



REPUBLIC OF KENYA



**In re Estate of Edith Nduta Gichanga (Deceased) (Succession Cause 1626 of 2016)
[2022] KEHC 14760 (KLR) (Family) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14760 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1626 OF 2016
MA ODERO, J
OCTOBER 21, 2022**

BETWEEN

AGNES WANJIKU GICHANGA PETITIONER

AND

ANN MARY WANJIKU OBJECTOR

JUDGMENT

1. Before this court is the Summons for Revocation of Grant dated March 4, 2020 by which the objector/ Applicant Ann Mary Wanjiku seeks the following orders:-

- “1. Spent
2. Spent
3. The court be pleased to revoke the grant of probate issued in this case on November 20, 2018 and to set aside its orders of February 18, 2020 confirming the grant in favour of the Petitioner and instead appoint the Objector as the sole administrator of the deceased’s estate.
4. The Will attached to the Petition filed in this case by the petitioner be declared null and void in law and the deceased’s estate be distributed intestate.
5. The court be pleased to issue a conservatory order by way of an injunction to protect the estate from going to waste and in particular to restrain the Petitioner from intermeddling with the estate and alienating or otherwise dealing with any part of the estate pending the confirmation of the grant of probate and distribution of the estate.



6. Costs of this application be in the cause.”
2. The summons which was premised upon Section 76 Law of Succession Cap 160, Laws of Kenya, and Rule 44 of the *Probate and Administration Rules* and which was supported by the Affidavit of even date sworn by the objector together with Affidavit also sworn on March 4, 2020 by Damaris Wanjiku and Njoroge Gichanga, Kenney Njoroge Kiarie and Amos Njoroge Kamweru was premised upon the following grounds:-
- a) The will attached to the Petition dated March 10, 2015 is a forgery and not a true reflection of how the deceased distributed her estate prior to her death. The proceedings to obtain the grant were therefore defective in substance ab initio.
 - b) The Deceased didn't and couldn't appoint the Petitioner as one of the executors of her will, or her guardian/caregiver in case she fell ill as the deceased and the petitioner didn't get along at all.
 - c) The mode of distribution of the deceased's estate as stated in the will dated March 10, 2015 is not a correct reflection of how the deceased distributed her estate prior to her death.
 - d) The objector was not served with the summons for confirmation of the grant filed on the January 23, 2020. If she has been served, she would have objected because the Petitioner is a stranger to the deceased's estate.
 - e) The Petitioner has already fenced off part of the deceased's estate even before the grant is confirmed. She has no right to do this. This is intermeddling with the deceased's estate.
 - f) The Petitioner being a daughter-in-law of the deceased, could not inherit in her own right immovable property of the deceased. The portions purportedly inherited under the will were allocated by the deceased to the petitioner's husband Agostino Gichanga (now deceased). The will was changed secretly to suit the Petitioner which the deceased didn't authorize.
 - g) In all events, if the Petitioner was to inherit anything due to her husband's estate, she should have applied for letters of administration first.
 - h) The grant was obtained and confirmed fraudulently by the making of a false statement or by the concealment from the court of all material facts related to the case especially that the will produced in court is not the Will the deceased wrote.
3. The Respondent/Petitioner Agnes Wanjiku Gichanga and Anthony Gichanga Waweru (a beneficiary of the estate) both filed Replying Affidavits opposing the summons. Thereafter the objector and Damaris Wanjiku Gachoka filed supplementary affidavits dated January 12, 2021 and January 28, 2021 respectively.
4. The summons was canvassed by way of *viva voce* evidence in open court. The Objector called seven (7) witnesses in support of her case whilst the Respondent called two (2) witnesses.

Background

5. This Succession Cause relates to the estate of the late Edith Nduta Gichanga (hereinafter 'the Deceased') who died testate on August 20, 2015. A copy of the Death Certificate Serial Number 436823 is annexed to the Petition for Grant of Probate dated April 6, 2018. A written will dated March 10, 2015 is also annexed to that Petition.
6. The Deceased was survived by the following persons:-



- i. Agnes Wanjiku Gichanga
- ii. Ann Mary Wairimu
- iii. Anthony Gichanga
- iv. Jeff Murai
- v. Edith Nduta Gichanga
- vi. Purity Wamuyu Gichanga

and her estate was comprised of the following assets.

“ASSETS –

- a. Dagoretti/Kinoo T. 384/2 also known as Plot No. 2 Kinoo
- b. Dagoretti/Kinoo/117
- c. Dagoretti/Kinoo/5949
- d. Dagoretti/Kinoo/281
- e. Dagoretti/Kinoo/5950 – Kariango Farm
- f. Dagoretti/Kinoo/878
- g. Dagoretti/Kinoo/1907
- h. Ongata Rongai Plot No. 309
- i. Monies held in account number No. 8310XXX Barclays Bank Limited – Market Branch
- j. Monies held in account number No. 8310XXX Barclays Bank Limited – Market Branch
- k. Monies held in account number No. 141-18-1XXX Kenya Commercial Bank – Kipande Branch
- l. Barclays Bank Shares
- m. Ken-Gen Shares

Liabilities

None”

7. The Deceased was said to have left a Written Will dated March 10, 2015 (Annexed to the Petition for Grant of probate) detailing how she wished her estate to be distributed. In said Written Will the Deceased appointed her daughter-in-law Agnes Wanjiku Gichanga (the Respondent herein) and her daughter Ann Mary Wanjiku (the objector) as joint Executors of her Will.
8. Following the demise of the deceased, the Respondent who was a daughter-in-law of the Deceased filed in court a citation dated October 4, 2016 inviting the objector to jointly initiate the process of Succession in court. In response to the citation, the objector who is a daughter to the Deceased filed a Protest dated October 26, 2016. The dispute was referred to court Annexed Mediation but the parties were unable to reach a settlement.
9. Thereafter the Respondent filed in court a Petition for Grant of Probate with Written Will dated April 12, 2018. A Grant of Probate was duly issued to the Respondent as sole Executrix of the Deceased’s



Written Will on November 20, 2018. On January 23, 2020, the Respondent filed a summons for confirmation of Grant. The Grant issued to the Respondent was confirmed by the High Court on February 18, 2020. On March 4, 2020 the Objector filed this summons seeking to have Grant which had been issued to the Respondent revoked. Hence the present hearing.

The Evidence

10. The objector Ann Mary Wanjiku who reside in California, USA told the court that she is the daughter of the Deceased. The objector relied on her Affidavit dated 4th March 2020 together with her supplementary Affidavit dated January 12, 2021 as her evidence in chief. The objector alleges that the Petitioner/Respondent is a stranger to the estate as she is neither the Executor in the Deceased's will nor a beneficiary to the estate.
11. The Objector claimed that she had not been served with the summons for confirmation of Grant and that no proof of service was availed to the court. She asserted that the Written Will dated March 10, 2015 which was annexed to the Petition and purported to be the last Written Will of the Deceased was in fact a 'forgery'. That the genuine Will left by the Deceased had been altered and/or destroyed and replaced by this 'forged' Will.
12. In Paragraph 4 of her Affidavit dated March 4, 2022 the Objector avers the Will presented to court by the Respondent differed from the original (genuine) Will in four (4) material aspects as follows:-
 - “(a) Agnes Wanjiku Gichanga, the Petitioner (who is the widow of my brother Agostino Gichanga (deceased) and a daughter-in-law of the deceased is not a beneficiary of the deceased. She was also not appointed an executor of the deceased's Will she could only benefit from her husband's estate if she obtained letters of administration to his estate which she didn't do.
 - (b) The only executor of the deceased's Will was myself. My mother originally had appointed my brother Agostino and I as Executors but my brother died in 2013. It is against the said background that I was appointed the sole Executor.
 - (c) The bequests purportedly made to my brother's widow Agnes Wanjiku Gichanga were made to my brother's estate to protect my brother's children and ensure they (the bequests) reached them. My mother didn't give Agnes anything in her own right.
 - (d) My mother didn't appoint Agnes as a manager of her (my mother's) affairs in case of sickness or incapacitation of any kind as the two were simply not on talking terms. The relationship between my mother and her son Agostino, and her daughter-in-law Agnes had always been strained and this was a notorious fact well known amongst our families and the entire neighbourhood. There was no way the deceased could thereof appoint Agnes her co-executor or manager. The persistent aggression by my brother's family towards my mother and myself prompted our area chief to intervene in June 2013 and restrained my brother and his wife from harassing mum and I.”
13. The Objector asserts that she was present when the Deceased made her Will. That in fact it was she who invited the Advocate to the home of the Deceased to draft the Will and that she even paid the Advocate for his services. The Objector lamented that the property known as Dagorettei/Kinoo/117 was to devolve to her entirely yet her brother had erected a property on the said plot without her consent.



- She complains that in the Written Will annexed by the Respondent this property was to be subdivided between herself and the Respondent.
14. The Objector further complains that a quarter (¼) acre of the property known as Dagoretti/Kinoo/5949 was to be given to her nephews whom the Deceased had raised following the death of their mother. However, in the Written Will annexed to the Petition the entire property is to devolve to the Respondent. According to the Objector, the Deceased did not leave any of her assets to the Respondent. That the Respondent was only entitled to the share of the estate that had been left to her late husband Agostino Gichanga who was the objector's brother.
 15. According to the Objector the Advocate at the behest and with the complicity of the Respondent acted to ensure the original genuine Will, which the Deceased had made was altered. That particularly Clause 2 and 5A of the Will did not represent the wishes of the Deceased as stated to the Advocate in her presence. The objector has annexed to this summons for Revocation of Grant a copy of what she alleges is the genuine Will of the Deceased (Annexure 'A').
 16. PW2 Damaris Wanjiku Gachoka a retired nurse told the court that the Deceased was a family friend whom she had known all her life. PW2 relied on her Affidavit dated January 7, 2020 as well as her Supplementary Affidavit dated January 28, 2021 as her evidence in chief. PW2 confirms that she was one of the witnesses to the Will of the Deceased dated March 10, 2015. According to PW2 the Will which the Advocate read out to the family in May 2014 after the demise of the Deceased was markedly different from the document which she had witnessed. That although the family met in the home of the Deceased in May 2014 when the Deceased dictated her wishes to the Advocate, she did not sign the Will until May 2015 as the Advocate had taken away the document claiming that he was going to correct some errors in it.
 17. PW 2 agreed with the Objector that the Deceased did not leave any of her property to the Respondent but states that the Deceased only left property to the estate of her late son 'Agostino Gichanga'. PW2 confirmed that the Deceased was not mentally ill at the time she made her Will though she was physically unwell and had to be assisted to affix her thumbprint on the document.
 18. PW3 James Njenga Wachege told the court that the Deceased was a close family friend. He describes Deceased as a mother figure and confidante. The witness stated that he would rely entirely upon his Affidavit dated January 28, 2021.
 19. According to PW3 the Deceased had a very acrimonious relationship with her son Agostino Gichanga and his wife (the Respondent herein) because the two had always wanted to grab the property of the Deceased. PW3 states that the Deceased did not leave any of her properties to the Respondent but that she left property to her grandchildren. Edith Nduta Gichanga, Ruth Wamuyu Gichanga and Elizabeth Wambui Gichanga.
 20. PW3 states that the genuine Will which reflects the true wishes of the Deceased is the one annexed by the objector to this summons for revocation of Grant. (Annexure 'A').
 21. PW4 Kenny Njoroge Kiarie is a farmer and a businessman. He states that the Deceased in this matter was his Aunt (sister to his father) and she regarded him as a son. The witness relies entirely upon his Affidavit dated January 7, 2020.



22. PW4 states that in May 2014 the Deceased called him to her house. He went with his father Mr Njoroge Gichanga where they met the objector and a surveyor known to PW4 as Mr Njoroge Kawmeru. In their presence, the Deceased distributed her property PW4 states as follows in paragraph (5) of his Affidavit.
- “(a) That she wanted the parcel of land known as Title Number Dagoretti/Kinoo/629 subdivided into 3 units (the parcel of land was about one acre in size). Ann Mary Wanjiku was given unit measuring 0.25 acres while the sons of the Deceased’s daughter called Hannah Wambui (Anthony Gichanga and Jeff Murai) were jointly given 0.25 acres. The rest of the land was given to the deceased’s son, one Agostino Gichanga.
- (b) That I was consequently directed to take the surveyor to the land to subdivide it. I took the surveyor accompanied by my father and Ann Mary Wanjiku. The surveyor subdivided the land and hive off Ann’s parcel (known as Dagoretti/Kinoo/5950). However, before we would complete the subdivision process to excise the parcel of land for Anthony Gichanga and Jeff Mutai my father who is diabetic fell sick and we postponed the subdivision process to another day.”
23. PW4 confirms that the surveyor consequently produced two (2) Titles one being Dagoretti/Kinoo/5950 measuring 0.25 acres for Ann Mary Wanjiku (objector). Out of the remaining parcel being Dagoretti/Kinoo/5949 measuring 0.75 acres approximately 0.25 acres was to go to Anthony Gichanga and Jeff Murai children of Deceased’s late daughter Hannah Wambui who are the grandchildren of the Deceased in equal shares. The rest of the land was to go to the Deceased’s late son Agostino Gichanga.
24. PW4 further stated that during the same meeting at her home, the deceased gave the property known as Dagoretti/Kinoo/117 to the objector absolutely and directed that Agostino Gichanga either demolish the house he had constructed thereon or sell the house to the objector.
25. PW4 agreed with the objector that the Will produced by the Respondent does not reflect the wishes of the Deceased as communicated to him in May 2014. PW4 insists that the Deceased did not leave any of her properties to the Respondent. That the Will provided by the Respondent erroneously indicates that Dagoretti/Kinoo/117 was to devolve to the Objector and the Respondent in equal shares. PW4 asserts that the correct reflection of the wishes of the Deceased is the Will marked as Annexure ‘A’ which is annexed to the objectors summons for revocation of Grant.
26. PW5 Amos Njoroge Kwamweru is a registered surveyor. He told the court that he knew the Deceased very well. The witness relies entirely upon his Affidavit dated January 7, 2020 as his evidence in chief.
27. PW5 told the court that the Deceased had earlier informed him that she wanted her land Title Number Dagoretti/Kinoo/629 measuring approximately one acre subdivided into three (3) units as follows:-
- “(a) 0.25 acres for Ann Mary Wanjiku (Deceased’s daughter)
- (b) 0.25 acres for Anthony Gichanga and Jeff Murai (Deceased’s Grandchildren).
- (c) The rest approximately 0.5 acres for Agostino Gichanga (Deceased’s son).”
28. PW5 states that later in May 2014 the Deceased called him to her house. He went there and met the Objector Ann Mary Wanjiku, Mr Njoroge Gichanga a brother to the Deceased, and Kenny Njoroge (PW4). That on that day in May 2014, PW5 went with the witnesses to subdivide the land as he had earlier been instructed by the Deceased. However, PW5 was not able to complete the subdivision



- because Mr Njoroge Gichanga who was to supervise the entire process fell ill and by the time he recovered, the Deceased had already passed away.
29. PW5 told the court that he did not witness the Will and has no knowledge of its contents. PW5 stated that based upon the instructions given to him by the Deceased, parcel Number Dagoretti/Kinoo/5949 does not belong entirely to Agostino Gichanga.
 30. PW6 Joyce Wanjiku states that the Deceased was well known to her as a friend to her mother. The witness relied entirely upon her Affidavit dated January 28, 2021.
 31. The evidence of PW6 is that the Deceased trusted her to run errands like collection of rents, payment of rates etc. That when the Deceased was hospitalized it was PW6 who paid the hospital bills using rental income derived from the Deceased's properties. She denies that the Respondent paid the Deceased's hospital bills.
 32. PW6 stated that sometime in 2013 the Respondent and her late husband told her to stop collecting rents on behalf of the Deceased as they were about to take over that duty. According to PW6 the Deceased did not appoint the Respondent as one of the Administrators of her estate.
 33. PW7 Esther Njuki Kathimba is a provider in Homecare Nursing. She told the court that she took care of the Deceased from the year 2013 until her demise in August 2015. PW7 relies entirely upon her Affidavit dated January 22, 2021. PW7 confirms that the meeting of May 2014 took place and that she cooked a meal for all who were present. PW7 stated that the Deceased did not have a good relationship with her son Agostino Gichanga and his wife (the Respondent) who continuously insulted and caused stress to the Deceased.
 34. The Respondent Agnes Wanjiku Gichanga told the court that she was a daughter-in-law of the Deceased having been the wife of the late Agostino Gichanga who was a son to the Deceased. The Respondent told the court that her husband who died on March 8, 2013 pre-deceased his mother. The Respondent relies entirely upon her Replying Affidavit dated October 12, 2020.
 35. The Respondent stated that prior to the year 2012 she and her husband lived in Texas, USA. That the Deceased visited them there annually and the couple would cater for her travel, accommodation and medical costs. After moving back to Kenya the Respondent and her husband continued to visit the Deceased regularly and even after her husband died, the Respondent avers that she continues to visit and take care of the Deceased.
 36. The Respondent insists that contrary to the allegations made by the objector and her witnesses, she and the Deceased had a very cordial relationship and that there was no bad blood whatsoever between them.
 37. The Respondent confirms that the Deceased died on August 20, 2015 and that she died testate having left a Written Will dated March 10, 2015 in which the Respondent and the Objector were appointed as Executors.
 38. Accordingly, the Respondent denies the allegation by the objector that she is a stranger to the estate. She insists that the objector was properly served and notified of the date for the summons for confirmation of grant but neither she nor her Advocate attended court on the date in question. Therefore according to the Respondent the Grant issued to her was properly confirmed.
 39. The Respondent categorically denies the objectors claim that the original genuine Will left by the Deceased was changed and/or altered. She asserts that the genuine Will is the document which she annexed to the Petition for Grant of Probate with written Will dated April 6, 2018. The Respondent denies the allegation that the documents which she annexed to her Petition is a forgery.



40. The Respondent avers that she became aware of her appointment as Executrix and beneficiary after the Will was read out at the family home in Kinoo on September 4, 2015 by the Advocate. That there was no evidence to support the claim that the Deceased had initially appointed her late husband and the objector as the Executors of the will. Similarly, there is no evidence that the bequests made to the Respondent in the Will were meant to have been made to the estate of her late husband. The Respondent insists that the bequests were made to her directly by the Deceased.
41. The Respondent totally rejects the Objector's version of the Will which is marked as Annexure 'A' to this summons for Revocation of Grant. The Respondent insists that Land Parcel Number Dagoretti/Kinoo/5949 measuring 0.302 Hectares was bequeathed to her alone given that her late husband had already constructed a house thereon. That Anthony Gichanga and Jeff Murai were given their own parcels of land under the Will and therefore have no claim over Dagoretti/Kinoo/5949.
42. The Respondent alleges that the Objector has continued to intermeddle with the following parcels of land –Ongata Rongai Plot No. 309Dagoretti/Kinoo/117Dagoretti/Kinoo T. 384/2
43. Finally the Respondent avers that the Objector has had the knowledge of the existence of the Will of the Deceased since 2015. That the allegations of alterations to the Deceased Will are totally false. That the present summons has been filed in bad faith in a bid to delay the distribution of the estate. She urges that the summons be dismissed in the interest of justice.
44. DW2 Titus Kanyi Ndurumo is an Advocate of the High Court of Kenya practicing under the name and style of Kanyi Ndurumo & Co Advocates. He confirms having filed a Replying Affidavit dated September 28, 2020.
45. DW2 confirms that sometime in March 2013 the Deceased who was his client instructed him to draft her Will. That in the Will of March 2013 the Deceased had appointed her first born son Agostino Gichanga and her daughter Ann Mary Gichanga as joint Executors. However on August 8, 2013 one of the proposed Executors Agostino Gichanga passed away.
46. That the Deceased again called the Advocate to her home in March 2015. She instructed him to draft another Will replacing her late son Agostino Gichanga with Agnes Wanjiku Gichanga (the widow of Agostino Gichanga) as Executrix. PW2 averred that the Objector was not present when the Deceased executed the Will in March 2015, which written Will was also signed by the two (2) witnesses Damaris Wanjiku Gachoka and Njoroge Gichanga (brother to Deceased).
47. DW2 stated that following the demise of the Deceased he read out the Will in the presence of nine (9) persons namely-
- i. Ann Mary Wanjiku
 - ii. Elizabeth Wamuhu Njuguna
 - iii. Damaris Wanjiku Gachoka
 - iv. James Chege
 - v. John Kiarie
 - vi. Anthony Chege
 - vii. John Njoroge Gichanga
 - viii. Jennifer Wambui Kihanya



ix. Agnes Wanjiku Gichanga

The witness has annexed to his affidavit a handwritten list of the names of all who were present TKN '2'. Those present all signed against their names.

48. DW2 asserted that the Will which he read out is the genuine Will of the Deceased. He states that he is not aware of any meeting which took place in May 2014 at the home of the Deceased. That the earlier Will of 2013 was revoked by the testator through the Will of March 10, 2015.
49. The Advocate confirms that the instructions given to him by the Deceased were clear and precise and that she was in full control of her mental faculties when dictating her wishes. That when the time the Will was read out to the family in September 2015 no person raised any objection to the same. That this summons for revocation coming five (5) years after the Will was read has come too late in the day.
50. Upon close of oral evidence parties were invited to file and serve their written submissions. The objector filed written submissions dated May 4, 2022 the Respondent relied upon her written submissions dated June 13, 2022 whilst a beneficiary Anthony Gichanga Waweru filed written submissions dated May 19, 2022.

Analysis and Determination

51. I have carefully considered this summons for revocation of Grant, the Replies filed thereto, the evidence adduced in court as well as the written submissions filed by the parties. In my view, the following are the issues which arise for determination-
- (i) Whether the Will dated March 10, 2015 is valid
 - (ii) Whether the Grant issued to the Respondent ought to be revoked
 - (i) Validity of the Will date March 10, 2015
52. The Respondent obtained the Grant of Probate confirmed on 18th February 2020 on the basis of the Written Will dated March 10, 2015. A copy of the said Written Will is annexed to the Petition filed by the Respondent. The Respondent insists that this is the genuine Written Will left by the Deceased.
53. The Objector on the other hand asserts that the document produced by the Respondent is a forgery, which does not accurately represent the wishes of the Deceased.
54. Section 5(1) of the Law of Succession provides that any person of sound mind (who is not a minor) may dispose of all or any of his free property by way of a Written Will. The parties herein are all in agreement that the Deceased did have a Written Will. The bone of contention is which document is the genuine Will. The parties are also all in agreement that the Deceased though physically ill, was in sound mind at the time she made her Will. Therefore, there exists no challenge to the 'capacity' of the Deceased to make a Will.
55. Section 11 of the Law of Succession Act which deals with the validity of written wills provides as follows:-
- “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.”
56. The Written Will dated March 10, 2015 which formed the basis of the Grant issued to the Respondent has been executed by the Testator by affixing her left thumbprint. The Will is duly witnessed by two (2) competent witnesses as required by Law. PW2 Damaris Wanjiku Gachoka has affixed her thumbprint to the Will whilst the second witness Njoroge Gachanga (a brother to the Deceased) has also affixed his thumbprint on the Will.
57. DW2 Mr Kanyi Ndurumo the Advocate who prepared the Will narrated to the court how he prepared Will based upon the instructions which he received from the Deceased. DW2 told the court that he had initially prepared a Written Will as instructed by the Deceased in the year 2013. That later upon the demise of one of the proposed Executors, the Deceased instructed the Advocate to draft a second Will in March 2015.
58. The Advocate confirms that he then drafted a second Will on March 10, 2015 which Will effectively revoked the earlier Will drafted in 2013. DW2 was an independent witness who was only acting in his professional capacity as a lawyer. He had nothing to gain by telling the court that he drafted the Will, if in fact he did not do so.
59. The Objector in challenging the Written Will produced by the Respondent claims that the Will dated March 10, 2015 was a forgery. The objector claims that the Will in question does not reflect the wishes of the Deceased as communicated to the Objector by the Deceased during her lifetime. The Objector further claims that the Deceased did not appoint the Respondent as an Executrix of her Will. That the Deceased all along intended to appoint the Objector and her late brother as Executors of her Will. That upon the demise of Agostino Gichanga the objector was to remain as the sole Executrix of the Will.
60. The fact that the Written Will was not drafted in the manner, which the objector anticipated is not a valid reason to invalidate said Will. The Advocate has clearly explained that the Deceased did initially appoint her two children as the Executors. However, upon the demise of her son, the Deceased instructed the Advocate to revise the Will and to replace her late son with his wife (the Respondent). This the Deceased was perfectly at liberty to do.
61. The Objector also challenges the manner in which the bequests in the written will dated March 10, 2015 were made. Specifically she challenges the bequest of Dagoretti/Kinoo/5949 to the Respondent alone. The objector also challenges the bequest of Dagoretti/Kinoo/117 to herself and the Respondent jointly. According to the objector, this parcel of land ought to have devolved to her entirely.
62. What is evident is that the Objector is dissatisfied with certain bequests made in the Written Will. I reiterate that the Deceased had the free will to dispose of her assets as she wished. There is no evidence to prove the Objectors allegations that the Advocate did not draft the Will as instructed by the Deceased. Likewise the Objector has not adduced any tangible evidence to prove her allegation that the advocate ‘colluded’ with the Respondent to alter the Will. On his part, the Advocate who is an officer of this court categorically denies having colluded with the Respondent to alter the Will of the Deceased. The Advocate was not a family member. He had no incentive at all to alter the Will of his client.



63. The objector admitted that she was present in the house of the Deceased when the Advocate read out the Will to the family. Why did she not immediately file a legal challenge to the Will? It is noteworthy that this challenge to the validity of the Written Will is only being made a full five (5) years after the Will had been read out to the family in the presence of the Objector herself. The Objector has been aware of its existence all along. Why did she not act earlier. The Objector has not challenged the fact that the Will was executed by the Deceased. Similarly no challenge is made to the signatures of the two (2) witnesses. Indeed PW2 confirmed that she affixed her thumbprint on each page of the Will. PW2 also confirms that she was present when the Advocate read out the Will. Why did she not at that point protest that the document being read out was not what she had signed. The witness kept silent until she was called to testify as a witness for the Objector.
64. It is trite law that ‘he who alleges must prove’. There is no evidence to prove the allegations of forgery made by the objector. Fraud is a very serious offence and mere allegations will not suffice. In the case of *Christopher Ndaru Kagina Vs Esther Mbandi Kagina & Another* [2016] eKLR the Court stated as follows:-
- “It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the case *Central Bank of Kenya Ltd – Vs – Trust Bank Ltd & 4 others* [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case.” (own emphasis)
65. The Objector accuses the Advocate Mr Kanyi of altering the Will of the Deceased. As stated earlier the Advocate is not beneficiary to the estate. He is not the recipient of any of the bequests made in the Will. He had nothing to gain by altering the Will. The Objector admits that she made no report to the police or to any other authority regarding this alleged ‘forgery’. Indeed, under cross examination the Objector concedes that- “I did not lodge any complaint to police about the forgery. I complained to the court.....”. No evidence has been adduced by a document examiner to prove that the signatures and/or thumbprints on the document are not genuine. In short, all that the objector has presented to this court are a series of unproven allegations.
66. In challenging the Written Will dated March 10, 2015, the Objector seeks to rely on a draft Will marked Annexure ‘A’ which she has annexed to this summons for revocation of Grant. The Objector’s position is that it is this draft Will which is a true reflection of the wishes of the Deceased. Not surprisingly, this Annexure ‘A’ provides for the distribution of the estate of the Deceased in the manner which accords with the testimony of the objector and her witnesses.
67. I reiterate that the prerequisite of a valid Will are to be found in section 11 of the *Law of Succession Act*. This draft will does not conform with section 11 as the document has not been executed by the testator neither is it signed by any witnesses. Further, the Objector admitted in court that this draft (Annexure ‘A’) was prepared by herself long after the demise of the Deceased. Therefore it cannot be said to be the will of the Deceased. The document is nothing but a ‘wish list’ of how the objector would have wanted to have her mother’s estate to be distributed. It cannot be deemed to be a valid will.
68. Where a Deceased has left a Written Will then the court will uphold and enforce the mode of distribution set out in the Will. To do otherwise would be tantamount to interfering with the wishes of the testator and would amount to rewriting the Will.



69. The Objector told the court that the Deceased held a meeting at her home in May 2014 at which meeting she communicated how she wished her estate to be distributed. The evidence regarding this meeting was corroborated by PW4 and PW5.
70. This meeting allegedly took place in May 2014. According to DW2 who was the Advocate, the Deceased reviewed her Will in March 2015 one full year after this alleged meeting. The Deceased had ample opportunity to review her Will in line with what she had communicated a year earlier. PW5 who was the surveyor confirmed to the court that he did not complete the sub-divisions of the Deceased's land because the Deceased's brother who was to supervise the exercise fell ill. Why was no attempt made by the parties to revisit this subdivision. The fact remains that no subdivision took place. This court reiterates that where a Written Will exists then it will take precedence over wishes alleged to have been orally communicated by the Deceased to others. Whether or not this meeting of May 2014 took place does not affect the validity of the Written Will.
71. The Objector insist that she was the only Executrix appointed by the Deceased. However the written Will clearly names the Respondent Agnes Wanjiku Gichanga (wife to Agostino Gichanga – Deceased) as a joint Executrix. The Objector is laboring under the mistaken belief that being the only living child of the Deceased she is the only one entitled to be named as Executor. This is not the case. A testator is at liberty to name any person even a non-relative as Executor of his/her Will.
72. I find that the Written Will dated March 10, 2015 is a genuine document properly executed and witnessed, which reflects the wishes of the Deceased as narrated by her to her Advocate. Accordingly, I uphold this Written Will as valid.
- (ii) Revocation of the Grant
73. The Objector has prayed that he Grant of Probate issued to the Respondent be revoked on grounds that said Grant was irregularly obtained. The grounds upon which a Grant may be revoked are set out in Section 76 of the [Law of Succession Act](#) which provides as follows:-
- “ A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
- (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
- (ii) to proceed diligently with the administration of the estate; or
- (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”



74. It is common ground that Grant of Probate with Written Will was made to the Respondent on November 20, 2018. The said Grant was confirmed on February 18, 2020. The Objector seeks to have that confirmed Grant revoked on the following grounds. The Objector has alleged that the Will dated March 10, 2015 which formed the basis for issuance of the Grant of Probate was not a valid will and did not reflect the wishes of Deceased. This issue has been addressed at length earlier in this judgment. The fact that the Objector is not happy with the contents of the Will is not sufficient grounds to invalidate the said Will. In any event, this court has already found the will dated March 10, 2015 to be valid.
75. Another reason advanced by the Objector for seeking revocation of the Grant is that she was not notified and/or served with the summons for confirmation of Grant. The Objector therefore asserts that she was deliberately excluded from the process of obtaining and confirming the Grant.
76. A close look at the record reveals that this claim is not true. The Objector has all along been represented by counsel in this matter. Hon Lady Justice Ongeri who was hearing the summons for confirmation of Grant directed that an Affidavit of service be filed to prove that the Objector had been served. An Affidavit of service dated February 24, 2020 was filed in court. The Affidavit was sworn by one Amos K Mumo a licensed court process server who detailed how he served notice of hearing on the Advocate then on record for the Objector. The objector has not effectively controverted the contents of this Affidavit of service. Neither did she seek to have the process server summoned for purposes of cross-examination.
77. Upon being satisfied that service had been effected the Hon Judge proceeded to confirm the Grant. Indeed in the court proceedings of February 18, 2020 the Honorable Judge indicated that one of the beneficiaries 'Ann Mary' was 'Absent-Served'. Further in confirming the Grant the court observed as follows:-
- “ Ann Mary Wanjiku who is absent was served and she is catered for in the mothers Will.”
78. It is clear therefore that the court was satisfied that the Objector had been properly served and proceeded to allow the summons for confirmation of Grant. The court directed that the estate be distributed in accordance with the annexed Written Will dated March 10, 2015. In the circumstances, the Objector cannot claim to have been unaware of the confirmation proceedings. Having herself declined to participate the Objector cannot now claim to have been sidelined.
79. This matter has had a very long history in the corridors of justice. Following a citation served upon her by the Respondent dated October 4, 2016, the Objector filed an Affidavit of Protest dated October 26, 2016. Mediation attempts failed due to non compliance by the Objector. The Mediators report dated May 10, 2017 confirmed that no settlement was reached. On March 6, 2018, the court authorized the Citor (who was the Respondent herein) to file a Petition for Grant of Probate which was duly filed on April 12, 2018.
80. It is manifest that the Objector has fought this Succession Cause from its initiation. Although in her summons seeking revocation of the Grant the objector purports to be advancing the interests of the Deceased grandchildren, I note that the said grandchildren Anthony Gichanga and Jeff Murai both signed consents dated January 23, 2020 and February 11, 2020 respectively confirming their consent to the summons for confirmation of Grant filed in court by the Respondent herein.
81. The objector herself is adequately provided for in the Will as the daughter to the Deceased. She cannot claim to have been overlooked by the Deceased in distributing her estate. The fact that the objector believes she ought to have derived greater benefit from the estate is not sufficient grounds to revoke the Grant. Although the will indicated that the Objector and the Respondent were to act as joint



Executors, it is evident that due to the bad blood between them, the two would be unlikely to be able to act in concert in distributing the estate. This would be detrimental to the estate, as well as to the beneficiaries named in the Will.

82. This is an old matter, the Deceased died in the year 2015. Seven (7) years down the line there is still no agreement on the way forward. The matter needs to be expedited and the estate ought to be distributed to the beneficiaries named in the Will. In the circumstances, this court upholds the appointment of the Respondent as sole Executor.
83. Based on the foregoing, I find that no sufficient grounds have been established for revocation of the Grant. In conclusion, I find no merit in the summons dated 4th March 2020. The same is dismissed in its entirety. For clarity, this court makes the following orders:-
- (1) The Written Will dated March 10, 2015 is declared to be a valid manifestation of the wishes of the Deceased Edith Nduta Gichanga.
 - (2) This court upholds the confirmed Grant of Probate issued to the Respondent Agnes Wanjiku Gichanga on February 18, 2020.
 - (3) The Estate of the Deceased Edith Nduta Gichanga to be distributed in accordance with the Written Will dated March 10, 2015.
 - (4) The summons for Revocation of Grant dated March 4, 2020 is dismissed in its entirety.
 - (5) This being a family matter each side will bear its own costs.

DATED IN NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

.....

MAUREEN A. ODERO

JUDGE

