

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
FAMILY DIVISION
PROBATE & ADMINISTRATION CAUSE 1559 OF 1995

IN THE MATTER OF THE ESTATE OF ZAKAYO KIPKOECH KIRUI
(DECEASED)

ROSEMARY CHEPKORIR SANG APPLICANT

RULING

1. This Court is seized of a matter that strikes at the very heart of succession law. It is a matter that demands a delicate and solemn judicial balancing of two profound principles: the Court's duty to honor the final, declared wishes of the dead, and its parallel, statutory duty to protect the welfare of the living dependants they leave behind.
2. The first principle, that of testamentary freedom, is enshrined in section 5 of the Law of Succession Act. This section grants every adult of sound mind the unfettered right to dispose of their property by Will in any manner they see fit. This freedom is the cornerstone of a testator's autonomy, a right to command one's legacy from beyond the grave.
3. The second principle, however, acts as a vital limitation on the first. Parliament, in its wisdom, codified a profound societal compact in section 26 of the Act, recognising that a testator's freedom does not exist in a moral vacuum. This section clothes the Court with a discretionary power to interfere

with a valid Will if it is of the opinion that the testator has failed to make reasonable provision for his dependants.

4. This tension was articulated with enduring clarity by the Court of Appeal in the *locus classicus* case of ***Elizabeth Kamene Ndolo v George Matata Ndolo [1996] KECA 209 (KLR)***. The Court held that the freedom to dispose of property must be exercised with responsibility, and a testator, in the enjoyment of that freedom, is not entitled to hurt those for whom he was responsible during his lifetime.
5. The Application before this Court is the very embodiment of this legal and moral tension. It is a contest between the ink of a Will, validated by this very Court, and the present, tangible needs of the wives and children it excluded.
6. The Applicant has filed the present Summons dated 28 July 2023, brought under Article 27 and 159(2) of The Constitution, sections 26,27, 28, 29, 47 and 70 of the Law of Succession Act and Rules 45 and 73 of the Probate & Administration Rules, seeking the following:
 - (i) THAT a declaration be issued that ALICE CHERONO KIRUI, GRACE KAMBUA KIRUI, JENIFFER CHEPTOO CHEPKWONY, JOYCE CHEPKIRUI MUTAI, IRENE CHELANGAT KIRUI, ELIZABETH CHEBET KIRUI, AND ROSEMARY CHEPKORIR SANG, as dependants of the deceased, are entitled to a reasonable provision out of his net estate.
 - (ii) THAT such reasonable provision be made for ALICE CHERONO KIRUI, GRACE KAMBUA KIRUI, JENIFFER CHEPTOO CHEPKWONY, JOYCE CHEPKIRUI MUTAI, IRENE CHELANGAT KIRUI, ELIZABETH CHEBET KIRUI, AND ROSEMARY CHEPKORIR SANG as dependents of the deceased out of his net estate as this Honourable Court deems fit.

- (iii) THAT this Honourable Court issue an order for the valuation of the entire estate of the deceased. Summons
 - (iv) THAT the costs of this Application be in the cause.
7. The Application is supported by the Affidavit sworn by the Applicant and premised on the following numerous grounds:
- (a) The Deceased passed away on 3rd November 1995.
 - (b) The Deceased is survived by three wives and eleven children.
 - (c) The Deceased left a valid Will, dated 4th August 1988.
 - (d) The Will adequately provided for seven of the Deceased's kin: Margaret Isutsa, Hellen Chepkemei, Judy Kirui, Geoffrey Koech, Davis Kipkemoi, Kenny Kipkemoi, and Shadrack Kiplangat.
 - (e) However, the Will did not sufficiently provide for Elizabeth Chebet Kirui, and completely disinherited Alice Cheronno Kirui, Grace Kambua Kirui, Rosemary Chepkorir Sang, Jennifer Cheptoo Chepkwony, Joyce Chepkirui Mutai, and Irene Chelangat.
 - (f) The dependants affected by the Will's provisions are the deceased's wives and daughters.
 - (g) While the Deceased possessed the right to dispose of his property as he deemed fit, he was not entitled to disinherit his two wives and six daughters, as he had a legal obligation towards them during his lifetime.
 - (h) The Deceased, in exercising the freedom to make a Will, appeared to disregard the responsibility of not causing harm to those he was responsible for during his life.
 - (i) The act of disinheriting the dependants has left them in a state of destitution, lacking adequate means of support. This is demonstrated through their individual Affidavits of Means filed herewith.
 - (j) By virtue of their status as dependants, the wives and children are entitled to a reasonable bequest from the Deceased's estate.

- (k) In the interest of fairness and equity, all the Deceased's dependents have a right to equal treatment and an equitable distribution of his estate.
 - (l) Although a formal valuation of the Deceased's estate is pending, it can be inferred that the estate holds considerable value.
 - (m) The Deceased did not provide any of the dependants with a gift *inter vivos* that could justify their illegitimate exclusion from the Will.
 - (n) The exclusion of the daughters without any stated reason demonstrates eccentric and unreasonable behaviour, warranting the Court's intervention in the matter.
 - (o) Denying a daughter inheritance solely based on her marital status contradicts the principles of gender equity and equality enshrined in our Constitution.
 - (p) In line with contemporary justice, this Court should consider making an order for reasonable provision, even if the testator explicitly cited reasons for not granting any bequest in his Will to his wives.
 - (q) The disposition of the deceased's Will, particularly the disinheritance, is unreasonable and justifies this Court's intervention.
 - (r) The dependants herein are entitled to a provision that is not only adequate but also just and equitable, given the substantial value of the Deceased's estate.
 - (s) Considering the protracted duration of this legal dispute, it would be astounding if any dependant, provided for in the will, were to oppose this summons and attempt to justify the exclusion of their stepchildren, sisters, and co-wives, given the immense suffering endured, as it would be inhumane.
8. This Application does not exist in isolation. It is a direct consequence of protracted litigation in this file, which culminated in a judgment delivered by Onyiego, J. on 30 June 2023. That judgement is critical to the current application for two reasons. First, it definitely settled the primary dispute that had consumed this matter for decades. The Court, at paragraphs 49 and 53,

found that the Deceased's Will dated 4 August 1988, and its accompanying 21-page statement, was valid. It dismissed all claims of forgery, undue influence, or lack of testamentary capacity. It was the finding of that Court that the Deceased died testate.

9. Second, and most crucially, in that judgement, the learned Judge explicitly anticipated and sanctioned this very Application. At paragraph 53, the Court held:

"In view of the fact that there are children of the deceased listed in the application for confirmation of the grant who did not benefit from the estate and since the wives excluded in the will are claiming a share in their capacity as dependants (widows), it will be prudent to give them a chance to make an application for reasonable provision. Such application to be made within 30 days from the date of delivery of this ruling."

10. The current application was filed within the 30-day window prescribed. The sole question for my determination is whether to exercise the Court's discretion under Part III of the Law of Succession Act to interfere with the dispositions of that valid Will.
11. Parties canvassed the Application by way of submissions.

The Applicants' Case

12. The Applicants, being the wives and biological children of the Deceased, argue that they are *ipso facto* dependants under section 29(a) of the Act. They rely on the Court of Appeal decision in ***Popat vs Popat (2021) KECA 106 (KLR)***, which affirmed that children and wives are automatic dependants, and this status is not pegged on proof of maintenance or financial dependency prior to the deceased's death.

13. The Applicants have tendered extensive affidavit evidence detailing their current state of financial hardship and destitution. They are, by and large, retirees of advanced age, surviving on meagre or non-existent pensions, and battling chronic medical conditions. They assert that the Deceased's Will, in disinheriting them, has left them destitute.
14. The Applicants contend that the Deceased's Will is based on a state of affairs that became obsolete. They provide detailed, sworn testimony that after the Deceased suffered a debilitating stroke in 1990, he was abandoned in a nondescript public hospital in Nakuru by one Margaret. It was the Applicant, with the daily support of the daughters, who arranged for the Deceased's transfer to Nairobi and cared for him wholeheartedly for the last 4 years of his life. They argue that this exemplary conduct occurred after the Will was written and created a profound moral obligation that the Deceased, being incapacitated, was unable to capture in a new Will.
15. The Applicants argue that the Deceased's stated reason for excluding his daughters – namely that they were educated and married – is blatantly discriminatory and contrary to the principles of gender equity enshrined in The Constitution. They cite the case of ***Re Estate of Gideon Sawe Kipkessio (Deceased) eKLR***, where the Court held that a Will that disinherits dependants for such reasons cannot stand the test of the law.

The Respondent's Case

16. The Respondent filed a Replying Affidavit opposing the Application. Basing her argument on the primacy of testamentary freedom, the Respondent contends that the Court affirmed the Will's validity. The Deceased's wishes are paramount and were clearly expressed in both the Will and the accompanying 1988 statement. The Court's discretion to interfere, as held in

Rono vs Rono (supra), must be exercised sparingly and only where necessary.

17. The Respondent challenges the status of the two Applicants. First, the claim by Alice Cherono Kirui abates as she is now deceased, having passed away on 4 June 2024. Second, the Respondents argues that Grace Kambua Kirui is not a dependant. The Deceased's 1988 statement, which the Court accepted, explicitly states, "*I did not take any formal marriage with Grace.*" The Respondent relies on the case of **Nelia Wanjiru Gitumbi vs Jacinta Wanjiru Gitumbi eKLR**, where a wife who had long separated from the deceased was held not to be a dependant.
18. The Respondent strongly argues that the Applicant daughters are self-sufficient adult children and well of financially. Specific examples are given of their successful careers" Rosemary is a well-known Kenyan virologist at KEMRI. Elizabeth resides abroad and supports her family. Joyce is a Hospitality Officer at Kenyatta National Hospital. It is submitted that they mischievously and voluntarily failed to show this Honourable Court their income and have not proven any special needs, citing **Re Estate of Gedion Manthi Nzioka (Deceased) eKLR**.
19. The Respondent contends that the Deceased's reasons were sound. He fulfilled his parental his parental duty by educating his daughters and seeing them married. The Respondent points to the testator's own words: "*Now I am happy all five of them are all working and married.*" Having provided for them adequately during his lifetime, he was under no further obligation to provide for them in death.

Analysis & Determination

20. I have carefully considered the extensive pleadings, the detailed Affidavits and rival submissions. The first issue to address is that of dependant status under section 29 of the Act.
21. The Court notes the un rebutted submission that Alice Cheron Kirui passed away on 4 June 2024. A claim for reasonable provision under Section 26 is, by its very nature, a personal action. It is predicated on the needs of a living dependant—for maintenance, for housing, for medical care. It is not a claim for a vested property right that automatically transmits to the dependant's personal estate. Upon her death, her personal needs ceased to exist, and the statutory basis for her claim was extinguished. The Court, therefore, finds that the application for provision for Alice Cheron Kirui abated upon her demise.
22. The Applicants, Rosemary Sang, Jeniffer Chepkwony, Joyce Mutai, Irene Kirui, and Elizabeth Kirui, are the biological children of the deceased. Section 29(a) of the Act defines dependants to include the children of the deceased whether or not maintained by the deceased immediately prior to his death. The Applicants' financial status is irrelevant to their status as dependants under section 29(a). As held in ***Popat vs Popat (supra)***, this status is automatic for a biological child.
23. With respect to Grace Kambua Kirui, the Respondent relies on the Deceased's statement that there was no formal marriage and that Grace deserted him. This is further complicated by the record of the judgement of 30 June 2023, where at paragraph 21, the Court noted, "*RW2 Grace Kambua stated that she... did not contract a Kamba customary marriage as a second wife.*"
24. However, section 29(a) also includes former wife or wives as dependants. The record is undisputed that the Deceased had a long association with

Grace Kirui, which resulted in 3 children – Kenny, Kiplangat and Chebet- who are expressly named and provided for in the Will. The Deceased's own act of referring to Grace Kirui and their children in his Will and statement is a sufficient factual basis to establish her as a former wife for the purposes of section 29(a). For that reason, this Court finds that Grace Kambui Kirui is a dependant.

25. Having established the Applicants' standing, the Court must now determinate whether to exercise its discretion by weighing the evidence against the mandatory factors set out in section 28 of the Act.
26. The Judgement of 30 June 2023 and the Respondent's own Affidavit details a vast and valuable estate. This includer Sotik LR 7288, Kericho/Kipchimchim/543, LR 11336/1 Molo, Molo Town Plot 129, Loresho LR 209/8336/127, Malindi Plot 335, and shares in Kenya Aerotech Ltd and Sam-con Ltd. It is, therefore, my considered view that the estate is substantial and fully capable of making further reasonable provision for the Applicants without rendering the beneficiaries named in the Will destitute.
27. The past, present or future capital, income, means and needs of the Application is the primary factual dispute herein. The Respondent portrays the daughters as well-known professionals, while the Applicants portray themselves as retirees facing destitution.
28. The mandate of Section 28(c) is to consider the existing and future means and needs of the dependant. The Respondent's submissions focus on the Applicants' past careers, which are of historical interest but not determinative of their current needs. The Applicants, in stark contrast, have provided specific, documented evidence of their present and future predicaments. These can be summarised as follows:

- (i) Rosemary Sang – Widow. Retired in June 2018. Her pension is unsettled. She relies on her sons and a near-empty bank account. She suffers from hypertension and Type II diabetes.
- (ii) Grace Kirui – Widow. She has no income and relies on family. She receives Kshs 2,000/= per month from 'pesa za wazee'. She has no home. She suffers from high blood pressure, arthritis and poor eyesight. She has no medical cover.
- (iii) Elizabeth Kirui – Daughter. She resides in the USA, below the poverty line on a low-paying job. She has no property and no medical insurance. She supports her elderly mother, Grace Kirui, and her late brother's children.
- (iv) Irene Kirui – Daughter. She retired in 2000 and has meagre pension. She relies on her sons. She has no property. No medical condition specified.
- (v) Jeniffer Chepkwony – She retired in 1995 and has a meagre monthly pension of Kshs 8,521/- per month. She has no property. She suffers from arthritis, hypertension, back problems. She spends approximately Kshs 20,000/= to 30,000/= per month on medical costs. She has no medical insurance.
- (vi) Joyce Mutai – She retired in June 2024. She has a SACCO loan of Kshs 448,000/-, supports two unemployed sons and has no property. She suffers from hypertension, arthritis. She has no medical cover.

29. From the foregoing, the Applicants have provided extensive and specific details of their financial and medical penury. The Court finds this evidence of their existing and future needs to be credible and compelling.
30. On the issue of advancements and gifts *inter vivos*, the Respondent argues that the Deceased, by educating his daughters, fulfilled his duty. This Court holds that a parent's fundamental duty to educate their children, which was fulfilled decades ago, cannot be construed as an advancement or gift *inter vivos* in lieu of inheritance. It does not justify total disinheritance from a substantial estate in their old age.
31. It is this Court's view that the conduct of the dependants in relation to the Deceased is the most dispositive factor in this Application. The Deceased's Will and his 1988 statement are a snapshot of his wishes based on the facts as they existed in 1988. The Applicants, however, have provided specific and detailed evidence of a fundamental change in circumstances. They aver that after the Deceased's debilitating stroke in 1990, he was abandoned by Margaret at a public hospital. It was Grace Kirui who, with the daily, hands-on support of her daughters, Rosemary, Elizabeth and Joyce, took the Deceased into her home and tenderly cared for him for the last 4 years of his life, when he was paralysed and incapable of talking, walking or communicating.
32. The Respondent's Affidavit is notably silent on this critical issue, offering no rebuttal to the charge of abandonment nor any counter-narrative of her conduct.
33. It is my considered view that the Applicants' evidence on their conduct is credible and un rebutted. This conduct, occurring after the Will was written, created a profound moral and social obligation on the part of the Deceased. This obligation arose from the Applicants' loyalty and care during his time of

greatest need, a time when the Will's primary beneficiary was, according to the evidence, absent. The Will, being "frozen in time," does not reflect this new reality.

34. This notwithstanding, the Court must consider the reasons ascertained from the 1988 for not making provision for the Applicants. It is stated that Grace Kirui deserted the Deceased in or around 1983. This reason, whatever its merit in 1988, was rendered moot and irrelevant by her subsequent conduct in returning to care for him from 1990 to 1994.
35. This Court's analysis of the mandatory section 28 factors leads to an inescapable conclusion. The 6 Applicants have established their legal status as dependants under section 29(a) and demonstrated significant existing and future financial and medical needs under section 28(c). They have proved exemplary conduct and care for the Deceased under Section 28(e), which occurred after the Will was made and which created a new moral obligation. They have shown that the Deceased's reasons for their exclusion under Section 28(g) are either factually outdated (in the case of Grace Kirui) or unlawful and discriminatory (in the case of the daughters). Finally, they have confirmed that the estate is of a sufficient size under section 28(a) to make provision.
36. Therefore, this Court finds that the disposition of the Deceased's estate by his Will dated 4 August 1988, while valid, was not such as to make reasonable provision for the Applicants: Grace Kambua Kirui, Rosemary Chepkorir Sang, Jeniffer Cheptoo Chepkwony, Joyce Chepkirui Mutai, Irene Chelangat Kirui, and Elizabeth Chebet Kirui. The Court's intervention under Section 26 is not only justified but statutorily mandated.
37. In light of the foregoing and in exercise of the discretion vested in this Court by sections 26 and 27 of the Act, it is hereby ordered that:

- (i) The claim for reasonable provision made on behalf of **ALICE CHERONO KIRUI** is hereby declared to have abated upon her demise on 4 June 2024;
- (ii) A declaration is hereby issued that **GRACE KAMBUA KIRUI, ROSEMARY CHEPKORIR SANG, JENIFFER CHEPTOO CHEPKWONY, JOYCE CHEPKIRUI MUTAI, IRENE CHELANGAT KIRUI,** and **ELIZABETH CHEBET KIRUI** are dependants of the Deceased within the meaning of Section 29(a) of the Law of Succession Act.
- (iii) An Order for Reasonable Provision is hereby made, for the six (6) aforesaid dependants.
- (iv) The said provision shall be made from the Deceased's Molo farm, **LR NUMBER 11336/1**. It is hereby directed that Thirty (30) acres shall be excised from the remainder of the said LR NUMBER 11336/1 Molo (that portion bequeathed to Margaret Kirui in trust) and shall be shared equally among **GRACE KAMBUA KIRUI, ROSEMARY CHEPKORIR SANG, JENIFFER CHEPTOO CHEPKWONY, JOYCE CHEPKIRUI MUTAI, IRENE CHELANGAT KIRUI,** and **ELIZABETH CHEBET KIRUI,** such that each shall receive Five (5) acres absolutely.
- (v) The Administrators are hereby directed to facilitate, within ninety (90) days of this Order, a survey and valuation by a Government Surveyor to effect the excision and distribution ordered in (iv) above.
- (vi) This being a family matter, each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 21 DAY OF NOVEMBER 2025

**HELENE R. NAMISI
JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For the Applicants: Mr. Kiptoo

For the Respondent: Ms. Kemunto h/b Mongeri

Court Assistant: Lucy Mwangi

Ruling