

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**SUCCESSION CAUSE NO. E043 OF 2021**

**IN THE MATTER OF THE ESTATE OF MOSES KIPTONUI BII**  
**alias MOSES ARAP BII alias MUSA BII alias MOSES BII**  
**(DECEASED)**

**KENNETH KIPKOECH TANUI.....1<sup>ST</sup>**  
**PETITIONER**

**VERSUS**

**NAOMI CHEPKOECH BII.....2<sup>ND</sup>**  
**PETITIONER/PROTESTER**

**JUDGMENT**

1. This Court is tasked to determine Summons for Confirmation of Grant dated 20<sup>th</sup> April 2024 filed by the 1<sup>st</sup> Petitioner, **KENNETH KIPKOECH TANUI**, seeking for the confirmation of the grant of letters of administration intestate issued to him and the 2<sup>nd</sup> Petitioner, **NAOMI CHEPKOECH BII**, on 10<sup>th</sup> January 2022. The application is brought under Section 71 of the Law of Succession Act, Cap 160, and Rule 40 of the Probate and Administration Rules.

2. The 2<sup>nd</sup> Petitioner has opposed the summons by way of an Affidavit of Protest dated 16<sup>th</sup> June 2024, in which she contends that the deceased, MOSES KIPTONUI BII alias MOSES ARAP BII alias MUSA BII alias MOSES BII (hereinafter "the deceased"), made a valid oral will on 6<sup>th</sup> June 2020, and that the estate should be distributed in accordance with the terms of that oral will.

3. The Court has carefully considered the pleadings, the oral testimonies of all witnesses, the documentary evidence tendered, and the comprehensive written submissions filed by both parties. The relevant statutory provisions and judicial authorities have also been considered. This judgment now determines the Summons for Confirmation of Grant and the Protest thereto.

4. The deceased died on 23<sup>rd</sup> June 2020. He was polygamous, survived by two houses. The 1<sup>st</sup> house comprises ten (11) children, (three of which are deceased). The 1<sup>st</sup> Petitioner, Kenneth Kipkoech Tanui belongs to the 1<sup>st</sup> house. The 2<sup>nd</sup> house comprises four (4) children and the surviving widow, Naomi Chepkoech Bii, who is both a co-administrator and the Protester herein.

5. The 1<sup>st</sup> Petitioner filed a Summons for Confirmation of Grant on 20<sup>th</sup> April 2024, proposing distribution under Section 40 of the Law of Succession Act based on survivors of the estate derived from the number of units in each house. The proposed distribution takes into account properties allegedly sold during the deceased's lifetime, including Kericho Municipality Block 5/701, and liabilities including a debt of Kshs. 3.2 million paid by David Kipkemoi Tanui, a son from the 1<sup>st</sup> house, on behalf of the estate.

6. The Protester filed an Affidavit of Protest dated 16<sup>th</sup> June 2024, alleging the existence of an oral will made on 6<sup>th</sup> June 2020. According to the Protester, the oral will was witnessed by several individuals and directed that the 2<sup>nd</sup> family would continue to live

on land parcel **Kericho/Kabianga/1428**, that no one from the 1<sup>st</sup> family was to cross over to that parcel, and that only Vivian Chepkoech Bii, a daughter from the 1<sup>st</sup> house, would be given one acre from the said parcel.

7. Additionally, in her Affidavit of Protest, the Protester claimed that other properties including Kericho/Kabianga/1784, Kericho/Kabianga/2047, Kericho/Kabianga/3203, and Plot 90 Kipkelion Town did not form part of the estate, either because she had purchased them jointly with the deceased or because they were registered in her son's name.

8. Regarding Kericho Municipality Block 5/701, the Protester took a different position. She claimed that this property was sold by the deceased to third parties, namely **Phillip Kiprotich Titoek** and **Daniel Kiptum Salil**, and that she had discovered sale agreements in the deceased's box after his death. This position is significant because it demonstrates that the Protester acknowledges that this property was disposed of by the deceased during his lifetime and therefore should not form part of the estate.

9. The matter proceeded to full hearing by way of viva voce evidence. The hearing commenced on 24<sup>th</sup> February 2025 and continued on various dates, with the Protester calling six witnesses and the 1<sup>st</sup> Petitioner also calling six witnesses. What follows is a summary of the testimony as it unfolded before this Court.

10. The Protester, **PW1 Naomi Chepkoech Bii**, was the first to testify. She identified herself as a farmer residing in Chepkosilen Village. She stated that the deceased was her husband and that she wished to rely on her Affidavit of Protest as her evidence-in-chief. She sought to produce the documents attached thereto as exhibits, namely a Sale Agreement with Official Search for L.R. Kericho/Kabianga/2047 as P. Exhibit 1, a Copy of Official Search in respect of Kericho/Kabianga/1784 as P. Exhibit 2, an Official Search in respect of Kericho/Kabianga/3203 as P. Exhibit 3, and an Allotment letter in respect of Plot No. 90 Kipkelion Town as P. Exhibit 4.

11. Under cross-examination by Mr. Koech, the following emerged. She admitted that the deceased made an oral will on 6<sup>th</sup> June 2020. She conceded that the date of 6<sup>th</sup> June 2020 was not disclosed in her Affidavit of Protest. She stated that clan members visited the deceased and that is when he made his oral will. She confirmed that the oral will was in respect of one property which was vested in her. She admitted she could not tell what made him make the oral will. She disclosed the facts on the oral will on 16<sup>th</sup> June 2024, three years after the Petition was filed. She claimed she contributed Kshs. 1.3 Million to purchase Kericho/Kabianga/1784. She admitted the Sale Agreement was done in the name of her husband. She stated no one witnessed the sale. She referred to Paragraph 17 of her Affidavit where she discussed the sale of property Kericho Municipality Block 5/701. She claimed she discovered Sale Agreements in her husband's

box but could not tell when the property was sold. She did not file the Sale Agreements in Court. She admitted there is no evidence of payment of Kshs. 16 Million. She stated the alleged purchasers are not in occupation.

12. She identified Joel Chepkwony as the person in occupation, who had a claim of Kshs. 1 Million against the deceased. She was not aware if that amount was settled. She was aware of a Court Order marked as DMFI-1. She stated that David Tanui sent money to the deceased to put up David's house, not to buy land. She could not remember the date when the house was built. She confirmed David Tanui sent \$26,605 to his late father.

13. Under re-examination by Mr. Kipngetich, she admitted she had not participated in the Succession proceedings. She confirmed \$26,605 was sent to the deceased. She stated she was not sued by David Tanui. She admitted the minutes of 12<sup>th</sup> August 2020 were not signed.

14. Regarding Kericho Municipality Block 5/701, the Protester testified that her late husband had sold the same to Phillip Kiprotich Titoek and Daniel Kiptum Salil, who had been joined as protestors. She stated that she was aware of the sale and that Mr. Salil called her in the year 2021 after the demise of her husband trying to trace him, and that is when she informed him that he had passed on. She further testified that she discovered Sale Agreements in her husband's box but could not tell when the property was sold.

15. PW2, Joel Siele, testified on 22<sup>nd</sup> May 2025. He identified himself as a farmer residing in Matobo. He adopted his witness statement dated 16<sup>th</sup> June 2024 as his evidence-in-chief. He testified that on 6<sup>th</sup> June 2020, he went to see Moses Bii in his house. He met the deceased's wife Naomi and two sons. He also found Richard Chepkwony, David, and another person. He stated that the deceased said he had given one acre to Lilian his daughter and that he would curse those who would defy his wishes.

16. Under cross-examination by Mr. Koech, he admitted they did not record what the deceased said. He stated they were not invited to visit the deceased but just visited by coincidence. He claimed he was the first to arrive, followed by Chepkwony, David, Richard, and Joseph Soi. He stated the deceased had two parcels of land but merely talked about one shamba. He was not aware the deceased had other parcels of land.

17. He stated the deceased told them he was leaving one of the parcels to his 2<sup>nd</sup> wife. He visited the deceased as a relative; the deceased was sick but not very sick. He did not know the type of ailment. He could not remember the date the deceased died or the date of his funeral. He stated the deceased died after a few days. He claimed he could remember the date of his visit, being 6<sup>th</sup> June 2020.

18. He confirmed they held family meetings after the deceased passed on. He stated they have minutes in respect of those

meetings, where they recorded about debts the deceased owed people. He referred to a meeting held on 12<sup>th</sup> May 2020, marked as DMFI-1, where they discussed debts. He admitted they managed to discuss what the deceased told them on 6<sup>th</sup> June 2020 but did not put it into writing.

19. In re-examination by Ms. Jausiku, he stated the land of the 1<sup>st</sup> wife is on the upper side and that belonging to the 2<sup>nd</sup> wife is on the lower side.

20. PW3, Richard Chepkwony, also testified on 22<sup>nd</sup> May 2025. He identified himself as a farmer residing in Roret. He adopted his witness statement dated 18<sup>th</sup> February 2025 as his evidence-in-chief.

21. He testified that he visited the deceased and met him with Collins, Kenneth, and Naomi. He also met Joel Siele, Soi, Kipkurui, and Joseph Soi. He stated the deceased told them the land belonging to the 1<sup>st</sup> wife and that of the 2<sup>nd</sup> wife. He did not specify the parcel number.

22. Under cross-examination by Mr. Koech, he stated the deceased told them how he shared his land, saying his unmarried daughters would occupy a portion of one acre which he set aside. He admitted that at that time, the deceased was not anticipating he would die. He stated there is a road separating the two parcels of land. He confirmed the 1<sup>st</sup> wife has never lived in the parcel of land now occupied by the 2<sup>nd</sup> wife.

23. He stated that on 6<sup>th</sup> June 2020, he, David, and Tum had planned to visit the deceased. He described the deceased as alert when they met. He was aware the deceased had been sick for a while before they visited him. He claimed he could easily remember the date they visited the deceased but could not remember when the deceased passed on or when he was buried.

24. He stated the deceased talked about his parcels of land. He confirmed they held several meetings after his death, including a day they met to discuss issues touching on the deceased's debt. He admitted they did not discuss what the deceased told them on 6<sup>th</sup> June 2020 at those meetings. He stated they arrived at the deceased's home at around 2.00 p.m.

25. Under cross-examination by Ms. Jausiku, he stated they met the deceased in the home of the 2<sup>nd</sup> wife. He described the land belonging to the 1<sup>st</sup> wife as in the West and that of the 2<sup>nd</sup> wife as in the East. He confirmed that at the time of meeting the deceased, the deceased was alert.

26. PW4, **Kipkurui Arap Tum**, also testified on 22<sup>nd</sup> May 2025. He identified himself as a resident of Kabartegan. He adopted his witness statement dated 16<sup>th</sup> June 2024 as his evidence-in-chief.

27. He testified that he remembers on 6<sup>th</sup> June 2020, the deceased told them about the land to be occupied by the 2<sup>nd</sup> wife. He stated that he, David, and Chepkwony arrived together, and later Joseph Soi arrived. They found the deceased, his two sons, and his wife. They went to see the land which had bananas.

28. Under cross-examination by Mr. Koech, he stated he went to visit the deceased on 6<sup>th</sup> June 2020 in the morning at around 9.00 a.m. He claimed the deceased took him and showed him the one acre to be given to his unmarried daughter. He stated the deceased died three weeks after they met. He described the deceased as sick but alert, and seated at that time. He admitted he never saw the deceased walk. He could not tell what ailment he suffered from. He stated the deceased was his cousin.

29. He disputed that the 2<sup>nd</sup> wife moved to the land after the 1<sup>st</sup> wife passed away, claiming the first wife had her own land. He stated the land belonging to Naomi has a tea plantation.

30. In re-examination by Ms. Jausiku, he stated the daughter who was given 1 acre is a daughter of the first wife. He confirmed the 1<sup>st</sup> wife did not live on that land; she had her land with a big house.

31. PW5, Joseph Soi, identified himself as a resident of Chepkosilen in Belgut. He adopted his witness statement as his evidence-in-chief. He testified that they visited the deceased on 6<sup>th</sup> June 2020. He was with Siele, Arap Tum, Richard, Ken, and David. They are all related to the deceased.

32. Under cross-examination by Mr. Koech, he stated he was the last person to reach the deceased's house at around 10:00 a.m. He claimed he accompanied the deceased who showed them the one acre he gave to his daughter after taking tea. He stated he does not know the number of acres he gave to Naomi. He recalled

the deceased stated that members of the 1<sup>st</sup> house were not meant to cross over the road cutting across the land.

33. He stated they visited the deceased when they heard he was sick. He did not know he was suffering from Cancer. He described the deceased as well and able to come out to show them the land. He confirmed the deceased was able to walk to show them the land. He could not remember the day the deceased died. He could not remember the date he executed the witness statement. He stated he has never been called to narrate what the deceased told them on 6<sup>th</sup> June 2020.

34. He confirmed it is on 6<sup>th</sup> that he visited the deceased's house. He attended the burial of the deceased on a date he could not remember. He could not tell the date the deceased died.

35. In re-examination by Ms. Jausiku, he stated the one acre is adjacent to the road. He confirmed that parcel does not separate the parcels of land. He stated they were not told the registration number. He confirmed the 2<sup>nd</sup> wife was present when they were being shown the parcel. In further re-examination, he stated he was not sure of the exact time the land was shown, but it was past noon.

36. PW6, **David Kipkorir Rotich**, testified and identified himself as a farmer residing in Tulwet in Roret. He adopted his witness statement as his evidence-in-chief.

37. He testified that on 6<sup>th</sup> June 2020, they visited the deceased and found Naomi Bii, Ken, and David. The deceased told them the

land where they met belonged to the 2<sup>nd</sup> wife. He stated that the deceased said the 1<sup>st</sup> wife's children should not cross over to the 2<sup>nd</sup> house's land except for the daughter who was not married.

38. Under cross-examination by Mr. Koech, he confirmed he attended meetings after the deceased died. He stated minutes were taken in their meetings when they were discussing debts. He admitted the oral will of the deceased was not discussed after the deceased passed on. He stated the intentions of the deceased were never disclosed when they met to discuss debts.

39. He claimed they could not discuss the deceased's oral will until after the lapse of one year from the death of the deceased. He admitted they have not sat to pass the deceased's information to the family. He stated he disclosed to Ken what his deceased father told them after the lapse of a year. He stated the land belonging to the deceased and given to the deceased's daughter was shown to them in the afternoon.

40. This marked the close of the Protester's case.

41. The 1<sup>st</sup> Petitioner's case commenced on 29<sup>th</sup> July 2025. The 1<sup>st</sup> Petitioner called several witnesses;

42. DW1, **Kenneth Kipkoech Tanui**, testified and identified himself as a farmer residing in Chepkosilen, Kericho County. He stated that the deceased was his father. He adopted his witness statement dated 18<sup>th</sup> February 2025 as his evidence-in-chief.

43. He testified that it is not true that the deceased made an oral will. He remembered Joel Siele visiting his father on various dates. He stated the deceased was suffering from Cancer and had been sick for a while. He testified that the deceased was not in a position to move out of the house; he could only get out on being assisted. He stated emphatically that the deceased did not go to the shamba as alleged but stayed indoors until the time of his death.

44. He produced various documents comprised in the list of documents dated 18<sup>th</sup> February 2025 as the 1<sup>st</sup> Petitioner's exhibits marked D. Exhibit 1-20. He testified that he was aware the deceased sold Kericho/Municipality Block 5/7 to David Tanui, his brother, way back in 2002. David paid their father a sum of \$26,000 through Western Union. He stated David has been in the U.S.A. since 1980. He produced the payment documents as D. Exhibit 4.

45. He further testified that his brother settled a debt of Kshs. 3,283,000/= that was due from his late father, producing RTGS Forms as D. Exhibit 2. He explained that the debt arose from a suit, referencing a decree dated 17<sup>th</sup> April 2018.

46. Under cross-examination by Mr. Kipngetich, he confirmed his father died intestate and was a polygamous man. He admitted he was the one who filed the Petition. He referred to the Petition and noted there are members of the 2<sup>nd</sup> house who did not sign the Consent. He confirmed he is the 1<sup>st</sup> Petitioner and not a member

of the 2<sup>nd</sup> house. He stated members of the 2<sup>nd</sup> house were included in the Petition and they jointly filed it with Naomi. He was not aware that Naomi filed an Objection.

47. He stated the Property in Kericho Township was sold to his brother David. He confirmed no ownership documents were given to his brother because the property was not transferred due to a pending case. He stated there existed a debt of Kshs. 3,200,000/=. He confirmed the property was sold to his brother during his father's lifetime. He referred to a Court Order issued on 7<sup>th</sup> June 2021, stating the money was paid to Chepkwony through the firm of Miruka.

48. He confirmed he was not present when the alleged oral will was made. He stated the deceased was bedridden. He confirmed the property known as 1428 belonged to his father, and his mother wasn't buried in Plot No. 1428.

49. In re-examination by Mr. Koech, he stated the basis of payment of Kshs. 3,200,000/= was damages awarded to Chepkwony. He explained a decree for damages and costs had to be settled. He confirmed his brother was not a party to the suit; the decree was directed to his late father. He stated he was bound to have the decree settled. He confirmed the property was never transferred to his brother, but there was mutual trust between his late father and his brother. He stated his brother David Tanui is in occupation of the property.

50. DW2, **David Tanui**, testified and identified himself as the 1<sup>st</sup> born son of the late Moses Bii from the 1<sup>st</sup> house. He stated he is living in the U.S.A. where he has been for the last 25 years. He adopted his witness statement as his evidence-in-chief.

51. He testified that he purchased L.R. No. Kericho Municipality Block 5/701 from his late father, wiring money to his father by Western Union. The amount he paid was USD 26,000. He stated the transaction was not reduced into writing. He explained that Joel Chepkwony had occupied the land, obtained it in 2010, filed for damages, and was awarded damages. Chepkwony attached the property to satisfy the decree claiming Kshs. 3,200,000/= . He stated Chepkwony was trying to recover his money by having the property sold by Public Auction.

52. He further testified that he also bought 2 properties from third parties who had bought from his father. He produced Sale Agreements as D. Exhibit 6 in respect of Kericho/Kabianga/5264. He produced another Sale Agreement in respect of Kericho/Kabianga/1412 as D. Exhibit 18, noting the property had not been sub-divided. He requested the Court to transfer to him 0.6 Acres from L.R. No. Kericho/Kabianga/5264 and Plot 5/701, Kericho Municipality, and to be repaid Kshs. 3,283,000/= as a liability to the Estate.

53. Under cross-examination by Mr. Kipngetich, he stated he acquired Kericho/5/701 when his father called him offering to sell the property to him. He stated his father was to put up a house

for him on the land but did not do the construction. He decided to instead put up a house in Chepkosilen in 2014 in land parcel 1962. He confirmed there was no transfer. He stated the Certificate was issued on 3<sup>rd</sup> May 2012. He produced the green card which shows how the property was acquired. He stated he got the Consent and evidence of money wired.

54. He confirmed the Administrators of the Estate are Kenneth Tanui and Naomi Bii. He stated Chepkwony tried to sell the property, and his late father owed Chepkwony the debt since 2003. He stated he is now in occupation of the Land after settling the debt of Kshs. 3,283,000/=. He claimed every beneficiary of the Estate knows that he purchased L.R. No. Kericho/Municipality/5/701. He stated his father died in 2021 having sold some plots namely Kericho/Kabianga 5264 and Kericho/Kabianga/1412. He confirmed there was no oral will made by his father.

55. In re-examination by Mr. Koech, he stated there was a Court Order justifying him to purchase L.R. No. Kericho/Municipality Block 5/701. He explained the Court order was to pay damages and interest due to Joel Chepkwony of Kshs. 3,283,000/=. He stated his father was in occupation of the parcel of land. He confirmed the lease was prepared and registered in 2012, and the original lease was handed over to the Advocate.

56. DW3, **Ismael Kiptonui Soi**, testified and identified himself as a resident of Chepkosilen Village. He stated the late Moses

Kiptonui was known to him and was his neighbor. He adopted his witness statement dated 18<sup>th</sup> February 2025 as his evidence-in-chief.

57. He testified that he knows L.R. No. Kericho/Kabianga/1784 as their land where he lived. He stated the land is in the name of his mother, Rael Kitet. He sold 1<sup>3</sup>/<sub>4</sub> acres of his land to Joel Chepkwony who in turn sold it to Moses Kiptonui Bii. He was not present when Chepkwony sold the land to Moses, but Joel Chepkwony informed him. He stated the late Moses Bii bought the land before marrying Naomi.

58. Under cross-examination by Mr. Kipngetich, he confirmed the land was sold to Joel Chepkwony while registered in the name of his mother. He admitted they did not visit the land control board.

59. In re-examination by Mr. Koech, he stated his mother passed away in 1956. He confirmed he merely sold his share which was due to him.

60. DW4, **Richard Chepkwony**, testified and identified himself as a farmer residing in Kapichungu, Kericho County. He stated that Moses Bii was his cousin.

61. Under cross-examination by Mr. Kipngetich, He stated he came to know Moses Kiptonui since 1959 when he was a herdsman. He confirmed the deceased did not leave an oral will. He stated his home is not far from that of Moses Kiptonui. He was aware the deceased sold land in Kericho and another in Kapkelelwa. He confirmed Anna, the first wife, was buried at

Chepkosilen Village. He disputed that the deceased was buried in Parcel No. 1428. He was aware that the deceased gave one acre to Chepkoech who is a daughter to the deceased. He maintained the deceased did not make an oral will. He stated there were minutes which barred Naomi from occupying the land, and the elder wife denied Naomi occupation of the land known as L.R. 1428.

62. In re-examination by Mr. Koech, he reiterated the deceased did not leave a will; he visited him severally. He stated some of the clan members chased them away after the deceased passed on. He later learnt that the deceased gave his daughter Chepkoech one Acre.

63. DW5, **Richard Kipkemoi Chilgei**, testified and identified himself as a Village Elder residing in Chepkosilen. He stated Moses Kiptonui was his neighbor. He adopted his witness statement as his evidence-in-chief.

64. Under cross-examination by Mr. Kipngetich, he confirmed the late Ann was buried in a different parcel of land. He stated he lives not far from where the deceased lived. He confirmed the deceased used to be his neighbor. He stated the deceased's health was not very good.

65. In re-examination by Mr. Koech, he stated the parcel of land where the deceased's first wife was buried is plot No. 1548.

## D.6. Testimony of DW.6 - VIVIAN CHEPKOECH BII

66. DW6, **Vivian Chepkoech Bii**. She identified herself as a teacher residing in Kericho Municipality. She stated Moses Kiptonui Bii was her father. She adopted her witness statement dated 18<sup>th</sup> February 2025 as her evidence-in-chief.

67. She testified that Kericho Municipality Block 5/701 is a plot sold to her brother David Tanui. Their father used to tell them that the Plot belongs to David. She stated their father did not leave an oral will. There were several meetings held after their father passed on.

68. Under cross-examination by Mr. Kipngetich, she confirmed when their father passed away, they met and each house agreed to appoint one person to co-administer the estate. She did not understand why Naomi did not append her signature. She stated the Co-Administrators were orally appointed. She used to visit her late father on several occasions. She confirmed the deceased did not discuss how he wanted his property shared.

69. She stated their father told them that he sold the land to David Tanui, and it was disclosed that David Tanui gave their deceased father \$26,000. She confirmed David Tanui paid the amount of Kshs. 3,283,000/= which was owed by the deceased.

70. In re-examination by Mr. Koech, she referred to paragraph 17 of Naomi's Affidavit where Naomi states that the Plot had been

sold to two other people. She stated the debt of Kshs. 3.2 M was pursuant to the Court decree and not negotiable. She confirmed it is acknowledged by Naomi that L.R. Kericho Municipality/5/701 was no longer part of the Estate. She stated there was no need to even consult Naomi over the issue. She confirmed she was never told of the oral will. She stated her father was bedridden and suffered from Cancer.

71. At this point, the 1<sup>st</sup> Petitioner's case was closed. The Court directed parties to file and exchange Written Submissions.

72. The Court received extensive documentary evidence from both parties. Of particular significance are the following documents;

*. Minutes of the Clan Members Meeting held on 12<sup>th</sup> August 2020. These minutes, produced by the 1<sup>st</sup> Petitioner, were taken just two months after the deceased's death. They were attended by over 40 clan members, including the Protester herself, Naomi Chepkoech Bii, and several of her witnesses, including Joel Siele and Joseph Soi. The agenda included discussions about debts owed by and to the deceased. The minutes list various creditors and amounts in detail. Critically, there is no mention whatsoever of any oral will.*

*. Western Union Money Transfer Vouchers and PNC Payment Systems Vouchers (P.Exh 4) evidencing payment of USD 26,605 by David Tanui to the deceased.*

- . RTGS Forms (D. Exhibit 2) evidencing payment of Kshs. 3.2 million.
- . Court orders dated 7<sup>th</sup> June 2021 and 14<sup>th</sup> January 2025 attesting to the payment of Kshs. 3.2 million to satisfy a decree against the deceased.
- . Sale Agreements (P.Exh 8-12 & 17-20) evidencing re-acquisition of properties by David Tanui from third parties.
- . Sale Agreement for Kericho/Kabianga/5264 (D. Exhibit 6).
- . Sale Agreement for Kericho/Kabianga/1412 (D. Exhibit 18).
- . Official Searches for Kericho/Kabianga/1962, 1963, 2178, and Kericho Municipality Block 5/701.
- . Title Deed for Kericho/Kabianga/2178.
- . Allotment letter for Plot No. 90 Kipkelion Town (Exhibit NCB-4).
- . Decree dated 17<sup>th</sup> April 2018 in Kericho CMCC No. 432 of 2015.

73. Both parties filed comprehensive written submissions. The Protester's submissions, filed in August 2025, argued that the oral will was validly made before multiple witnesses and that the alleged sales to third parties were unenforceable for lack of written agreements. The Protester relied on Section 9 of the Law of Succession Act and several authorities which I have looked into.

74. The 1<sup>st</sup> Petitioner's submissions, filed on 18<sup>th</sup> September 2025, argued that the oral will was a fabrication, pointing to the

inconsistencies in the Protester's evidence, the delayed disclosure, and the clan minutes of 12<sup>th</sup> August 2020 which made no mention of any oral will. The 1<sup>st</sup> Petitioner relied on several authorities which I have considered.

75. From the pleadings, evidence, and submissions, the following issues arise for determination; *Whether the deceased made a valid oral will on 6<sup>th</sup> June 2020.*

*Whether properties allegedly sold during the deceased's lifetime, particularly Kericho Municipality Block 5/701 and Kericho/Kabianga/5264, form part of the estate.*

*Whether the Kshs. 3.2 million debt paid by David Tanui should be reimbursed before distribution.*

*What is the appropriate mode of distribution of the estate?*

76. The law on oral wills is codified in Section 9 of the Law of Succession Act, Cap 160, which provides that no oral will shall be valid unless it is made before two or more competent witnesses and the testator dies within a period of three months from the date of making the will.

77. Section 10 of the Act further provides that if there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.

78. The courts have repeatedly emphasized that oral wills are susceptible to abuse and must be proved with strictness, clarity, and consistency. In ***Re Estate of Solomon Ngatia Kariuki (Deceased) [2008] eKLR***, the court stated that oral wills are by their nature susceptible to abuse and the law therefore insists on strict proof. Contradictory and unreliable evidence cannot be the basis for proving such a will.

79. Similarly, in ***Re Estate of Mwaura Mutungu alias Mwaura Gichichio Mbura (Deceased) [2018] eKLR***, the court held that where evidence on an oral will is contradictory, incoherent, and suspicious, the court cannot rely on it. Oral wills, due to their susceptibility to abuse, must be proved beyond peradventure.

80. Applying these legal principles to the present case, the Court finds that the Protester has failed to prove the alleged oral will to the required standard for the following reasons;

**Firstly**, there are material inconsistencies in the testimonies of the Protester's witnesses. PW.4, Kipkurui Arap Tum, claimed the deceased showed him the one-acre parcel but admitted under cross-examination that he never saw the deceased walk. This contradiction is irreconcilable. If he never saw the deceased walk, how could the deceased have walked to show him the land? The 1<sup>st</sup> Petitioner's witnesses, particularly DW.1, Kenneth Kipkoech Tanui, and DW.6, Vivian Chepkoech Bii, testified consistently that the deceased was bedridden and unable to move out of the

house. The Court finds the latter more credible, as they were in daily contact with the deceased during his illness.

**Secondly**, the Protester's witnesses displayed selective memory. They claimed to remember the specific date of 6<sup>th</sup> June 2020 with clarity, yet under cross-examination, they could not remember the date of the deceased's death or burial. PW.2, Joel Siele, admitted he could not remember the date of death. PW.3, Richard Chepkwony, made a similar admission. This selective memory undermines their credibility.

**Thirdly**, there is a significant discrepancy in what was said to have been stated in the oral will. The Protester's Affidavit of Protest and PW.7's testimony mentioned multiple properties including 1428, 1784, 2047, and 3203. However, the other five witnesses, PW.2 through PW.6, only mentioned Kericho/Kabianga/1428 and the one acre for Vivian. If all were present at the same event, their accounts should be consistent. This discrepancy is significant and unexplained.

**Fourth**, and most compelling, is the evidence of the Clan Minutes of 12<sup>th</sup> August 2020. These minutes, taken just two months after the deceased's death, were attended by over 40 clan members, including the Protester herself and several of her witnesses, including Joel Siele and Joseph Soi. The agenda included detailed discussions about debts owed by and to the deceased. The minutes list various creditors and amounts. Critically, there is no mention whatsoever of any oral will. If the deceased had indeed

made an oral will on 6<sup>th</sup> June 2020, distributing his properties, it is inconceivable that this would not have been discussed at the first clan meeting after his death. The minutes demonstrate that the family was meticulous in recording debts, yet the alleged oral will, a matter of far greater importance, was completely omitted. This omission is fatal to the Protester's case.

**Fifth**, the Protester delayed disclosing the oral will for three years. She admitted under cross-examination that she only disclosed the facts about the oral will on 16<sup>th</sup> June 2024, three years after the Petition was filed. This delayed disclosure is highly suspicious. If the deceased had indeed made an oral will, one would expect it to be raised at the earliest opportunity, not years later when distribution is imminent.

**Sixth**, there is no independent witness. Section 10 of the Law of Succession Act requires that where there is conflict, an oral will must be proved by a competent independent witness. The Protester's witnesses are all relatives or close associates with potential interests in the outcome. PW.6, David Kipkorir Rotich, claimed to be neutral, but his testimony was virtually identical to the others and suffered from the same inconsistencies. No truly independent witness, such as a neighbor, doctor, or village elder, was called to corroborate the event. Indeed, DW.5, Richard Kipkemoi Cheilgei, the Village Elder and an immediate neighbor, testified that he never heard of any oral will and would have seen any gathering.

**Seventh**, there is doubt as to whether the deceased was under the impression of imminent death. PW.3, Richard Chepkwony, conceded under cross-examination that the deceased was not anticipating death at that time. In ***Re Estate of Wilson Njau Kamau (Deceased) [2019] eKLR***, the Court of Appeal emphasized that the testator must be under the impression of imminent death for an oral will to be valid.

81. Having considered all the evidence, the Court finds that the Protester has failed to prove the existence of a valid oral will. The alleged oral will is riddled with inconsistencies, contradicted by contemporaneous clan minutes, disclosed belatedly, and unsupported by independent witnesses.

82. Regarding Kericho Municipality Block 5/701, the Protester claimed that this property does not belong to the estate because it was sold by the deceased to Phillip Kiprotich Titoek and Daniel Kiptum Salil. She testified that she discovered Sale Agreements in her husband's box after his death and that Mr. Salil called her in 2021 trying to trace the deceased. This testimony is significant because it demonstrates that the Protester herself acknowledges that this property was disposed of by the deceased during his lifetime and therefore should not form part of the estate.

83. However, the Protester produced no evidence to support this allegation. No sale agreement was produced, no evidence of payment was tendered, and the alleged purchasers are not in

occupation. The documents she claimed to have found in her husband's box were never filed in Court.

84. On the other hand, the 1<sup>st</sup> Petitioner produced substantial evidence that this property was sold by the deceased to David Kipkemoi Tanui during his lifetime. Western Union Money Transfer Vouchers and PNC Payment Systems Vouchers, marked as P.Exh 4, evidence payment of USD 26,605 by David Tanui to the deceased. Court orders dated 7<sup>th</sup> June 2021 and 14<sup>th</sup> January 2025 attest to the payment of Kshs. 3.2 million by David Tanui to satisfy a decree against the deceased, thereby freeing the property from attachment. There is also evidence that David Tanui is in actual possession of the property.

85. In ***Re Estate of Stanley Mathenge (Deceased) [2019] eKLR***, the court held that where the deceased sold a parcel of land during his lifetime, the same cannot form part of the free estate available for distribution. The estate is bound to complete the transaction.

86. Applying this principle, the Court finds that Kericho Municipality Block 5/701 was validly sold by the deceased to David Tanui during his lifetime and does not form part of the free estate available for distribution. The same applies to portions of Kericho/Kabianga/5264 that were re-acquired by David Tanui from third parties, as evidenced by Sale Agreements marked as P.Exh 8-12 and 17-20.

87. Regarding Kericho/Kabianga/1784, the Protester claimed joint purchase with contribution of Kshs. 1.2 million. However, DW.3, Ishmael Kiptonui Soi, testified that he sold 0.5 acres comprised in 1784 to the deceased in the early nineties, before the deceased had married Naomi. This evidence was uncontroverted and significantly undermines the Protester's claim of contribution. The property remains to be part of the estate though it was not registered on the deceased's name. Concerning Kericho/Kabianga/2047 and 3203, the Protester produced official searches but no evidence of ownership or valid transfer to herself during the deceased's lifetime. These properties remain part of the estate estate as evidenced by the sale agreements entered between the deceased and the third parties.

88. On Plot 90 Kipkelion Town, the Protester claimed that this property is registered in her son Collins Tanui's name and produced a letter of allotment, Exhibit NCB-4. However, a letter of allotment is not proof of ownership. No title deed was produced. In the absence of conclusive evidence that this property was transferred to Collins Tanui during the deceased's lifetime, it remains part of the estate.

89. Section 83 of the Law of Succession Act obligates administrators to pay all debts of the estate before distributing the net estate. The decree in Kericho CMCC No. 432 of 2015 created a liability of Kshs. 3.2 million against the deceased. David Tanui paid this amount on behalf of the estate, as evidenced by

court orders dated 7th June 2021 and 14th January 2025, and RTGS forms marked as D. Exhibit 2.

90. In ***re Estate of Thiong'o Mungai (Deceased) [2020] eKLR***, the court held that legal fees incurred in the course of administration are a proper expense of the estate and must be borne by the estate before distribution. By analogy, a debt of the estate paid by a beneficiary must be reimbursed before distribution.

91. The Court finds that the Kshs. 3.2 million paid by David Tanui shall be reimbursed to him as a first charge on the estate.

92. Having found that the deceased died intestate, the distribution of his estate is governed by Section 40 of the Law of Succession Act, which provides that where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

93. In ***Rono v Rono [2005] eKLR***, the Court of Appeal held that distribution under Section 40 should be based on the number of units in each house, comprising the surviving spouse and each child.

94. The 1<sup>st</sup> Petitioner's proposed distribution in paragraph 8 of the Supporting Affidavit to the Summons for Confirmation of Grant

dated 20<sup>th</sup> April 2024 follows this legal framework. The proposal takes into account properties validly sold during the deceased's lifetime, the estate liabilities, legal fees and incidental costs as a first charge on the estate, and the ratio of 9:5 based on the number of units in each house.

95. The Court has reviewed the proposal and finds it fair, equitable, and in accordance with the law.

96. For the reasons set out hereinabove, the Court makes the following final orders;

***a) The Affidavit of Protest dated 16<sup>th</sup> June 2024 is hereby dismissed.***

***b) The Summons for Confirmation of Grant dated 20<sup>th</sup> April 2024 is hereby allowed. The grant of letters of administration intestate issued to Kenneth Kipkoech Tanui and Naomi Chepkoech Bii on 10<sup>th</sup> January 2022 is hereby confirmed. The estate be distributed as proposed in Affidavit of Kenneth Kipkoech Tanui.***

***c) Each party shall bear their own costs.***

**Dated, signed and delivered at Kericho this 10<sup>th</sup> day of March, 2026.**

.....  
**J. K. SERGON  
JUDGE**

In the Presence of:-

C/Assistant – Rutoh

Koech for 1<sup>st</sup> Petitioner

Malel holding brief for Kipngetich for 2<sup>nd</sup> Petitioner