



REPUBLIC OF KENYA



**In re Estate of Erastus Lunyagi Sagala (Deceased) (Succession Cause  
12 of 2019) [2022] KEHC 12371 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12371 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
SUCCESSION CAUSE 12 OF 2019  
LK KIMARU, J  
JULY 25, 2022**

**BETWEEN**

**WALTER MAJANGA NYABERA ..... 1<sup>ST</sup> PETITIONER**

**WILBERFORCE MUNIALO KUFWAFWA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ARTHUR NASIALI SAGALA ..... 1<sup>ST</sup> OBJECTOR**

**MORRIS MULUSA SAGALA ..... 2<sup>ND</sup> OBJECTOR**

**GEORGE MMBOGO SAGALA ..... 3<sup>RD</sup> OBJECTOR**

**JOHSTONE LUNYAGI SAGALA ..... 4<sup>TH</sup> OBJECTOR**

**JUDGMENT**

1. Erastus Sagala Lunyagi, the deceased to whose estate these proceedings relate died on January 17, 2019 at Cherengany Nursing Home, Kitale. On January 17, 2019, the executors of the written will of the deceased, Walter Mayonga Nyabera and Munialo Wilberforce Kufwafwa petitioned this court to be issued with a grant of probate of the last written Will of the deceased dated April 9, 2019. The Will list the beneficiaries of the estate of the deceased and their respective bequests. Among the beneficiaries listed is a company known as Sagala Development Company Limited Reg. No. PVT – DLULT8X. The directors and shareholders of the company are listed as Wycliffe Kemoli Sagala, Nancy Sagala, Sidika Sgala, Befiny Chelui Lwangu and Janet Kendi Ngoci. All the above directors each have 15 ordinary shares except for Wycliffe Kemoli Sagala who has 10 ordinary shares.
2. The Will has been challenged by the sons of the deceased who contend that the deceased could not have written the Will of his own free will since at the time it is alleged he wrote the Will he was “seriously sick and not in good health and not in a stable mental condition or ability to understand and sign for transfer of parcels of land which are now being purported as the property of Sagala Development



Company Limited and which has denied us and especially Johnstone Lunyagi Sagala who fully resides on them the right to ownership of land, property and our birth right.” The sons who have challenged the Will are Arthur Nasiali Sagala, Morris Mulusa Sagala, George MMBogo Sagala and Johnstone Lunyagi Sagala. They contend that the Will was fraudulent in that daughters of the deceased, who are all married, are purported to have inherited more property than the sons of the deceased who have families to take care of.

3. The executors filed one witness statement by the Advocate, Aggrey Kidiavai setting out the circumstances in which he drafted the Will for the deceased. He swore that the deceased was his client and used to visit his office to seek legal advice, he also visited him once at his home. Two weeks prior to 9th April 2018, the deceased went to his office and requested him to draft his Will. He advised him to make an inventory of all his properties. On April 9, 2018, the deceased again visited his office. This time he had the inventory of his properties. The deceased indicated that he did not want any of his children to be executors of his Will because he did not trust them to be good managers to manage and control his vast estate. The deceased stated that he trusted his two friends and his son in law. He was emphatic that the deceased was in “a proper and good physical and mental status. At the time of making the Will, the deceased was eloquent and sober without any sign of sickness.” He recalled that after the Will was drafted, the deceased appended his signature on the Will in his presence and that of his associate Ronny Khisa advocate. On March 12, 2019, after the death of the deceased, four of the deceased’s children being Wycliffe Kemoli Sagala, Beffry Chaledi Lwangu, Alice Mwenywa Sagala and Jane Kendi Ngoci and one of the executors Wilberforce Kufwafwa visited his office. He read the Will and handed over the original Will to the executor.
4. When cross-examined in court, the advocate confirmed that he did not ascertain whether or not the properties that were said to belong to the deceased were actually registered in the deceased’s name. He stated that he would not be surprised if the properties were in other persons’ names. He explained that the deceased was alone when he visited his office to instruct him to draft the Will.
5. The Objectors, who are the sons of the deceased, filed several witnesses’ statements in which they contended as follows:
  - i) That before his demise, the deceased summoned them at his residence at Big tree Farm where he indicated that each of his daughters would inherit 15 acres of land except Jane Kendi who was to inherit 25 acres. The inherited portions were to be excised from the 328 acre Leisa Farm.
  - ii) That the remainder of the properties was to be inherited by the sons.
  - iii) The monies in several banks was to be shared equally among the beneficiaries.
  - iv) They proposed that each son inherits 40 acres at Leisa farm, 10 acres at big Tree and 0.2 acres of the Maragoli ancestral land.
  - v) All the vehicles and Machinery should be shared among the sons.
  - vi) That the deceased held the properties in trust for himself and all his dependants
  - vii) That they were not aware that a company called Sagala Development Company Limited had been incorporated or that such incorporation was done under the instructions of the deceased.
  - viii) That the transfer of the properties, including their ancestral land where one of the deceased’s son resides to a Company was fraudulent and was instigated at instance of their sisters and a grandson of the deceased.



- ix) That some of the properties which had been registered in the name of Arthur Nasiali Sagala was included in the Will.
  - x) That the transfer of LR No. Maragoli/Kisatiru/25 and 1008 was done when the deceased was seriously sick and was not in stable mental condition. He did not have the ability to understand and transfer the properties to the company.
  - xi) That the deceased's health had started failing in 2017 and therefore had "even lost his power to sign in the ordinary way, he had lost his eyesight and to the best of my (their) knowledge that he could only sign by thumb printing on the documents that he needed to sign."
  - xii) They doubted that the deceased signed the Will noting that the signatures in each page was different.
  - xiii) That the incorporation of Sagala Development Company Limited and the purported Will allegedly made by the deceased was a fraudulently scheme by the sisters to disinherit the sons of the deceased.
6. George Sagala reiterated the above facts in his testimony before court. He added that due to his deteriorating health and specifically his eyesight, the deceased gave the power of Attorney to their sister Janet to assist him in the conduct of his affairs. This was in June 2017. He reiterated that the Will was fraudulent and should be set aside because some of the children of the deceased were not provided for. He urged the court to direct that the estate of the deceased should be distributed as if he had died intestate for justice to be done.
7. After the close of the respective cases of the disputants, Counsels for the parties filed written submission urging their respective clients' cases. There is really one issue for determination by this court. Is the deceased's will valid? And if so, should it be probated? Section 5 of the [Law of Succession Act](#) provides thus:
- (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 was 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."
8. The essentials for testamentary capacity were laid out in the case of *Banks vs Goodfellow* [1870] R5QB549 in the following terms:
- "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 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.”

9. The Court of Appeal in *Ngengi Muigai & Anor – vs- Peter Nyoike Muigai & 4 others in the matter of the estate of James Ngengi Muigai (Deceased)* [2018]eKLR held thus;

“ ... construing the issue of capacity, Githinji J In the case of In the estate of Gatuthu Njuguna (Deceased) [1998] eKLR stated:

“As regards the testators mental and physical capacity to make the will, the law presumes that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind ...

It seems that, if the objector produces evidence which raises suspicion of the testator’s capacity at the time of execution of the will which generally disturbs the conscience of the court as to whether or not the testator had the necessary capacity, he had discharged his burden of proof and the burden then shifts to the person setting up the will to satisfy the court that the testator had the necessary capacity.”

10. In the above decision, the Court of Appeal held that the nature of evidence that may be adduced to establish the incapacity of the testator (deceased) is either medical, oral or circumstantial evidence. The evidence required to prove the incapacity of the deceased should relate to the time the Will was made and the surrounding circumstances.
11. In the present case, it was the Objector’s case that the deceased ailed for a considerable period of time before his death. They stated that the deceased’s medical condition had deteriorated so much that by the year 2017, he had given a power of Attorney to one of his daughters, Janet Kendi. His eyesight was failing that a week before he is alleged to have made the Will, one of his sons George Sagala had taken him to Lions Eye Hospital for check-up. The prognosis was not good. The deceased had gone completely blind in one eye – the other eye was not any good – he could only see with the use of glasses.
12. The Objectors posited that it could not have been possible for the deceased to have signed the Will, let alone visit his advocate’s office unaccompanied. The other piece of evidence that the Objector’s relied on to challenge the Will is the formation of the Company known as Sagala Development Company Limited. They contend that this company, which is inheriting a substantial portion of the deceased’s property, was incorporated without the knowledge of the deceased or majority of the beneficiaries of the estate of the deceased. They were of the firm view that the company was incorporated by the daughters to defraud the sons from their rightful inheritance. It was a vehicle for fraud which the Will was used to validate its existence. That is essentially the evidence that the Objectors relied on to challenge the validity of the Will.
13. The executors of the Will curiously chose not to challenge this evidence regarding whether the deceased had been ailing for a considerable period of time before he is said to have written the Will. The only witness that the executors called was the advocate who testified on the technical aspects of the making of the Will and not on the medical condition of deceased. The Advocate testified that the deceased went to see him alone. This evidence, contrasted with the evidence adduced by the Objectors, who are the sons of the deceased, does not seem to have a ring of truth in it. Given the deceased’s age and the fact that his eyesight had nearly completely failed, it was improbable that the deceased could have taken himself to the Advocate’s office without some form of assistance. In that state, it is not possible that the deceased could have read the Will and appended his signature with the full knowledge of its contents.



14. The deceased died nine (9) months after it is said that he wrote the Will. This was on January 17, 2019. According to the death certificate, the cause of death was hypoglycaemia due to hypertension due to diabetes. This court can draw an inference that the disease that the deceased suffered from (being a diabetic) negatively affected his eyesight that he could not have been in a mental condition to write the Will or if it was written, to understand what was written. Although no handwriting expert was called, it was evident from the signatures that were appended on each page of the said Will that the deceased was unable to comprehensibly sign on the said Will in a consistent signature.
15. This court's evaluation of the totality of evidence adduced leads it to the irresistible determination that the Will presented to the court for probating is invalid by reason that the deceased was not in a mental state or condition to comprehend or understand the contents of the Will. If the court had any doubt as to this finding, that doubt was removed when the advocate confirmed that the deceased had purported to make bequests of properties that he did not even own at the time. The claim by the Objectors that the Will was procured specifically to validate the transfer of the majority of the deceased's property to a company known as Sagala Development Company Limited has basis hence this court's invalidation of the Will.
16. In the premise therefore this court holds that the purported Will of the deceased dated 9<sup>th</sup> April 2018 is invalid and shall not be probated by this court. The estate of the deceased shall be distributed to the beneficiaries under the intestacy provisions of the *Law of Succession Act*. So as to avoid any intermeddling with the estate of the deceased pending the resolution of this succession cause, all the properties that were transferred from the deceased to any beneficiary or the company known as Sagala Development Company Limited shall not be interfered with, transferred to third parties or adversely dealt with pending the distribution of the properties that comprise the estate of the deceased to the beneficiaries. The parties herein are ordered to take a date at the registry as a matter of priority so that the distribution of the estate of the deceased to the beneficiaries can be determined by the court. There shall be no order as to costs as this is a family dispute.

**DATED AT KITALE THIS 25<sup>TH</sup> DAY OF JULY 2022.**

**L. KIMARU**

**JUDGE**

