



**In re Estate of Seth Kirigwi Joseph (Deceased) (Succession Cause
799 of 2014) [2022] KEHC 526 (KLR) (Family) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE 799 OF 2014

MA ODERO, J

MAY 27, 2022

IN THE MATTER OF THE ESTATE OF SETH KIRIGWI JOSEPH (DECEASED)

BETWEEN

RICHARD KIRIGWI SETH 1ST ADMINISTRATOR

BETTY WAMBUI GACHANJA 2ND ADMINISTRATOR

MARTIN KAMAU KIRIGWI 3RD ADMINISTRATOR

AND

GRACE WAITHERA WARIMWE 1ST PROTESTOR

GEORGE MBUGUA WARIMWE 2ND PROTESTOR

JUDGMENT

1. Richard Kirigwi Seth, Betty Wambui Gachanja and Martin Kamau Kirigwi (hereinafter jointly referred to as ‘the Administrators’) filed a summons for confirmation of Grant dated 14th March 2019 seeking confirmation of the Grant of Probate issued to them by the court on 24th April 2018. The Administrators in their summons proposed that the estate be distributed in accordance with the Written Will of the deceased dated 6th April 1999.
2. The Protestors Grace Waithera Warimwe and George Mbugua Warimwe filed an Affidavit of Protest dated 9th July 2019.
3. The 3rd Administrator filed an Affidavit in Response to Protest dated 17th October 2019 and thereafter the 1st Protestor filed a Replying Affidavit dated 17th January 2020. The Protest was heard by way of oral evidence. The protestors called three (3) witnesses in support of their case whilst the Administrators called four (4) witnesses.



Background

4. This Succession Cause relates to the estate of Joseph Kirigwi Seth (hereinafter ‘the Deceased’) who died testate on 9th November 2009. A copy of the Death Certificate Serial Number 20758 is in the file. The Deceased left a Written Will dated 6th April 1999 (a copy of which is in the court file).
5. The Deceased was survived by the following persons: -
 - (a) Betty Wambui Gachanja – Daughter
 - (b) Elizabeth N. Nganga – Daughter
 - (c) Florence Wanjiku Kuria – Daughter
 - (d) Richard Kirigwe Seth – Son
 - (e) Lynn Wanja Kirigwi – Daughter
 - (f) Martin Kamau Kirigwi – Son
 - (g) Nancy Waringa Kirigwi – Son
 - (h) Wendy Wangari Mwangi – Daughter
 - (i) Martha Wanjiru Kirigwe – Daughter
 - (j) George Mbugua Warimwe – grandson
 - (k) Grace Waithera Warimwe – granddaughter
6. Following the demise of the Deceased Richard Kirigwi Seth and Betty Wambui Gachanja as son and daughter to the Deceased sought and obtained Grant of Probate with Written Will dated 24th April 2018 which Grant was later rectified on 20th May 2019 to include Martin Kamau Kirigwi, as a third Executor.
7. On 14th March 2019 the two Administrators filed a summons for Confirmation of Grant. The objectors who are the Grandson and Granddaughter of the Deceased filed an Affidavit of Protest dated 19th July 2019.
8. The Protestors contend that the Deceased left an oral will which he made in the presence of the family elders. They challenge the authenticity of the written will. The Protesters oppose the proposed mode of distribution of the estate as set out in the summons for confirmation of Grant dated 14th March 2019. Specifically the Protestors challenge the proposed mode of distribution of the asset known as Plot T.4 Dagoretti/Riruta (hereinafter the ‘suit land’) which they allege was to devolve entirely to their late Father James Warimwe Seth (the first born son of the Deceased who passed away on 9th January 1992) but in the Written Will is bequeathed jointly to the two (2) Protestors and to Elizabeth Nguhi Nganga a daughter of the Deceased.

The Evidence

9. PW1 was Grace Waithera Warimwe is the 1st Protestor. She told the court that she was a daughter of one James Warimwe Seth, the first-born son of the Deceased. That her father who died on 9th January 1992 pre-deceased the Deceased herein. PW1 relied on her written statement dated 17th January 2020.



10. PW1 states that she was not involved and/or consulted when this succession cause was filed. That she only became aware of the matter when she received a summons requiring her to attend court for the hearing of the summons for confirmation of Grant on 20th May 2019. PW1 further asserts that at no time was her consent sought and /or obtained with respect to the appointment of the three executors.
11. PW1 told the court that following the demise of the Deceased several family meetings were held at which they were informed that the Deceased had not left a written Will. That to her knowledge the Deceased had left an oral will by giving instructions to three elders namely, Rogers Kuria, Jason Kimani and Douglas Kimemia on the manner in which his property was to be distributed. That during the family meeting it was agreed that a Petition for Grant of letters of administration would be filed. However, PW1 heard nothing more about the matter until the summons for confirmation of Grant had been filed.
12. PW1 informed the court that she had not seen the alleged Written Will left by the Deceased. She states further that no beneficiary had been informed about the written will. The court directed that she be served with a copy of the Will. Upon perusing the same the said Will PW1 was shocked to discover that Plot T.4 was to devolve to Elizabeth Nguhi who was to receive a half share and the remaining half share was to devolve jointly to herself and her brother George Mbugua Warimwe.
13. According to PW1 this Plot T.4 had been gifted entirely to her late Father during his lifetime. PW1 states that her parents built their matrimonial home on the plot and her family lived on the same plot and that she currently still resides on the plot. She states further that the Deceased developed rental properties on the plot.
14. The Protestors insisted that the Deceased left an oral will. That Elizabeth Nguhi (their Aunt) who was taking care of the Deceased during his illness took possession of the Title Deed to Plot T.4. PW1 asks the court to disregard the Written Will dated 6th April 1999 and distributed the estate of the Deceased in accordance with the proposal made by the Elders.
15. PW2 Seth Kirigwi Mwangi is a grandson of the Deceased being a son to Richard Mwangi Kirigwi, one of the three (3) Administrators of the estate. PW2 relied on his written statement dated 17th January 2020.
16. PW2 told the court that prior to his death, the Deceased invited three elders Rogers Kuria, Jason Kimani and Douglas Kimemia to tour his property in Murang'a County with him. PW2 accompanied them during this exercise. That the Deceased instructed the three elders on how he wanted his property distributed after he died.
17. PW2 further stated that he visited the Deceased in hospital the day before he died. That the Deceased told PW2 that Dagoretti/Riruta T.4 was to be transferred to George Mbugua Warimwe (the 2nd Protestor).
18. PW2 confirms that following the demise of the Deceased several family meetings were held. At no time was any mention made of a written will. That he himself had no knowledge of a Written Will and only came to know of its existence much later. PW2 says that he is certain that Plot T.4 would not have been bequeathed to Elizabeth Nguhi since the same had been gifted by the Deceased to his son George Mbugua Warimwe (the 2nd Protestor) during his lifetime. PW2 casts doubt on the objectivity of the two persons said to have witnessed the will. He states that his aunt Elizabeth Nguhi had been trying to influence the Deceased to favour her over the other siblings.
19. PW3 Rogers Kuria was a brother-in-law of the Deceased. He too relied upon his written statement dated 20th January 2020. PW3 told the court that the Deceased had given instructions to himself



Jason Kimani and Douglas Kimemia (as elders) of the manner in which he wished his properties to be distributed after his death. That Deceased also showed family members their plots.

20. That following the demise of the Deceased the named elders held several meetings with all the family members. At a final meeting held on 20th February 2012 it was agreed that the estate would be distributed in accordance with the wishes of the Deceased (communicated to the elders) as indicated below:-

Property	Beneficiary	Share
Muchagatha(Loc Gacharage/3119)	Lyn Wanja Kirigwi	1.21 Ha
	Nancy Waringa	0.93 Ha
	Richard Mwangi	6.23 Ha
	Martin Kamau	6.12 Ha
	Martha Wanjiru	2.26 Ha
	Grace Waithera	2.27 Ha
	Beatrice Wambui	1.68 Ha
Muchagatha(Loc Gacharage/2617)	George Mbugua Warimwe	Whole
Maigoya-ini homestead	Anthony Kirigwi Mwangi Seth Family Graveyard	
Maigoya-ini Land	George Mbugua Warimwe	3.20
	Seth Kirwigwi Wanja	1.21
	Jimmy Warimwe Kamau	1.54
	Wendy Wangari	2.78
	Jospeh Githara Mwangi	1.25
Dagoretti/Riruta/T.4	George Mbugua Warimwe	Whole
	Grace Waithera Warimwe	
Dagoretti/Riruta/T.5	Seth Kirigwi Warimwe	Whole
Dagoretti/Riruta/T.226	Seth Kirigwe	Whole
Kinungi Land (L.R. Naivasha Mariagushu Block 8/238)	Martha Wanjiru	Whole
Thika Plot (Juja/Juja Block 1/255)	Elizabeth Nguhi	Whole



21. PW3 said he was not aware of any written will. He insisted that the Deceased was ailing and forgetful at the time when he is alleged to have written the Will.
22. The first witness for the Administrators was Martin Kamau Kirigwi (the 3rd Administrator) who was a son to the Deceased. He relied on his Affidavit sworn on 17th October 2019. DW1 confirms that the Protestors are his niece and nephew, the children of his late brother James Warimwe Seth. DW1 states that he was not one of the Administrators initially appointed but that it was the Protestors who insisted that he be included as one of the Administrators of the estate.
23. DW1 further states that ranking in priority lower than the children of the Deceased, it was not necessary to seek and/or obtain the consent of the Protestors when the Administrators were being appointed. He states that in any event the Protestors have always been kept informed of every step taken by the Administrators.
24. DW1 states that he is not aware that the Deceased left an oral will. That what he knows is that the Deceased left a written Will, which Will was read out to all the beneficiaries, (including the 1st Protestor) by the Advocate on 20th May 2011. That the Written Will provides conclusive evidence of the manner in which the Deceased intended to distribute his estate, and that the Will does make provisions for the Protestors as well.
25. Regarding Plot T.4 DW1 confirms that the said plot had been given by the Deceased to his late son James Warimwe Seth to build a home. He states that the Deceased himself also built some house for rental purposes on the said plot. DW1 states that the suit land was bequeathed by the Deceased, jointly to Elizabeth Nguhi and the Protestors.
26. DW2 Elizabeth Nguhi Nganga is a daughter to the Deceased. She adopted as her evidence her written statement dated 12th November 2019. DW2 stated that prior to his demise her late Father gifted the property known as Title Number Dagoretti/Riruta/T.4 jointly to her late brother James Warimwe Seth and herself. That the Deceased allowed the late James Warimwe to construct a home on his portion of the land whilst the rest of the plot which had already been developed was left to Elizabeth for her own use. She urged the court to uphold the Written Will left by Deceased.
27. PW2 states that when James Warimwe Seth and his wife died his portion of Plot T.4 devolved to his children who are the Protestors herein. That when the Deceased passed away the Protestors began to collect rents from the entire plot without remitting any portion of the rent to Elizabeth or indeed accounting for the same. That when Elizabeth raised an objection, the Protestors retorted that the entire plot belonged to them.
28. DW2 stated that although she had in her possession the original Title to Plot T.4 she surrendered the same to the 1st Protestor due to persistent insults and harassment from the Protestors who had gone to complain to the local chief alleging that Elizabeth wanted to snatch the land away from them. DW2 is categorical that at no time did she waive and/or relinquish her rights over Plot T.4. She denies that the intention of the Deceased was to give Plot T.4 to the Protestors absolutely.
29. DW2 states that the Will left by Deceased was read out to the family on 20th May 2011. She asserts that said Will is indicative of the wishes of the Deceased concerning his estate. She urges the court to uphold the Written Will left the Deceased.
30. DW3 Nyambura Kinyanjui is an Advocate of the High Court of Kenya who has been in practice for the past 34 years. She adopted as her evidence the contents of her Affidavit sworn on 17th October 2019 as well as her Witness Statement dated 20th November 2019.



31. DW3 told the court that she knew the Deceased and his family well as they were her neighbours and stated that Deceased was one of her first clients when she began her legal practice. DW3 stated that sometime in April 1999 the Deceased instructed her to draft his written Will. She proceeded to draft the Will in accordance with the instructions of the Deceased.
32. DW3 averred that on or about 6th April 1999 she went to the home of the Deceased. The Deceased invited herself, and Mr Ernest Stephen Kamau to follow him to his bedroom. The Deceased asked the Advocate to read out the contents of the Will, which she did. He then requested DW3 and Ernest Kamau to witness the Will and they both obliged by appending their signatures to the Document. DW3 told the court that the Deceased was well and was lucid at the time these events occurred. She confirms that she was present and saw the Deceased execute the Written Will dated 6th April 1999.
33. Following the demise of the Deceased DW3 wrote to the family informing them that Deceased had left a Written Will. On 20th May 2011 at 2.30 pm in her offices at Hughes Building in Nairobi, the Advocate read out the contents of the Will to the family members including the 1st Protestor Grace Waithera. DW3 further confirms that the Deceased did not appoint any Executor to his will.
34. DW4 Ernest Kamau Nduatitold the court that the Deceased was an in-law and a friend. He confirms that the Deceased daughter Elizabeth Nguhi is married to his brother. DW4 relied upon his witness statement dated 18th November 2019
35. The witness confirmed that on 6th April 199 the Deceased executed his Written Will in his presence. That he also witnessed the Will by appending his signature on the Document. DW4 confirms that the Deceased was well and was of sound mind at the time. He confirms that he has no personal interest in the estate of the Deceased.
36. Upon conclusion of the oral evidence parties were invited to file written submissions. The Protestors filed the written submissions dated 28th January 2022 whilst the Administrators relied upon their written submissions dated 14th February 2022.

Analysis and Determination

37. I have carefully considered the Affidavit of Protest filed by the two Protestors, the Replies filed by the Administrators, the evidence adduced by the various witnesses as well as the written submissions filed by both parties. In my view, the following are the issues which arise for determination –
 - (i) Whether the Deceased left a Written Will
 - (ii) Whether the Deceased made an oral Will.
 - (iii) Whether Dagoretti/Riruta/T.4 was gifted to the Protestors absolutely.
38. The *Evidence Act*, places the burden of proof of any fact on the person who wishes to rely on the same Section 107 of the *Evidence Act* Cap 80, Law of Kenya provides as follows: -

“Burden of Proof

1. Whoever desires any court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”



39. Before I delve into the issues which have been identified for determination, I deem it necessary for the court to consider the question of whether the Protestors have sufficient ‘Locus standi’ to challenge the Grant.
40. The term ‘Locus standi’ is a Latin term which literally means “place of standing” and refers to the capacity of a party to act in a particular matter. Without requisite ‘Locus standi’ a suit is deemed to be a non-starter and the matter ends there.
41. It is not in dispute that the two Protestors Grace Waithera Warimwe and George Mbugua Warimwe are both the grandchildren of the Deceased Seth Karigwi Joseph. They are the children of one James Warimwe Seth who was a son to the Deceased.
42. It is further not in dispute that the father to the two Protestors died in the year 1992 thereby pre-deceasing his Father. Similarly, the mother of the two Protestors is also now deceased. The Protestors who were left as orphans were then taken care of by their Grandfather and their aunt Elizabeth Nguhi. It would therefore seem that the Protestors were in fact dependants of the Deceased.
43. Section 38 of the *Law of Succession Act* Cap 160 Laws of Kenya provides as follows:-

“Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

Rule 4 of the Second Schedule of the Probate and Administration Rules

In determining the degree of consanguinity of a person from the deceased by tracing through an intermediate relative it is not necessary that such relative was living at the death of the deceased, e.g. a grandchild of the deceased living at the latter’s death would be included among the relatives notwithstanding that his parent (i.e the deceased’s child) had died before the deceased. (own emphasis)

44. In *Re Estate of Wahome Njoki Wakagoto* [2013] eKLR the court held that:-

“Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents who died intestate after 01/7/1981 when the Act came into operation. The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit from their grandparents indirectly through their own parents, the child of their grandparents. The child to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time the grandchildren can inherit directly from their grandparents is when the grandchildren’s own parents are dead. Those grandchildren can now step into the shoes of their parents and take directly the share that ought to have gone to the said parents. Needless to say, such grandchildren must hold appropriate representation on behalf of their parents.” (Own emphasis)

45. Similarly, *in Re Estate of Florence Mukami Kinyua (Deceased)* [2018] eKLR the court stated that:-

“A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent’s share in the estate of the grandparents.”



46. The Protestors therefore have the right to step into the shoes, so to speak, of their deceased Father who being a son of the Deceased was a beneficiary to the estate. I am therefore satisfied that the Protestors have sufficient ‘*Locus standi*’ in this matter.

(i) Whether Deceased left a Written Will

47. The fact of the death of the Deceased is not in any doubt. The original copy of his Death Certificate serial Number 20758 indicating that the Deceased passed in Nairobi on 9th November 2009 is in the court file. Similarly, there exists no contention regarding the identities of the beneficiaries to the estate. The Administrators obtained a Grant of Probate with Written Will. They produced in court a Written Will dated 6th April 1999. The position of the Administrators therefore is that the Deceased died testate.

48. The Protestors on the other hand reject the claim that the Deceased wrote a Will. They insist that the Deceased died intestate.

49. PW3 Nyambura Kinyanjui an Advocate of the High Court of Kenya, testified that the Deceased instructed her to draft a Will. She confirms that it was she who drafted the Will upon as instructed by the Deceased. PW3 and PW4 Ernest Kamau both testify that they witnessed the said Will. They both confirm having been present with the Deceased in his bedroom on 6th April 1999 and state that they saw the Deceased execute the Will by appending his signature thereon.

50. The legal requirements of a valid Will are contained in Section 11 of the *Law of Succession Act*, which provides as follows:-

“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.”

51. The Protestors take issue with the Will exhibited in court and submit that the same is not valid. They raise several grounds in challenging the Will.

52. Firstly, the Protestors submit that the failure by the Deceased to appointing an Executor or Executors of the Will invalidates the entire Will. Section 60 of the *Law of Succession Act* which deals with the appointment of Executors provides as follows:-

“A person may by Will appoint an executor or executors.” (Own emphasis)



53. The word used in the above provision of Law is the discretionary ‘may’. This implies that a testator is not obliged to appoint an Executor. I have carefully perused the provisions of Section 11 of the same Act, which sets out the legal requirements of a written Will. Nowhere is it stated that the appointment of Executors is a mandatory legal requirement of a valid Will. I therefore find and hold that the failure to appoint Executors does not invalidate the Deceased’s Will.
54. Where no Executor is appointed by the Testator, a family member or a close friend may come forward and petition the court to be appointed as Executor of the Will. In this case three of the Deceased’s children applied for the Grant and applied to administer the estate. If no person had come forward the court would be at liberty to appoint an Executor.
55. Secondly the Protestors submit that the Deceased was unwell in April 1999 when the Will was executed. They allege that in the year 1999 the Deceased had suffered a stroke resulting in his being bed-ridden for months. That he had just left hospital and was not in a proper state mentally and physically to make a Written Will.
56. Section 5(3) of the *Succession Act* Cap 160 provides:-
- “(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.”
57. The essentials of testamentary capacity were set out in the case of *Banks vs. Goodfellow* [1870] LR 5 QB 549 in which the court stated –
- “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.”
58. It is trite law that he who alleges must prove. The Protestors have not presented to the court any evidence e.g. medical report to demonstrate that the Deceased lacked testamentary capacity to make a Will.
59. PW3 Elizabeth Nguhi who took care of the Deceased during his illness told the court that the Deceased had earlier been admitted in hospital suffering from hypertension and had suffered a mild stroke. She however stated that the Deceased had been discharged from hospital in January 1999 and had recovered well. PW 3 and PW4 who witnessed the Will told the court that on the date in question, 6th April 1999 the Deceased was in good health and was in full control of his mental faculties. Indeed DW4 the lawyer confirmed that the Deceased had been hospitalized before he made the Will and even suggests that his ill health may have been a factor, which motivated the Deceased to write a Will. Both witnesses however assert that at the time he made his Will the Deceased had full capacity to comprehend the contents of the Will.



60. Section 5(4) of the *Law of Succession Act* provides for a presumption that a testator has capacity to make a Will. The burden therefore falls on the party disputing this presumption to prove otherwise. Neither the Protestor nor their witnesses have adduced any tangible evidence to show that the Deceased was not in sound mind at the time he executed his Will. The fact that he had previously been hospitalized is not sufficient proof of mental incapacity. The two witnesses, one being an Advocate of the High Court insists that the Deceased was of sound mind and fully comprehended the nature of the Document he was executing. Likewise, DW1 who was a son of the Deceased told the court that he regularly visited his Father. DW1 insisted that the Deceased “was in his right senses and had no mental problems.” I find no evidence to prove that the Deceased lacked the requisite testamentary capacity to make a Written Will.
61. Secondly, the Protestors allege that the Deceased was coerced into making the Will. They suggest that the two witnesses, i.e., the Advocate and Ernest Kamau were not truly independent and lacked objectivity. They accuse the two of exerting undue influence on the Deceased.
62. Section 7 of the *Law of Succession Act* provides thus:-
- “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.”
63. The Protestors assert that Elizabeth Nguhi who was the Deceased caregiver during his illness influenced the Deceased to make a Will granting her half of the suit property. Of this allegation, there is no proof. It is not shown in what manner Elizabeth influenced the Deceased. The mere fact that Elizabeth cared for her Father during his illness does not mean that she exerted undue influence upon him. *In re Estate of Julius Mimano (Deceased)* [2019] eKLR the Court held as follows: -
- “it is the circumstances of the making of the will that are suspicious or ought to raise suspicion. The focus should not just be on the large benefit accruing to the propounder of the will. The argument should be that the benefit was large because the will was made in circumstances where manipulation or fraud or undue influence or pressure or even coercion was brought to bear on the testator. There must be evidence of the intimate details of the making of the will, in terms of what exactly transpired at the event of the making of the will.” (own emphasis)
64. I find nothing suspicious in the fact or the manner in which the Deceased made his will. It is quite in order for Elizabeth as a daughter to the deceased to have been the caregiver of her father during his illness. This fact alone does not prove that she exerted any influence on the Deceased regarding the bequests, which he made in his will. The Protestors have not availed any evidence to show that Elizabeth ‘manipulated’ the Deceased in any manner.
65. Neither is there anything disproportionate in the bequests made to Elizabeth as opposed to any of the other beneficiaries. She was only to receive a half portion of the suit land not the entire plot. The Will did not grant to Elizabeth a greater share of the estate of the Deceased thus she cannot be said to have benefitted over and above the other beneficiaries. I find no evidence of undue influence over the Deceased by Elizabeth.
66. The Protestors also accuse the Advocate and Ernest Kamau of unduly influencing the Deceased to favour Elizabeth. They claim that the Advocate being a childhood friend to Elizabeth drafted the Will to favour her. They further allege that Ernest Kamau who is a brother-in-law to Elizabeth cannot be said to have been an independent witness.



67. Once again these are fanciful allegations. The Protestors have not shown in what manner the two witnesses manipulated and/or influenced the Deceased. Each had explained the circumstances under which they were invited by Deceased to witness his Will.
68. DW3 told the court that the Deceased had been her client from the time she began her legal practice and stated that she had done a lot of legal work for him, therefore it would not be surprising that Deceased would instruct her to draft his Will.
69. DW4 told the court that aside from being an in-law he was also a good friend to the Deceased and visited him often. Thus again it was not surprising that the Deceased would ask his friend to witness his Will. Neither DW3, nor DW4 was a beneficiary to the estate. Neither is named in the Will and neither stood to make any gain from the bequests made by the Deceased.
70. I find no evidence of pressure, coercion or duress exerted upon the Deceased which persuaded him to make his Will in a particular manner. The Act does not exclude friends, lawyers or relatives from witnessing a Will. All that the law requires is that a beneficiary under a Will cannot be a witness to the same. The two witnesses were competent in terms of Section 11(c) of the *Law of Succession Act*. As such, I reject this ground of the challenge of the Will.
71. Finally the Protestors have alleged that the Written Will produced in court does not cover all the properties of the Deceased. The Protestors have failed to specify which properties belonging to the Deceased were omitted from the Will.
72. Under cross-examination PW1 claimed that a plot in Weteithe and another in Thika both belonging to the Deceased had not been included in the Will. However, the witness was able to avail in court the Title Deeds for these two plots. Neither did she seek to have the Grant amended to include the two alleged plots. To merely allege that some properties have been left out without specifying the particulars of said omitted properties will not suffice. In any event, the fact that a property has been left out does not invalidate a Will. The omitted property can later be made the subject of a Grant intestate.
73. The Protestors have challenged the existence of the Written Will on the basis that they were not aware of its existence. Firstly, the validity of a Written Will is not pegged on whether its existence is known to third parties. Secondly, DW3 the Advocate testified that she summoned the family members to her office and read out the Will in their presence. DW3 insists that the 1st Protestor Grace Waithera was present in her office when the Will was read out. She cannot in the circumstances, deny knowledge of its contents.
74. In conclusion I find no evidence sufficient to invalidate the Written Will dated 6th April 1999. I find that the same was valid as it complied with all the requirements as set out in Section 11 of the *Law of Succession Act*. I therefore find that the Deceased died testate.

(ii) Did the Deceased make an oral Will?

75. In rejecting the Written Will left by the Deceased the Protestors assert that the Deceased made an Oral Will by relaying his wishes concerning the distribution of his estate to three elders namely, Rogers Kuria, Jason Kimani and Douglas Kimemia.
76. PW 2 Seth Kirigwi Mwangi testified as to the existence of the oral Will. He told the court that sometime in the year 2008 the Deceased summoned his family members and took them round all his property pointing out to each what portion of the property would devolve to them. PW2 states that the three elders were also present.



77. However according to PW2 the Deceased did not on this occasion distribute Plots T.4, T5 and T.226 (all in Kawangware). The evidence of PW2 was that the Deceased stated that the “old men” (the three elders) would answer any questions about the three (3) plots as he had instructed them on what was to be done.
78. PW2 further told the court that when he visited the Deceased in hospital, the Deceased informed him that he had instructed the three elders regarding the manner in which he wanted his estate distributed.
79. It would not make sense for the Deceased to walk his family members round his property and distribute the same but omit to distribute Plots T4, T5 & T226 leaving it to the elders to decide. Was the oral Will being made by the Deceased or by the Elders. A Will is a reflection of the wishes of the Deceased person not the wishes of third parties. Why would deceased distribute part of his estate and leave out a large portion of his property to be ‘dealt with’ by third parties. This is not credible.
80. PW3 Rogers Kuria a brother-in-law to the Deceased was one of the elders to whom the Deceased communicated his alleged oral Will. PW3 told the court that the Deceased had informed himself Jason Kimani and Douglas Kimemia, how he wanted his estate distributed after his demise. The witness told the court that following the demise of the Deceased the elders held several meetings with the family in which they communicated the wishes of the Deceased. That at a final meeting held on 20th February 2012 the family agreed on a mode of distribution of the estate, in which they decided that Plot T.4 was to devolve entirely to the two Protestors.
81. Section 9 of the *Laws of Succession Act* which deals with oral Wills provides as follows:-
- “9 (1) No oral will shall be valid unless—
- (a) it is made before two or more competent witnesses; and (b) the testator dies within a period of three months from the date of making the will
- (2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by sections 18 and 19.” (Own emphasis)
82. While contemplating the requirements of a valid oral Will, Musyoka J *in re Estate of Evanson Mbugua Thong’ote (Deceased)* [2016] eKLR stated as follows:-
- “Under section 9, there are only two requirements for a valid oral will. The first is that the will in question be made before two or more witnesses who are competent in terms of the definition in section 3 of the Act. Secondly, the maker of the Will ought to die within three months from the date of the making of the will. An oral will is made simply by the making of utterances orally relating to disposal of property.” (Own emphasis)
83. In this case whilst it is alleged that the Deceased made an oral Will in the presence of the three elders, there is no evidence regarding the date when he communicated his wishes to the three elders. Neither the Protestors nor their witnesses was able to state the ‘date’ when the Deceased made this ‘oral Will’. Under cross-examination the 1st Protestor stated-
- “The oral will was made before he (the Deceased) died. I do not recall the date when the oral will was made.” (Own emphasis)



84. Likewise PW3 to whom the Deceased allegedly communicated his wishes stated under cross-examination.

“I cannot recall the precise dated when the deceased told us these things. He told us of his wishes before he fell sick.....”

85. According to Elizabeth who was the deceased caregiver, the deceased was discharged from hospital in January 1999. According to PW3 the Deceased told the elders about his wishes before he fell ill i.e. before January 1999. The Deceased eventually died on 9th November 2009. A simple mathematical calculation shows that he Deceased died about ten (10) years after he allegedly made this oral will. This is way beyond the three (3) month period stipulated by section 9 of the Act.

86. PW3 told the court that he wrote down the issues, which Deceased had communicated to them on a piece of paper. However, the witness was unable to produce that piece of paper in court. Given that the ‘date’ when this oral will was allegedly made is not known, the court is unable to tell whether the deceased died within three (3) months of the date of making this alleged oral Will as required by the section 9(b) of the Act.

87. Moreover the court found that PW3 was rather coy in revealing the contents of this ‘Oral will’. He did not disclose to the family all that the Deceased told him. The elders appeared to disclose elements of their communication with the Deceased in doses. Under cross-examination, PW3 admitted that the Deceased did not tell the elders how his bank account or shares were to be dealt with after his demise. DW3 gave the court a long and convoluted tale about how the elders went about revealing the wishes of the Deceased to the family. The witness stated that he ‘elders’ decided to await the payment of ‘Tea money’ before revealing to the family all that the Deceased had told them. It is not clear what this ‘tea money’ had to do with the oral will allegedly made by the Deceased nor was it clear why the elders had to wait for this ‘tea money’ to be paid before divulging the wishes of the Deceased to the family.

88. If there truly was an oral Will then the entire communication ought to have been disclosed to the family at once. The elders had no discretion to withhold elements of the ‘oral will’ until certain events occur to their satisfaction. In my view, these elders were playing mind games with the family.

89. I was able to observe the demeanor of PW3 as he testified before court. He was evasive and refused to answer directly questions put to him by counsel. In my view, he was not an honest witness.

90. In any event this court has already found that the Written Will executed by the Deceased on 6th April 1999 was valid. An oral Will cannot override a Written Will. Finally, I am not satisfied that there exists sufficient proof that the Deceased made an oral Will.

(iii) Whether Dagoretti/Riruta/T.4 was gifted to the Protestors

91. The real bone of contention and the real dispute in this succession cause is the distribution of the parcel of land known as Dagoretti/Riruta/T.4. According to the Protestors that parcel of land ought to devolve wholly to the two of them. PW1 told the court that the suit land was gifted to her late parents by the Deceased during his lifetime. It is not in dispute that the father of the Protestors built his home on the suit land and lived there with his family. The 1st Protestor told the court that she still resides on the suit land to date. Aside from the home constructed by the parents of the Protestor the suit land also contains rental rooms, which the parties all agree were constructed by the Deceased. The Protestors claim is that the entire parcel of land was left to their parents and should now devolve to themselves.

92. The evidence of the Protestors is that following the demise of the Deceased several family meetings were held at which meeting it was agreed that Plot T.4 would devolve entirely to the Protestor. PW1



annexed minutes of the alleged meetings. However, under cross-examination she admitted that the said minutes were not signed by the other attendees of the meetings. That the names of those who attended the meetings were not indicated and the name of the person chairing the meeting was not indicated. On the whole the annexed minutes are too scanty and cannot be taken as proof that such meeting occurred, much less proof of any alleged resolutions reached by attendees whose names have not been indicated.

93. This contention of the Protestors is challenged by Elizabeth Nguhi a daughter of the Deceased who states that the Deceased willed the suit property to herself and her late brother James Warimwe (the Protestors father) in equal shares. Elizabeth states that James Warimwe constructed a house on his share of the land while the remaining portion which was already developed was to be her share. She relies on the Written Will dated 6th April 1999 which at paragraph 5 reads as follows:-

“(5) dagoretti/riruta/T.4

I want to give my wife Grace Waithera a life interest and thereafter the Plot to be divided into 2 equal shares to be shared as follows

Elizabeth Nguhi 1 Share

George Mbugua and Grace Waithira - 1 share”

94. The words of the Written Will are clear and unambiguous. It is obvious that the Protestors rejection of the Written Will arises from the fact that it did not allocate Plot T.4 to them absolutely whereas the purported ‘Oral Will’ directed that the said plot was to devolve absolutely to the Protestors.
95. This court has not been shown any evidence to suggest much less prove that Plot T.4 was at any time allocated to the Protestors absolutely. If the Deceased intended to gift the suit land to the Protestors then he would have stated so clearly in his Will. At no time during his lifetime did the Deceased transfer Plot T.4 to the parents of the Protestors. There is no tangible evidence to show that the Deceased gifted the suit land to the two Protestors. The property remains registered in the name of the Deceased.
96. As things stand the only indication of the wishes of the Deceased concerning his estate are to be found in the Written Will dated 6th April 1999. That will remains valid and enforceable. Accordingly, I find and hold that the parcel of land known as Dagoretti/Riruta/T.4 is to devolve jointly to Elizabeth Nguhi on the one hand and the two Protestors on the other hand in equal shares.

Revocation of Grant

97. The Protestors have prayed that the Grant of Probate issued by the court be revoked on grounds that they were not informed and were not involved when the petition for Grant was filed. Section 76 of the [Law of Succession Act](#) provides for the circumstances under which a Grant may be revoked/annulled.
98. The Protestors being the grandchildren of the Deceased were not direct beneficiaries to the estate. The Protestors do not rank in higher priority to the children of the Deceased in seeking a Grant therefore it was not mandatory that their consent be obtained. I find no evidence of any irregularity in obtaining the Grant and I find no basis upon which the said Grant ought to be revoked.

Conclusion

99. Based on the foregoing I find no merit in the Objection raised by the two Protestors. I find that the Deceased, Seth Kirigwi Joseph died testate having left a valid Will dated 6th April 1999. The duty of the Probate Court is to ensure that the estate of the deceased is distributed in accordance with his Will.



100. I have perused the summons for confirmation of Grant dated 14th March 2019. I am satisfied that the proposed mode of distribution of the estate accords with the Written Will. Finally, I dismiss the Affidavit of Protest dated 9th July 2019. This being a family matter each side shall bear its own costs.

DATED IN NAIROBI THIS 27 TH DAY OF MAY 2022.

.....

MAUREEN A. ODERO

JUDGE

