In re Estate of Kipkeino Arap Cheplanget (Deceased) (Succession Cause 274 of 2003) [2024] KEHC 15976 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15976 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 274 OF 2003

JRA WANANDA, J

DECEMBER 20, 2024

IN THE MATTER OF THE ESTATE OF KIPKEINO ARAP CHEPLANGET (DECEASED)

BETWEEN

MARY JEROP BETT .... 1ST PETITIONER

SIMION KIPRUTO SANG .... 2ND PETITIONER

AND

SAMSON KIPROTICH KEINO .... 1ST OBJECTOR

CHRISTOPHER KEMEI .... 2ND OBJECTOR

ISAAC KIPCHUMBA CHEPKWONY .... 3RD OBJECTOR

MATTHEW KUTTO .... 4TH OBJECTOR

JUDGMENT

1. The background of the matter is that the deceased, Kipkeino Arap Cheplanget, died on 26/02/1985 at the age of 80 years old. On 5/12/2003, through Messrs Anassi Momanyi & Co. Advocates, one Daniel Kipsang Arap Bett and the 2nd Petitioner, Simion Kipruto Sang, as sons of the deceased, filed a Petition of Letters of Administration seeking to be appointed Administrators of the estate of the deceased. In the Petition, the 4 survivors of the deceased were listed, including the 2 Petitioners and the 1st Objector. It was also stated that the deceased left behind the property known as Nandi/Ndalat/300. The Petition was then gazetted but, from the record, I gather that before the Grant could be issued, the 1st Objector, Samson Kiprotich Keino, on 21/07/2004, as the other son of the deceased and acting in person, challenged the Petition. The grounds set out was, basically, that the deceased was married to 2 wives but the Petitioners omitted one widow and that therefore, there was misrepresentation.

2. In opposition to the Objection, the 2nd Petitioner, Simion Kipruto Sang, swore the Replying Affidavit filed on 18/08/2004. He conceded that indeed the deceased had 2 wives but that one,

namely, Turubena Chepchumba Saina, died before the Petition was filed and that they could not include a deceased person as a beneficiary or Petitioner. They therefore denied that there was any misrepresentation.

3. As the matter was still pending for determination, through Messrs Machio & Co. Advocates, an Application was filed on 8/04/2005 by new Objectors, namely, Barnaba Kipkorir Metto, Isaac Kipchumba Chepkwony (3rd Objector) and Mathew Kuto (4th Objector) seeking leave to file such Objection out of time. In his Affidavit sworn on behalf of the new Objectors, the said Barnabas Kipkorir Meto deponed that by his Will made on 12/09/1984, the deceased bequeathed his said property known as Nandi/Ndalat 300 measuring 28.13 hectares or 69.5 acres as follows:

i)	Joram Kuto Lagat	12 acres
ii)	Isaac Kipchumba Chepkwony	6 acres
iii)	Simion Kipruto Sang	20.5 acres
iv)	Daniel Kipsang Bett	13 acres
v)	Samson Kiprotich Keino	13 acres
	Total	69.5 acres

4. He deponed that the deceased applied for consent for sub-division of the said property from the Land Control Board but became sickly and died before obtaining such sanction, but that however, the deceased very wisely prepared his Will in which he set out the purchasers' shares. He deponed that he took possession of his 5 acres share in 1984 and fenced it and that he has been cultivating the same to date, and that the other Applicants also took possession and some have also built structures thereon. He urged further that the administration of the estate of the deceased was the subject of proceedings in Kapsabet Resident Magistrate's Court Succession Cause No. 48 of 1985 in which a Grant was made in favour of the 2nd Petitioner, Simion Kipruto Sang, and to which the Applicants objected and that when the case was subsequently transferred to Eldoret, it became Eldoret Chief Magistrate's Court Magistrate's Succession Cause No. 33 of 1989, that the authenticity of the Will of the deceased became the subject of forensic examination and the thumb-print was found to be genuine. He speculated that the High Court must have later transferred the said Cause to the High Court but that in January 2005, he heard from one of the sons of the deceased that new proceedings had been commenced. According to him therefore, the Petitioners should not have filed a new action, that by the time he learnt of this new action, the time for him to object to the Grant had already lapsed, and that they have genuine claims and request the Court to give them an opportunity to file their Objections out of time.

5. In opposition to the Objection, the 2nd Petitioner, Simion Kipruto Sang, swore the Replying Affidavit filed on 20/05/2005. He deponed that the Application is defective as there is no provision under the *Law of Succession Act* for making an Application by way of Chamber Summons, that the Sale Agreement dated 30/03/1984 is null and void for lack of consent of the Land Control Board and thus unenforceable and that the Agreement itself does not satisfy the requirements of the *Law of Contract Act*. He deponed further that the Applicants had not demonstrated why they did not lodge the Objections in time. He further contended that there was no Will made by the deceased bequeathing the parcels of land to the Objectors, and that the Will allegedly made on 12/09/1984 is a forgery. He also denied that the Applicants had taken possession of the said parcel of land. He added further that

the proceedings in Kapsabet Resident Magistrate's Court No. 48 of 1985 as well as Eldoret Principal Magistrate's Court No. 33 of 1989 were incompetent, null and void for want of jurisdiction, and that no decision of the Court has been made on the validity or otherwise of the alleged Will. He also denied knowledge of any Succession Cause relating to the deceased pending in any Court and that he is unaware of any proceedings transferring Eldoret Principal Magistrate's Court No. 33 of 1989 to the High Court. He insisted that the deceased died intestate.

6. The said Application was however struck out on 16/11/2005 on the technicality that it was brought by way of a Chamber Summons, instead of Summons. Undeterred, the Objectors still proceeded to file their formal Objection on 16/07/2007. I have not come across any objection raised over this scenario and I therefore presume that none exists and that the Objection is valid on record.

7. Unfortunately, before the Objections could be heard, the said Daniel Kipsang Arap Bett died on 29/05/2009, and he was then substituted in this Cause by Mary Jerop Bett, as the 1st Petitioner.

8. I note from the record that on 5/10/2020, Sewe J directed that the Court file in Eldoret Principal Magistrate's Court No. 33 of 1989 be availed before her for scrutiny but that the same could not be traced. The Deputy Registrar issued a Certificate to that effect.

Hearing of the Objections

9. Directions were then given that the Objections be heard by way viva voce evidence. Pursuant thereto, the parties filed respective Witness Statements and bundles of documents. By this time, Messrs Songok & Co. Advocates appears to have taken over conduct of the 1st Objector's case, Messrs Isiaho Sawe & Co. Advocates was now acting for the 2nd, 3rd and 4th Objectors, and Too Koskey & Co. had taken over conduct of the Petitioners' case.

2nd & 4th Objectors' Case

10. Since the 1st Objector represented by Mr. Songok was not ready on 17/07/2023 when the matter came up for trial, it was agreed that the 2nd & 4th Objector, represented by Ms. Isiaho would present their case first, before the 1st Objector.

11. The 1st witness (PW1) was therefore the 2nd Objector, Christopher Kemei, who took the stand on 17/07/20223. Led in his evidence by his Counsel, Ms. Isiaho, he adopted his Affidavit filed on 29/09/2022 and testified that his father, the said Barnabas Kipkorir Meto purchased 5 acres of the suit property but is now deceased and that this is why he is the one pursuing the claim. He insisted that there is a Will dated 12/09/1994 made by the deceased, that the Will was challenged by the 1st Objector and that vide a Court Order, the Will was authenticated by the Directorate of Criminal Investigations (DCI) and a Report produced in Court. According to him therefore, the property should be distributed as per the Will.

12. Under cross-examination by Ms. Too, he insisted that his father purchased the said portion and took possession when the deceased was still alive and that the other purchasers were also mentioned in the Will. He stated that his father purchased the property for the purposes of assisting the deceased to pay a loan owing to the Agricultural Finance Corporation (AFC). Under cross-examination by Mr. Songok, he stated that the Will serves as the Sale Agreement, that there is a cheque confirming payment but that he has not produced the same, that their portion of the suit property was purchased at Kshs 35,000/-, thus Kshs 7,000/- per acre, in 1984, that he was born in 1978 and thus did not witness the sale but that his father showed him the Will and the DCI Report. When shown a letter indicating that the loan was never paid, his response was that he could not comment on it but stated that the loan was paid directly to the bank account of AFC through its Kenya Commercial Bank (KCB) account. He also stated that

he was not aware whether there was a waiver of the loan. During re-examination, he also pointed out that the letter that he was shown by Mr. Songok was a 2000 letter and which did not indicate anything on whether the loan of 1984 was paid. He again insisted that they have been in occupation since 1984 and that no case has been filed against them about it

13. PW2 was one Meshack Kimaiyo. He adopted his Witness Statement and testified that the son (Daniel Kipsang Arap Bett) of the deceased was married to his niece, the 1st Petitioner, the said Mary Jerop Bett. According to him, the deceased sold a portion of the suit property to only Barnabas Meto and one Joram Lagat, no one else. He then stated that the deceased sent him to the late Barabara Tanui, the Advocate who later became a Judge as he wanted the Advocate to write for him a Will and that the deceased could not go by himself because he was sick. He stated further that he did as instructed, that the deceased first wrote down the Will in his handwriting before it was later typed, that it was later brought to the deceased and that he (PW3) was present when the Will was read out to the deceased and which the deceased accepted and signed in his (PW3's) presence. He stated that the family of the deceased was not there and that it was only after he died that the family was informed and that Advocate Barabara Tanui instructed him not to disclose the existence of the Will until the death of the deceased. Under cross-examination by Ms. Too, he stated that the deceased sold the property because his son, the 1st Petitioner, Simion Kipruto Sang, had taken a loan at the said AFC and which wanted to sell the land and that the payment was made directly to AFC. He stated further that at the time of the purchase, the 1st Petitioner was in prison. He also testified that he was in Court when the DCI Report was produced in evidence.

14. Under cross-examination by Mr. Songok, he insisted that he is the one who was sent to go and bring Advocate Barabara Tanui and that the deceased wrote down his wishes and handed it over to the Advocate to go and type. When he was shown the copy of the Will before Court, he conceded that the same did not bear the Lawyer's stamp but insisted that the one that was prepared by the Lawyer had the stamp and speculated that the same could have gotten lost with the Court file that went missing. He stated that he had no knowledge whether the deceased appointed an executor and also stated that although his name (PW3) does not appear in the Will, his signature does, although his National Identity Card number does not also appear. He insisted that he personally went and remitted the money at the AFC bank and that in doing so, he was accompanied by one John Murei, one of the purchasers, that on that day, he remitted Kshs 50,000/- and that he is aware that the loan was eventually waived and that the amount waived was Kshs 633,209/-. Regarding the sale to the purchasers, he stated that the deceased never wrote any Sale Agreement.

15. In re-examination by Ms. Isiaho, he started that they paid the loan before the Will was later written in 1984, that the payment that they made to AFC on the date referred to was only part-payment, and that the purchasers were known to him even before the sale. He stated further that the purchasers were John Murei and Barnabas Meto and that the name of John Murei does not appear in the Will because he surrendered his portion to Joram Lagat Kuto. He stated that he has no interest in the land and that he had not been promised any payment.

16. At this juncture, the witness produced the documents contained in his bundle of documents. Mr. Songok had no objection to production of the documents except the copy of the contentious DCI Report. He insisted that the same be produced by its maker. Ms. Isiaho defended the intended production of the Report on the ground that the DCI Officer had already testified before the Magistrate's Court and produced the original Report and that the Court file having now gone missing, the tracing of the original Report is now impossible. In his rejoinder, Mr. Songok pointed out that according to Ms. Isiaho, the Report was produced pursuant to a Court but that the said order had not

been produced. Ms. Isiaho then conceded and prayed that the Court issues Summons to the Officer to attend Court.

17. However, on 31/10/2023, the date fixed for the DCI Officer to appear, Ms. Isiaho informed the Court that although she had intended to call the Officer as her next witness, she had been informed that the Officer concerned had since retired in 1990. She added that secondly, she had been informed that the records being old, had been archived and subsequently destroyed after 15 years and that in the circumstances, she would be asking the Court to admit secondary copies of the Report. She never however pursued that issue further.

18. PW3 was the 4th Objector, Mathew Kipruto Kuto. He too, testified on 31/10/2023. He, too, adopted his Witness Statement and testified that his father, the late Joram Kuto Lagat purchased 12 acres portion of the suit property from the deceased. He stated that the family of the deceased is only using 1 acre of the property and that the rest is being used by the family of the 1st Objector, Samson Kiprotich Keino. He, too, insisted that the deceased made the sales to different purchasers for purposes of paying-off the loan owing to AFC so as to prevent the land from being auctioned. He, too, insisted that when the 2nd Objector challenged the Will in the Magistrate's Court, the Court ordered that the same be authenticated and which was done and the Report produced in Court.

19. In cross-examination, he stated that it is his father who told him about the sale, the Will and the issue of the AFC loan, that he did not know the purchase price but he knew that it was 12 acres. According to him, his father gave the money to the deceased who then paid it to AFC. He was also shown the letter dated 9/05/2000 from AFC indicating that no payment was in fact made and also the letter dated 28/02/2000 from Birech & Co. Advocates to his father, Joram Kuto communicating that no purchase was made and demanding that, as a result, he vacates the land. He stated that apart from the 2nd Objector, all the rest of the family members of the deceased are in agreement that the purchase was indeed made. He had no comments to make when shown the letter dated 2/12/2002 from AFC indicating that the loan was waived. He insisted that in 1984, his family occupied 12 acres but that at the moment, they are only using 1 acre. He stated further that his family, subsequently in 1990s, purchased a further 3 acres from the 1st Objector, long after the deceased had already died, and which is separate from the 12 acres referred to, and that this said extra 3 acres that they purchased subsequently from the 1st Objector was still in the name of the deceased.

20. In re-examination, he stated that there is no evidence that the letter from Birech & Co. Advocates dated 9/05/2000 reached his father, and that in any event, the purchase price was paid in 1984, long before the said letter. He testified further that by the time of the letter, the Kapsabet Succession Cause had already been filed, that no eviction proceedings were undertaken against them by Birech & Co. after the letter and neither did the 1st Objector file any suit against them. He also insisted that the AFC loan was taken by the 1st Objector, that in fact, the letters were addressed to him, not the deceased and that he (1st Objector) was in prison at the time when the sales were undertaken. He stated that the 1st Objector's portion is also provided in the Will.

1st Objector's case

21. The 1st Objector, Samson Kiprotich Keino, finally being ready, in line with the agreement reached as aforesaid, took the stand and testified before me as PW4 on 4/03/2024. He was led in his evidence-in-chief by Mr. Sonkule Advocate who held brief for Mr. Songok and adopted his Witness Statement. He testified that his step-brothers fraudulently sold the suit land and that no sale took place. He challenged the alleged purchasers to produce documents proving that they paid the AFC loan and that they should

also clear the contradiction on whether they paid off the loan or whether they purchased the land, and that they should also produce Sale Agreements.

22. Under cross-examination by Ms. Too, he confirmed that the 1st Petitioner is his late brother's wife and the 2nd Petitioner is his step-brother. He conceded that when his father died, only the said Barnabas Meto (the father of the 2nd Objector, Christopher Kemei) was in occupation of the land and denied that the others were also in occupation. He however then also conceded that the 3rd Objector, the said Isaac Kipchumba Chepkwony, was also in occupation. He also conceded that he was away in prison at the time of the alleged sale point. He denied any knowledge of the Will allegedly written by his father, and stated that he challenged the Will in a case described as Eldoret No. 10B of 1989 in which the issue of authentication featured. He denied that he had ever seen the alleged Report from the DCI. He conceded that there was another case, namely, P&A No. 48 of 1985 which was transferred and gave rise to P&A No. 33 of 1989 but denied that he was the Petitioner therein.

23. Under cross-examination by Ms. Isiaho, he clarified that the late Daniel Kipsang is from the 1st house, and not from the 2nd house as he had erroneously indicated in his Witness Statement, and that the said Daniel Kipsang was the husband of the 1st Petitioner, Mary Jerop. He again denied any knowledge of the Will or the DCI Report which allegedly authenticated it. Regarding the loan from AFC, he conceded that he was the recipient of the loan funds although the title lodged as security was in the name of his father and that his father gave him a Power of Attorney. He alleged that by 1984 when the issue of the auction arose, he had already cleared the loan in 1982 but conceded that he had not produced any evidence to prove so. He confirmed that Birech & Co. which issued the letter dated 28/02/2000 demanding that Joram Kuto vacates the land were his Lawyers but conceded that he had no Power Attorney allowing him to evict the purchasers. He also conceded that the letters from AFC indicated that there was still a balance outstanding.

24. He denied any knowledge of the alleged intended auction but conceded that in 1984, he was still in prison and therefore would not know whether the purchasers paid for the loan. He acknowledged that PW3, Meshack Kiplimo (also known as "Moses") is a relative to his late brother's wife, the 1st Petitioner, Mary Jerop Bett, but denied any knowledge that it is Meshack who, in a bid to prevent the auction, brought the purchasers to the deceased. He again confirmed that his father died in 1984 when he was still in prison and that he did not therefore attend the burial. He insisted that the DCI Report that was produced before the Magistrate's Court confirmed that the Will was not genuine but conceded that he had not produced the same. He also confirmed that he was in Court when the DCI Report was produced. He also conceded that the all the 3 alleged purchasers were indeed in occupation of the land. He then insisted that the land is his and that it was registered in his name around the year 2000, and not 2004 as erroneously stated in the Search. He stated that the transfer was effected after his Lawyer, Chesang Advocate wrote a letter but conceded that he had also not produced a copy of such letter. He also conceded that the Will allocated to him 13 acres.

25. The 3rd Objector, Isaac Kipchumba Chepkwony did not participate in the trial.

Petitioner's Case

26. DW 1 was the 2nd Petitioner, Simion Kipruto Sang. He, too, testified on 31/10/2024 and was led in his evidence-in-chief by Ms. Too. He testified that he is 79 years old and that the deceased was his father. He stated that after their father died in 1984, they learnt that he had left a Will which was brought by Meshack Sang (PW3) and which was drawn by Mr. Tanui Advocate, that by the said Will, the purchasers were given portions of the land by their father, that they were 3, namely, Joram Ruto Langat, Barnabas Metto and Isaac Chepkwony and that they are therefore lawfully on the land. He

confirmed that the 1st Objector, Samson Keino, is his step-brother from the 1st house. He also stated that the purchasers should be given their portions as they paid off the loan when AFC was about to auction the land.

27. Under cross-examination by Ms Isiaho, he stated that apart from the purchasers, they (the children of the deceased) should also be given their portions of the land. He also confirmed that the families of the 3 purchases are all in occupation of the land. He denied that the family, at any time, agreed that it is the 1st Objector who would be the one distribute the land. He added that when the Kapsabet Succession Cause was commenced in 1985, the land was still in the name of the deceased and that if at all the deceased transferred it to himself, then he must have done so during the pendency of these cases. He stated that in the Will, he (DW1) was given 25 acres and which he is contented with. He also pointed out that their other brother, Daniel Kipsang Bett, was also given 13 acres and that he, too, is not complaining. He also stated that himself, PW3 and the 3 purchasers went together to the AFC branch at Kapsabet and paid the money. Under cross-examination by Mr. Sonkole, he reiterated that the funds from AFC loan was all given to the 1st Objector. He also stated that he witnessed the land purchase funds being paid at AFC, and that it was Kshs 70,000/-. In re-examination, he stated that he was in Court to tell the truth and it does not matter that the 1st Objector is his brother.

28. DW2 was the 1st Petitioner, Mary Jerop Bett who also testified on 31/10/2024. She testified that she is 80 years old, that the deceased was her father-in-law and that she is the widow of the late Daniel Kipsang Bett, the other son of the deceased. She stated that there are people who purchased portions of the land but he cannot recall their names, that she did not know about the AFC loan and that the deceased had shown each person his/her portion of the land, including the purchasers. During cross-examination by Ms. Isiaho, she stated that some of the purchasers reside on the land, She mentioned Joram Kuto as one of them and who, although now deceased, his family resides thereon. She also mentioned Barnabas Meto and Isaac Chepkwony and stated that she has no problem with the purchasers' possession of their said portions. Under cross-examination by Mr. Sonkule, she stated that the deceased had never informed her of the existence of the Will before his death. She also denied knowledge of any Power of Attorney donated to the 1st Objector by the deceased. She conceded that she never saw the purchasers giving money to the deceased as purchase price for the land.

Submissions

29. Upon close of the trial, the parties filed written Submissions. The 1st Objector filed his Submissions on 19/04/2024, the 2nd and 4th Objectors on 15/04/2024 and the Petitioners on 24/04/2024.

1st Objectors' Submissions

30. In his Submissions, Mr. Songok urged that upon the demise of the deceased, his step-brothers from the 2nd house (the 1st Petitioner's husband and the 2nd Petitioner) secretly instituted the instant Succession Cause with an intention to disinherit him and which prompted him to file his cross-Petition and Objection to the proposed mode of distribution. He submitted further that the 1st Objector also questioned the validity and genuineness of the Will which, he averred, was an issue for determination in Eldoret High Court P&A No. 33 of 1998 in which, according to him, an expert from the DCI testified that the thumbprint affixed on the Will did not belong to the deceased. Further, he pointed out that the 1st Objector disputed the allegations made by the 2nd and 4th Objector that they helped the deceased to pay the loan that was owed to AFC or that they purchased the land. According to him, the 2nd and 4th Objectors purchased land from the 1st Objector's step-brothers without a Court Order before a Grant of Probate has been confirmed and without obtaining the consent of the Land Control Board and are therefore guilty of intermeddling with the estate of the deceased. He added that it is actually him (1st

Objector) who struggled to help the deceased to repay the loan and that he then successfully applied for a waiver from AFC, and that one of his step-brothers, Simion Kipruto Sang, has also continued to illegally and unlawfully sell and lease portions of the suit land to strangers. He proposed that in the circumstances, the land ought to be shared out equally among the aforementioned 3 biological children of the deceased with each being awarded 23 acres.

31. Counsel submitted on the implications of the alleged purchasers' failure to produce Sale Agreements and stated that "he who alleges must prove". He cited Section 109 to 112 of the *Evidence Act* and also the case of Kirugi and Another vs Kabiya & 3 Others (1987) KLR 347. He submitted further that having failed to prove the existence of any written contract, the 2nd and 4th Objectors unsubstantiated claim that they purchased the land is unenforceable for lack of a written contract pursuant to the provisions of Section 3(3) of the *Law of Contract Act*. He also cited the case of Patrick Tarzan Matu & Another vs Nassim Shariff Abdulla & 2 Others [2009] eKLR and also the case of Silver Bird Kenya Limited vs Junction Ltd & 3 Others. He further submitted that even if such alleged land sale existed, the same would be a nullity for want of consent of the Land Control Board as required under Section 6 of the *Land Control Act* and void as per the definition given in the case of Macfoy v United Africa Ltd, 1961 3 ALL ER 1169. He also cited various other authorities on the issue.

32. On the issue of the Will, Counsel submitted that the 1st Objector has satisfied the criterion for, and discharged the burden of establishing that the alleged Will was a forgery. He cited the case of Ndolo v Ndolo [2008] 1 KLR (G&F)) 742. He reiterated that in any case, the Court should take judicial notice of the proceedings in Eldoret High Court P&A No. 33 of 1998 where an expert from the DCI did confirm that the Will purportedly executed by the deceased was not authentic as the thumb-print affixed thereon was not that of the deceased. According to him, the burden of proving that indeed the fingerprint affixed was that of the deceased fell on the Petitioners. He also submitted that the Petitioners have been intermeddling with the estate of the deceased by dealing with it without first obtaining the Court's permission and selling and/or leasing the same to strangers. He cited several authorities. He also took issue with the mode of distribution contained in the Certificate of Confirmation of Grant dated 3/12/2020 in that it has not been demonstrated that all the deceased's beneficiaries consented to the mode of distribution contained therein. He also cited various authorities. On the issue of there being two grants over the same estate, he submitted that the Court in Eldoret High Court P&A No. 33 of 1998 already dealt with the issue of mode of distribution.

2nd and 4th Objectors' Submissions

33. In her Submissions, Mr. Too, after recounting the evidence adduced, pointed out that although the 1st Objector alleged that there was another Report disputing the authenticity of the Will, he did not produce the same to corroborate his allegations and also that although the 1st Objector alleged that the Report from the DCI confirmed that the Will was not authentic, the Report in fact confirms the contrary and that no other Report was produced to controvert the same. He then cited various authorities to the effect that the *Law of Succession Act* recognizes a purchaser's rights and submitted that in this case, the 2nd and 4th Objector's and by extension, the estates of their late fathers, qualify as persons who had entered into Sale Agreements with the deceased for sale of portions of the land forming part of the deceased's estate. In her view, the Petitioners having confirmed the sale, the 2nd and 4th Objector's interests ought to be legitimately taken into account while distributing the estate of the deceased.

Petitioners' Submissions

34. On her part, Ms. Isiaho, after recounting the background of the case and the testimonies given by the respective witnesses, and in response to the question whether the Objectors had made their case to

the required standard, submitted that it is not in dispute that the 2nd to 4th Objectors' claim in this estate is premised on purchase of portions comprised in the sole asset earmarked for distribution in these proceedings; L.R No. Nandi/Ndalat/300, that evidence of PW1, PW2, PW3, DW1 and DW2 all confirm the purchase by the 2nd to 4th Objectors, that the evidence of PW1 (Meshack Kimaiyo Sang) confirms how the deceased incorporated the aforesaid entitlements into his Will dated 12/09/1984 as drawn by Barabara Tanui, then an Advocate, and that although the 1st Objector challenged the validity of the Will, the Report by the DCI dated 24/06/1993 produced as Plaintiff's Exhibit 5 puts to rest the said apprehension. She then cited the case of Johnson Muinde Ngunza & Another vs. Michael Gitau Kiarie & 12 Others (2017) eKLR which acknowledged a purchaser's rights under the *Law of Succession Act*. She cited various other cases to the same effect.

35. On the issue of the validity of the Will dated 12/09/1984, she cited Section 11 of the Law Succession Act and also the case of Banks vs Goodfellow (1870) LR 5 QB 549. She submitted that in the instant suit, the deceased's testamentary capacity was never raised and that the DCI Report confirmed the validity thereof. She also submitted that the 1st Objector disputed the validity of the Will on the grounds that the thumb-print thereon did not belong to the deceased, but that the 2nd and 4th Objectors as well, as the Petitioners, all defended the authenticity of the Will. She pointed out that PW2 confirmed that he was present when the Will was signed by the deceased and the witnesses, himself inclusive, and that this evidence remained unchallenged hence believable. She, too, cited Section 109 of the *Evidence Act* which places the burden of proof on "he who alleges". She submitted further that while the 1st Objector purported that there was a Report which disputed the authenticity of the Will on record, he did not produce the same to corroborate that position, that he also did not lead any evidence to demonstrate that the said thumb-print did not belong to the deceased and that the burden of proof fell on the 1st Objector to lead such evidence.

36. According to her, the only evidence on record on the subject Will is that of PW2 (Meshack Kimaiyo Sang) who confirmed that he saw the deceased append his thumb-print on the document in his presence, and that of the other attesting witnesses and that his testimony was not shaken on cross-examination. He cited the case of Re Estate of Samuel Ngugi Mbugua (Deceased) [2017] eKLR. He submitted that the allegation of forgery placed a heavy burden upon the 1st Objector to prove beyond reasonable doubt, or at least beyond a balance of probability, that indeed the thumb-print was forged but that he led no evidence on the alleged forgery and that it is clear therefore, that he failed to discharge the burden of proof. She also cited the case of Karanja and another vs. Karanja in which, she submitted, it was observed that that where a Will is regular on its face with an attesting clause and the signature of the testator, a rebuttable presumption of due execution or omnia esse riteatta arises. On this ground, she urged the Court to find and hold that the Will dated 12/09/1984 is regular and that the 1st Objector did not rebut the presumption through concrete evidence. She further cited the case of Curryian Okumu vs. Perez Okumu & 2 others [2016] eKLR on the principle that the legal position is clear however that failure to provide for a beneficiary in a Will does not invalidate the Will and that Section 5(1) of the *Law of Succession Act* gives a testator testamentary freedom.

37. On whether the estate should be devolved as testate of intestate, Counsel submitted that the bone of contention for determination by this Court is the validity or otherwise of the Will prepared by Barabara Tanui on the instructions of the deceased, that its validity having been ascertained by the DCI Report on record and produced as Plaintiff's Exhibit No. 5 and pursuant to its conformity with Section 11 of the *Law of Succession Act*, she submits, without any fear of contradiction, that the estate herein is indeed to be dealt with as a "testaste" one and that on the above background, the estate herein should devolve in accordance with the provisions of "testacy".

Determination

38. The issues for determination in this matter are evidently the following:

    i. Whether the deceased left behind a valid Will and therefore whether the estate herein should be treated as testate or intestate.

    ii. If there is a valid Will, whether the same allocated/bequeathed portions of the suit property to the 2nd, 3rd and 4th Objectors.

    iii. Whether the 2nd, 3rd and 4th Objectors have valid claims of ownership over portions of the suit property as purchasers and/or creditors.

39. From the record, litigation over the estate of the deceased began in 1985 at the Kapsabet Magistrate's Court. That is almost an astonishing 40 years ago! A number of the beneficiaries and/or Objectors are now dead and their interests are now being pursued by their legal representatives. As captured in my recital of the witness testimonies, the surviving beneficiaries are themselves also now quite old and in their 80s. By all means, this litigation must now come to an end and this is precisely what I now intend to do with finality.

40. In this case, the 2nd Petitioner and the 1st Objector are the surviving sons of the deceased and the 1st Objector is the widow of a late son of the deceased, thus a daughter-in-law of the deceased. On their part, the 2nd, 3rd and 4th Objectors claim as purchasers of portions of the suit property, namely, Nandi/Ndalat/300 or as creditors or as holding liabilities against the estate. Among the 5 litigants, the only one who is opposed to the mode of distribution proposed herein is the 1st Objector. The Petitioners and the 2nd, 3rd and 4th Objectors are all in agreement on the mode of distribution. The bone of contention is the authenticity of the Will alleged to have been executed by the deceased and which the 1st Objector terms a forgery.

41. The 2nd, 3rd and 4th Objectors claim that the suit property owned by the deceased was in danger of being auctioned as a result of an outstanding loan from AFC in respect to which the suit property had been given out as security or collateral. They claim that the deceased, in an attempt to prevent auction of the suit property, sourced for purchasers upon which the 2nd, 3rd and 4th Objectors came forward and to whom the deceased offered to sell respective portions of the suit property. According to the said Objectors, they obliged and did enter the deal with the deceased whereof they paid off the AFC loan on behalf of the deceased in return to the deceased giving to them the agreed portions of the suit property. According to the said Objectors, the deceased fell sick and died before formalizing the transfer of the portions to them but that before he died, he prepared and executed the Will whereof he bequeathed the said portions to the said Objectors. They indeed produced a produced a copy of the Will dated 12/09/1984.

42. The 1st Objector, on his part, denied the said narrative and went further to claim that the alleged Will was a forgery because, according to him, the purported thumb-print affixed thereon was not that of the deceased.

43. The parties are in unanimity that this litigation commenced as Kapsabet Resident Magistrate's Court Succession Cause No. 48 of 1985 and which was subsequently transferred to Eldoret and became Eldoret Chief Magistrate's Court Succession Cause No. 33 of 1989. They are also all in agreement that the issue of the said Will was raised and canvassed before the Magistrate's Court and that the Court directed that a forensic examination thereof be conducted and that pursuant thereto, such examination was indeed conducted and a Report presented in Court by the DCI. The parties also agree that the

Court file in Eldoret Chief Magistrate's Court Succession Cause No. 33 of 1989 "disappeared" and could not be traced at all. Where the parties differ however is on what the Report concluded. While the 2nd, 3rd and 4th Objectors insist that the Report confirmed the authenticity of the Will including the genuineness of the thumb-print affixed thereon, the 1st Objector strenuously avers that the Report confirmed that the Will was a forgery and that the thumb-print was not that of the deceased.

44. Since as aforesaid, the Court file in Eldoret Chief Magistrate's Court Succession Cause No. 33 of 1989 was certified to be lost, it is not possible to verify the truth as between the rival and conflicting accounts presented by the two protagonist sides herein. What is however obvious is that one of the two sides, in choosing to unscrupulously exploit the loss of the said Court file, is brazenly and knowingly lying to this Court. Since both sides are represented by Advocates, it is disheartening that the side that is lying is doing so with the full blessings and/or even on the advice of a licenced Advocate, supposedly an Officer of this Court. This conduct is a painful indictment of how the standards of integrity have sunk to shocking levels within the legal profession.

45. Be that as it may, the 2nd Objector had attached to his List of documents, a copy of what he alleged to be a copy of the said DCI Report and sought to produce it in evidence. However, an objection was taken thereon by the 1st Objector's Counsel, Mr. Songok, who insisted that the same be produced by the maker. In view of the objection, the said copy was "marked for identification" (2nd Objector's "MFI 5") and upon Application by the 2nd Objector's Advocate, Ms. Isiaho, the Court issued Summons requiring the DCI to avail the Officer who prepared the Report to attend Court and produce the same. However, on the date fixed for the Officer to appear, the 2nd Objector's Advocate, Ms. Isiaho, informed the Court that she had been informed that the said Officer, who prepared the Report, had since retired and that even the file containing the Report, considering the time lapse, was sent to the archives and later disposed of by destruction. In short therefore, there was no chance of the Report being traced for production in Court as an exhibit.

46. In the circumstances, the Report remained just that; one "marked for identification", as it was never formally produced in evidence as an exhibit. The submission by Ms. Isiaho that the copy of the Will was produced as the 2nd Objector's Exhibit 5 is therefore incorrect.

47. I note that the 1st Petitioner, Simion Kipruto Sang, while testifying, produced the documents contained in his List of documents as one bundle. I now notice that among those documents in that bundle was a copy of the same DCI Report already marked as "MFI 5" as aforesaid. Although the same went into record as an Exhibit, that was wrong and an oversight as the Report had remained "MFI 5". Clearly, Ms Too and Ms Isiaho took advantage of the absence of Mr. Songok whose brief was being held by Mr. Sonkule who may not have been aware of the issue, to "sneak in" the DCI Report as an Exhibit. This, I must say, amounted to "stealing a match" by the Advocates on the opponent considering that the Advocates also knowingly withheld this material information from the Court. Under the above circumstances, I refuse to consider the DCI Report. I cannot consider or rely on it in this Judgment as it remained merely "marked for identification".

48. I will therefore have to make a determination on the authenticity of the Will purely on the other evidence on record, apart from the DCI Report.

49. The validity of a Will depends on the capacity of the testator to make it. Further, a Will must conform to the prescribed legal requirements. There is a rebuttable presumption under Section 5 of the *Law of*

Succession Act that the person making a Will is of sound mind and therefore has the capacity to make the Will. Section 5(1) – (4) provide as follows:

> "(1) ...... any person who is of sound mind and not a minor may dispose of all or any of his free property by Will ......
>
> (2) ....
>
> (3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing;
>
> (4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges."

50. Section 7 of the Act then provides as follows:

> "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."

51. The above section presumably covers scenarios such as where a testator has the requisite capacity to make a Will but the circumstances surrounding the making of the Will raise doubts regarding its validity. The logic is that a testator must understand the import and effect of the document that he is signing as his Will and he must also have approved of the contents as reflecting his wishes.

52. On its part, Section 11 of the Act sets out the requirements for a Will to be deemed as valid. It provides as follows:

> "No written will shall be valid unless:-
>
> (a) The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
>
> (c) The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

53. On the capacity and state of mind of a testator to make a Will, the Court of Appeal in the case of Ngengi Muigai & Another V Peter Nyoike Muigai & 4 Others In the matter of James Ngengi Muigai (Deceased) [2018] eKLR, stated the following:

> "In the recent case of Rosemary B. Koinange (suing as legal representative of the late Dr. Wilfred Koinange and also in her own personal capacity) & 5 Others V Isabella Wanjiku Karanja & 2 Others [2017] eKLR this court examined the issue of mental capacity (to make a will) and stated as follows:
>
> > "The essentials of testamentary capacity were laid out in the case of Banks V Goodfellow [1870] LR5QB 549 as cited with approval in the Tanzanian Court of Appeal case of Vaghella V Vaghella [1999] EA 351 thus:
> >
> > > "A testator shall understand the nature of the act and its effects, shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made."
> >
> > "Construing the issue of capacity, Githinji J. in the case of In Re Estate of Gatuthu Njuguna (Deceased) (1998) e KLR stated:
> >
> > > "As regards the testator's mental and physical capacity to make the will, the law presumes that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind, in this case the applicant .... However, paras 903 and 904 of Volume 17 of Halsbury's Laws of England show that, where any dispute or doubt of sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity, and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of testator's capacity is one of fact which can be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that, if the objector produces evidence which raises suspicion of the testator's capacity at the time of execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof and the burden then shifts to the person settling up the will to satisfy the court that the testator had the necessary capacity."

54. It is therefore clear that for a Will to be valid, 4 main requirements must be met, namely, it must have been executed with testamentary intent; the testator must have had testamentary capacity; it must have been executed free of fraud, duress, undue influence or mistake; and it must be duly executed.

55. In this case, in determining the authenticity of the Will or lack thereof, I note the testimony of PW2, Meshack Kimaiyo, also known as "Moses" that he was known to the deceased as his (PW2's) niece, the 1st Objector, Mary Jerop Bett, was married to the said Daniel Kipsang Arap Bett, a son of the deceased. I note his further testimony that because the deceased was old and ailing, it is him whom the deceased sent to Barabara Tanui, then an Advocate but who later became a Judge, for the purposes of preparing the Will, that as instructed, he indeed brought the Advocate to the deceased's home where the deceased handed over to the Advocate a write-up of what he wanted to be contained in the Will, that the Advocate then went with the write-up which he caused to be typed and brought it back to the deceased. PW2 stated that he was again present when the Advocate brought back the Will to the deceased and read it out to him and that he was therefore present when the deceased signed the Will which he then witnessed. This testimony was put to test in cross-examination but my assessment of PW2 is that he remained firmly steadfast and his testimony remained largely unshaken. I found his testimony to be consistent and plausible and I, in turn, found him to be a credible witness. I also note that, apart from mere denials, his testimony was not controverted through any contradictory evidence or testimony.

56. Further, under cross-examination, PW2 stated that he was aware that the deceased sold off portions of the suit property to several purchasers for purposes of raising funds to liquidate the AFC loan and who paid the purchase prices directly into AFC's bank account. He testified further that, upon instructions from the deceased, he in fact, accompanied the purchasers to go and make the payment to AFC. He stated that the purchasers he accompanied to make the payments to AFC were Barnabas Metto (the 2nd Objector's father) and one John Murei. He stated that John Murei's name does not appear in the Will because he had surrendered his portion to Joram Lagat Kuto (the 4th Objector's father) before the Will was written. This account to a large extent, corroborates the claim by the 2nd, 3rd and 4th Objectors that their inclusion in the Will by the deceased was as a result of the arrangements that they had with the deceased, namely, transfer to them of portions of the suit property in exchange for part-settlement of the AFC loan. There is also ample evidence that the 2nd, 3rd and 4th Objectors or their late fathers, where applicable, took possession of the respective portions while the deceased was still alive. This, the 1st Objection conceded in cross-examination after initially vehemently denying.

57. I also note the 1st Objector's admission that he was in prison during the period when it is alleged that the AFC loan was partly-paid by the purchasers as aforesaid. This therefore means that the 1st Objector may not have been privy to what transpired during the relevant time and that he is only basing his challenge on mere speculation. He has also not denied that it is in fact him whom the deceased took the loan for and that he was the beneficiary of the loan funds. He was therefore fully aware of its existence. Although there is evidence that the loan was subsequently waived in the year 2002, there is also evidence that the same had remained in arrears for a long time before the eventual waiver. While the loan advanced was for Kshs 47,000/- as per the "Notification of Charge" produced in evidence, by the time that it was being waived in 2002 vide the letter dated 2/12/2002, it had ballooned to an amount of Kshs 633,209.53. The 1st Objector has not demonstrated that he, at any time, made any payments in settlement thereof.

58. On the aspects of form and legal requirements for a Will to be deemed valid, I am also satisfied that the Will, to a large extent, meets all the basic criteria stipulated. The maker of the Will, the property bequeathed and his wishes are identifiable. Although the names of the witnesses are not indicated on

the Will, it has not been alleged that witnesses were fictional characters. In any event, PW2 stated that, indeed, he was one of the two witnesses as the Will was executed in his presence.

59. I also find that the 1st Objector being the one who is alleging that the Will is a forgery, the burden of proof to demonstrate that forgery and/or fraud lay squarely on him. Being the one who alleges that the thumb-print appearing on the Will was not that of the deceased, it is him who bears the burden of bringing evidence to convince the Court to agree with him. Unfortunately, apart from making mere allegations and only casting suspicions, the 1st Objector totally failed to present any evidence to support his allegations of forgery.

60. Applying the principles set out in the authorities cited above to facts of this case, I am satisfied that, on a balance of probabilities, the Will dated 12/09/1984 was made by the deceased, is genuine and valid and satisfactorily advanced the wishes of the deceased. It is sufficiently believable to me that the inclusion of the 2nd, 3rd and 4th Objectors in the Will was a wise move by the deceased to secure the respective portions of land which he had given out to them from the suit property in exchange for the said Objectors part-payment of the loan owing from him to AFC. Clearly, the 1st Objector has no basis for challenging the Will and, as the recipient and/or beneficiary of the loan in the first place, he should even be grateful that the 2nd,3rd and 4th Objectors came in to assist in salvaging the property at a time when it faced imminent danger of being auctioned and at a time when the 1st Objector was incarcerated in prison. It is very likely that had the said Objectors not come in to assist, of course at a consideration, the 1st Objector would not have found any land existing when he came out of prison.

61. In view of the foregoing, it is clear that the act of the deceased of giving out the respective portions of the land to the 2nd, 3rd and 4th Objectors was not strictly in the nature of Agreements for Sale of Land but were basically "informal" or "local" arrangements between them and that the giving out of land was basically as consideration in exchange for payment of the loan owed by the deceased to AFC. In light of the foregoing, and taking judicial notice of the realities of our Kenyan practices, particularly in the rural setting where most transactions are based on mutual trust, without being necessarily backed by written agreements, I find it unjust to strictly or "blindly" apply the provisions of Section 3(3) of the *Law of Contract Act* which requires that a contract for sale of land be in writing, to dispossess the said Objectors of their genuinely acquired portions of land. For the same reason, I find it unjust to insist on strict application of the provisions of the Section 6 of the *Land Control Act* which renders void land transactions upon which the consent of the relevant Land Control Board has not been obtained within 6 months.

62. In any event, since my finding that the 2nd, 3rd and 4th Objectors entitlement to the subject portions of land is basically on the basis of the Will dated 12/09/1984 which I have found to be genuine, the issue of Sale Agreements or lack thereof may not therefore be even relevant any more.

63. Before I pen off, I note that there was indication that the 1st Objector may have during the pendency of this litigation, somehow obtained registration of the suit property, Nandi/Ndalat/300 in his name. This, he even proclaimed in his evidence-in-chief. If indeed, the name of the deceased as registered owner of the suit property has been changed or transferred to the name of the 1st Objector, then that can only have been done during the course of this litigation and without any Court order or sanction. Needless to state, such change of ownership or transfer, if it really occurred, was done clandestinely, with collusion or connivance of officials at the Lands office, is void and a clear act of intermeddling which is in breach of Section 45 of the *Law of Succession Act*. It would accordingly be an act of fraud and cannot be allowed to stand.

Final Orders

64. In the end, the I rule and order as follows:

i. A declaration is hereby made that the deceased herein – the late Kipkeino Cheplanget Keino - left behind a valid Will, dated 12/09/1984, and therefore died testate.

ii. The only property constituting the estate of the deceased, namely, Nandi/Ndalat/300, measuring an approximate area of 28.13 Hectares (approximately 69.5 acres) shall therefore be distributed in accordance with the said Will dated 12/09/1984, as follows:

i)	Joram Kuto Lagat (father to 4th Objector)	12 acres
ii)	Isaac Kipchumba Chepkwony (3rd Objector)	6 acres
iii)	Barnaba Kipkorir Metto (father to 2nd Objector)	5 acres
iv)	Simion Kipruto Sang (2nd Petitioner)	20.5 acres
v)	Daniel Kipsang Bett (1st Petitioner's late husband)	13 acres
vi)	Samson Kiprotich Keino (1st Objector)	13 acres
	Total	69.5 acres

iii. In the event that no Grant of Letters of Administration had not yet been issued after gazettement of the Petition herein, then the same now be issued to the 1st and 2nd Petitioners, and a Certificate of Confirmation of Grant be also issued reflecting distribution of the estate in accordance with the orders made hereinabove.

iv. In the event that the name of the deceased as registered owner of the said property Nandi/ Ndalat/300 had indeed been changed or transferred to the name of the 1st Objector, or any other person, during the course of this litigation, such change of ownership or transfer is hereby declared unlawful, void and an act of intermeddling and is revoked.

v. Any party is also liberty to approach the police and make a report or complaint and/or seek for investigations to establish how the name of the deceased as registered owner of the said property Nandi/Ndalat/300 was changed or transferred to the name of the 1st Objector, or any other person, during the course of this litigation, without any Court order and before a Certificate of Confirmation of Grant was issued herein, and if any criminal liability is established, to seek for prosecution of the persons involved in such criminal act.

vi. Each party shall bear his/her own costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF DECEMBER 2024

…………………

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Mr. A. Songok for 1st Objector

Mr. Kipsamo h/b for Ms. Isiaho for 2nd and 2nd Objectors

N/A for Petitioner

Court Assistant: Brian Kimathi