



REPUBLIC OF KENYA



**In re Estate of Priscilla Kanyi Gathuma (Deceased) (Succession Cause  
3004 of 2012) [2024] KEHC 11582 (KLR) (Family) (14 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 11582 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**SUCCESSION CAUSE 3004 OF 2012**

**SN RIECHI, J**

**AUGUST 14, 2024**

**IN THE MATTER OF THE ESTATE OF PRISCILLA KANYI GATHUMA (DECEASED)**

**JUDGMENT**

1. This Succession Cause relates to the estate of Priscilla Kanyi Gathuma (hereinafter ‘the Deceased’) who died on 4<sup>th</sup> September, 2012. Following the demise of the Deceased, the petitioners Grace Wambui Gaithuma and Charles Muthemba Kimumu herein filed a petition for probate of the written will and an affidavit in support both dated 4<sup>th</sup> December, 2012. The petitioners averred that they are seeking a grant of representation to the deceased by virtue of being beneficiaries in the deceased written Will. In their petition, they stated that prior to her demise, the deceased had written a will dated 27<sup>th</sup> February, 2003. The Petitioners stated they wish to be appointed as the executors named in the said will. The petitioner sought that the probate of the deceased’s will be granted jointly to them.
2. In response to the Petition David Lawrence Kamau filed an objection to citation dated 26<sup>th</sup> July, 2013 opposing the petition for Grant of Probate. In the said objection, he averred that the reason why the family had difficulties in making the decision on how to distribute the property is that the will had appeared to have discrepancies as one of the beneficiaries being Grace Wambui Gaithuma had been allocated property that had been sold by the deceased long before her death. He averred further that he believes that the will was tampered with and it should be revoked.
3. Subsequently On 4<sup>th</sup> November 2013 this court issued directions that the dispute regarding whether or not the will of the deceased is valid to be determined by way of viva voce evidence.
4. The oral hearing commenced on 13<sup>th</sup> June 2017, with David Lawrence Kamau as the Objector who testified that he is one of the sons of Priscilla Kany Gaithuma (Deceased). He testified that in his earlier application in this matter, he had attached a Sale agreement. The Agreement was to prove that OW1, the deceased, Charles Mutembei sold the plot in Kasarani and deceased signatures are even in the document. He testified that they sold the Plot for Ksh.250,000/- and cheque was given to Charles Muthemba and held it for their late mother. He testified that the will of the deceased is not valid,



genuine or legal. He testified that the Will is dated 26.2.2003 and it was written before the plot was sold. OW1 testified the deceased did not write the will for reasons that;

- a. She included the plot which they had sold;
  - b. He does not think it is his late mother's signature;
  - c. He is displaced from the plot he resided when she placed him there.
  - d. She included shares that she had given her grandchild during her lifetime.
5. During cross examination he confirmed that he did file an objection to obtaining the grant of probate. He testified that he filed an objection to citations in that one of the properties allocated to Grace had been sold. He confirmed that he objected to the will. He stated further that he is not aware of the meeting held on 9.8.2013. He stated he does not recall signing an affidavit on the confirmation of the will and he was not invited to consent after the affidavit. He testified he did not sign any letter of consent. He stated that the deceased signature is not hers and it has not been taken to the document examiner.
6. OW1 testified that they had an agreement with the deceased that he manage the property for 4 years and that Jawabu Agents were to manage for 3 months in 2010 as per the agreement and that was on 16<sup>th</sup> April 2010 before the deceased died.
7. OW1 testified that the sale agreement is annexed and they were witnesses and the deceased sold the property. It was his testimony that the deceased gave the property to Grace and yet she had sold it. He testified that the shares were given to Catherine Kanyi. He reiterated that the deceased did not make the will and that he has no other evidence to confirm the shares were allocated to Catherine Kanyi. During re-examination he stated that the letter of Consent dated 14.12.2011 has a signature but it is not his signature.
8. PWI Margaret Wanjiru Mbaabu testified that Priscillah Kanyi Gaithuma (deceased) was a great friend of her mother and when her mother died, Priscilla Kanyi Gaithuma became her friend too. She testified that the deceased wrote a will and read to her in Kikuyu and English. She testified that it was on 26.2.2003 when the deceased called her. She testified that when she got to deceased's house she found Naomi and the deceased and she served them tea. She stated that deceased called her to go to her bedroom and deceased removed the letter and told Naomi to read it to them and they understood what she read in Kikuyu and English. She stated that when she finished, Naomi asked deceased "Tata is this the way you want to distribute your property." She stated that deceased responded that if she was not there they were to confirm that is what she said. She called them to sign their names to the Will. PW II confirmed that it is her signature and Naomi's signature. She confirmed that she did not attend any family meeting and she was only called to come to Court and testify. She confirmed that was the Will of the deceased and it is what she showed them.
9. On being cross examined PW I confirmed that she signed the Will by putting his thumb print. She stated the deceased was a member of Women Group which she took over from her mother. She stated Catherine has shares from the group. She stated that she cannot recall the details of the will and that after it was read to them and they signed. She testified that deceased sold a certain plot she but does know when she sold it but she heard the deceased say she sold a plot in Langata. She testified that in the Will there is a plot that was to be given to Grace Wambui Gaithuma and It was sold.
10. On being re-examined she stated she cannot tell why 'Cucu' the deceased left the shamba of the Women Group to Muthemba.



11. PW II Grace Wambui Gathima testified that her late husband was the deceased's son George Michael Gathima wa Kimumu (Deceased). He was the eldest son (first born in the family). She testified that she filed a Petition with Written Will on 14.12.2012. she testified that when the deceased died they buried her and went for a meeting on Friday after the burial on a Friday. She testified that while deceased was in hospital, she asked her how they could get money to pay the Hospital bill. She stated deceased told her that there was a box in her bedroom and her son David had the key. She testified that they held a meeting on 15<sup>th</sup> September 2011 and the Minutes show all the parties were present and the meeting was held to decide way forward and how they would distribute the estate. She stated the Will of the deceased was read, Naomi had an original will and the copy was in the box and the title document. She stated they all signed that they agreed with the Will of the deceased and Charles Muthemba's signature was by his wife Mariam Mwiri Mohammed Muthemba. She testified that David Lawrence Kamau, Charles Muthemba Kimumu and Gathoni stated that the plot in Embakasi was sold by deceased and she sold it and they witnessed. The purchase price was Ksh.300,000/- the amount was banked in the deceased's account. She stated she was asked to accept that the land was sold and she was to get the purchase price at the time.
12. During cross examination she testified that she is aware of the Will and she knew about it when they had a meeting. She stated they found the Will when they had a meeting and there was a copy in the box. She stated the chairman of the committee read the Will. The copy came with the person who had been given. She cannot remember the name of the chairman and Naomi also brought a copy of the Will. She stated that there was a meeting on 15.9.2011 for reading the Will and checking items mentioned in the Will.
13. Pw III Naomi Gathonio Muchogia testified that she is a matron working with Riara group of schools. The deceased Priscilla Kanyi Gaithumi was a step sister to her late mother. When shown the Will she confirmed that it was a copy of the Will written by her Aunt. She stated that she remembers the deceased called her and told me she had a letter and wanted her to go and witness. She testified that when the deceased was ready, she went on a Thursday to deceased's house at Satellite. She testified that she shared a fruit with her and then Margaret , Mama Njeri came and joined them.
14. She testified the deceased gave them a document and It was written in two versions and read in English. She testified that the deceased told them that she wanted to allocate her children her property and she told them to sign. She stated she told deceased to sign first then she signed and also wrote her name and signed and gave to Mama Njeri to sign too. She testified that the deceased told her to keep it and produce it in case of anything. She stated she went to Satellite and made a copy and gave deceased a copy and she kept a copy.
15. At the end of the oral hearing, the parties were directed to file written submissions. Both parties herein complied.
16. I have looked at the pleadings, the recorded evidence and the written submissions lodged by both sides. The issues that emerge for determination revolve around validity of the will on record. The determination of the rest of the issues will depend on the outcome of the resolution of the question of the validity of the will.
17. The objector's case is that the impugned Will was not written by deceased and that it has discrepancies for reasons that;
  - a. Deceased included the plot which they had sold
  - b. He does not think it is his late mother's signature;



- c. He is displaced from the plot he resided when she placed him there.
- d. She included shares that she had given her grandchild during her lifetime.
18. From the above I find that the main contention by the objector is that the Will was tempered with and it was not written and signed by the deceased. The objector also stated that the maker of the Will is unknown and that the impugned Will was never witnessed and signed by the alleged witnesses who testified in court.
19. I will deal with the issue of the validity of the alleged will. The validity of a will is dependent on two principal factors, namely the capacity of the testator to make a will at the material time and compliance with the formal requirements for the making of a will.
20. Section 5 of the *Law of Succession Act*, deals with capacity to make a will, and of testation. The relevant provisions state as follows -
- ‘5(1) ... any person who is sound of mind and not a minor may dispose 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.’
21. The other provision related to testamentary capacity is section 7 which states –
- ‘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.’
22. Section 7 covers situations where the testator at the time of making the will is of the requisite testamentary capacity. That would be to say that the testator was of age and of sound mind at the material time, but the circumstances of the making of the will detract from or undermine its validity. Fraud would arise in cases where the making of the will is procured by deceit or similar underhand methods. Coercion would refer to circumstances where a person is literally forced to make a will in a certain way, either under duress or threats to life or limb. The will, though made by the deceased himself, in terms of the same being executed by him, would not reflect his will or wishes or intentions in the circumstances, but those of the person driving him to make it in that particular way. Importunity refers to what is often described as undue influence. In such cases there would be no coercion or force or duress as such, but pressure would be brought on the testator of such nature that he cannot resist. He would bend to the pressure, not so much because he is persuaded or convinced that he should make his will in such manner, but because he would be tempted to rid himself of the pressure by capitulating to it. Mistake would refer to cases where the testator signed the wrote document, such as that meant for someone else believing it to be meant for him.
23. The essentials of testamentary capacity were laid out in *Banks vs. Goodfellow* (1870) LR 5 QB 549, where the court stated that -
- ‘A testator shall understand the nature of the act and its effects, shall understand the extent of 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.’

24. In this instant suit, the issue of testamentary capacity was raised by objector. It was submitted that the deceased did not make the will for reasons that she was not learned and could not read and write. The objector submitted that the deceased could not confirm the contents of the Will and she was coerced to sign the Will if it is true it was signed by her. The objector also submitted that the maker of the Will was not called as a witness.
25. From the material before me, that the Objector anchored his case on section 7 of the [Law of Succession Act](#) in the Will was made by fraud or coercion or importunity
26. I have to first determine whether deceased understood the content of the Will and whether the Will was signed by the Deceased. The objector submitted that the deceased was not learned and could not write or read. She was a Kikuyu and could only speak Kikuyu. The objector submitted that the deceased could not confirm the content of the will other than what she told by the people who read the will. The objector submitted person who wrote the Will was not called as a witness. The objector stated that the Will amenable to manipulation and misguided. The objector submitted the Will may have been made from threat and dates backdated by the witnesses. The objector also raised issue as to the attestation of the Will by competent witnesses. Therefore this court needs to establish the validity of the alleged Will.
27. The above allegations by objector raises the question of fraud in that the Will is not genuine and the Deceased did not sign the Will or understand content of the Will.
28. To determine whether the the deceased understood the content of the Will was signed it, I have analyzed the evidence on record and I note that PWI Margaret Wanjiru Mbaabu an alleged witness to the Will testified as follows;

“...I am here to talk about the Will of the deceased that she wrote and to me in Kikuyu and English....she called to visit her on a certain day. When I got there I found Naomi, the deceased served us tea. She called me to her bedroom and she removed the letter and told Naomi to read it to us and we understood what she read in Kikuyu and English....”
29. Also PWIII Naomi G Muchugua informed this court during the hearing that the deceased called her to her house and gave them a written document and I quote;

“.....she gave something recorded. It was written in two versions and read in English and it was translate.....”
30. From the above evidence I note from the two witnesses testimony they were called and Will was read to them, the deceased and they also signed the Will. However, I note that PW1 testified that Will was read to her but deceased and she also stated that the Will was read to her by Naomi. At this stage it is imperative to note that the objector stated in his evidence that he was immediate caregiver of deceased and that the deceased was not learned and could not read or write. This fact was not disputed by the Petitioners at any point. This therefore raises the question as to how was the deceased able to read the Will in English and Kikuyu to PW1 before signing the same yet she was illiterate. I do find that there is contradiction in Pw1 evidence as to the deceased reading the will and understanding the content of the Will. I also note that the maker of the Will was not called as a Witness as clearly the deceased was illiterate and could not write in Kikuyu and English. Having analyzed the above this court finds that the deceased did not write the will and she was illiterate.



31. On whether deceased signed the will I find no evidenced was tendered by Objector to prove that the deceased did not sign the will. I therefore dismiss the allegation that deceased did not sign the will. However, the objector submitted that if the deceased signed the Will as alleged by the Petitioners the same was caused by fraud or coercion or importunity or mistake. I note that the fact the deceased was illiterate was not disputed by the petitioner and having already found that the deceased did not under content of the Will. I find that the deceased was signed by the mistake or coercion or fraud under Section 7 of [Law of Succession Act](#).
32. On issue whether the PWI Margaret Wanjiru Mbaabu and PWII Naomi Gathonio Muchogia witnessed the impugned Will.
- Section 11 of the [Law of Succession Act](#) it provides as follows:
- (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 Search
33. From the evidence adduced in court PWII Margaret Wanjiru Mbaabu testified as one of the Witnesses to the impugned Will. During examination in Chief she stated that she was present when the deceased was signing the Will. She testified that she witnessed the Will by signing the will and confirmed to court that the signature on the Will belongs to her. During cross examination PWII stated that she signed the Will by putting her thumb print.
34. To establish whether PWII indeed witnessed the signing of the Will, I have examined the Will and I note that the impugned Will has PW II name Margaret Wanjiru and signature against her name. I find this to be contrary to allegation during cross examination when he informed court that she signed the Will by using her thumb as a signature. I find her evidence to be a contradiction. Having set the above I find that PWI was not a Witness to the impugned will
35. It is important to set out 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 arises. In the context of the instant case, I am satisfied that the Will before me was regular on the face of it and the presumption applied to it, the objector did rebut the presumption through concrete evidence.
36. Upon examining the Will I also find that the Will purports to assign property which the deceased had sold to 3<sup>rd</sup> Parties. This was not property she would dispose as it had ceased to be hers by virtue of sale.
37. In the result, I find that the alleged Will not Valid. The estate of the deceased to be administered as intestate.

**DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF AUGUST, 2024**

**S. N. RIECHI**

**JUDGE**

