



REPUBLIC OF KENYA



**In re Estate of the Late Zakayo Kipkoech Kirui (Succession Cause
1559 of 1995) [2023] KEHC 19668 (KLR) (Family) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1559 OF 1995
JN ONYIEGO, J
JUNE 30, 2023**

BETWEEN

ROSEMARY CHEPKORIR SANG ADMINISTRATOR

AND

MARGARET ISUTSA CHAMULA RESPONDENT

JUDGMENT

1. The deceased herein died on 3rd November, 1990 after executing a will dated 4th August 1988 appointing the National Bank of Kenya Ltd as the executors.
2. In the said will, the deceased expressed his wishes for distribution of his estate upon his death as follows;
 - i. To Davis Kipkemoi his son; plot of land situate at Sotik LR 7288 and buildings thereon being his share from his father; the farm at Kericho title number Kericho/Kipchimchim/543 and the buildings thereon; all available livestock, furniture and other movables in Kericho farm upon his death.
 - ii. To his son Geoffrey Cheruiyot; 100 acres to be excised from his farm known as LR number 11336/1 Molo
 - iii. To his wife Margaret Kirui during her life and after her death to his daughters Judy Kirui and Hellen Chepkemei after attaining 21 years; plot no 129 situate in Molo town; remainder of Molo farm LR 11336/1 after excising Geoffrey Cheruiyot's share; house in Lolesho LR 209/8336/127; all available livestock, farming equipments, motor vehicles and tractors as shall be available upon his death at his molo farm; shares in Kenya Aerotech ltd; shares in Sam-con con ltd; all business in Kirui investments carried on plot no.11336/1 Molo township, clothing, articles of personal use, furniture and ornaments.



- iv. To the sons (by Grace Musya) Kenny and Kiplagat his Malindi plot no.335 in equal share.
3. At paragraph 14 of the will, it states that no provision was made to his wives Alice Cheron and Grace Musya for reasons set out in a detailed statement dated March 29, 1988 attached to the will.
4. Despite their appointment, the said executors renounced their executorship culminating to a grant of letters of administration with will annexed being given on September 28, 1995 to Margaret Isutsa Kirui wife to the deceased. The same was subsequently confirmed on February 23, 1996. *Vide* application dated November 16, 2006, Rosemary Chepkorir Sang sought for the respondent to provide accounts of the estate.
5. On June 2, 2009, Rawal J as she then was found that the administrator had failed to account for the estate. The grant was then revoked and a fresh grant of letters of administration intestate dated June 2, 2009 issued to Rosemary Chepkorir Sang the objector to the proceedings and also a daughter to the deceased. She was then directed to file an application for confirmation of grant which she did *vide* a summons application dated July 21, 2009.
6. In the said summons, Rosemary listed the following as beneficiaries; David Kipkemoi Koech, Rosemary Chepkorir Sang, Janeffer Cheptoo Chekwony, Geoffrey Cheruiyot koech, Irene Chelangat Kirui, Joyce Chepkirui, Kenneth Kipkemoi Kirui, Shadrack Kiplangat Kirui and Elizabeth Chebet Kirui. She then added Alice Kirui and Elizabeth Kirui as wives and therefore dependants. It is notable that Margaret was not mentioned anywhere as a beneficiary nor was the property for distribution listed.
7. However, Margret filed an application dated November 3, 2009 seeking review of the order for revocation of grant. One of the grounds advanced for review was that the court had issued a grant of letters of administration intestate yet the deceased had left a will.
8. After considering the application, Nambuye J as she then was dismissed the same arguing that the court had properly revoked the grant on its own motion. The court went further and directed Margaret to file a protest to the summons for confirmation. On May 6, 2013, Margaret filed a protest as directed.
9. In the said application, the respondent herein(Margaret) averred that; she was the original administrator to the estate; the deceased died testate; the orders of Rawal J revoking the grant given to her without according her audience was irregular; the will of the deceased has never been challenged nor declared invalid hence a grant of letters of administration intestate could not issue; in the application for confirmation the applicant had included persons who were not named as beneficiaries in the will or were excluded expressly; she was excluded from the list of beneficiaries together with her daughters Judy and Hellen who had been provided for in the will; distribution of the estate be in accordance with the will.
10. However, on May 9, 2013, parties appeared before Kimaru J as he then was. In circumstances that cannot clearly be ascertained from the record, the court distributed the estate as an intestate estate before determining the validity of the will nor determining the protest. It is this decision that culminated to the Court of Appeal Civil Case No. 384 of 2017.
11. After hearing the appeal, the court delivered its judgement on September 6, 2019 thus observing that; from the record, there was no evidence that there was a hearing of the application for confirmation; no party was heard; parties should have been heard before distribution of the estate; that unless disproved, a court cannot ignore the existence of a will. Consequently, the court remitted the file to the High Court for hearing to determine the application for confirmation and the protest before distribution of the estate.



12. Thereafter, the file was placed before several judges among them; Judge Dulu, Judge Ougo, Judge Musyoka, Judge Muchelule and then myself. For some reason, parties agreed on October 6, 2020 to file submissions to dispose of the application for confirmation and protest. Subsequently, Rosemary filed her submissions dated September 20, 2020. Unfortunately, around the same time, I was transferred from Milimani Law Courts to Mombasa Law Courts.
13. The file was later mentioned before the Presiding Judge Milimani division where parties agreed to have the file forwarded to me for judgment writing. By a letter dated February 24, 2022, the file was forwarded to the Deputy Registrar Mombasa for placement before me for judgment writing. For some reason, the carton containing the file was placed in my chamber without diarising the judgment date. Due to that oversight, the file remained unattended until sometime October 2022 this year when it was mentioned for further directions.
14. After going through the entire court record, it emerged quite clearly that the crux of the matter was whether the deceased died intestate or testate. Among the grounds cited to challenge the will are that; the will was obtained through fraud and forgery and that the deceased was so sick at the time of making the alleged will hence could not have exercised his testamentary freedom. It is this same will that the Court of Appeal stated that it was not proved or disproved.
15. It was therefore apparent that the consent entered by counsel to dispose of the matter by written submissions instead of *viva voce* evidence was not proper. This is because parties deserved to be given a chance to call witnesses to prove fraud or forgery besides the deceased's sickness. Accordingly, with the concurrence of all parties, the court made directions for the matter to be canvassed through *viva voce* evidence.

Hearing

16. During the hearing, PW1Raphael Ngethe a retired advocate adopted his witness statement dated November 25, 2022. He told the court that while practising in the law firm of Kwach and Ndung'u advocates, the deceased person whom he had known over some period of time went to their office for execution of a will. That he and their secretary Eunice Osindi did witness the execution of the will by signing. He stated that before executing the will, he had exchanged correspondences with the deceased. That the will was given to National Bank of Kenya as trustees for storage.
17. On cross examination, he admitted having done a deed poll in respect of Margaret and that they knew each other very well. He also stated that he did not sign all pages of the will and that he was aware the deceased had suffered a stroke the year 1986.
18. On her part, Rosemary(RW1), adopted her affidavit and further affidavit in support of the application for confirmation of the grant. She stated that her father had three wives namely; Alice Kirui her mother, Grace Kambua Kirui and Margaret Isutza Kirui. She stated that her father died out of massive stroke he suffered in 1990. That her father suffered his first stroke in 1986 and second stroke 1990.
19. She stated that the will purportedly left by the father was discriminatory as it left out his two wives. That the daughters from the 1st and 2nd house were not provided for while those from the 3rd wife were. That from 1987-1988, her father was staying with Margaret at Njoro and none was allowed to see him. That the Loresho property was for Grace Kambua her step mother. She asserted that her father left a big family and that the estate should be distributed equally.
20. On cross examination by Ms Ndirangu, she stated that her father could not have executed the will as he was mentally affected at the material time due to sickness. On further cross examination by SC.



Judy Thongori, she stated that she was challenging the will because it did not provide for the rest of the family members.

21. RW2 Grace Kambua stated that she met the deceased in 1969. That she did not contract a Kamba customary marriage as a second wife. That they moved from Mombasa 1970 to Nairobi whereof they bought a house at valley Arcade and later another house at Loresho valued at 260,000 out of which she contributed kshs 40,000. That in 1983, she was kicked out of Loresho house as her husband had gotten another lady one Margaret the protestor herein.
22. She stated that in 1986, the deceased suffered a bad stroke while staying at Njoro with Margaret who could not allow anybody to see him. That she later took the deceased to her house in South C from where the deceased could visit Nairobi hospital while Margaret stayed in Njoro and Alice in Kericho farm. She urged the court to provide for the three wives and equally between the children.
23. On cross examination by Thongori, she denied the suggestion that she was not married to the deceased. She went further to state her Id card bore the deceased's name. Upon close of the hearing, parties agreed to file submissions

Applicant's submissions

24. Through the firm of Ng'ania and company advocates, the applicant filed her submissions dated March 1, 2023. Counsel submitted that the grant of letters of administration intestate was properly issued as there was no valid will executed by the deceased. It was counsel's contention that the deceased had no capacity to execute a will as he was sick having suffered massive stroke which incapacitated his ability to read nor write. Learned counsel opined that Mr. Ngethe counsel who executed the will did not explain whether the deceased went alone to his office or was supported. That the deceased was so sick such that he had to be taken out of the country for treatment.
25. It was further submitted that the said will was executed under undue influence, suspicious circumstances, fraud or lack of Knowledge. Learned counsel made reference to treatment notes by DR. Silverstein who treated the deceased in 1987 and Dr. Russel's letter dated September 21, 1987 stating that the deceased had failed vision and could not be able to read due to sickness.
26. Learned counsel opined that Eunice Osindi who purportedly witnessed the will did not testify hence Ngethe's evidence was not corroborated. That counsel did not advise the deceased on the consequences of disinheriting his wives or children. Counsel submitted that the deceased could not have bequeathed Molo property to Margaret while Grace was all along staying in the same property as her matrimonial home.
27. Learned counsel went further to submit that the deceased was influenced by Margaret to disinherit the rest of the members of the family through her close friend Mr. Ngethe with whom they had interacted before. That he did not execute the will as a free agent. In that regard, the court was referred to the decision in the case of *Wingrove v Wingrove*(1885)11P&D 81 and [*Re estate of G..K.K \(Deceased\)*](#)(2013)e KLR. In conclusion, counsel submitted that the deceased had three wives and 11 children whom he educated during his lifetime.
28. Mr. Sigira advocate who filed his submissions on behalf of the applicant but on record appeared to represent Geoffrey Koech a beneficiary filed his submissions dated March 17, 2023 in addition to the submissions dated September 20, 2022 where he was appearing for the applicant as well. Mr. Sigira submitted that the respondent having failed to testify despite having been mentioned adversely implies that she was guilty of influencing the execution of the will in question. That failure to called one Eunice who witnessed the execution of the will was prejudicial to the respondent's case.



29. In his submissions dated September 20, 2020, Mr Sigira contended that section 47 of the Succession Act does grant the court wide discretionary powers to make orders that meets the ends of justice and that even if the court were to find the will valid, the omitted beneficiaries will be entitled to a share on account of dependency under section 26,27, and 29 of the *Law of Succession Act*. Counsel went further to invoke the application of Sections 4,6,7, and 8 of the *Matrimonial Property Act* to recognize spousal contribution in the acquisition of the subject property.
30. Regarding the validity of the will, counsel submitted that it was obtained through fraud, undue influence and suspicious circumstances. Counsel urged the court to cancel title deeds already transferred to the respondent and the same to revert back to its original position in the name of the deceased.

Respondent's submissions

31. Through the firm of SC Thongori, the respondent filed her submissions dated March 3, 2023 submitting on three issues *inter alia*; whether the deceased had mental capacity to write a will; whether the deceased left a valid will; whether the objectors are entitled to a share of the estate.
32. Regarding the 1st issue, counsel submitted that none of the doctors ever gave the deceased's mental condition or health status in 1988. That a sick person could not have given a detailed 21page statement on why he did not give out a share to some of his beneficiaries and where he expressed himself as having improved health-wise. Counsel submitted that the burden of proof that there was fraud, undue influence or coercion lay with the party alleging it. In that regard, the court was referred to the holding in the case of *Ngengi Muigai & another v Peter Nyoike Muigai & 4 others* in the matter of James Ngengi Muigai(deceased)(2018) e KLR where the court held that the law presumes a testator to be of unsound and the burden of proof that such person was not of sound mind lies with the person alleging it.
33. Regarding undue influence upon Ngethe who attested the will, counsel asserted that the same was far-fetched as there was no proof that the deceased was coerced to sign the will. To buttress that aspect, the court was referred to the case of *Mwathi v Mwathi* (1995-1998)1EA229.
34. As concerns issue No.2 on whether the will was valid, counsel contended that none of the parties raised the issue since their discovery of its existence. That even during the hearing, the applicant did not question the validity of the will but rather its failure to provide for the rest of the family members. Learned counsel submitted that none of the parties ever questioned the authenticity of the deceased's signature on the will in question.
35. Regarding the 3rd issue on whether the objectors were entitled to a share of the estate, counsel submitted that the deceased did not leave out any beneficiary and for those left out, it was deliberate and reasons were given as to why he could not provide for them. Counsel submitted that the deceased had a right to deal with his property in the manner he wished. That if they have to be provided for, they then need to make an application to be provided for under the law of dependency.

Analysis and determination.

36. I have considered the application herein seeking confirmation of the grant and the protest thereof. Have also considered oral evidence by both parties and rival submissions by counsel representing their respective parties. Issues that arise for determination are; whether the deceased left a valid will; whether the objectors and other family members omitted from the list of beneficiaries in the will are entitled to a share of the estate.



37. The crux of the matter herein is whether the deceased executed a valid will in respect of his estate. The question of whether a will is valid is hinged on the mental status or testamentary capacity of the testator to make a will and the procedural aspect accompanying execution of a will. Thus, a mentally incapacitated person has no capacity to execute a will and an improperly executed will or an executed will without following the laid down procedure is a candidate of invalidity.
38. I will first deal with the issue of the validity of the alleged will. Validity of a will is dependent on two principle 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.
39. Section 5 of the *Law of Succession Act* deals with capacity to make a will and a testation thereof. The relevant provisions state as follows;
- 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.
 - (2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.
 - (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.
40. It is upon the party alleging mental incapacity of a testator to establish that the mental incapacity compromised his mind to the extent that he could not reasonably comprehend what he was doing. See *John Kinuthia v Githua Kiarie and others* court of Appeal civil appeal number 99 of 1988 where the court held that any person alleging that illness of the testator affected the validity of a will must lead evidence to show that such illness affected the testator’s mind to the extent that the testator did not know what he was doing when he made the will.
41. In the case of *Elizabeth kamene ndolo v George Matata Ndolo*(1996)e KLR the court held that under section 5 of the *law of succession Act* every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit.
42. Indeed, the court *in re Estate of Libasi Bidali(deceased)*(2019) e KLR had this to say ;
- “ the court determines validity of a will, and construes it, and does not rewrite or recreate it...”.
43. Section 11 of the *law of succession* goes further to state that;
- Written wills
- “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.
44. In the instant case, the applicant is arguing that the will in question was obtained through coercion, undue influence, fraud and suspicious circumstances. That the father was not in his right frame of mind when he executed the same. There is no dispute that the deceased had a prolonged bout of stroke after stroke for the period between 1986 and 1990 which led to his treatment both locally and abroad.
45. His sickness has not been disputed. What is in contention is whether he was mentally incapacitated as a result of that sickness. From the pleadings and testimony of all parties, there was no medical evidence adduced to suggest that as at the time the deceased executed the will, he was mentally incapacitated so as not to understand what he was doing. None of the objectors ever doubted the signature made by the deceased on the will. If the signature is not challenged, it means that the deceased was in his right frame of mind to be able to impose his natural or known signature.
46. From the detailed statement accompanying the will stating reasons why he did not provide for his two wives with whom he allegedly had parted but never the less educated their children, nobody challenged his handwriting of 21 pages as well as his signature. That conduct is not consistent with a mentally incapacitated person. He bitterly explained how he suffered in the hands of Alice and grace hence the reason for their exclusion. For Alice, she allegedly betrayed him by entering into a love affair with a neighbour giving rise to a child born out of wedlock. With Grace, she entered into a love affair with his boss. In the said supplementary statement to the will, he expressed himself that he had improved medically.
47. Did Margaret influence the execution of the will by having the same done by Ngethe Advocate who had earlier on executed a deed poll for her? It is trite that he who alleges must prove. The question of coercion, undue influence and fraud are just imaginary. The fact that Ngethe had executed a deed poll for Margaret before execution of the will in question does not translate to undue influence nor coercion. Again, from the otherwise undisputed clear signature of the deceased on the will and detailed supplementary statement attached to the will, it is not discernible that the deceased was coerced or influenced.
48. Regarding fraud, the law is clear that he who alleges must specifically prove. See *Viyay Morjaria v Nansingh Madhusingh Darbar and another* (2000) e KLR where the court held that acts of fraud must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from facts. In this case, allegations of fraud were made but without proof.
49. Regarding the question of lack of corroboration, section 143 of the *evidence Act* is clear to the extent that there is no particular number of witnesses required to prove any fact. The evidence of Ngethe advocate plus the executed will and accompanying statement is sufficient proof of the existence of a valid will. The absence of Eunice's evidence is immaterial. It is also understandable that it has been long since execution and Eunice has since retired hence could possibly not be traced without great difficult



or unnecessary cost. In a nutshell, it is my holding that the will was properly executed by the deceased while in his right frame of mind hence a valid document.

50. As concerns the need for a share for those who were not provided, they would only claim for reasonable provision as dependants which they did not. It was only submitted for by Mr. Sigira but not pleaded. It must also be born in mind that for the court to make reasonable provision, it must be demonstrated that by omitting them from the estate, they have been rendered destitute. Whereas spouses and children entitled to a share of the property of a deceased spouse or parent, the same is not automatic and it must not be equal to other beneficiaries provided for in the will. The person claiming must prove that he or she is not a person of means or that he will be rendered destitute as a consequence. See *in re Estate of Abdulkarim Chatur popat*(2020) e KLR where the court held that ;

“A testator may choose to make equal or unequal or no bequests to his beneficiaries. It is his sole prerogative. All that the law requires is that none is left destitute”.

51. According to the testimony of both parties, the deceased did educate all his children and they are independent. None of them came forth to claim reasonable provision. This court has no specific application for reasonable provision in which case the court would have required valuation of the estate and the applicants submitting an affidavit detailing their sources of income, expected benefit from the estate and any other sources so as to be informed how much is reasonable to order for; see *Abdulkarim popat*(supra) where the court held as follows;

“Under rule 45(2)(g) and (h) of the *Probate and Administration Rules*, an applicant for reasonable provision is required to provide information in his supporting affidavit, of any past, present or future capital or income of the applicant derived or expected to be derived from any source as well as his existing and future means and needs”

52. In view of the fact that there are children of the deceased listed in the application for confirmation of the grant who did not benefit from the estate and since the wives excluded in the will are claiming a share in their capacity as dependants (widows), it will be prudent to give them a chance to make an application for reasonable provision. Such application to be made within 30 days from the date of delivery of this ruling.
53. Regarding the question whether the deceased died intestate or testate, the answer is clear from the above holding that the will in question was valid. I do hold that the deceased died testate. Who is entitled to administer the estate? Since Margaret was found unsuitable by justice Rawal for failure to account for the estate and using this court’s wide discretionary powers under section 47 of the *Evidence Act*, I do hereby order that a grant of letters of administration intestate issued to the applicant is hereby revoked and a grant of letters of administration with written will annexed to issue to Davis Kipkemoi and Geoffrey Cheruiyot jointly.
54. In view of the above holding, the grant is confirmed and estate shall be distributed pursuant to the will subject to any orders on reasonable provision if found to be applicable. Issuance of confirmation certificate to await final order on distribution. Regarding costs, this is a family matter hence each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 30TH DAY OF JUNE 2023

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J. N. ONYIEGO

JUDGE

