

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO. 39 OF 2016

IN THE MATTER OF THE ESTATE OF JOHN MARITIM RUTO (DECEASED)

JOSEPH KIPSANG KEINO.....PETITIONER

VERSUS

ROSEMARY CHEPKEMOI RUTO.....OBJECTOR

RULING

1. The petitioner, Joseph Kipsang Keino made an application for probate of the last will of the deceased, John Maritim Ruto, who died on the 19th of April 2016 at the Kericho Hospital. It appears that notice of the application was published in the Kenya Gazette on 11th July 2016. Thereafter, the objector, Rosemary Chepkemoi Ruto, lodged an objection to the grant of probate to the petitioner and indicated an intention to file a cross-petition by way of an application for letters of administration intestate. The basis of her application was that she was the widow of the deceased, and the alleged will propounded by John Kipsang Maritim was a forgery.

2. When the parties appeared in court on 4th April 2017, the court directed that the issue of the validity or otherwise of the will would be determined by way of oral evidence, and parties were directed to file witness statements on their respective positions. The objector thereafter indicated to the court through her Counsel, Mr. Orieyo, that she had presented the alleged will to the Criminal Investigations Department for investigation but had not received a report, and that she would not be able to proceed without the report. A report from the Directorate of Criminal Investigations dated 14th May 2018 was filed in court on 15th May 2018.

3. Upon perusal of the report, Mr. Koko, who had come on record for the objector, submitted that the objector had lodged a complaint in court on the validity of the will, and had also lodged a complaint at the Kericho DCIO. After the court made an order for investigation, a report had been filed stating that the will is a forgery. According to Mr. Koko, an institution that is given the responsibility to determine whether a document is a forgery has spoken. In his view, the provisions of section 7 of the Law of Succession Act were clear, and unless the petitioner wished to question the document examiner, his view was that the court cannot proceed with this matter as it is.

4. Mr. Koko therefore asked the court to dismiss the petition under section 7 of the Law of Succession Act which states that a will is void if made through fraud. Further, since the petition had been filed under the testate provisions and the will having been found to be a forgery, there is no petition before court, and the only way to go was through intestate succession.

5. In response, Ms. Koech for the petitioner asked the court to hear the application by the objector dated 30th August 2016. In her view, only when the document examiner is called to testify can a determination be made on whether or not the document propounded as a will was a forgery or not, and the court cannot take the document examiner's report as it is.

6. I have read the report of the document examiner and considered the submissions of Counsel for the parties in this matter. I note that Counsel for the objector bases his application for the court to dismiss the petition on section 7 of the Law of Succession Act. This section, which is titled "***Wills caused by fraud, coercion, importunity or mistake***" provides as follows:

7. 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 induced by mistake, is void.

7. If I understand the submissions by Mr. Koko correctly, he asks the court to take the word of the document examiner as the final determinant of whether or not the will alleged to be the last will of the deceased is a forgery or not. He has cited section 7 of the Law of Succession Act. Having read and considered the section, however, I do not believe it applies to the circumstances of this case in the manner suggested by Learned Counsel.

8. Further, I believe that the view expressed by the document examiner is an opinion. The court can admit into evidence the opinions of experts under section 50 of the Evidence Act. However, ultimately, the decision on whether or not a will is a forgery lies with the court. It has a duty to hear the parties and their witnesses, including the attesting witnesses, as well as the document examiner. For the court to proceed in the manner proposed by Mr. Koko would be to abdicate its responsibility and its decision-making authority to the document examiner.

9. Accordingly, the parties are directed to file their respective witness statements on the issue of the will and take a date for hearing of the matter by way of oral evidence as earlier directed.

Dated Delivered and Signed at Kericho this 1st day of November 2018

MUMBI NGUGI

JUDGE