



REPUBLIC OF KENYA



In re Estate of Julius Otulia Imongura (Deceased) (Succession Cause 88 & 87 of 2016 (Consolidated)) [2024] KEHC 10728 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KEHC 10728 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 88 & 87 OF 2016 (CONSOLIDATED)**

REA OUGO, J

JULY 26, 2024

IN THE MATTER OF THE ESTATE OF JULIUS OTULIA IMONGURA (DECEASED)

BETWEEN

PATRICK OMUTIA OTULIA PETITIONER

AND

JUMA ENOCK IMONGURA 1ST OBJECTOR

EVERLYNE IKWAP OTULIA 2ND OBJECTOR

RULING

1. The deceased in this cause died on 15th May 2016. On 30th September 2016, the 1st objector filed a petition for the grant of letters of administration intestate, in Succession Cause No. 87 of 2016. Subsequently, on 3rd November 2016, the petitioner in Succession Cause 88 of 2016 petitioned the court for a grant of probate. The two causes were consolidated and the proceedings in Succession Cause No. 87 of 2016 were deemed to be the objection to the deceased's Will.
2. The application for determination is the summons dated the 8th November 2023, seeking that the last Will and Testament dated 12/4/2002 be revoked, annulled, or invalidated because the same did not provide for other beneficiaries and did not include the inventory of all the assets of the deceased.
3. The grounds on the face of the application are that; the Succession Cause No. 87 of 2016 are that the purported Will does not provide for other beneficiaries of the deceased and neither does it capture the inventory of all of the deceased's estate to be distributed. The Will is discriminative and has disinherited some beneficiaries. Juma Enock Imonguria filed an affidavit dated 8th November 2023 in support of the summons.
4. The petitioner also filed an affidavit by Joyce Lwande Oneko affidavit dated the 22nd May 2024 that she drafted the Will dated 12th April 2002. She averred that she was an advocate and that in 2002 she



was practicing in the name and style of Joyce L. Oneko & Associates Advocate. She explained that the deceased on 12th April 2002 came to her office in the company of Mr. Daniel Omondi Odago and Mr. Simon Cornelius Oluoch. The deceased informed her that he wished to put his affairs in order. The advocate explained to him the imports and requirements for a valid Will. The deceased then gave her an inventory of his assets and the names of his family members. He appointed his son Patrick Omutia, as the executor of the Will. She drafted and printed the final draft of the Will for execution. The deceased in her presence and the presence of both Mr. Daniel Odago and Mr. Simon Cornelius Oluoch appended his signature to the Will. Subsequently, two witnesses in turn affixed their signatures to the Will in her presence and the presence of the deceased. She avers that at the time of making the will the testator demonstrated clear, coherent, rational and logical thought processes and his memory and cognitive functions were intact. The deceased took the original copy of the will and the advocate confirmed that the will presented by the petitioner is the same as the one she drafted and saw the testator and his witnesses sign on 12th April 2002.

5. Enock Juma Imongura filed a response to the affidavit and reiterated the contents of his earlier affidavit. He further averred that the Will did not provide for an independent executor and was biased towards the deceased's widow, children and beneficiaries. The Will did not mention the immovable properties of the deceased in Kenya and Uganda something the deceased could not have forgotten to do. The advocate failed to either seal or sign the will, therefore, it cannot be ascertained whether the deceased appeared before the advocate. The two witnesses to the Will, Daniel Omondi Odago and Simon Cornelius Oluoch were not called as witnesses. He opposed the contents of the evidence contained in the affidavit of Joyce Lwande Oneko and urged the court to declare the Will fraudulent, forged an altered document, and that the Will is not valid.

The Evidence

6. Patrick Omutia Otulia (PW1) adopted his statement dated 26.3.2029 and testified as follows that; the deceased had 4 wives, Sarah Mama Otulia, Naomi Toto Otulia, Mary Mukande Amukachi, and Christine Asirang Osikata. The first house had 6 children, the second house had two children, the third house had three children and the fourth house had four children. He had his father's Will at the time of his death as it was given to him after it was made in 2002. The signature in the Will belongs to the deceased and it is similar to the deceased's signature in other documents like agreements with tenants. He neither knew the witnesses to the Will nor the advocate who drew the Will, Joyce L. Oneko & Associates Advocate. He did not file a certificate from the advocate who drew the Will.
7. PW1 further testified that the Will listed all the beneficiaries, specified the deceased's properties, and how they were to be distributed to his children. He contended that in 2002, the deceased was of sound health. He denied that the Will gives him the lion's share of the estate and explained that he contributed to the acquisition of the properties that the deceased bequeathed him. PW1 disclosed the existence of the Will to the family after the deceased's burial, and it was read by the deceased's brother. He had been managing the estate when the deceased was ailing. The deceased bequeathed some properties inter vivos. The Will is valid and all the deceased's children are adults. The agricultural land in Uganda was not included. He did not know the parcel Nos. in Kenya and Uganda. On page 1(a) of the Will the Uganda property is given to him. He produced a statement of rental income as Pexh7. The Will was prepared under the applicable laws in Kenya; was signed by the deceased in the presence of two witnesses and was prepared by a qualified advocate. He believed the Will to be valid.
8. Juma Enock Imonguria (DW1) adopted his statement dated 2/11/2018. According to DW1 the deceased had 4 wives and several children:
 1. 1st House of Mama Sarah Mama Otulia (deceased)



1. Melda Atenga Idewa
 2. George Jakait Otulia
 3. Enock Imongura Juma
 4. Michael Ajelo Otulia
 5. Jerusa Aojat
 6. Jackline Imujaru Otulia
2. 2nd House of Naomi Toto Otulia (deceased)
 1. Beatrice Abanyasi Otulia
 2. Patrick Omutia Otulia
 3. 3rd House of Mary Mukade Amukachi (deceased)
 1. David Imongura
 2. Rose Amwatok
 3. Jane Amai
 4. 4th House of Christine Asirang Osikata
 1. Beverlyne Ikwap Otulia
 2. Wilberforce Odukenya
 3. Faith Ivone Otulia
 4. Winnie Korobe Otulia
9. DW1 testified that the following children had been left out of the Will: Imelda, Faith Ivone from the 4th house, Rose Amwatok from the 3rd house, Jackline Imujaru from the 1st house, and Melda Atenda from the 1st house. Similarly, the Will left out some of the deceased's properties. He testified that the deceased in his lifetime owned the following properties:
1. Ancestral land comprised in title no. North Teso/Angurai/439 measuring approximately 5.8 hectares.
 2. Plot No. 27 Malaba Township in Kenya opposite the National Cereals and Produce Board
 3. Fully developed plot No. 16 Block 4 Malaba Township Tororo District in the Republic of Uganda
 4. Undeveloped plot measuring approximately 50ft x 100 ft at Amagoro
 5. Developed plot at Angurai Trading Centre opposite the D.O's office
 6. Plot at Angurai Township Centre along Angurai Primary School Road fully developed measuring approximately 50ft x 100ft
 7. Undeveloped plot opposite Katakwa ginnery measuring approximately 50ft x 100ft
 8. Plot at Angurai Trading Centre opposite Angurai Salvation Army Church developed and fenced with a wall measuring approximately 50ft x 100 ft



9. Land at Kataboi village in Malaba within the Republic of Uganda measuring approximately 4 acres
10. Monthly proceeds of rent from tenants from the Malaba Uganda plot
10. DW1 stated that Samson Olukaya, and Everline Ikundi Otulia were unknown to them yet included in the Will. That he suspected that the Will was not genuine because the document did not have a seal whether by ink or watermark by the author or the advocate who prepared it. It was similarly not signed by the advocate who prepared it. The Will was kept in the custody of PW1 as opposed to Joyce Oneko Advocate. All the names of the deceased were not included in the Will. The names that purported to be for the children of the deceased do not belong to them. All of the deceased's movable and immovable properties were not listed in the Will.
11. DW1 also questioned the Will on grounds that the Will did not have an independent executor as it purported to give PW1 powers as the executor of the same yet he has a beneficial interest and by extension has bias. Even if the Will was valid, the same is biased as it has substantially disinherited the heirs and gives PW1 the lion's share of the estate. DW1 testified that they were aware that the deceased had a personal lawyer based in Bungoma, M/s Ocharo Kebira & Co. Advocates, and it was not possible for the deceased to have travelled to Bungoma to have the Will prepared.
12. On the rental income, DW1 testified that PW1 is not sharing the rental income that he is collecting. On cross-examination, he testified that he did not produce a certified copy of the deceased's signature or a handwriting expert to confirm if the signature was not for the deceased. He also testified that the Uganda properties don't have titles and similarly the Angurai property did not have a title.
13. Melda Atenge Edewa (DW2) and Rose Amwatok (DW3) supported DW1's case. DW2 testified that she had been left out as the Will did not indicate she was a beneficiary.
14. Christine Asirang Osikuta (DW4) adopted her witness statement dated 16/3/2021 and testified that PW1 is receiving rent and using it to their exclusion. She testified that the deceased had been sick and that he never mentioned that he had left a Will. The deceased only had one advocate based in Bungoma and she is surprised that he had a lawyer in Nairobi. She claims that the Will is not valid as the deceased would not have intentionally disinherited some of his children. The Will has not been sealed or stamped and signed by an advocate. She testified that PW1 has left her children from sharing the estate.

Submissions By The Parties

Petitioner's submissions

15. The petitioner identified the following issues for the court's determination:
 - i. Whether the deceased's Will dated 12th April 2002 is valid;
 - ii. Whether the Objectors have proved their case to the required standard; and
 - iii. What are the appropriate reliefs in the circumstances?

Whether the deceased's Will dated 12th April 2002 is valid

16. It was submitted that in determining whether a Will is valid, courts examine whether the testator had mental and physical capacity at the time of making the Will and whether the document meets the criteria of validity as to form. Section 5(1) of the *Law of Succession Act*, Cap 160 Laws of Kenya provides that every person who is of sound mind and not a minor may dispose of all or any of his free property



by Will. Section 5(3) goes on to create a rebuttable presumption that a person making a Will is of sound mind. He relied on the case of *re Estate of Sadrudin Ebrahim Jiwani (Deceased)* [2019] eKLR where the High Court sitting at Nairobi cited the much-acclaimed case of *Banks v Goodfellow* [1870] LR5QB 549 by noting thus;

“ 13. The test of mental capacity to make a Will was set down by Cockburn C.J. in *Banks –v- Goodfellow* (1870) LR 5 Q.B. 549 as follows: -

“... he must have a sound and disposing mind and memory. In other words, he ought to be capable of making his Will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the objects of his bounty and the manner it is to be distributed between them.” Emphasis ours.

17. The Petitioner submits that the deceased was of sound and disposing mind and memory as at the time of executing his Will and he was fully aware of the nature of the business of making a Will. He consulted Joyce L. Oneko Advocate and gave her a list of the properties available for disposition, the persons that he intended to be his beneficiaries and dictated the terms of his Will. The deceased even summoned the witnesses that he wanted to attest his Will that is Daniel Omondi Udago and Simon Cornelius Oluoch whose signatures are appended on the contested Will.
18. He contends that despite the objectors’ allegation that all the immovable property and moveable property of the deceased are not mentioned in the Will, DW1’s Witness Statement does not reveal which properties were left out. On the ancestral land, it was submitted that the deceased had already settled his family in accordance with the houses on the said parcel and that in his mind the same was not available for distribution. In any event, leaving out of the Will some of the properties forming part of the estate does not render the deceased’s Will invalid as the properties left out Will be subjected to Part V of the *Law of Succession Act* which governs intestate succession. A person is allowed to die both testate and intestate (see the case of *Ndirangu v Ndirangu* (Civil Appeal 141 of 2019) [2022] KECA 1296 (KLR) (2 December 2022) (Judgment).
19. The petitioner submitted that the deceased made reasonable provision for his dependants at the time of the making of the Will.
20. On the second limb, in determining whether the Will dated 12th April 2002 was properly executed they invited this Honourable Court to be guided by Section 11 of the *Law of Succession Act. In Re Estate of Lusila Wairu Waweru (Deceased)* [2020] eKLR the learned judge stated the following with regards to the formal validity of a written Will;

“What Section 11 emphasizes explicitly are the formal and procedural requirements to make a Will. The Will must be in writing and signed at the end of it by the testator and at least two witnesses. Such a solemn instrument is expected to be signed in the presence of the two appointed witnesses. The Court is also required to look out for any suspicious circumstances that may have played a role in executing the Will to ensure that was founded on free will without any undue influence or coercion or duress. The executor of an estate is responsible for collecting the testator’s assets, paying any debts and thereafter distributing the assets to the beneficiaries.

The making of a valid Will is one of the best instruments that can ensure that the property of the testator will be distributed according to his or her wishes upon death.”



20. It was submitted that the Will was duly executed by the deceased as can be deduced from his signature appended to the document. He urged the court to hold that the deceased's signature on the Will is placed in a manner that appears to have been intended to give effect to the writing as a Will. The Will of the deceased must conform to the formal requirements under section 11 of the [Law of Succession Act](#). Although the objectors lament that the Will did not have a seal and/or signature of the Advocate who prepared it, the same is not a requirement under the Kenyan Law and can therefore not form a basis for declaring the Will invalid.
21. They further submitted that the law does not require a testator to make another Will to cater for issues that are born after making of an existing Will. A child not adequately provided for is at liberty to apply adequate provision by the court from the deceased's estate (see [re Estate of Ezekiel Mabeya Kegoro \(Deceased\)](#) [2019] eKLR). Further, there is no harm if the deceased in the instant case deemed it fit to bequeath the executor more than he bequeathed his other dependants.

Whether the Objectors have discharged the burden of proof in the instant cause

22. On the issue, it was submitted that they are guided by section 107 of the [Evidence Act](#) Cap 80 Laws of Kenya and section 5(4) of the [Law of Succession Act](#). Under the two statutory provisions, the Objectors are required to discharge the burden of proof with regard to each of their allegations. They submit that the evidence adduced by the Objectors does not raise the suspicion of this Honourable Court as to whether the deceased had the capacity to make the Will at the material time. The Objectors case is pegged on suspicious circumstances as a ground for vitiating the validity of the Will. Section 7 of the [Law of Succession Act](#) underscores fraud, coercion, importunity and mistake as the four scenarios where the testator at the time of making the Will is of the requisite testamentary capacity i.e. of age and of sound mind, but the circumstances of the making of the Will undermine its validity.

What are the appropriate reliefs in the circumstances?

23. The Objectors have not discharged the burden of proof to their allegations, we urge this Honourable Court to issue the Petitioner with a grant of probate with Will annexed.

Objectors' Submissions

24. The objectors in their submissions contend that the document being purported as the deceased's Will was suspect and prepared fraudulently and it failed to comply with section 29 of the [Law of Succession Act](#). The document did not have the advocate's seal, stamp or watermark. The same was in the petitioner's custody instead of the custody of the advocate who prepared it. The names of some of the deceased's children were not included and the purported bequeathed property to strangers who are not the deceased's children. The deceased couldn't have forgotten to list all his properties in Kenya and Uganda in his Will.
25. It was submitted that the Will was invalid because it did not have an independent executor as the petitioner was a beneficiary whom he bequeathed 80% of the estate. The deceased's beneficiaries have been disinherited and they submit that the document was fraudulently authored to cater to the needs of the petitioner to disinherit the widows and the children of the deceased.
26. The objector urged the court to find that the deceased died intestate and the document presented to the court was not his Will.



Analysis and Determination

27. I have considered the objection and the evidence in support thereof together with the evidence of the petitioner, the parties submissions and the main issue for determination is whether the Will annexed to the petition was valid.
28. In this case, the mental capacity of the deceased was not questioned. It was common ground by the petitioner and objector that the deceased was of sound mind. The objectors mainly attacked the validity of the Will because the formal requirements under section 11 of the Law of Succession Act were not met. Section 11 of the Law of Succession Act:
- “ 11. 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.”
29. In Re Estate of Dorcas Wairimu Riitho (Deceased) [2013] eKLR the Court stated:
- “It is a general principle of law that the burden of proof always lies with the person who alleges that a document is not valid. In this case it is the petitioner who is attacking the validity of the alleged Will of the deceased. The document appears on the face of it to be properly executed and attested. The burden was on the petitioner to prove that the document was not properly executed and attested and he has not discharged that burden.”
30. The advocate, Joyce Lwande Oneko who prepared the Will averred that the deceased in the presence of the two witnesses appended his signature to the will and subsequently, the two witnesses in turn affixed their signature to the Will. On the face of it, the Will is dated 12/4/2002. It appoints the petitioner as the sole Executor and Trustee. There was no evidence tendered by the objector pointing to his assertion that the Will was forged or was obtained fraudulently. On the contrary, the evidence of PW1 and advocate Joyce Lwande Oneko shows that the deceased made his Will and Testament to have his affairs in order.
31. The objector also argued that some of the deceased’s beneficiaries were not provided for and therefore the Will was invalid. This was supported by the testimonies of DW1, DW2, DW3 and DW4 who testified that the deceased would not have left out from the Will some of his beneficiaries. However,



the fact that some of the beneficiaries have not been adequately provided for does not automatically invalidate a Will. In re Estate of Philip Nthenge Mukonyo (Deceased) [2018] eKLR the court held that:

“The fact that the Deceased did not provide for the Objector in the will and codicil to the Objector’s expectations or satisfaction, does not cast any doubt to his capacity. It is also noteworthy in this regard that section 5(1) of the Law of Succession provides for testamentary freedom and allows any person with capacity to make any disposition of his or her free property in any manner he or she wishes. The Objector is however still at liberty to request for reasonable provision to be made for him out of the estate of the Deceased pursuant to section 26 of the *Law of Succession Act*.”

32. Although the petitioner proved that there was compliance with sections 11(a), (b) and (c) of the *Law of Succession Act* it is also imperative that the Will must contain free property of the deceased. Section 5 (1) of the *Law of Succession Act* provides as follows:

“Part II – Wills

Capacity

5. Persons capable of making wills and freedom of testation

- (1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.” [Emphasis Mine]

33. The deceased listed his properties in Uganda, Leasehold Register Volume 1221 Folia 12, Plot 16, Block 4, Malaba Township Tororo District. of the deceased’s Will. The Will also lists his plots in Angurai and Amagoro which the deceased distributes to his beneficiaries. Testate and intestate succession deal with the free property of the deceased. Section 3 of the *Law of Succession Act* defines free property as the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death. In re Estate of John Wandera Magonda (Deceased) (Succession Cause 237 of 2010) [2023] KEHC 25030 (KLR) (10 November 2023) (Ruling) the court stated:

“...Although the application, dated 30th July 2022, invites me to make orders on distribution of 7 assets, only 2 of them are supported by documentation, that is to say Mombasa Municipality/Changamwe/Tenant Purchase House No. 82 (LR No. MN/2636) and Kisumu Municipality Block 10/10. Ideally, I can only distribute these 2. I would like to emphasize what the Court of Appeal said, that distributing assets, whose title documents are unavailable, is like tossing a coin, for there is no certainty whether those assets exist, and if they do, whether they are registered in the name of the deceased, and if they are registered in his name, whether they are free or available for distribution. The probate court should not act blindly, by making a distribution on the basis of a mere list of assets purported to be in the name of the deceased, when there is no proof of the existence of the assets in favour of the deceased in the first place. The court should not act in vain. There ought to be certainty, to avoid wastage of judicial effort, and to obviate the possibility of parties needlessly running all over the place trying to enforce a certificate of confirmation of grant which is not implementable. It is the duty of the administrators to obtain the relevant documentation,



and to place it before the court. That is what administration entails. Administration is not just about filing applications in court, with lists of assets, whose ownership is unknown.”

34. The Will listed plots in Angurai and Amagoro as properties forming part of the deceased estate. There is no proof that the properties in Kenya and Uganda are registered in favour of the deceased. Both the Petitioner and objector failed to avail title documents or certificate of official search that captured the full description of the properties or documents showing that the same are free properties of the deceased. There was no evidence that the properties listed in the Will were free property of the deceased, to this end, the Will cannot be considered valid where there is no identifiable property by title or any other documentation for distribution.
35. It is common ground that the ancestral land comprised in land title No North Teso/Angurai/439 measuring approximately 5.8 hectares was not listed nor distributed in the Will. The objectors availed the Certificate of Official Search for land title no. North Teso/Angurai/439 showing it is free property of the deceased. It shall be administered in terms of intestacy probate.
36. Lastly I note that though the Will was written by Counsel Joyce Lwande Oneko it was not left in her custody but in the custody of a beneficiary which in my view is not proper. For the reasons stated above, I find that though the provisions of section 11 of the *Law of Succession Act* Cap 160 (the Act), were complied, section 5 of the Act which talks of free properties persuades me that the Will cannot stand as is and therefore I find it is invalid.
37. In conclusion, this court makes the following orders:
 1. The Will executed by the deceased dated 12th April 2002 is not valid and therefore deceased died intestate;
 2. This Court appoints Patrick Omutia Otulia, Enock Juma Otulia, And Beverlyne Ikwap Otulia administrators of the estate of the deceased herein.
 3. A grant of letters of administration intestate shall be issued to them forthwith;
 4. The above-mentioned administrators, or any one of them with notice to the rest, shall be at liberty to file an application to confirm of grant within 30 days from the date of this Ruling.
 5. Costs shall be in the cause.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 26TH DAY OF JULY 2024.

R.E. OUGO

JUDGE

In the presence of:

Mr. Mwangi -For the Petitioner

Enock Juma Imongura -1st Objector

Miss Change For the Objectors -Absent

Wilkister/ Diana -C/A

