect the wishes of the deceased in terms of distribution of property as per the Will, the Objector's Summons for revocation of Grant lacks merit and it should be dismissed



## Analysis & determination

19. From the foregoing, I find that the issues that arise for determination in this matter are the following:
- i. Whether there was fraud and/or concealment of material facts by the Petitioner at the time of applying for the Grant of Probate of written Will.
  - ii. Whether the Will presented by the Petitioner is valid.
  - iii. Whether therefore the Grant of Probate of written Will issued herein should be revoked.
20. I now proceed to analyse and determine the said issues.

### **i. Whether there was fraud and/or concealment of material facts by the Petitioner at the time of applying for the Grant of Probate of written Will**

21. Section 76 of the *Law of Succession Act* states as follows:

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any Interested Party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
  - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
  - (ii) to proceed diligently with the administration of the estate; or
  - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”



22. Section 76 was expounded on by the Court *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR in the following terms:

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

23. The first ground upon which the Applicant invited the Court to revoke the Grant of Probate made to the Respondent was that the proceedings to obtain the Grant were fraudulent and based on false statements and concealment of material facts.
24. The reasons given by the Objector were that the Petitioner misled the Court as to the wishes of the deceased, left the Objector out, applied without the blessings of all the beneficiaries, the land parcel No. Nandi/Kaboi/37 listed as part of the deceased estate by the Petitioner is not registered in the deceased's name, the Petitioner had not disclosed that parcel No. Nandi/Kaboi/427 has a cattle dip on it which is a community water project having been donated by the deceased, the Petitioner is entitled to 1 acre of land out of parcel No. Nandi/Kaboi/427 given to him by the deceased prior to his death, one Robert Sawe occupies parcel No. Nandi/Kaboi/427 a fact which has not been disclosed, there is no disclosure that there is tea growing which tea belongs to the 1<sup>st</sup> house, there is no confirmation of the 48 acres shown in the Will, the deceased's share with KTDA and Kaptumo Multipurpose Society Ltd have not been disclosed.
25. In response, the Petitioner deponed that the Objector was notified to participate in applying for the Probate and be enjoined as a co-Petitioner but that he declined. The Petitioner's Counsel then submitted that in petitioning for the Grant, the Petitioner listed all children of the deceased, including the Objector, who was also listed to be an executor of the Will, the Objector refused to co-operate thereby forcing the Petitioner to institute this Succession Proceedings, the Petitioner is agreeable to the Objector being enjoined as an executor to the Will following the wishes of the deceased.
26. I have looked at the Objector's Further Affidavit which I believe the Objector filed for the purposes of countering the matters deponed in the Petitioner's Replying Affidavit and note that the Objector has not denied or even responded to the Petitioner's rejoinder that she notified and invited the Objector to participate in applying for the Probate and be enjoined as a co-Petitioner but that the Objector



declined. I also take into account the fact that the family is a polygamous one and from the contents and tone of the Affidavits filed by the parties, it is clear the two houses were not seeing “eye to eye” with each other. The relationship was clearly strained. In the circumstances, it is reasonable to believe that achieving unanimity on jointly filing for the probate became difficult. In light of this lack of unanimity, should everyone in the family have just sat back and waited for fate to take its own course? In my view, someone had to take charge and initiate the process. This, I believe, is what the Petitioner did. I also note that while the deceased died in July 2006, the Petitioner filed the Petition in July 2009, 3 years later. The Objector has not explained why in all these 3 years, he never on his own, took steps to initiate the Succession proceedings.

27. I have perused the Petition and agree with the Petitioner’s Counsel that in petitioning for the Grant, the Petitioner listed all children of the deceased, including the Objector, who was also listed as an executor of the Will. In the Petition and in the Will, all beneficiaries, including the Objector, are catered for and each has been allocated a portion of the properties in the estate. On the face of it, and without prejudging the Court’s final decision over the mode of distribution, the proposed distribution seems quite fair. Under these circumstances, I again agree with the Petitioner’s Counsel that if indeed the Objector felt that distribution as per the Will is unfair then rather than applying for revocation and re-opening of the matter afresh, the Objector ought to have applied to the Court for reasonable provision under Section 26 of the [Law of Succession Act](#). The Section provides as follows:

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

28. As aforesaid, the other allegations brought up by the Objector are that the land parcel No. Nandi/Kaboi/37 is not part of the estate, that parcel No. Nandi/Kaboi/427 has a cattle dip on it which is a community water project having been donated by the deceased, that the Petitioner is entitled to 1 acre of land out of parcel No. Nandi/Kaboi/427 given to him by the deceased prior to his death, that one Robert Sawe occupies parcel No. Nandi/Kaboi/427, that there is tea growing by the Objector’s family on parcel No. Nandi/Kaboi/427, that there is no confirmation of the 48 acres shown in the Will, that the estate also includes the deceased’s share with KTDA and Kaptumo Multipurpose Society Ltd. I find that these are matters that can be handled through other avenues available under the [Law of Succession Act](#), the same can even be canvassed and determined at or during the stage of hearing the Application for Confirmation of the Grant. Considering the above scenario and also the age of this matter, I find revocation of the Grant will not serve any useful purpose. Instead, it will only serve to escalate the animosity existing within the family and delay the matter further.
29. In the circumstances, I find that no sufficient evidence has been presented to justify a finding that there was substantial or material non-disclosure on the part of the Petitioner or that the Petitioner obtained the Grant fraudulently or by making false statements or that the proceedings were done clandestinely without the knowledge of the other beneficiaries.



## ii. Whether the Will presented by the Petitioner is valid

30. The second ground alleged for revocation of the Grant is that it was made on a fraudulent Will. Regarding the legal capacity to make wills, Section 5 of the [Law of Succession Act](#) provides as follows:

“ 1. Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will and may thereby make any dispositions by reference to any secular or religious law he chooses.

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.”

31. On this issue, the Court of Appeal in *Ngengi Muigai & Another v Peter Nyoike Muigai & 4 Others* in *In the matter of James Ngengi Muigai (Deceased)* [2018] eKLR stated as follows:

“In the recent case of *Rosemary B. Koinange (suing as legal representative of the late Dr. Wilfred Koinange and also in her own personal capacity) & 5 Others v Isabella Wanjiku Karanja & 2 Others* [2017] eKLR this court examined the issue of mental capacity (to make a will) and stated as follows:

“The essentials of testamentary capacity were laid out in the case of *Banks v Goodfellow* [1870] LR5QB 549 as cited with approval in the Tanzanian Court of Appeal case of *Vagbella v Vagbella* [1999] EA 351 thus:

“ A testator shall understand the nature of the act and its effects, shall understand the extent of the 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.”

32. The Court of Appeal further stated:

“ Construing the issue of capacity, Githinji J. in the case of *In Re Estate of Gatuthu Njuguna (Deceased)* [1998] eKLR 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."

33. It is therefore clear that the onus lay on the Objector to satisfy this Court that at the time of making the Will, the deceased was too ill, incapacitated or substantially affected by medication to understand what he was doing. However, apart from bare assertions made by the Objector, no evidence whatsoever was placed before the Court to support such assertions. For instance, no medical report addressing the condition of the deceased was presented.
34. In the circumstances and in the absence of any evidence on the physical or mental condition of the deceased as at the time that he allegedly executed the Will, I do not find any merit in the claim that the deceased lacked the physical mental capacity to make the Will.
35. On the question of validity of the will, I find guidance in section 11 of the [Law of Succession Act](#) which provides for the requirements of the validity of a written will as follows:

"No written will shall be valid unless-

- (a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
  - (b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
  - (c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of that person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."
37. From Section 11 cited above, it is evident that for a Will to be valid, it must have been duly executed by the testator and attested by two competent witnesses. The document on record as a written will bears a signature said to be that of the deceased and it is attested by two witnesses. The contents and form of the Will has not been challenged. Therefore, for all intents and purposes, this Court accepts the written Will presented to the Court and dated 16/08/2002 as being the deceased's valid last Will and testament at that particular time.



**iii. Whether therefore the Grant of Probate of written Will issued herein should be revoked.**

37. From the foregoing, it clear that my finding is that no justifiable grounds have been demonstrated to justify revocation or annulment of the Grant of Probate. No evidence has been adduced to demonstrate that the Grant was obtained fraudulently or by misrepresentation or by concealment of material facts. Similarly, it has not been demonstrated that the Will presented to the Court suffers from any form of invalidity

**Final Orders**

37. In the premises, I order as follows:

- i. The Summons dated 12/11/2009 seeking the Revocation or annulment of the Grant of Probate of Written Will issued herein is hereby dismissed
- ii. This being a family matter, to cultivate a cordial relationship amongst the family members, I make no order on costs.
- iii. The Petitioner should now expeditiously move to the next stages of the Probate proceedings and bring this old matter to conclusion.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF JUNE 2023**

.....

**WANANDA J. R. ANURO**

**JUDGE**

