

**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT LODWAR  
SUCCESSION CAUSE NO. E001 OF 2024**

**IN THE MATTER OF THE ESTATE OF FRANCIC ETHURON KARE  
(DECEASED)**

**ELIJAH ETHURON**

**KARE.....PETITIONER**

**VERSUS**

**LEAH EKAI**

**LOKOEL.....OBJECTOR**

**JUDGMENT**

**Case Background**

1. The deceased, Francis Ethuron Kare, was a resident of Kanamkemer Location within Lodwar Township, Turkana Central Sub-County, until his demise on the 24<sup>th</sup> day of March 2024 at Lodwar County Referral Hospital. Following the deceased, the petitioner on 4<sup>th</sup> April 2024, filed a Petition for Letters of Administration Ad Colligenda Bona citing several grounds of urgency. The Petitioner's initial affidavit listed the survivors of the deceased as four children; Elijah Ethuron Kare, Kennedy Ethuron Kare, Grace Munyes Kare, and Jayden Ethuron Kare alongside the deceased's biological mother.
2. In support of the identification of beneficiaries, a letter from the Office of the Chief, Kanamkemer Location (Ref: KANAM LOC 346) dated 31<sup>st</sup> July 2024 was filed. This letter stated that the deceased solely raised his four children. The Chief's list categorized the households as follows: the first house (Margaret Napeikar, (deceased), the second house (Selma Achna Peter, deceased), and the third house, where Leah Akai Lokoel was listed as a wife (separated) and Jayden Ethuron Kare as a son.

3. At the time of his death, the deceased had disclosed free property to including; Land Block No. 1/005 (0.4677 HA), Land Block No. 2/007 (1.5533 HA), Land Block No. 1/037 (0.3012 HA), Land Block No. 1/100 (0.5568 HA), Land Block No. 1/047 (2.2222 HA), Land Block No. Kalokol (f) (1.4865 HA), Land Block No. 3/2022/547 (0.2103 HA), Land Block No. 3/2022/598 (0.2188 HA), Land Block No. Kalokol (i) (0.0849 HA), Land Block No. 3/2022/896 (0.5204 HA), Plot No. 456B (Lodwar Town) (Unspecified), Plot No. 42 (Lodwar Town) (Unspecified), Plots No. 9A, 127, 265, 164 (Kalokol), Plot No. 158B (Napetet); and, Equity Bank (Lodwar) A/C 0990184233428 (Undisclosed Balance).
4. Following the issuance of the limited grant, the Petitioner moved the court for a Grant of Probate with will annexed, based on a Written Will dated 6<sup>th</sup> September 2017. The will appointed the Petitioner as the Trustee and Executor. The Will reportedly further provided for the deceased's son Jaiden but notably excluded the Objector.
5. The petition for probate initially attracted an objection from the Objector who then entered an appearance and filed a formal objection, asserting her status as a surviving widow of the deceased and claiming that her separation from the deceased in 2018 was temporary and intended for educational purposes. She asserted that the Will was unrepresentative of the deceased's true state of mind and that she, as a surviving widow, had been unfairly excluded.
6. In response to the objection, the Petitioner admitted the fact of the Objector having been deceased's wife but had been traditionally divorced in 2017 following her abandonment of the matrimonial home to go and live in Eldoret. The court struck out the initial Objection to Making Grant and directed the Petitioner to file for Confirmation of Grant, to which the Objector was permitted to respond by way of a protest.
7. The primary issue for trial was narrowed down to whether the Objector is a widow or a former wife of the deceased and as such her rights in a testamentary disposition.

### **Summary of the Objector's Case**

8. The Objector's case is predicated on the assertion that she was customarily married to the deceased, and that this marriage was never legally or customarily dissolved prior to his death. In support of this claim, the Objector produced four witnesses who testified on diverse dates. The Objector testified as DW1 and said that she married the deceased in September 2014 under Turkana customary law.
9. She asserted that they lived together happily as husband and wife until 2017/2018, when she moved to Eldoret to pursue university studies. She claimed that the deceased was fully supportive of this move, paying her tuition fees and maintaining her through periodic cash and M-Pesa remittances. According to her testimony, even though they were living apart, they remained in constant communication, and she viewed herself as a subsisting wife until the date of his death.
10. Regarding the events following the deceased's death, the Objector claimed she participated in the burial rites and was acknowledged as a widow in the eulogy. She produced a Chief's letter which she claimed described her as a widow who separated from the deceased. She argued that this separation did not constitute a divorce.
11. In cross-examination by Mr. Nabenyo Advocate, the Objector admitted that they were blessed with only one child, Jaiden Kare, born on 21<sup>st</sup> May 2015. She specifically denied that a child was born in 2022, Sonia Nalipan, whose birth certificate lists *Leah Ekai* as the mother and *Henry Ekai Nalapan* as the father, was her biological child. Further, the Objector admitted that her marriage was never registered in accordance with the 2017 Marriage Gazette requirements.
12. She also conceded that after the death of the deceased, she was not shaved, she did not stay indoors for the mandatory three-day ritual confinement, and no other traditional widowhood rituals were performed

on her. She attributed this to family differences and the deceased's conversion to Christianity. Finally, she admitted knowledge of the 2017 Will but argued she did not know why her name was excluded, maintaining that her son Jaiden is entitled to a share of the estate.

13. DW2 was Akwam Akaku, a Bishop/Pastor at Successful Christian Living International Church, who testified as a friend of the deceased. She recalled that in 2014, the deceased called her to his office and requested her to act as an intermediary by taking an envelope to the Objector's mother to initiate marriage negotiations. She confirmed that the mother received the envelope and gave the greenlight for the marriage, leading to a traditional wedding.
14. However, the witness admitted that after the Objector moved to Eldoret for her studies, she lost touch with the couple and could not say with certainty whether they had divorced. In re-examination, she clarified that a Turkana divorce requires an agreement between families and the formal return of dowry.
15. DW3, a driver employed by the Turkana County Assembly, appeared as the third witness for the Objector. Upon being shown the statement filed in his name, he denied having ever recorded or signed such a document, claiming he was seeing it for the first time in court. He stated he was merely called by the Objector to be a witness without any preparation or briefing. The witness was consequently declared hostile and his testimony abandoned.
16. DW4 who identified himself as a cousin of the deceased, testified that the deceased married the Objector in September 2014 and that she, along with her siblings, contributed a total of 90 goats toward the bride wealth. She asserted that the Objector remains a widow because no dowry had ever been demanded or returned, which she argued was a mandatory step for a Turkana customary divorce.
17. On cross-examination, she admitted she had not visited the deceased's home in many years and did not meet the Objector when she visited the

deceased's office in 2023. She also confirmed that no traditional widowhood rituals were conducted at the burial because the deceased was buried the Christian way and his mother had declared that he was *saved* and did not follow traditions. She admitted being unaware of any remarriage by the Objector or the existence of a second child named Sonia.

### **Summary of the Petitioner's Case**

18. The Petitioner's case is built on the assertion that the deceased died testate, having left a valid Will, and that the Objector had been customarily divorced in 2017. Five witnesses were called to establish these facts.
19. PW1 was one Boniface Korube. He introduced himself as a practising anthropologist and Director for Culture, Heritage & Art, County Government of Turkana County and therefore testified as an expert witness. He stated that widowhood rituals which include; three days of confinement, the removal of wedding garments, and the "kilur" (shaving) of the head, are mandatory and spiritual in nature. He added that a woman who refuses these rituals is no longer treated as a member of the lineage and stands cursed by the ancestors.
20. Regarding divorce, the witness clarified that under Turkana custom, marriage is a family and community affair. He testified that a divorce meeting involves elders and the "cleansing" of the woman at her parents' home, which restores her status to that of a "girl". He noted that while dowry animals are generally returned, the husband has the discretion to forgo the return of dowry to maintain family relationships or to legitimize the status of children remaining with the biological father. He emphasized that once a woman undergoes the cleansing and removal of marital garments, the marriage is effectively terminated regardless of whether animals are returned.

21. PW2, an electrician and self-employed businessman, testified that he was a close friend and business partner of the deceased. He claimed to have facilitated the logistics for the 2014 traditional wedding but stated that the relationship soured when the Objector chose to leave the supermarket, she managed at the Petrol Station to go for studies in Eldoret. He testified that the deceased explicitly told him he *did not want the Objector in his life anymore* and that she had *left for good* in 2017. He asserted that the Objector was not the wife of the deceased at the time of his death and claimed she had remarried and had another child, though he did not provide documentary proof of the new union.
22. PW3, a foreman who constructed the deceased's house at Naperebei in 2020, testified that he worked for the deceased for several years. He stated that during the construction period and up until the deceased's illness, the deceased lived alone in the house. He testified that he was the person who took the deceased to the hospital when he fell ill and that it was at the hospital that he first met the Objector. He claimed she introduced herself as *Mama Jaiden* and not as the deceased's wife. He further confirmed seeing the Objector at the funeral but noted she did not appear to be performing the roles of a widow.
23. PW4 was a casual labourer who lived with the deceased from 2020 to 2023, and testified that his duties included cooking and domestic chores. He stated that for the three years he lived in the deceased's household, he never saw the Objector or any other woman residing with the deceased. He testified that the deceased lived as a single man and that he only met the Objector at the funeral, where she was introduced as the mother of the deceased's son, Jaiden.
24. The petitioner testified as PW5. He introduced himself as an engineer employed by the County Government of Turkana and the eldest son of the deceased. He testified that his father died testate, leaving a Will dated 6<sup>th</sup> September 2017. He asserted that the Objector is a *former wife* who was customarily divorced in 2017. He claimed to have personally witnessed

the divorce ceremony at the Objector's father's home, where elders were present, and the deceased publicly declared the termination of the marriage.

25. At the divorce meeting, he explained that his father chose not to demand a refund of the bride wealth to maintain peace and for the sake of his son Jaiden. He further testified that the Objector had moved on and remarried a man named Henry, with whom she had a child named Sonia Nalipan in 2022. He stated that the Objector's own mother had introduced the child to him as his *step-sister*. He urged the court to uphold the Will as the authentic final wishes of his father.
26. At the close of production of evidence, parties took time to file written submissions. The court has had the benefit of reading the filed submissions and shall duly give due regard to same in this decision

### **Summary of the Objector's Submissions**

27. The Objector's submissions, filed on the 27<sup>th</sup> of September 2025, focus on two primary arguments: the lack of a legal decree for divorce and the failure of the Petitioner to prove the completion of customary divorce rituals. The Objector submits that under Section 69 of the Marriage Act 2014, a customary marriage can only be dissolved through a court decree. She maintained that since no divorce proceedings were ever filed and no decree was obtained, the marriage subsisted as a matter of law until the deceased's death. She further argued that customary law, while recognized under Articles 2(4) and 159(2)(c) of the Constitution, its dissolution must be evidentially proven in court.
28. Relying on the Ghanaian case of **Angu vs Attah (1916) PC** and the Kenyan authority of **Ernest Kinyanjui Kimani V Muuru Gikanga &**

**Another (1965) EA 733**, the objector argues that the burden of proving a custom, such as the optional return of dowry, rests on the party alleging it. She contended that the Petitioner failed to produce any elders who participated in the alleged 2017 divorce ceremony, relying instead on his own testimony and an expert who was not a witness to the facts.

29. The Objector also cited **JFB vs MOO (2017) eKLR** to support the proposition that a marriage remains valid where dowry has not been refunded. She concluded that she remains a widow for all intents and purposes and is entitled to a share of the estate as a primary beneficiary.

### **Summary of the Petitioner's Submissions**

30. The Petitioner's submissions, filed on the 8<sup>th</sup> of October 2025, countered that the deceased died testate and that the Objector lacked the legal standing to challenge the bequests. The Petitioner argued that the Written Will dated 6<sup>th</sup> September 2017 is valid under Section 11 of the Law of Succession Act, as it is regular on its face, signed by the testator, and witnessed by two competent individuals. He invoked the principle of *omnia esse rite acta* applied by the court in **Karanja & Another vs Karanja (2002) 2 KLR 22**, asserting a rebuttable presumption of due execution.
31. On the status of the marriage, the Petitioner submitted that the parties were divorced in 2017 under Turkana Customary Law. He argued that the expert testimony of PW1 established that the return of dowry is not a prerequisite for a valid divorce. More critically, he relied on the Law of Succession (Amendment) Act, 2021, which amended Section 29 to exclude *former wives* from the definition of dependants. He argued that as the parties had lived apart for eight years and the Objector had allegedly remarried, she was a *former wife* and thus legally barred from claiming dependency.
32. Finally, the Petitioner highlighted the Objector's failure to produce a Certificate of Customary Marriage as required by the Marriage (Customary

Marriage) Rules, 2017, which renders her claim to subsisting widowhood legally fragile. He cited the decision in **re Estate of Benson Maingi Mutua (2022) eKLR** to emphasize the legislative intent to block opportunistic claims by estranged spouses.

### **Issues, Analysis and Determination**

33. The court has duly perused and considered the evidence on record and the comprehensive rival submissions by the parties and identifies the following four issues for determination:

- a. **Whether the Written Will of the deceased's dated 6<sup>th</sup> September 2017 is valid and enforceable;**
- b. **Whether the Objector was a legal spouse/widow of the deceased at the time of his death; and**
- c. **Whether the Petitioner is entitled to a Grant of Probate and the subsequent confirmation thereof.**

34. On the first issue addressing the testamentary effect and the formal validity of the Will propounded by the Petitioner, the Law of Succession Act, Cap 160, under Section 5(1), is indubitably explicit that any person of sound mind may dispose of their free property by Will. Section 11 of the Act mandates that for a written Will to be valid, it must be signed by the testator (or his mark affixed to the will) in the presence of two or more competent witnesses, each of whom must see the testator sign or receive his personal acknowledgment of the signature.

35. In the present case, the Will is dated 6<sup>th</sup> September 2017. It bears the signature of the deceased, Francis Ethuron Kare and was attested by two individuals being; Joseph Loswakan Lobolia Ekal and Nelly Areng Edonga. The court observes that the Will appears regular on its face. As held in **Karanja & Another v Karanja (2002) 2 KLR 22**, where a Will is regular on its face with a proper attestation clause, a rebuttable presumption of due execution, *omnia esse rite acta*, arises. The burden then shifts to the Objector to provide evidence of fraud, forgery, or lack of capacity.

36. The Objector, in her testimony, admitted that a Will exists and that she was aware of its contents. However, she did not lead any evidence to suggest that the deceased lacked the sound and disposing mind required by Section 5(3) of the Act yet the onus squarely rested on the person contesting the validity of a will. To her credit, however, the court appreciates that no challenge on the validity of the will was ever mounted save for the assertion that being a widow, she was entitled to a share.
37. As illustrated in **Re Estate of Murimi Kennedy Njogu (2016) eKLR**, testamentary capacity requires that the testator understand the nature of the act, the extent of his property, and the objects of his bounty. There is no medical or circumstantial evidence before this court suggesting that the deceased, who was an active businessman in 2017, lacked this capacity.
38. Furthermore, the exclusion of the Objector from the Will is not, in itself, a ground for invalidation. Freedom of testation, as reinforced in **re Estate of Sospeter Kimani Waithaka (Deceased) [2018] eKLR**, allows a testator to distribute his property as he deems fit, provided reasonable provision is made for dependants. Given that the deceased's son with the objector, Jaiden, like all his other children with other ladies, was catered for in the Will, the court finds no grounds to disturb the deceased's express intentions. Thus, the Will dated 6<sup>th</sup> September 2017 is determined valid with full testamentary effects.
39. On the second question, whether the Objector was a legal spouse/widow of the deceased at the time of his death, it has not been disputed a fact that a Turkana customary marriage was celebrated between the deceased and the objector in 2014. The divergence is that while the Objector argues that because no dowry was returned and no court decree was obtained, she remained a wife, the petitioner takes the position that there was indeed a customary divorce in 2017 but the deceased elected not to demand and collect dowry for the sake of continued relationship for the sake of the child Jaiden.

40. The court must then look at the intersection of the Marriage Act 2014 and customary practices. Section 69 of the Marriage Act 2014 provides grounds for the dissolution of customary marriages and implies a role for the court. However, the Act also recognizes marriages and dissolutions concluded under customary law prior to its full implementation in a procedural sense. The expert testimony of Boniface Korube (PW1) provided clarity on Turkana customs. He explained that the *return of dowry* is a general rule but subject to the husband's discretion to forgo it for the sake of the children legitimization.
41. The Petitioner provided direct evidence of a 2017 divorce ceremony at the home of the Objector's father. This testimony was supported by the conduct of the parties thereafter. Factually, the evidence of PW2, PW3, and PW4 is overwhelming. The said witnesses lived with or worked daily for the deceased from 2017/2020 until 2024 and consistently testified that the deceased lived as a single man and that the Objector was absent from his life. In contrast, the Objector's own witnesses, specifically DW4, admitted having not seen the deceased and the objector together for years prior to his death. To the court, a spouse who has been absent for six or seven years, residing in a different town, hundreds of kilometres away, and who has had no domestic presence in the matrimonial home, cannot reasonably claim to be a subsisting wife.
42. Furthermore, the court takes judicial notice of the Marriage (Customary Marriage) Rules, 2017, which mandated the registration of all customary marriages by 1<sup>st</sup> August 2017. The Objector admitted that her marriage was never registered. While non-registration does not necessarily invalidate a marriage, it places a heavy evidentiary burden on the person asserting the marriage's existence. The Objector failed to meet this burden on the face of the evidence that her and the deceased never lived as a man and wife since 2017.
43. Most compellingly, the Objector's failure to undergo any mandatory widowhood rituals; shaving, confinement, or animal slaughter, is a strong

indicator that the Turkana community and the deceased's family did not recognize her as a widow. PW1, the expert witness, asserted that failure to undergo such rituals results in a person being viewed as an outsider. The court finds that the marriage was customarily dissolved in 2017.

44. The court holds that since the objector's marriage to the deceased had not been registered as mandatory under the Marriage Act, that it was equally proved to have been dissolved customarily, the objector was at best a former wife which the Law of Succession Act ceased to recognise as a dependant. She was not a *spouse* within the meaning of the 2021 Amendment to the Law of Succession Act. at the time of the deceased's death in 2024. To qualify as a dependant under Section 29(2), the Objector had to prove she was being maintained by the deceased for two years prior to his death. She failed to provide a single shred of documentary evidence such as M-Pesa records or bank transfers to support her claim of receiving cash. The testimony of the deceased's employees confirms he maintained no such relationship. Consequently, she lacks the legal status of a dependant and has no standing to challenge the Will or claim a share of the estate under Section 26 or Part V of the Act.
45. Finally, on the Petitioner's entitlement to the Grant, the court notes that the Petitioner is the deceased's eldest son and the named Executor in a valid Will. Under Section 66 of the Law of Succession Act, the court has discretion to appoint administrators, but in testate cases, the court must follow the testator's choice of Executor unless there is proof of unfitness. The Petitioner has demonstrated diligence in preserving the estate, managing the burial, and ensuring the education of the deceased's children. The court finds him to be a fit and proper person to hold the Grant of Probate.
46. In the upshot, the court finds that the Petitioner has proved the validity of the Will and the factual dissolution of the marriage between the deceased and the Objector. The Objector has failed to prove her status as

a widow or her eligibility as a dependant under the 2021 legislative regime. As observed in **In the Matter of the Estate of Late Sospeter Kimani Waithaka**, (supra) the court should not freely intervene to alter the preferences of a testator for specific beneficiaries. The deceased's decision to exclude the Objector from his Will in 2017, followed by seven years of separate living, must be respected.

47. The consequence of the foregoing discussion and conclusions is that the Objection filed by Leah Akai Lokoel is hereby dismissed. The Written Will dated 6th September 2017 is hereby declared the valid last Will and Testament of the deceased, Francis Ethuron Kare. The Grant of Probate issued to Elijah Ethuron Kare on 3<sup>rd</sup> May 2024 is hereby confirmed with the Petitioner being authorized to administer and distribute the estate. The Petitioner shall file a comprehensive account of the administration and a final transmission within six months from today for the court's formal discharge.

Dated, signed and delivered virtually this 18<sup>th</sup> day of March, 2026.



Patrick J O Otieno

Judge